Chapter 7

Genocide under the Statute of the ICC: An Attempt to Organise the Interpretative Issues Using Methods of Modern Criminal Law Analysis

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Abstract

The interpretation of the provisions of the Statute of the International Criminal Court (ICC) defining the grounds of criminal responsibility for the crime of genocide is the subject of many interpretative disputes. However, these disputes are premised on certain theoretical assumptions. These assumptions fall into one of two types: those directly reflected in the text of the Statute, and assumptions that affect interpretation because the interpreter is convinced of such a role. Therefore, the accuracy of both types of assumption can be verified. This chapter focuses on assumptions that emerge in the reconstruction of the norms of the Statute that prohibit genocide. This choice is prompted by the fact that the output of the jurisprudence and the literature appears unsatisfactory. In doing so, this chapter shows that:
1) For all crimes under ICC jurisdiction, the provision of the Statute containing the norms prohibiting the commission of crimes is Article 25(2).
2) Article 6 of the Statute–the provision that defines the term "genocide"– is the provision that makes the content of this norm adequate.
3) Article 25(2)contains the following sanctioned norms: first, prohibition of the killing of members of a protected group; second, prohibition of the infliction of grievous bodily or mental harm on members of a protected group; third, prohibition of the creation of living conditions for a protected

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group calculated to bring about its physical destruction in whole or in part; fourth, prohibition of the use of measures aimed at stopping births within the protected group; and fifth, prohibition of the forced transfer of children of members of the protected group to another group.
4) Article 25(3)(a) indicates that the previously distinguished sanctioned norms prohibiting genocide shall also be violated jointly with another person (this framing constructs the formula of co-perpetration).
5) The normative status of the crime of genocide committed through another person has the closest connection to the construction of indirect perpetration.
6) In case of behaviours typified in Article 25(3)(b)–namely, the commission, incitement, and inducement to commit the crime of genocide–sanctioned norms are separated from norms prohibiting particular varieties of the crime of genocide (typified in Article 6).
7) Article 25(3)(c) does not indicate either the conduct to which aiding and abetting would be relativised or the conduct that the instigator would incite.
8) The contribution to the crime of genocide appears to be a highly indeterminate form of behaviour. Consequently, it is challenging to consider "the contribution to the crime" as an appropriately defined object of criminal law regulation, underscoring the need to clarify it in the Elements of Crimes.
9) It would be better to use the construction of a "broad intention" here, including the formula of *dolus eventualis*.
10) Article 25(3)(f) specifies that an attempt is the taking of action that initiates the commission of a crime. Here, it seems apparent that a narrow approach to the attempt to commit the crime of genocide is unconvincing. Certainly, many national criminal law systems adopt a different conception, according to which an attempt is behaviour that starts earlier, namely, at the moment when the perpetrator directly aims at performing a prohibited act.
This normative analysis reveals several weaknesses in the Statute concerning the definition of the grounds of criminal responsibility for the crime of genocide. The recommended solution is to improve the substantive quality of specific provisions of the Statute by introducing appropriate explanations to the Elements of Crimes.

Keywords: genocide, the Statute of the International Criminal Court, the Elements of Crimes, sanctioned norms

The interpretation of the provisions of the Statute of the International Criminal Court (hereinafter, the Statute) defining the grounds of criminal responsibility for the crime of genocide is the subject of many interpretative disputes. These disputes primarily arise from the ambiguity of many of its legal features, underscoring the difficulties in determining the scope of protected groups (national, ethnic, racial, and religious). The jurisprudence of the International Criminal Court (ICC) and the subject literature play an enormous role in combating this ambiguity. However, many of these disputes arise from the adoption of certain theoretical assumptions. These assumptions fall into one of two types. Assumptions of the first type are directly reflected in the text of the Statute, while those of the second type affect interpretation only because the interpreter is convinced of such a role. Therefore, the accuracy of both types of assumptions can be verified. Of course, it is not possible to address or challenge all of these assumptions here. Indeed, the range of Statute provisions delimiting the scope of criminalisation related to genocide is overwhelming. Accordingly, I only examine some of these provisions. This chapter focuses on assumptions that emerge in the process of reconstructing the norms of the Statute that prohibit genocide. This choice was prompted by the fact that the output of the related jurisprudence and literature appears unsatisfactory.

