

COLLECTIVE VIOLENCE AND INTERNATIONAL CRIMINAL JUSTICE

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COLLECTIVE VIOLENCE  
AND INTERNATIONAL  
CRIMINAL JUSTICE

An interdisciplinary approach

*Edited by*

Alette Smeul ers



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Alette Smeulers (ed.)

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# CHAPTER 7

## CRIMINOLOGICALLY EXPLAINED REALITY OF GENOCIDE, STRUCTURE OF THE OFFENCE AND THE ‘INTENT TO DESTROY’ REQUIREMENT

Kai Ambos<sup>\*</sup>

*“Certainement qui est en droit de vous rendre  
absurde, est en droit de vous rendre injuste”<sup>\*\*</sup>*

Voltaire, *Questions sur les miracles* (1765)

### 1. INTRODUCTION

I have argued elsewhere<sup>1</sup> that the traditional understanding of the “intent to destroy” requirement in the genocide offence as a purpose based special or specific intent (*dolus specialis*) with regard to *all* participants in a genocidal enterprise should be replaced by a combined structure- and knowledge-based approach *distinguishing according to the status and role of the* (low-, mid- and top-level) *perpetrators*. Thus, the purpose based intent should only be upheld with regard to the top- and mid-level perpetrators while for the low-level perpetrators’ knowledge of the genocidal context should suffice. Apart from doctrinal considerations related to the peculiar structure of the genocide offence and its relationship with crimes against humanity, I have argued that this reading of the “intent to destroy” requirement better fits the *criminological reality* of genocidal campaigns. From this reality it follows, so I argued, that a genocide

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<sup>\*\*</sup> “Those who can make you believe absurdities, can make you commit atrocities.”

<sup>1</sup> Ambos 2009.

cannot be committed by a few crazy individuals alone but needs intellectual masterminds and an organizational apparatus to be carried out. The low-level perpetrators, i.e., the easily interchangeable “foot soldiers” of a genocidal campaign, normally lack the means to destroy a group alone and sometimes do not act with a purpose or desire to destroy. In fact, although these individuals cannot solely contribute in any meaningful way to the ultimate destruction of a group, they can either express any meaningful, act-oriented will as to the overall result. These low-level perpetrators, albeit carrying out the underlying genocidal acts with their own hands, are, in terms of their overall contribution to the genocidal campaign, only secondary participants (accessories), more precisely aiders or assistants. In other words, while they are the direct executors of the genocidal plan and therefore should be convicted as such (i.e., as principals) their acts receive only their full “genocidal meaning” because there exists a genocidal plan in the first place. As the low-level perpetrators were not involved in designing this plan but are, in a normative sense, only used as mere instruments to implement it, they need not possess the destructive special intent themselves but only know of its existence. In addition, I argued, that, as to the direct perpetrator’s (hostile) attitude towards the group, it does not make a difference if he acts with the purpose or knowledge of the overall genocidal purpose.<sup>2</sup> He may even act with a kind of indirect purpose by not distancing himself completely from the overall genocidal purpose.

In this paper I will put my theory through a criminological reality check by examining the following questions: Do my arguments correspond to the criminological reality of genocidal acts and campaigns? Is the threefold distinction between low-, mid- and top-level perpetrators or participants in genocide too simplistic in the light of the more sophisticated models of recent criminological research? Finally, does the criminological reality of genocide support the reinterpretation of the intent to destroy requirement or does it speak against it?

## 2. TYPOLOGIES IN CRIMINOLOGY

As Smeulers has correctly pointed out, relying on the results of the majority of the case studies,<sup>3</sup> perpetrators are “ordinary people within extraordinary

<sup>2</sup> Here and in the following I use the masculine pronoun *he* while referring to the male and female form.

<sup>3</sup> See for individual and group case studies Arendt 1964; Gupta 2001; Haritos-Fatouras 1993. See for general studies Staub 1989; Bandura 1999: 200 (“Given appropriate social conditions, decent, ordinary people can be led to do extraordinarily cruel things.”); Smeulers 2004; Welzer 2005. See also Smeulers 2008: 234 with more references.

circumstances”<sup>4</sup> In these extraordinary circumstances they are actually acting in a “continuum of destruction” where the ordinary social rules and the ordinary law are restructured:

*‘Genocide and mass killing do not directly arise from difficult life conditions and their psychological effects. There is a continuum of destruction. People learn and change by doing, by participation, as a consequence of their own actions. Small, seemingly insignificant acts can involve a person with a destructive system.’*<sup>5</sup>

Thus, law-abiding citizens can convert into perpetrators and lawful activities may ironically lead to the perpetration of crimes.<sup>6</sup> This is confirmed by the idea of a “reversal of morality” according to which killing members of the other (protected) group comes to be seen as morally right, and even desirable. So, “new group norms evolve, and institutions are established in the service of genocide or mass killing.”<sup>7</sup> Jamieson asserts that in times of war, emergency, and social transformation a rearticulation of concepts of “crime” and morality takes place at the levels of both law and ideology.<sup>8</sup> I would add that this *rearticulation* also exists in genocidal situations since the genocidal ideology transforms crime categories as well. Yet this triggers the question of how one can say that genocidal perpetrators commit crimes if their acts are considered as being in conformity with the prevailing socio-legal values? The answer is that it is not the perpetrators or their personality structures that change, but rather the societal rules to which they must adapt. There is a cognitively redefined morality of killing<sup>9</sup> and the perpetrators of genocide adapt to the *newly* established rules.<sup>10</sup> It is for this reason that genocidal actions cannot be satisfactorily explained by traditional criminology.<sup>11</sup>

<sup>4</sup> Smeulers 2008: 234.

<sup>5</sup> Staub 1989: 17. See also Smeulers 2008: 235.

