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THE CRIME OF GENOCIDE. QUESTIONS ABOUT THE MENS REA

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Abstract

The definition of genocide established in the 1948 UN Convention has been totally adopted by the international lawmakers when formulating the corresponding provisions of the Ad Hoc Tribunals' Statutes, and, more recently, also article 6 of the Rome Statute of the International Criminal Court. In my oral presentation, I will try to address the topic of the genocidal specific intent. The theme of the genocidal dolus specialis is certainly among the most debated, not only because it is relevant to the crime itself, but also because it can well represent the occasion for the emergence of the various opinions concerning, upstream, the reconstruction of a theory of guilt in international criminal law (and, more specifically, in the ICC Statute's system).

Moreover, pursuant to a rigorous approach, I will try to rebut the thesis according to which the genocidal mental element can also be fulfilled by two psychological standards which are, in my opinion, wrong: i.e. the recklessness and the wilful blindness. Such a contradiction is generated by a misunderstanding of the normative provision: indeed, it is caused by a separate analysis of the two components (knowledge and intent) which constitute (as a whole) the standard provided for by article 30 of the Rome Statute. Concentrating all the efforts on the binomial knowledge-intent, one completely loses sight of the (previous in the text) clause "unless otherwise provided".

1. INTRODUCTION

The proper analysis of the crime of genocide, and in particular of its mental element, requires us to start from article II of the 1948 UN Convention on the prevention and punishment of the crime.

The definition established therein has been totally adopted by the international lawmakers when formulating the corresponding provisions of the Ad Hoc Tribunals' Statutes, and, more recently, also article 6 of the ICC Statute.

The Rome Statute of the International Criminal Court provides for four categories of crimes falling within the scope of jurisdiction of the Court. Among these, the crime of genocide stands out for importance – so much so as to be the first in order of codification. A few weeks after the Statute's adoption, the International Criminal Tribunal for Rwanda confirmed the relevance of the crime in the leading case *Akayesu*[1], in which it was referred as « the crime of crimes ». This precedent also gave a significant contribution to develop the crime's structure[2].

Moreover, it should be noted that the International Court of Justice has ruled that the definition of genocide provided for in the various conventions codifies a rule of customary international law[3].

Article II of the UN Convention (article 6 ICC St.) establishes that:

[...] "Genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- *a) Killing members of the group;*
- *b) Causing serious bodily or mental harm to members of the group;*
- *c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- *d) Imposing measures intended to prevent births within the group;*
- *e) Forcibly transferring children from a group to another group.*

The choice to dedicate this work to the topic of the *mens rea* is not fortuitous. It is the most controversial topic, and therefore, perhaps, the most interesting.

The theme of the genocidal specific intent is certainly among the most debated, not only because it is relevant to the crime itself, but also because it can well represent the occasion for the emergence of the various opinions concerning, upstream, the reconstruction of a theory of guilt in international criminal law (and, more specifically, in the Rome Statute's system).

2. THE PRINCIPLE OF GUILT IN INTERNATIONAL CRIMINAL LAW

From the point of view of international criminal law, as for the concept of guilt, there is the need for a synthesis of the choices made by the various national lawmakers.

At a national level, the elaborations concerning the relationship between the principle of guilt and the functions attributable to punishment are valuable.

In modern liberal-democratic societies, criminal law is now conceived as an instrument for the protection of fundamental legal interests, which are essential to the peaceful existence of the community. The criminal sanction therefore assumes the role of useful vehicle in making such a protection effective, on the one hand dissuading the people from the commission of crimes

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1 Akayesu (ICTR-96-4-T), Judgment, 2Nd September 1998. Affirmed: Akayesu (ICTR-96-4-A), Judgment, 1St July 2001.

2 Antonio Cassese, International Criminal Law, p. 100 – Oxford University Press, 2003.

3 Case concerning Application of the Convention on prevention and Punishment of the Crime of genocide [Bosnia and Herzegovina V-Yugoslavia (Serbia and Montenegro)], Judgment 26Th February 2007, § 161.