Of course, the reference to the category of the legal norm and the phase of its reconstruction requires clarification. The need for this clarification is due to the far-reaching substantive diversity in this area. Being convinced of the superiority of concepts of legal interpretation distinguished by the transparent and scientifically justified structure of both the object of legal interpretation and its goal, I present this explanation from the perspective of one of the leading concepts of this type, namely, from the perspective of the so-called "derivative concept of legal interpretation" developed by Maciej Zieliński.[1]

This conception determines the structure of both the object of interpretation and its purpose. It also has the advantage of organising the process of legal interpretation in a comprehensive, highly ordered, and objective manner, limiting the margin for speculation. This conception assumes that the interpretation of a legal text is carried out through three sequential phases: namely, the order-oriented, reconstructive-oriented, and perception-oriented phases.[2] During the order-oriented

1 See Zieliński, 1972.; Zieliński, 2010.; Zieliński, 1987. This concept is used in many analyses of criminal law. See, for example, Pohl, 2007.; Kardas, 2011.; Burdziak, 2021. Zieliński's concept is also the basis for the textbook on Polish criminal law written by Łukasz Pohl. See Pohl, 2012. and subsequent editions of this work (2013, 2015, 2019). Ziembiński characterised this concept as follows: *'More modern theory of M. Zieliński stresses the difference between legal provisions, i.e. sentence-like expressions of various verbal forms included in the text of a given legal act, and legal norms as norms of conduct worded univocally and directly. The interpretation of a legal text consists in reproducing ("decoding") legal norms worded indirectly in that text […]. The model reveals the structure of the process of interpretation of legal text. It does not have character of algorithm, though, it may be ordered in some perspicuously established pattern'*. See Ziembiński, 1987.

2 Initially, Zieliński distinguished more phases of the interpretation process: (I) "distinguishing process", (II) "idiomatic decoding", (III) "decondensation", (IV) "uniting process", (V) "non-idiomatic

phase, the moment of the validity of the legal provision and the validity of the verbal shape of the provision are established. In the reconstructive-oriented phase, the interpreter aims to obtain from the provisions of various syntactic structures the so-called "norm-shaped expression"[3] that serves as the basis of the legal norm. This expression is characterised by a determined structure, in which one can distinguish four elements: (1) the addressee of the future legal norm, (2) the circumstances when the norm will be applied, (3) the normative (deontic) operator of the norm (shall/may), and (4) the behaviour regulated by the norm.[4] Finally, the perception-oriented

decoding", and (VI) "decoding for unification meaning". See Zieliński, 1972, p. 84. Zieliński described these phases as follows: *'Stage I (distinguishing process) encompasses activities aimed at distinguishing the characteristics of a concrete expression under interpretation. These characteristics are attributed to the given expression according to the means by which it words the norms. Since the distinguishing of the characteristics decides on the whole further process of interpretation in the given case […]. The following ways of wording norms through expressions of a legal text are distinguished: 1. Direct or indirect, depending on whether the given disposition is or is not at the same time an expression of the common univocally characterised language; 2. Basic or non-basic, depending on whether the given disposition contains at least the operator of command in connection with the designation of behaviour or also the remaining elements of the norm of comportment (i.e. a designation of the subject or a description of the circumstances); 3. Singular or plural, depending on whether the disposition formulates one or more norms; 4. Univocal or ambiguous, depending whether the disposition is a univocal or ambiguous expression in that language; 5. Complete or incomplete, depending on whether it formulates all the elements in the norm (i.e. the designation of the subject, description of circumstances, operator of command, and description of behaviour) or some only; 6. Non-elliptical, depending on whether it is a non-elliptical or an elliptical expression (i.e. containing [a] relative expression without relativisation, [b] expression without quantification or designation, [c] references to other expressions, [d] shortened substituting expressions); 7. Adequate or inadequate, depending on whether the expression is in meaning independent form any other disposition of a legal text, or whether the text contains dispositions that complete, supplement, or modify it. […]. The aim of the interpretation procedure of Stage II (idiomatic decoding) is to replace idiomatic expressions of a legal text with non-idiomatic ones. At this stage the choice is also made as to the meaning if the idiomatic expressions of the legal text are ambiguous. The interpretation procedure of Stage III (decondensation) is aimed at breaking up a given disposition which formulates norms plurally and replacing it with the different norm-like expressions coded in it. The procedure of Stage IV (uniting process) is aimed at finding in a legal text dispositions related in meaning to the norm-like expression obtained in the procedure of the preceding stages in such a way that they complete, supplement, or modify them. Hence, it is aimed at this stage to obtain a norm, or rather at this moment still a norm-like expression, which would be adequate to the legal text. The procedure of Stage V (non-idiomatic decoding) is to replace norm-like expressions containing elements which do not belong to the common language with norm-like expressions fully belonging to the common language. At this stage, the opportunity is also taken to choose the meaning if the elements of the norm-like expression that are being replaced are ambiguous in the language to which they belong. Finally, Stage VI (decoding for unification of meaning) consists of translating the norm-like expressions that belong to the common language but still contain ambiguous expressions into unequivocal expressions of the common language. This produces a legal norm after a final choice of meaning, if necessary'*. Zieliński, 1972.