<sup>6</sup> Smeulers 2008: 237.

<sup>7</sup> Staub 1989: 18.

<sup>8</sup> Jamieson 1998: 493.

<sup>9</sup> See Bandura 1999: 195.

<sup>10</sup> In the same vein Jäger 1985: 7 et seq.

<sup>11</sup> On the difficulties and challenges of genocide for criminological studies see Brannigan 1998: 257–276, explaining the limitations of the mainstream criminology for the research on genocide and suggesting more history-based criminological analysis. In the same token Jamieson (1998: 488) who claims that “we need a criminology that can problematize the relationship between moral and immoral acts and social order in conditions of peace and war.” See also Yacoubian 2000, explaining the limited possibilities of traditional criminology and suggesting more exchange between criminology and international criminal law. See in the same vein Woolford 2006, advocating a criminology of genocide 1. reflexive and non-redemptive, 2. undisciplined and critical, and 3. responsible. Also calling for more criminological analysis on genocide see Day & Vandiver 2000. See in general on the problems of the reductionist comprehension of “crime” Jäger 1989: 20 et seq.; Neubacher 2005: 158 et seq.

The typology offered by Michael Mann is a very useful starting point. The author distinguishes nine common motives found among perpetrators:<sup>12</sup>

1. *Ideological* killers believe in the “righteousness of murderous cleansing” and characterize themselves as victims. They justify killing as “self-defense”;
2. *Bigoted* killers, more mundane in their ideology, often share the prejudices of their social environment and react to the physical disgust provoked by disliked minorities;
3. *Violent* killers feel attracted to murder and experience violence as a release;
4. *Fearful* killers do not really want to kill, but they “feel credibly threatened” and fear harm to life or limb if they do not kill;
5. *Careerist* killers work for organizations involved in murderous cleansing and garner a professional benefit because of their compliance with killing;
6. *Materialist* killers feel motivated by the idea of “direct economic gain” e.g., by taking the job of the victim or his or her property;
7. *Disciplined* killers feel pressure by organizational authority and have the necessity to act in conformity with directives;
8. *Comradely* killers feel pressure by the peer group to kill because they do not want to lose the group’s emotional support;
9. *Bureaucratic* killers are caged within “the bureaucracies of modernity” and are motivated by habitual obedience.

Mann explains, however, that these characterizations are “only ideal types” while “almost all perpetrators ha[ve] mixed motives”.<sup>13</sup> Also Raul Hilberg, in his seminal work on the destruction of the European Jews, identifies different kinds of perpetrators but does not classify them according to different categories. He distinguishes between “Hitler”<sup>14</sup> and “the participants” (“Die Beteiligten“),<sup>15</sup> i.e., between the *mastermind* and the (*willing*) *executors* of his diabolical plan. Among the participants the author distinguishes are the *bureaucrats* who merely comply with the orders and instructions within their formal competences,<sup>16</sup> and the “*fanatics*” who are eager to go beyond the instructions of their superiors.<sup>17</sup> Further, there are the “*sadists*”<sup>18</sup> that enjoy making their victims suffer and, in contrast, the “*skeptics*” (“Zweifler”) who are plagued by doubts and do not really want to get involved.<sup>19</sup>

<sup>12</sup> Mann 2005: 27–29 (emphasis in the original).

<sup>13</sup> Mann 2005: 29.

<sup>14</sup> Hilberg 1992: 15 et seq.

<sup>15</sup> Hilberg 1992: 33 et seq.

<sup>16</sup> Hilberg 1992: 37 and 66.

<sup>17</sup> Hilberg 1992: 64 et seq. (‘Fanatiker an ihren Schreibtisch’ [‘fanatics at their desks’], p. 69).

<sup>18</sup> Hilberg 1992: 67 et seq. (‘völlig gefühllosen Killer vor Ort’ [‘totally unfeeling killer on site’], p. 69).

<sup>19</sup> Hilberg 1992: 69. See a similar typology Crelinsten 1993: 64 et seq., distinguishing three types of torturers: the true believers, the professional or careerist, and the sadist (at pp. 67–68). It is

In turn, Dipak Gupta identifies three decisive motivations for an individual's choice: ideology (group preference), greed (selfish interest) and fear (cost). Subsequently, three kinds of participants in collective actions follow: *true believers* are motivated primarily by the goals of the collective enterprise; *mercenaries* are motivated mainly by their own narrow self-interests; and *captive participants* are motivated primarily by the cost of non participation, i.e., by fear. Together, these three basic motivations explain the reasons for *non* participation in collective criminal actions: *conscientious objectors* do not participate because of ideology; *collaborators* do not participate in the collective action of their own group but cooperate with the other group because of greed, i.e., because they think that they can pursue their own selfish interests better by assisting the other group; and *easy riders* do not take part in the collective action because of fear.<sup>20</sup>

These three motivational patterns are also confirmed by Kressel with regard to the participants in the Nazi machinery:

*'From their statements after the war, one might conclude that few Nazi leaders agreed with Nazi ideology, fewer still knew about anything outside of their direct organizational responsibilities, and that virtually none disliked the Jews. One might be led further to the conclusion that even those who committed the most heinous war crimes did so out of soldierly obedience and with a deep sense of guilt, often because they perceived no way out of difficult situations. To the extent that they acted out of personal motives, these were: (1) to be good soldiers; (2) to move up the career ladder; (3) to save their own skins.'*<sup>21</sup>

These patterns do not only explain the involvement of leaders in genocidal acts, but also of other lower mid- and even low-level perpetrators. In this sense, it is not always possible to distinguish reasons for a certain conduct with a view to the rank of the perpetrator. As correctly pointed out by *Kressel* recalling explanations of the "major war criminals" Wilhelm Keitel, Albert Speer, and Hermann W. Goering:

*'Some truth may remain in the explanations offered by Nazi leaders. They square rather well with the findings of some social science studies (...). And if obedience, career ambition, and fear constituted the primary motivation of these top dogs, shouldn't we conclude that they played an even greater role for mid-level bureaucrats and low-level grunts?'*<sup>22</sup>

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worthwhile pointing out, however, that as to torture perpetrators – in contrast to genocide perpetrators – the categories of "sceptics" and "compromised" perpetrators are excluded.