(so-called general prevention), and, on the other hand, avoiding the recidivism of those who have already been recognized as perpetrators of a criminal offence (so-called special prevention). And, given the need for the agent's will and his/her ability to self-determine future behaviours, the mental aspect is a necessary element of justification (albeit not the only one) for the punishment's infliction. If it was not, the deterrent function would certainly not be fulfilled, inflicting sanctions on persons who, when carried out a certain conduct, were not *in dolo* or, at least, *in culpa*[4].

The use of such arguments at an international level is controversial, and the doctrine is divided essentially into two fronts. Apart from those in favour[5], not few are the critical voices. The latter support the need to consider the specific aims of the punishment at an international level[6]. The solution of this question necessarily presupposes the identification of the international *potestas puniendi*'s grounds. The latter are by the best doctrine identified in the need to preserve the conditions of existence of the international community. Ultimately, the aims pursued by international criminal law must be identified, directly, in the maintenance of international peace and security, as well as in the wellness of the communities, and, indirectly, in the reconciliation/peace-making of conflicting populations[7].

However, such a conclusion needs to be further specified by reference to the notion of international public order, within which fundamental rights have progressively assumed a central role, thus becoming not only the main object of protection (in a positive sense) – going beyond their traditional nature of limit (in a negative sense) to the repression, which however must be assured[8] – but also the justification for the punitive claim of what has been well defined « a criminal law system without a State»[9].

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4 Giovanni Fiandaca, Considerazioni su colpevolezza e prevenzione, in Rivista italiana di diritto e procedura penale, p. 836 ss., 1987; Giovanni Fiandaca/Enzo Musco, Diritto Penale. Parte Generale, p. 316 ss. – Zanichelli, 2014; Vincenzo Militello, Prevenzione generale e commisurazione della pena, p. 141-173 – Milano, 1982; Tullio Padovani, Teoria della colpevolezza e scopi della pena, in Rivista italiana di diritto e procedura penale, p. 798 ss., 1987; Mario Romano, Pre-Art. 1, in Commentario sistematico al codice penale – Giuffrè, 2004.

5 Kai Ambos, On the Rationale of Punishment at the Domestic and International Level, in Henzelin-Roth, Le droit penal à l'éprauve de l'internationalisation, p. 305 ss., Paris-Geneve-Bruxelles, 2002; Otto Triffterer, The Preventive and Repressive Function of the International Criminal Court, p. 173, 2001

6 Mirjan Damaška, L'incerta identità delle Corti penali internazionali, in Criminalia, p. 9 ss., 2006; Giovanni Fiandaca, I crimini internazionali tra punizione, riconciliazione e ricostruzione, in Criminalia, p. 41 ss., 2007; Hanna Arendt, Responsabilità e giudizio, p. 21 ss., Torino, 2003.

7 Nicoletta Parisi, Problemi attuali del diritto internazionale penale, in Diritto e forze armate. Nuovi impegni, p. 194 – Padova, 2001.

8 Rosaria Sicurella, Per una teoria della colpevolezza nel sistema dello Statuto della Corte Penale Internazionale, in Università di Catania – Pubblicazioni della Facoltà di Giurisprudenza – Giuffrè Editore, 2008.; Lorenzo Picotti, I diritti fondamentali come oggetto e limite del diritto penale internazionale, in Indice Penale, n. 1, p. 259 ss., 2003.

9 Gaetano Insolera, Un diritto penale senza Stato?, in Delmas-Marty/Fronza/Lambert-Abdelgawad, Les sources du droit International pénal: l'expérience des tribunaux pénaux internationaux et le Statut de la Cour pénale internationale – Mission de Recherche Droit & Justice, 2004.

The *mens rea* is unanimously considered a constitutive element of international crimes[10].

Nevertheless, there is a lack of sufficient legal references for a full outline of the culpability's main grounds at an international level, i.e.: the imputability, the criteria by which a conduct can be psychologically ascribable to someone, the grounds for excluding guilt.