<sup>20</sup> Gupta 2001: 103 et seq.

<sup>21</sup> Kressel 1996: 124.

<sup>22</sup> Kressel 1996: 125.

It seems then that the motivation of the perpetrators depends on personal characteristics rather than on factors of hierarchy.<sup>23</sup> These characteristics, often indicating the true *motives* for participation in genocide, must not be confused, however, with *intent* as the required mental element in criminal law. In fact, motives are only to be taken into account at the sentencing level but not, as intent, at the level of allocation of responsibility for the criminal acts.<sup>24</sup>

Regarding the relationship, if any, of motives and intent, Smeulers' types (the criminal mastermind, the fanatic, the criminal/sadist, the profiteer, the careerist, the devoted warrior, the followers and the conformist, the compromised perpetrator, and the professional), which remind us especially of Mann's typology, show that motives and intent may differ, i.e., that the same motives may entail different intents. For example, the perpetrator could have material reasons and pursue material goals, e.g., the property of the murdered neighbor (i.e., the *profiteer* perpetrator), but he could also be motivated by hate of the other group and could then aim at the destruction of the members of this group (i.e., the *fanatic* perpetrator); he could be motivated by fear and pursue the destruction of the group out of (putative) self-defense assuming and strongly believing that the group poses a threat to his people and his country (i.e., the *devoted warrior*), or, out of the same motive, he could merely want to protect his own life and in order to avoid to be seen as a traitor and become a target of the violence, he could attack members of the other group (this would be a *compromised* perpetrator – the motive for his conduct is still fear, but his intent is not directed at the destruction of the group); he could merely act because of the professional reason to keep his job or to even get a better one (i.e., the *careerist* perpetrator), or only because he is accustomed to obeying orders without asking further questions (i.e., the *follower* and *conformist* perpetrator); he could also become involved in genocidal acts because of a mental disorder and a feeling of individual pleasure or satisfaction (the *sadist*), or because he acts upon orders and is trained to do so (the *professional*) or, last but not least, he is doing more than expected because of his strong ideological commitment (i.e., the *devoted warrior*).

Criminologists and sociologists often distinguish between motive and intent when studying genocidal crimes. Yet, as already pointed out, for the question of

<sup>23</sup> See Brewster-Smith 1968.

<sup>24</sup> See Drost 1959: 83 et seq., who does not accept motives as criminal elements of genocide, but seems to confuse them with the purpose ("Whatever the ultimate purpose of the deed, whatever the reasons for the perpetration of the crime, whatever the open or secret motives for the acts or measures directed against the life of the protected groups, whenever the destruction of human life of members of the group as such takes place, the crime of genocide is being committed", at p. 84). See also LeBlanc 1991: 80 et seq.; Verhoeven 1991: 19; Bassiouni & Manikas 1996: 528; Ratner et al. 2009: 40 and Vest 2002: 109–110. See also Ambos 2008: §7 marginal number 158 with further references of the case law of the ICTY and ICTR.

individual criminal responsibility it is not important *why*, i.e., for which motive, an act was carried out (fear, hate, etc.), but only that the act can be attributed to the actor, i.e., that he, *inter alia*, acted with intent.<sup>25</sup> In any case, the dividing line between intent and motive is sometimes difficult to draw, especially in the context of genocide because of the (ulterior) intent to destroy requirement. Take for example the following quote:

*‘Where an attacker rapes a victim solely as an act of vengeance or hostility toward the victim, the rape is not genocidal, even if the attacker has selected the victim on the basis of her religion or ethnicity. On the other hand, if evidence suggests that the attacker committed the rape as part of an effort to drive the victim or members of her group into mental states that the attacker hopes will lead to the group’s destruction, a finding of genocide is justifiable [...]. The line between intent, a relevant factor, and motive, an irrelevant one, may thus prove thin in practice.’<sup>26</sup>*

As shown in this example, while motives must not be confused with criminal intent they may constitute *indicia* as to the genocidal intent to destroy. It also follows from the typology of (genocidal) perpetrators that there may be a series of reasons or “motives” to commit genocide, often going beyond or different from the destruction of the group. Thus, the question arises how these different motives relate, if at all, to the “intent to destroy” requirement.

### 3. THE SIGNIFICANCE OF THE CRIMINOLOGICAL TYPOLOGY OF PERPETRATORS FOR THE OFFENCE OF GENOCIDE

The “intent to destroy” requirement of the genocide offence has always been understood by case law as a “special intent” or “*dolus specialis*” with a view to the destruction of the group – in the words of the seminal Akayesu Trial Chamber, as “the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged”.<sup>27</sup> According to a dissenting view in the doctrine – the so called knowledge-based approach – knowledge as to the genocidal intent of the main perpetrators or as to the possibility of the destruction of the group is sufficient to establish liability.<sup>28</sup> In this vein, it has been argued that “principal culpability should extend to those who may lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of

<sup>25</sup> See *supra* note 24 and main text.

<sup>26</sup> Ratner et al. 2009: 44–45.

<sup>27</sup> *Prosecutor v. Akayesu*, Trial Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 498.