In fact, even at the domestic level, on the one hand, the concept of guilt is unanimously recognized as a constitutive element of the crime, but, on the other hand, contrasts arise about what guilt means[11]. In particular, within the Italian doctrine[12] (as well as within the German-Austrian one[13]), scholars debate on whether, in order for the *mens rea* to be fulfilled, additional elements (i.e. in addition to the mental element in the strict sense of *dolus* or *culpa*) are needed: that is, the capacity of someone to fully understand his/her conduct's meaning, and to activate psychological criteria of impulse or inhibition in application of decisions taken in accordance with his/her knowledge of reality.

The international jurisprudence and the subsequent normative practice have addressed the fluidity of contours of *mens rea*. The point is that very different figures are usually referred to the same category, i.e. the so-called circumstances excluding guilt: the justifications (which exclude the anti-legality of an *actus reus*) and the so-called *defences*[14].

International crimes are usually characterized by the involvement in their commission of the political and military leaders of a State. It should not be ignored that the criminal intent gradually lessens as we consider the moment of the material realization of the conduct, instead of the criminal plan's conception. Thus, the criminal conduct is the result of a decision-making process that is individually ascribable to no one. Therefore, for the purposes of a declaration of liability, the Prosecutor needs to subdivide such a decision-making process in order to highlight (and prove) the different mental profiles[15].

A structural character of international crimes in general, but of genocide in particular, is the pluri-subjectivity, from the point of view of both the perpetrators and the victims[16]. Because of this character, cases that can be abstractly qualified as common *figurae criminis* are instead considered as international crimes, in relation to the so-called *contextual element*.

As for the pluri-subjectivity on the perpetrators' side, two questions have to be addressed.

First, the objective imputability. We need to correctly frame how each agent contributed to the crime.

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10 Antonio Cassese, International Criminal Law, p. 159 – Oxford University Press, 2003.

11 Rosaria Sicurella, Ibidem.

12 Giovanni Fiandaca, Considerazioni su colpevolezza e prevenzione, p. 836 ss., cit.; Giorgio Marinucci, Politica criminale e codificazione del principio di colpevolezza, in Rivista italiana di diritto e procedura penale, p. 423 ss., 1996.

13 Bernd Schünemann, L'evoluzione della teoria della colpevolezza nella Repubblica Federale Tedesca, in Rivista italiana di diritto e procedura penale, p. 3 ss., 1990; Manfred Maiwald, La colpevolezza quale presupposto della pena statuale: necessità dell'istituto o realtà metafisica?, in Rivista di Polizia, p. 705 ss., 1992.

14 Rosaria Sicurella, Ibidem.

15 Rosaria Sicurella, Ibidem.

16 Giuliano Vassalli, La giustizia internazionale penale. Studi, p. 28 – Giuffrè Editore, 1995.

Second, the subjective imputability. It is essential in order to avoid two extremes, i.e. the depersonalization of punishment on the one hand, and its artificial personalization on the other. This is a goal which, although strongly desirable, is difficult to achieve. For example, the so-called "joint criminal enterprise" doctrine can be cited here.

The paradigm of the joint criminal enterprise was developed by the Ad Hoc Tribunals. It is a model of collective responsibility without a real normative basis. It is also characterized by an exaggerated simplification of the Prosecutor's *onus probandi*, that, in my opinion, violates the safeguards given by the principles of legality (*nullum crimen, nulla poena sine lege*) and guilt (*nullum crimen, nulla poena sine culpa*)[17].