<sup>28</sup> See Bassiouni & Manikas 1996: 527; Gil Gil 1999: 258 et seq.; Vest 2002: 104 et seq. See also Greenawalt 1999: 2259–2294. See for a discussion and further references Ambos 2009.

their actions for the survival of the relevant victim group”.<sup>29</sup> In my view, as explained at the beginning of this paper,<sup>30</sup> the knowledge-based approach must be combined with the traditional approach, which takes into account the different status and role of the perpetrators.

Indeed, the criminological studies on genocide show that a flexible approach is needed. It seems quite unlikely that a participant acts with “intent to destroy” in a volitional, purpose-based sense if he has no special feelings towards the targeted group or, for example, if he does not follow the genocidal ideology. According to Smeulers, the hate towards the victims often only comes after the fact and serves to justify the criminal conduct, first of all before oneself.<sup>31</sup> If this is correct, many perpetrators act without a purpose-based intent to destroy. This purpose may, at best, be deduced from the negative feelings that may arise, if at all, after the fact; yet these feelings operate as pure *ex post facto* neutralization techniques vis-à-vis the criminal acts and the ensuing intent would, in terms of criminal law doctrine, not be more than an irrelevant *dolus subsequens*.

The criminological findings also demonstrate that a knowledge-based intent will often not exist. Many participants in genocidal campaigns are simply unaware of the final aim pursued by the masterminds and leaders of the campaign. The corresponding knowledge cannot be deduced without more evidence of the participant’s awareness of a campaign’s general policies since each contribution depends on the specific circumstances surrounding the genocidal campaign. These circumstances must be considered in context, taking into account that genocide usually develops within structural changes in the social order.<sup>32</sup> The “intent” of the participants must therefore be examined from a twofold perspective: observing the particular factual circumstances surrounding their individual conduct (indicated by the motives and goals) *and* considering the context in which this conduct takes place (as official state duty, or isolated from other actions, or in groups, etc.). Both levels constitute what John Steiner called *social and moral intelligence*, and *role margin*: the manner and degree of accountability that an interacting individual assumes for the consequences and welfare of others, and the area of authority over the choice span that is available to any role one undertakes in social interaction, respectively.<sup>33</sup>

<sup>29</sup> Greenawalt 1999: 2265.

<sup>30</sup> See *supra* note 1.

<sup>31</sup> Smeulers 2008: 239: ‘many people do not start to kill and torture because they hate their victims or perceive killing and torturing them as justifiable but they start to hate their victims and start to believe in the ideology because it justifies the killing and torture in which they have become involved.’

<sup>32</sup> Smeulers 2008: 235.

<sup>33</sup> Steiner 2000.

In the same token and going even further, Martin Shaw proposes that genocide studies should focus not on the intentions of the perpetrators but on the structure of the conflict situations.

*'Intentionality does not therefore provide an overall framework for understanding genocide. We need to move, I propose, to the main stage of sociological conceptualization, structural concept formation. This means moving away from the subjective meaning of genocidal action (for the perpetrators) to understanding the typical social relations of genocide (not only among perpetrators, but crucially between them and the victims, and indeed among victims), and therefore the structure of social conflict that these set up.'*<sup>34</sup>

While Shaw accepts the intentionality underlying genocidal conduct,<sup>35</sup> he claims that the legal understanding of intent is too narrow and moves away from a realistic concept.<sup>36</sup> For Shaw it is "unrealistic", from a sociological perspective, to use concepts like *collective* intention to capture the collective nature of genocide.<sup>37</sup> As Post puts it: "Groups don't make decisions; individuals do".<sup>38</sup> In other words, the collective genocidal act (*Gesamttat*) consists of the individual contributions and intents (*Einzel-taten*) that, in turn, make up the *Gesamttat*. In this view then the "collective intent" concept only seems to serve as a theoretical vehicle or tool to grasp the complexity of the genocide offence.<sup>39</sup> Accordingly, it may be more correct to draw attention to the social conflictive "context" than to search for a collectively carried out intention. Thus, a sociological structural approach considers the individual intent contextualized in the genocidal relationships.

Collectivity in subjective terms is, however, not rejected by all scholars. Thus, Smeulders seems to identify a collective motive when she writes

*'(...) the masses aim to get rid of the alleged privileged classes or minorities whom they blame for their misfortune. Ideologies usually serve as motivating forces which at the same time incite and instigate the masses while justifying the violence.'*<sup>40</sup>

<sup>34</sup> Shaw 2007: 81–82.

<sup>35</sup> Schabas 2009: 256: 'it is inconceivable that an infraction of such magnitude could be committed unintentionally'.

<sup>36</sup> Shaw 2007: 82 et seq.

<sup>37</sup> Shaw 2009: 83.

<sup>38</sup> Post 2004: 16.

<sup>39</sup> See against this idea Hagan & Raymond-Richmond 2009: 162 et seq., who offer a detailed analysis of the individual- and collective-level dynamics of the racially intentional and targeted violence in the Darfur genocide.

<sup>40</sup> Smeulders 2008: 235.

This description would fit a very collective phenomenon in which almost everyone, as part of the *mass*, is engaged as perpetrator. Similarly, Mann explains the Rwanda genocide as follows:

*'Ethnic hatreds may transpose this threat-humiliation-rage triad to a collective level: Hutus feel threatened and humiliated by Tutsi power, and they strike out, enraged at any Tutsi.'*<sup>41</sup>

The obvious problem with this position is that genocide does not always manifest itself in the same way. Indeed, the public is not always involved at all or to the same extent. The Nazi-genocide, for example, was almost exclusively carried out by way of a hierarchically organized state apparatus which did not depend on the involvement of normal citizens.<sup>42</sup> This is a clear difference to the genocide in Rwanda, which turned into a "collective violence" where civilians killed other civilians, either unknown to the killers or their neighbors and friends.<sup>43</sup> Against this background it is important to distinguish between acts carried out by the *state* and its agents (or non-state actors organized in *armed groups*<sup>44</sup>) and acts carried out by *normal citizens*. In the former case there is usually a direct chain of command and the genocidal policy is generally known, at least as a policy against a certain group or persons. In this case the acts of genocide can be

<sup>41</sup> Mann 2005: 28.