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[17] The paradigm of the joint criminal enterprise was created by the ICTY. The Appeals Chamber in Tadic´ established its atus reus, namely: a plurality of persons; the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; the participation of the accused in the common design involving the perpetration of one of the crimes provided for in the ICTY Statute.
« The Appeals Chamber in Tadic´ elaborated on these criteria. For example, the plurality 'need not be organized in a military, political or administrative structure ...'. 'There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.' Participation in the common design 'need not involve commission of a specific crime under one of those provisions ... but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.' Later cases have also contributed to understanding of the actus reus. It is clear, for example, that membership in the group per se is not enough to ground liability on this basis. There has to be some form of action by the defendant to contribute to the implementation of the plan. Equally, both direct and indirect participation suffice. There is no requirement that the contribution made by the defendant is a significant one. The ICTY has inconsistent jurisprudence on whether or not those that physically commit the relevant crimes need to be parties to the joint criminal enterprise for participants in that enterprise to be found guilty through this principle. If the common plan or purpose fundamentally alters, then this is a new plan or purpose, not simply a continuation/mutation of the old one, and a person is only responsible for crimes which relate to the plan or purpose he or she subscribed to. Some doubt might be expressed about the statement in Blagojevic´ and Jokic´ that 'any ''escalation'' of the original objective must either be agreed to if a person is to entail criminal responsibility for the first category of joint criminal enterprise, or that ''escalation'' must be a natural and foreseeable consequence of the original enterprise.' This is because in the latter case, there is a risk that a person could become liable for crimes committed as a foreseeable result of the new enterprise, but not the one agreed to. […] Although the conduct element of all of the forms of joint criminal enterprise liability is the same, the distinction between them comes in through the mental element. The Appeals Chamber in Tadic´ is the standard reference on the point: ... the mens rea element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which ... is really a variant of the first), personal knowledge of the system of ill treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under

As for the circumstances excluding criminal liability, in accordance with the Continental approach (instead of the Common Law one), the doctrine distinguishes between justification and excuses.

« Justifications, broadly speaking, are pleas that the conduct of the defendant was acceptable, and thus necessarily lawful. […] 'Excuses', painting again with something of a broad brush, do not seek to defend the conduct of the defendant per se, but seek to say that, in the particular instance, the defendant ought not be blamed for what he or she did »[18].

Examples of justifications are: the justified repression of civil or military enemies who are perpetrators of war crimes or crimes against humanity; the legitimate reprisals in conflicting contexts; the self-defence; the so-called consent (*volentieri non fit iniuria*); and, under certain conditions, the superior order.

Examples of excuses are: the mental disease; the state of intoxication; the mistake of fact; under certain conditions, the mistake of law; the duress; and the physical compulsion[19].

However, only the doctrine distinguishes between justifications and excuses. The international lawmakers are, instead, much less sensitive to such a categorization, as evidenced by the Rome Statute. For example, article 31 ("Grounds For Excluding Criminal Responsibility") refers indistinctly to justifications as in the case of the self-defense [§ 1 *c)*], and to excuses, such as the duress [§ 1 *d)*].

Rebus sic stantibus, it can be useful a summing-up of the ICC Statute's rules that address the hypothesis here relevant, regardless of the dogmatic category of reference.

The aforementioned article 31 provides for: the mental disease, the state of intoxication, the self-defense and the duress[20].

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the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk » (Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst, An Introduction to International Criminal Law, p. 306-307 – Cambridge University Press, 2014).

18 Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst, An Introduction to International Criminal Law, p. 321-322 – Cambridge University Press, 2014.

19 Antonio Cassese, International Criminal Law, p. 219 S. – Oxford University Press, 2003.

20 Art. 31 § 1 ICC Statute: « (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law; (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court; (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph; (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death

Article 32 deals with mistake of fact and mistake of law[21].

Finally, article 33 provides for superior orders and the prescription of law. In accordance with the principle of "conditional liability"[22] [23], this responsibility will be excluded if: the person who obeys was legally obligated to do so; he/she was unaware of the anti-legality of the order; and the latter was not manifestly contrary to the law. In any case, there is an absolute presumption of manifest unlawfulness of the orders to commit genocide and crimes against humanity[24].

A question that is certainly relevant concerns the relationship between the duress and the superior order.

These are two figures abstractly different and independent. However, they can in some way complement each other, as a Judge uses the first as factual element integrated by the second, in those cases in which the subordinate seriously risks his/her or other's safety in case of disobedience[25].