<sup>42</sup> So, for example Niewyk (2009: 129): "Violent attacks on Jews were uncommon... The exception... was the 'Crystal Night' (Kristallnacht) pogrom of November 9–10, 1938, when Nazi thugs physically attacked thousands of Jews... These actions were clearly the work of virulent anti-Semites in the Nazi Party, supported by government officials who found pogroms useful in advancing economic objectives." See also Niewyk (2009: 130): "Only when Hitler invaded the Soviet Union in 1941 did emigration give way to extermination. Believing that the German people would not understand such a ghastly policy, the Nazis carried out the genocide of the Jews in secrecy and under cover of war. Accordingly, responsibility for mass murder was placed in the hands of the SS (*Schutzstaffel*), Hitler's special guard of policemen and soldiers that had grown into the central agency of terror in Nazi-dominated Europe."

<sup>43</sup> See Lemarchand (2009: 489): "Despite many exceptions to the rule, one cannot fail to notice the number of journalists, medical doctors, agronomists, teachers, university lecturers, and even priests who were identified by survivors as accomplices in the massacre of innocent civilians. At the other end of the social spectrum were the hundreds and thousands of landless Hutu peasants and unemployed city youth whose prime motivation for killing was to steal their victims' property, their land, their furniture, their radio, or what little cash they happened to carry." See in this sense also Jamieson (1999: 136) who analyses genocide as "social exclusion" and argues that an individualizing juridical approach overlooks that exclusionary projects (e.g. ethnic cleansing in Bosnia-Herzegovina) are only achievable with the complicity and the support of the whole community. It is, however, not exactly the same to act as principal perpetrator (regardless of whether high-, mid- or low-level perpetrator) or mere accomplice. This distinction must be always kept in mind when analyzing the different grades of involvement in crime.

<sup>44</sup> Under International Humanitarian Law *armed groups* are recognized as legal subjects if they fulfill certain requirements such as a minimum degree of organization, i.e. a certain level of organizational coherence and hierarchy, a command structure and the capacity to sustain military operations (cf. La Rosa/ Wuerzner 2008). In this sense most references to the state and state actors in the text equally apply to *armed groups* (and their members).

understood as “crimes of obedience”.<sup>45</sup> In the latter case of “private” violence the perpetrators are not necessarily aware of the genocidal purpose but rather “believe”<sup>46</sup> that their acts are promoted or approved by the authorities.

#### 4. CORRESPONDENCE OF CATEGORIES OF INTERNATIONAL CRIMINAL LAW WITH CRIMINOLOGICAL TYPOLOGIES OF PERPETRATORS

The typologies of perpetrators and the intent analysis of the criminological studies on genocide suggest a more realistic approach with regard to the categories of imputation in international criminal law. Concretely speaking, it seems advisable to add a further distinction to the combined structure- and knowledge-based approach explained above.<sup>47</sup> First of all, it can be noted that the basic threefold classification of top-, mid- and low-level perpetrators is confirmed by criminological studies. For example, Jamieson refers to the cases of division of labor and the chain of responsibility in Bosnia and Rwanda, “with the planners at the top overseeing the ‘middle men of genocide’ – the coordinators and tacticians who, in turn, directed those who implemented the policy on the ground”.<sup>48</sup> In particular, the threefold classification is reflected in the case of genocidal campaigns by state actors. The case of the Holocaust is paradigmatic in this respect because the objective three-level-distinction is also reflected in the intent of the Nazi elite (including Hitler), the mid-level bureaucrats (who were not always Nazis), and of the low-level police or death camp personnel:

*‘An ideological commitment to exterminate the Jews, a careerist concern on the part of bureaucrats, an adaptation to extraordinary circumstances and peer conformity on the part of perpetrators, contributed to the lethal dynamic of the Holocaust.’<sup>49</sup>*

From this analysis, it clearly follows that the ideological commitment to exterminate the Jews, i.e., the purpose-based intent “to destroy”, is located at the top-level of the hierarchy. Mid- and low-level perpetrators, on the contrary, do not necessarily share this purpose. They may at best know about its existence because of their functions: they receive orders and are aware of internal instructions and guidelines, they talk to colleagues of other hierarchical levels, they receive information about the activities and tasks of other officials; in sum,

<sup>45</sup> Smeulers 2008: 236.

<sup>46</sup> Smeulers 2008: 236.

<sup>47</sup> See *supra* notes 1 and 28 and main text. See on this discussion also Kreß 2005.

<sup>48</sup> See Jamieson 1999: 138 with further references.

<sup>49</sup> Friedrichs 2000: 27.

they do not act in an isolated manner but as interconnected links.<sup>50</sup> Of course, it is possible to imagine situations in which the low-level state agent is not actually aware of the genocidal state plan. Thus, the character of Hanna in Bernhard Schlink's novel "The Reader" was unable to know the details about her job and its relation to the Nazi genocide because of her illiteracy. She did not tell her colleagues and superiors because she was ashamed of her illiteracy. Such cases are, however, just the exceptions to the rule.

In any case, the threefold classification cannot be transferred without further ado to the case of *non-state, private* actors. First of all, as non-state, private actors do not receive direct and structural state support they can hardly implement a full-fledged genocidal plan, even if they belong to the top-level of the respective group or organization. Second, their knowledge of a genocidal plan, at the mid- or low-level, cannot be simply inferred from their formal involvement or role in the power apparatus but rather depends on their factual status and role in the group and their access to the top level individuals or to the information at the disposal of these individuals. Thus, one should apply the threefold classification in a more flexible way to non-state actors.