The *Erdemovič* case[26] is emblematic. The defendant, accused of the famous crimes against humanity perpetrated in Srebrenica, argued that he was not morally free at the time of the crime, because of a serious threat to his life and that of his family members in case he disobeyed the superior order to savagely kill civilians. In particular, in the ICTY Statute [Article 7 (4)], the superior order not manifestly illegal represents a mere mitigation, distinct from d*uress*. The

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or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control ».

21 Art. 32 ICC Statute: « 1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime. 2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33 ».

22 Anna Maria Maugeri, La responsabilità da comando nello Statuto della Corte Penale Internazionale, p. 314, chapter III, footnote n. 77, in Università di Catania. Pubblicazioni della Facoltà di Giurisprudenza – Giuffrè Editore, 2007.

23 C.T. Sistare, Responsibility and Criminal Liability, p. 166 ss. – Springer Science and Business Media, 2012: « […] where individual freedom and agency are premier values, conditional liability is the most suitable system. The principle of conditional liability can be expressed as the principle of responsibility for liability: that as a matter of justice, individual responsibility is required for liability. Adherence to conditional standards is one way in which a liberal society promotes and displays respect for personal agency ».

24 Art. 33 St. ICC: « 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful ».

25 Yoram Dinstein, The Defence of Obedience to Superior Order in International Law, p. 223 ss. – Leyden, 1965.

26 ICTY Prosecutor v. Drazen Erdemovič (Case IT – 96 – 22 – T, Sentencing Judgment, 31st May 1996, § 63, 66, 67 e 86).

latter, in fact, needs an imminent threat to the agent's life in case of disobedience, regardless of a subordination link. In this case, the applicability of the mitigating circumstance was denied to Erdemovič for a number of reasons: firstly, the order to kill two hundred civilians was manifestly unlawful; secondly, the defendant was aware that he was violating the most basic laws of war; and finally, a serious threat in case of disobedience was missing[27].

3. THE GENOCIDAL SPECIFIC INTENT

From the psychological point of view the crime is characterized by the intentional element expressed by the formula « with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such ». According to the best doctrine the specific intent would distinguish the facts of genocide from those fulfilling common crimes against the person[28].

The idea of the genocidal specific intent in terms of mere intentionality is controversial[29].

Reducing the *dolus specialis* to a pure psychological phenomenon involves the risk of confusing it with motive, that is the subjective reason for action. And the motive, as a psychic phenomenon inside the agent's mind, is not necessarily connected to the material fact.

The genocidal specific intent was formulated according to a technique appearing in several national criminal systems: that is, the identification of a particular surplus of the purpose as compared to the *actus reus*¸ that is the common object of the general standard of intent and knowledge[30].

For example, we can cite the Italian notion of the so-called *dolo specifico* (*dolus specialis*), the German figure of the so-called *Absichtsdelikte* (intentional crimes), and the Austrian figure of the so-called *Delikte mit überschießendem*. Actually, also in Common Law systems – which are historically less sensitive to the dogmatic elaboration of this category – more attention is gradually being paid (at least at the doctrinal and jurisprudential level) to the crimes characterized by a weighty intentional element, in the sense of intent to commit further acts as compared to the *actus reus*.

As already mentioned, the modern doctrines, both Continental and Anglo-Saxon, reject a purely psychological understanding of the specific/further intent (in the sense of *mens rea*'s subelement). Instead, it is theorized a central role of the intent within the objective element of the crime. This additional element is part of the judgement of guilt[31].

However, the way in which such a specific intent links the protected interests of a crime's provision is controversial.

Pursuant to a rigorous approach, the agent, on the one hand, must disclose his/her intent to realize the further unlawful result, and, on the other hand, he/she must commit a base-fact

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27 Anna Maria Maugeri, Ibidem.