The following table encompasses the perpetrators' types resulting from the criminological studies<sup>51</sup> and intends to relate them to the threefold classification of International Criminal Law, in particular with regard to the mental requirement (knowledge and purpose). *First*, the table shows different categories of perpetrators differentiated according to level (high, middle and low) and status (state agent or private actor). The distinction as to the state or private perpetrator's type (see the extreme left and right columns, respectively) shows that these must also be treated differently from a legal perspective. If we take, by way of example, the top-level, we can see that there exist only state perpetrator's types (as mastermind, leader, and planner) but no private perpetrator's types. At the mid- and low-level there are both state and private perpetrator's types, yet often a perpetrator type appears in a different level and status categories. The "true believer", for example, could be a mid- or low-level state agent or private actor, i.e., there are four types of true believers. However, the differences between level and status and their influence on the legal classification appear more significant in the case of perpetrator's types that are not represented in both the extreme left

<sup>50</sup> See for example on the Armenian genocide Adalian (2009: 65): 'The chain of command that put the Armenian genocide into motion joined every link in the administration of the Ottoman state'; on the Nazi genocide and their microphysical distribution of tasks and responsibilities through all different state links Niewyk 2009: 134: 'each department and individual was accountable for only one small segment of the program, diffusing personal responsibility.'

<sup>51</sup> In this table are considered the above mentioned typologies by Smeulders 2008; Mann 2005; Hilberg 1992; Gupta 2001 and Jamieson 1998.

and right (state/private) columns. At the mid-level, for example, one finds state agents acting because of their institutional career (compromised type, or careerist type), yet these perpetrator's types do not exist for private actors; a mid-level private actor may act for reasons of profit (profiteer, materialist type) or because of ideology (true believer type), but not pursuant to a command chain (e.g., the professional type state agent). Moreover, a mid-level private actor would neither act because of fear (fearful type) nor professional pressure (captive participant type), and this distinguishes him/her further from private low-level perpetrators, who may possibly act with the group out of fear or pressure. *Secondly*, the table shows what kind of mental requirement would be necessary and sufficient in each case (knowledge *and* purpose, only knowledge, knowledge in a general or specific form) depending on the category (level and status) of the perpetrator. This second aspect of the table is further explained in the following.

**Table. International criminal law categories in comparison with criminological typology of perpetrators**

Perpetrator's type (state)	Perpetrator is state agent		Perpetrator's level	Perpetrator is a private actor		Perpetrator's type (private)
	Knowledge	Purpose		Knowledge	Purpose	
mastermind; leader; planner	X	X	top-level	-	-	----
fanatic; careerist; devote warrior; bigot; true believer; compromised; professional	X	-	mid-level	X	-	criminal/sadist; bigot; true believer; profiteer; materialist
criminal/sadist; violent; bigot; true believer; careerist; obedient follower; professional; conformist; disciplined; bureaucratic; comradely; compromised; fearful; doubter; captive participant	X	-	low-level	X	X	fanatic/ bigot; violent; ideological; devote warrior; true believer; profiteer; materialist; comradely; compromised; fearful; captive participant

(Glossary: X = required - = not-required ---- = non-existing category)

#### 4.1. REGARDING TOP-LEVEL PERPETRATORS “INTENT TO DESTROY” MEANS KNOWLEDGE AND PURPOSE

Top-level perpetrators are classified in most criminological studies as criminal masterminds that occupy high positions in the state apparatus and have strong and direct influence over subordinates and the public. Dictators, explains Kressel, have the ability to mix threats, manipulation, persuasion, and bribes to change a person politically and psychologically. Direct control or indirect influence over the media, schools, police, military, and other institutions and organizations over time can result in the transformation of souls and of supporters into “mindless pawns”.<sup>52</sup> Masterminds thus influence the personality structures of their followers and delineate the goals and performance of the destructive policy which forms the legitimizing basis of the individual acts.<sup>53</sup> Furthermore, as Bandura puts it, “language shapes thought patterns on which actions are based.”<sup>54</sup> This connection is crucial for understanding the role of the leader and of the distribution of responsibilities between him and his followers. The context “that at once influences the leader’s attitudes and is shaped and influenced by the leader”<sup>55</sup> connects him with the physical perpetrators. Thus, the top-level perpetrator not only *knows* about the genocidal context of the concrete individual acts, but he shapes and prepares this context in the first place, i.e., he acts with the purpose towards the ultimate destruction of the respective group. Indeed, on the basis of the criminological typologies, it is safe to say that the top-level perpetrator is the only type of perpetrator that *always* acts with a destructive purpose. In other words, either he acts with genocidal purpose or there is no genocide at all. Thus, the twofold knowledge *and* purpose requirement is indispensable for his responsibility.

#### 4.2. AS TO MID-LEVEL PERPETRATORS THE KNOWLEDGE-BASED APPROACH IS APPLICABLE

Mid-level perpetrators do not always act with purpose in genocidal contexts. A *careerist* or a *professional*, situated at the mid-level of the state apparatus, may be aware of the genocidal context and thus of the supporting nature of his conduct but he may not possess the purpose-based intent to destroy the respective group himself. In fact, he is not so much pursuing the destruction of the group but his own career in the system. Mid-level perpetrators are not necessarily involved in

<sup>52</sup> Kressel 1996: 200–201.

<sup>53</sup> See Vest 2002: 108 (‘An der Festlegung der Ziele wirken nur die *Entscheidungsträger*.’ [‘Exclusively *decision makers* set the objectives’]). See also Paul 2008: 258.

<sup>54</sup> Bandura 1999: 195.

<sup>55</sup> Post 2004: 13. See for the socio-psychological background of this analysis Brewster-Smith 1968: 23, *passim*.

the objectives of the genocidal campaign. Their participation in such a campaign and even the achievement of their personal goals exist independent of the purpose to destroy. Kressel, taking the example of Rudolf Höß, demonstrates how difficult it is to draw the line between purpose and knowledge in the case of mid-level perpetrators. Höß was the chief administrator of the Auschwitz concentration camp. In his memories, Kressel argues, Höß

*'maintains that throughout his life he strongly valued obedience and authority, but he was no sadist. He had a human heart. He was not evil. He even shot a guard, once, for abusing a prisoner against his orders. Hoess assures us he had nothing in particular against the Jews. He was no less, and no more, than a patriot – rendering a necessary service to his country.'*<sup>56</sup>

So the question arises whether Höß really pursued the destruction of the Jews as a group. Did he understand this purpose as part of his job? Did he individually desire the destruction of the group or did he merely want to serve his country? These questions show how difficult it is to separate personal (individual) from state (collective) goals in the case of mid-level perpetrators. In most cases, mid-level perpetrators will at best act with knowledge of the genocidal campaign surrounding their individual acts and, in any case, this is hard enough to prove. If one were to additionally require purpose on their part there would hardly be any mid-level genocidaire.

A further issue regarding mid-level perpetrators concerns their role in society. Mid-level perpetrators are usually, but not always, state agents. They may be bureaucrats ("the Eichmann type") but could also only be *profiteers*. Take the director of a company who uses members of the persecuted group as "slave workers" ("the industrialist type") or the owner of a radio station who incites to genocide. Both know what they are doing and that they are acting within the framework of a genocidal policy but they do not necessarily act with a purpose of destruction. They make use of the top-level perpetrators' purpose for economic, commercial purposes (the industrialist) or they reproduce it by means of the mass media. Thus, mid-level perpetrators, regardless of whether they are state agents, profit from the genocidal purpose of the masterminds when they take opportunistic advantage of it by aligning themselves with the official genocidal policy. In other words, while mid-level perpetrators normally do not share the purpose-based intent to destroy, they are aware of its existence and the corresponding genocidal campaign, i.e., they know that their activity promotes and furthers this campaign. It is for this reason that they deserve to be punished as principals in a genocidal enterprise. To require, apart from genocidal

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<sup>56</sup> Kressel 1996: 123.

knowledge, also genocidal purpose from them would ignore the criminologically explained reality of their genocidal conduct.<sup>57</sup>

#### 4.3. REGARDING THE LOW-LEVEL PERPETRATORS IT IS NECESSARY TO DISTINGUISH BETWEEN STATE AGENTS AND PRIVATE ACTORS. WHILE THE FORMER ARE NORMALLY INFORMED ABOUT THE GENOCIDAL (STATE) PLAN, THE LATTER ARE NOT

Compared to the mid-level perpetrators, the low-level perpetrators are even less likely to act with purpose and they will certainly possess less knowledge as to the genocidal campaign. This also means that the purpose requirement cannot be reasonably demanded either.<sup>58</sup> As to the knowledge requirement, a distinction between low-level state agents and private actors becomes of crucial importance. In the case of the former it can be expected that they are aware of the genocidal state policy, at least in a general sense of acting within the framework of a genocidal policy. They act upon orders and obey as “instruments” for the implementation of this policy. Their knowledge may be inferred from the genocidal state policy implemented through the said orders and the fact that they are part of the genocidal state apparatus. If low-level state agents know about the context, they necessarily know that their official task is part of and contribution to the state plan.

In contrast, *private actors* will normally not possess this knowledge and it cannot be inferred from the State policy since they are not part of the State. Even if they know by hearsay, they may lack the specific knowledge as to how their concrete acts connect to the collective genocidal conduct. In this sense one may distinguish between general and specific knowledge: The former alone – a kind of general idea of the genocidal context or policy – does not suffice;<sup>59</sup> rather, it

<sup>57</sup> This is also recognized by legal scholars, see e.g. Vest 2002: 108 (‘Die *praktische Umsetzung* und Durchführung der Entscheidung [über die Ziele] erfolgt dagegen innerhalb des von dieser Führungsclique gesteckten Rahmens, so dass es auf die individuellen Ziele der einzelnen Akteure überhaupt nicht mehr ankommen kann. Es muss deshalb folgerichtig genügen, dass der einzelne bewussterweise in diesem *ihm bekannten kollektiven Muster* der ganzen oder teilweisen Zerstörung einer geschützten Gruppe agiert.’). In the same vein Schabas 2009: 252 (‘Individual offenders need not participate in devising the plan. If they commit acts of genocide with knowledge of the plan, then the requirements of the Convention are met.’).

<sup>58</sup> See Vest 2002: 108 and Paul 2008: 258.

<sup>59</sup> In the same vein see Schabas 2009: 250, when criticizing that the Appeals Chamber of the International Criminal Tribunal for the Ex-Yugoslavia (*Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004, para. 137; *Prosecutor v. Blagojević*, Case No. IT-02-60-A, Judgment, 9 May 2007, para. 123) ‘has focused on evidence of State policy’ rather than seriously inquired the direct perpetrators’ acts which could be imputed to the State in question

must be complemented by a kind of *specific knowledge* linking the specific, individual acts to the concrete genocidal campaign, i.e., a particular mental connection between the individual act of the private perpetrator and the collective state crime is required. Given that the private actor does not receive formal orders which link his concrete conduct to the collective genocidal campaign, such a link can only be construed by way of this specific knowledge requirement.<sup>60</sup> An example of the possible lack of this link is offered by Daoud Hari in his memoir as translator in Darfur when remembering the answer of a Janjaweed Arab boy about why he attacked a village:

*'We were told by the government soldiers that these people were going to attack our village and kill our families if we did not attack them first. They would give us money if we did this. [...] Our families need this money, and we had to protect them.'*<sup>61</sup>

It is clear that this boy had not the slightest idea that he was acting within the context of a genocidal policy and therefore he could not have had specific knowledge without having received the respective official information. Thus, he could, at best, possess a very general knowledge but never a specific one linking his acts to a concrete genocidal campaign. To qualify him then as a genocidaire would not correspond to his mental state when carrying out the said acts.