28 Giovanni Grasso, Genocidio in Digesto delle Discipline Penalistiche, vol. V – Torino, 1991.

29 Lorenzo Picotti, Il dolo specifico. Un'indagine sugli elementi finalistici delle fattispecie penali – Giuffré Editore, 1993.

30 Lorenzo Picotti, Ibidem.

31 Simona ragazzi, "Pulizia etnica" in Bosnia e crimine di genocidio, in Rivista italiana di diritto e procedura penale (2003).

suitable to fulfil the forbidden future result. As for genocide, the agent must be aware of and mean to realize the *actus reus*, with the further intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

In case of murders regarding a specific protected group, if such (not purely subjective) element is missing, it will not be possible to qualify it as genocide. However, a legal framework in terms of crimes against humanity and/or war crimes cannot be ruled out.

The link that must connect the base-fact to the further event is subjective and teleological (instead of physico-naturalistic). Indeed, the second term of this relationship is only the purpose (the "psychic" cause) that brings about the agent's conduct, and not a naturalistic event etiologically linked to the latter. Since this further element (as previously expressed) concerns the *actus reus*, its validation needs the proof of the finalistic nexus between the agent's conduct and its ultimate purpose in the context of the objective element's ascertainment, but by means of the further elements as compared to the (materially considered) conduct[32].

Given that, as for genocide, the minimum threshold of the *dolus specialis*' fulfilment widely alters by reason of a broad or restrictive interpretation of the provision's protected interest[33]. In the opinion of the prevailing doctrine and jurisprudence, it is the group's existence or survival[34]. However, isolated voices object that the concept of "existence" evokes an unrealistic idea of hereditary transmission of the group's identity, which would instead be a fluid entity in constant transformation, so they affirm that the protected interest is the group's development[35]. The second approach, in some way, can be considered a hegelian-dialectic vision.

4. CONCLUSIONS

In conclusion, another question must be solved: what is the degree of intensity of the volitional component that must cover the further element?

An authoritative doctrine asserts a controvertible theory[36].

Professor William Schabas takes as a normative reference article 30 of the Rome Statute of the International Criminal Court, namely "Mental element", that establishes as follows: « Unless otherwise provided, a person shall be criminally responsible and reliable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. For the purposes of this article, a person has intent where: (a) in relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. For the purposes of this article, 'Knowledge' means awareness that a circumstance ex-

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32 Lorenzo Picotti, Ibidem.

33 Simona Ragazzi, Ibidem.

34 Daniel David Ntanda Nesereko, Genocide, in Kirk Mc Donald-Swaak Goldman, Substantive and Procedural Aspects of International Criminal Law, vol. I – Dordrecht, 2000.

35 Emanuela Fronza, Genocide in the Rome Statute, in Schabas-Lattanzi, Essays on the Rome Statute of the International Criminal Court – Il Sirente, 1999.

36 William A. Schabas, Genocide in International Law, p. 206 ss. – Cambridge University Press, 2000.

ists or a consequence will occur in the ordinary course of events. 'Know' and 'Knowingly' shall be construed accordingly ».

It is correctly argued that a genocidal conduct hardly can be committed by a single agent and that, therefore, a plan is needed in order for the crime to be fulfilled, although this element is not expressly required in the normative provision. Such a requirement is also confirmed by the jurisprudence[37]. As much correctly it is stated that: it is not necessary that the author has personally devised the plan, provided that – of course – he/she have known it; the knowledge of the plan/policy (and of the broader context in which the conduct is carried out) should not be confused with the knowledge that all these elements fulfil the crime of genocide.

Nulla quaestio, so far.

But this doctrine makes a serious mistake by stating that the genocidal mental element can be fulfilled even by two psychological standards which are, in my opinion, wrong.

In primis, the so-called *recklessness*, that is, the agent is aware that his/her conduct, in the ordinary course of events, unreasonably puts the protected interest in danger, or, in other words, he/she knows the risky consequences of his/her conduct. For this purpose, he cites the maxim – wrong as well – affirmed in *Akayesu*: « the perpetrator is capable because he *knew or should have known*[38] that the act committed would destroy, in whole or in part, a group »[39]. This stance is likely to be conditioned by the legal culture to which the scholar belongs. Indeed, by distinguishing different degrees within the *recklessness*, it rules out relevance only to those that are in some way at the basis of this ideal "intentional ascending scale". Nonetheless, these conclusions must be rejected, mainly because any attempt to affirm a certain legal culture's hegemony is flawed.

Secondly, the so-called *wilful blindness*, that is, the agent deliberately does not wonder about the consequences of a certain behaviour, while being aware that such a judgment is mandatory[40].

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37 ICTY Prosecutor v. Rodovan Karadžić and Ratko Mladić (Case No. IT – 95 – 5 – R61, IT – 95 – 18 – R61); ICTY Prosecutor v. Goran Jelisić (Case No. IT- 95 – 10 – T), Judgment, 14th December 1999, § 655; ICTR Prosecutor v. Jean Paul Akayesu (Case No. ICTR – 96 – 4 – T), Judgment, 2nd September 1998, § 477, 579, 651; ICTR Prosecutor v. Kayshema and Ruzindana (ICTR Case No. – 95 – 1 – T), Judgment, 21st May 1999, § 94, 276.

38 Italics and underline added.

39 Akayesu § 519.

40 The wilful blindness has been well analysed by the Anglo-Saxon doctrine and jurisprudence.
In the case Croyalgrange Ltd. (House of Lords, Westminster CC v. Croyalgrange Ltd [1986] 2 All ER 353, 359), the House of Lords (whose jurisdictional function has been undertaken by the Supreme Court of England and Wales, after the 2005 Constitutional Reform Act) stated the so-called "doctrine of wilful blindness": « the defendant had deliberately shut his eyes to the obvious means of knowledge or refrained from enquiry because he suspected the truth but did not want to have his suspicion confirmed ».
Moreover, in *Roper v Taylor's Central Garages (Exeter) Ltd* [1951] 2 TLR 284, 288, it has been distinguished between: the actual knowledge; the wilful blindness (knowledge in the second degree), that is the intentional refusal to verify a certain circumstance; and the constructive knowledge (knowledge in the third degree), that is the refusal to make those checks that a normally prudent and rational person would have made.

Well, what this doctrine seems to ignore is the speciality clause at the beginning of article 30 of the Rome Statute. Or, at the very least, he contradicts himself when, on the one hand, he affirms the essentiality of the specific intent in order for the crime of genocide to be fulfilled, but, on the other hand, he admits the standards of the *recklessness* and the *wilful blindness*.

The truth is that such a contradiction is generated by a misunderstanding of the normative provision: indeed, it is caused by a separate analysis of the two components (knowledge on the one hand, and intent on the other) which constitute, as a whole, the standard provided for by article 30. This doctrine, concentrating all his efforts on the binomial knowledge-intent, completely loses sight of the (previous in the text) clause « unless otherwise provided ».

In this way, the result is inevitably incoherent, and cannot be shared. This is imposed, further upstream, by a correct use of the interpretative criteria, in particular the need for an interpretation in respect of the safeguard-*ratio* that inspires the principle of guilt.

The wrongness of such an approach also comes to light from the scholar's comment to the genocidal conduct of forcible transfer of children, belonging to the target group, to another group [see article 6 *e)*]. About the maximum age for the childhood's fulfilment, the *Elements of Crimes* state that persons are considered as children if they are less than eighteen years old, adding that the offender « knew or should have known » that the victims were minors. The scholar makes a mistake again. He argues that the *Elements of Crimes*' provision is « inconsistent with article 30 of the Rome Statute, which requires that a perpetrator have actual knowledge of a relevant circumstance ». Once again, it is not adequately considered that article 30 itself is opened by the aforementioned speciality clause, which puts the *dolus generalis* standard "in offside". This also applies to the question of the agent's mistake about the victims' age. And the *Elements of Crimes*'s provision cannot be a normative reference to the theory that the recklessness and the wilful blindness are relevant. Indeed, it should not be confused, on the one hand, the specific intent required as a psychological coefficient – at least – of the principal author and, on the other hand, the question about the relevance of the mistake of fact. After all, the latter is expressly solved in the affirmative sense by the *Elements of Crimes*: in other words, given the need for the specific intent, it is logical to think that, about the mistake of fact, a lower mental element is acceptable only where expressly provided for. And the elucidation given by the *Elements of Crimes* would therefore have such primary function.