Smeulers argues that "within a period of collective violence all individuals have to make a choice: they either go along with or they set themselves apart from it."<sup>62</sup> At the first glance, this idea seems to suggest a very simple binary choice pro or contra (genocidal) violence which would certainly be too simplistic for the purposes of imputation in criminal law. Yet, Smeulers herself makes later clear that things are more complicated and dynamic, arguing for the possibility of an inevitable transformation of individuals through continuous and escalating decisions.<sup>63</sup> Given the many different forms of participation and the complexity

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and who 'had killed members of the groups or committed one of the other acts with genocidal intent at the personal level à la Jelisić'.

<sup>60</sup> The distinction between low-level private actors and state agents is also supported by the first writings on genocide, see Lemkin (1944: 93), stating: 'The liability of persons who order genocide practices, as well as of persons who execute such orders, should be provided expressly by the criminal codes of the respective countries.' The liability of those low-level perpetrators who do not receive formally any orders and who do not belong to the state structure is in fact the most difficult to determine.

<sup>61</sup> Hari 2008: 95.

<sup>62</sup> Smeulers 2008: 238.

<sup>63</sup> See Smeulers 2008: 238 illustrating this escalating commitment by the example of the Milgram experiment and stating: 'Probably without being fully aware of the consequences people within the period prior to the collective violence, are confronted with all kinds of small and seemingly insignificant decisions that make them go along. These same decisions however compromise them into going along further and further and step by step they get deeper and deeper involved. Within a period of collective violence, many people slowly progress on a continuum of destructiveness, often without being really aware of it. This

of human relations, many grey areas where the actor's participation does not result from a clear pro or contra choice exist.<sup>64</sup> The spectrum of an individual's participation in the genocidal policy ranges from acts even prohibited by the genocidal state (e.g., excessive acts going beyond the genocidal plan) to the commission of crimes under coercion.<sup>65</sup>

Apart from that, the quite probable ignorance of a private actor as to the genocidal state policy (if this policy is not made public) entails a certain "neutrality" of his conduct with regard to this policy. In other words, while his act certainly constitutes an assault on the members of the respective group, it does not necessarily impose a negative identity on the victim<sup>66</sup> or even "dehumanize" it.<sup>67</sup> The genocidal policy or context could, therefore, not so much be understood as an element of the offence but as an "objective point of reference of genocidal intent".<sup>68</sup>

## 5. CONCLUSION: THE STRUCTURE OF THE GENOCIDE OFFENCE IN LIGHT OF THE CRIMINOLOGICAL FINDINGS

The criminological findings on genocide suggest that the threefold distinction between top-, mid- and low-level perpetrators must be complemented by a *further distinction between state agents and non-state (private) actors*. Only the former may possess genocidal knowledge as a consequence of their official functions and duties while the latter can only be classified as genocidaire if they are specifically aware of the connection of their acts to the overall genocidal policy (i.e., a specific knowledge requirement). This distinction gains particular importance with regard to low-level perpetrators. Apart from that, criminological theories confirm the threefold classification by adding *more refined typologies* to

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process can also be described as a pattern of escalating commitment. People get caught up by it. Slowly, inevitably.'

<sup>64</sup> See Shaw 2007: passim and Jamieson 1998: 136.

<sup>65</sup> Jäger 1967: 76 et seq.

<sup>66</sup> See on the notion of negative group identity as explanation for genocide Simon 1996: 243–256; see also Afflitto 2000: 80 and 84 applying this concept to the analysis of genocidal victimization in Rwanda.

<sup>67</sup> See Kelman 1973; see also Delmas-Marty 2009: 8, who also stresses the meaning of "depersonalization (*dépersonnalisation*)" in genocide. I do not neglect that "dehumanization" or "depersonalization" processes are a common social component in the dynamic of genocides. However, I do not agree with the idea that these collective processes are also present in each individual perpetrator when he decides to kill, rape or steal. On the dehumanization (Dehumanisierung) of the victim and other types of neutralization see Jäger 1989: 191 et seq.

<sup>68</sup> Krefß 2009: 305.

the three levels. These theories make therefore a compelling case for a differentiated interpretation of the "intent to destroy" requirement in the sense of a purpose- and knowledge-based approach by applying the stricter purpose concept only to the top-level perpetrators. In the result, the top-level perpetrators, being the masterminds of a genocidal policy, possess a purpose-based and knowledge-based intent. Their purpose is to shape the overall genocidal context and is followed by the mid- and low-level perpetrators in varying degrees depending on the circumstances of each case. Mid- and low-level perpetrators need not necessarily share this genocidal purpose but must be aware of its existence and the ensuing genocidal policy. In the case of low-level private actors this awareness cannot be simply inferred from the genocidal state policy (as in the case of low-level state agents) nor from their essential involvement in the state plans (as in the case of mid-level private actors) but requires a *specific knowledge* in terms of a link of their concrete acts to the overall genocidal policy. Only then can a banalization of the genocide crime be avoided and their qualification as "genocidaire" justified.

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