A different and further point is that those who contributed to the crime can be recognized criminally liable because of a contribution covered by a *mens rea* lower than the d*olus specialis*.

According to Andrew Simester, John Spencer, Robert Sullivan e Graham Virgo (Simester and Sullivan's Criminal Law – Theory and Doctrine – Oxford-Portland Oregon, 2013), within the category of the wilful blindness a distinction should be made, between recklessness knowledge and actual knowledge. The first sub-category is fulfilled whereas in the agent's psyche there is the knowledge or the doubt of a certain circumstance, and nevertheless he/she avoids to further check.
The second one is fulfilled whereas in the agent's psyche there is the intent to not check the truthfulness of a certain circumstance, since he/she does not have any doubt about it.
Finally, according to David Ormerod e Karl Laird (Smith and Hogan's Criminal Law – Oxford, 2015), the element characterizing the wilful blindness is the coexistence, in the agent's psyche, on the one hand, of the knowledge of a certain circumstance and, on the other, a blameworthy (because conscious) refusal to check his/her own conduct's consequences.

Regarding the genocidal *dolus specialis*, a final question is very complex, i.e. whether the agent must know that his/her conduct is suitable for realizing the further purpose.

As for crimes against humanity, article 7 of the Rome Statute provides for enough indications in the positive sense[41]. Instead, nothing explicit is disposed about the crime of genocide, neither by article 6 of the ICC Statute, nor by the Ad Hoc Tribunals' Statutes, nor by article II of the 1948 UN Convention.

Thus, apparently, the crime could be fulfilled even in case of an isolated and structurally unsuitable (with regard to the purpose) conduct[42] [43]. In other words: *Ubi Lex Voluit Dixit, Ubi Noluit Tacuit*.

However, it must be remembered that, since the genocidal intent complements the so-called contextual element, the latter objectively and subjectively defines the specific harmfulness of the crime, as a conflicting link between the agent(-group) and the victim(-group)[44].

Therefore, from the agent's points of view two elements are essential to the crime's fulfilment: the fact that the *actus reus* is realized in order to achieve the further purpose and, psychologically, its knowledge.

Actually, in the doctrine and the jurisprudence, it is unanimously affirmed that the genocidal specific intent presupposes the agent's knowledge of his/her conduct's relevance to a plan/policy and to a criminal context on a large scale[45].

In conclusion, the approach suggested here aims at a good use of the rule of law "tools". In other words, we cannot "step back" when we talk about safeguards, such as the principles of legality and guilt. The jurist's task is not to make rough justice. It is to interpret and apply the law rigorously, correctly and in good faith.

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41 Antonio Vallini, L'elemento soggettivo nei crimini di competenza della Corte Penale Internazionale, in Cassese/Chiavario/De Francesco, Problemi attuali di giustizia penale internazionale – Torino, 2005.

42 Rosaria Sicurella, Ibidem.

43 In fact, within many national systems, the contextual element is not provided for; instead, within others, it has been established that the conduct needs to be part of a broader criminal sequence of events (e.g. art. 211-1 of the French criminal code: « en exécution d'un plan concret étendant à la distruction totale ou partielle d'un groupe national, ethnique, racial ou religieux »).

44 Lorenzo Picotti, I diritti fondamentali come oggetto e limite del diritto penale internazionale, p. 282 ss., in Indice Penale, n. 1 – 2003.

45 William A. Schabas, Genocide in International Law p. 207 ss. cit.