3 Zieliński also used the term "norm-like expression"; see Zieliński, 1972. However, in his later works, he used the term "norm-shaped expression". See Zieliński, 1987. and Zieliński, 2010.

4 According to Zieliński: *'The definition of norm of conduct differentiates four essential elements of the contents of norm: the qualification of the addresses, the qualification of the conduct ordered or forbidden, the qualification of circumstances in which the norm find its application, and the phrase expressing the element of order (prohibition). The definition does not formulate any proviso concerning connecting those elements in a syntactically correct whole. It is an unessential problem whether the norm has a*

phase is the stage wherein the linguistic meaning of the elements indicated above are established, so as to achieve their unambiguity.[5]

The derivative conception of legal interpretation further assumes that in addition to the application of linguistic directives (connected with the perception-oriented phase of interpretation), systemic and functional directives should also be applied, that is, directives derived from the central assumption adopted in the conception of the so-called "rational legislator".[6] This assumption is supposed to eliminate the inconsistency of legal norms in the given system. Consequently, the ultimate goal of the process of interpretation is to decode a legal norm understood as an expression in the frame of a defined behaviour that is prohibited (by a deontic expression like "shall" or "may") into a defined subject under the circumstances specified by this norm.

Regarding criminal law, contemporary reflection on the normative content of a provision defining the elements of a given type of crime (i.e. a prohibited act) clarifies that there are two legal norms encoded in such a provision: the sanctioning norm and the sanctioned norm.[7] The sanctioning norm is addressed to the Court and, based on this norm, the Court imposes a penalty on the offender when a criminally relevant violation of the sanctioned norm occurs. In contrast, the sanctioned norm–the subject of the following analysis–is the norm whose violation implies the commission of a prohibited act by the perpetrator.[8]

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verbal shape of the utterance: "If somebody possesses features A and is in circumstances O then he ought to perform act C," or "Everybody who possesses features A and is in circumstances O, ought to perform act C," or some other form'. See Zieliński, 1987. pp. 166–167.

5 Zieliński emphasised this as follows: *'The term "norm of conduct" is to be understood as an expression which on the ground of the meaning rules of a given national language (independently of the occasional elements of situation) formulates in a direct way an order or a prohibition for the directly appointed subjects directly appointed conduct in a given situation'.* See Zieliński, 1987, p. 165.

6 Leszek Nowak created this concept. See Nowak, 1987. pp. 137–145. This concept has been discussed in many works. See, for example, Nowak, 1968.; Nowak, 1973.; Wróblewski, 1979.; Kustra, 1980.; Wronkowska, 1987.

7 The concept of a norm sanctioned in criminal law was developed by Pohl. See Pohl, 2007.

8 Zieliński explained the process of reconstructing these norms as follows: *'Art. 148 para. 1 Polish Penal Code (1969–this act is no longer in force in Poland) declares: Who kills a man shall be liable to at least 8 years of imprisonment or the death penalty. This provision contains only one sentence situated in the special part of Polish Penal Code and following the stylistics of Polish legislation this provision should be characterised as the basic one. This provision should be decoded as an idiomatic one. But the provisions of this type must also be "decondensated" by splitting it into at least three norm-shaped expressions which outline: (N1) the sanctioned norm, prohibiting the homicide; (N2) the sanctioning norm, ordering to sanction the homicide by at least 8 years of imprisonment or the death penalty; (N3) the norm granting the competence to sentence in this way. Art. 148 para. 1 of PPC has a character of a plural provision and its de-idiomatization leads to its deconcentration as well. In the effect of de-idiomatization, one receives three separate norm-shaped expressions and the further interpretation of them is to be performed in separate ways. In the present example, we will fix our minds on the further process of interpretation of N1. The expression N1, "Anybody ought to forbear from killing a man," does not need any supplement. In principle, this provision contains all essential elements of a norm of conduct. Otherwise, the expression N2 ordering the sanction of homicide ought to be supplemented by mentioning the addressee of the sanctioning norm, i.e. the agency of administration of justice obliged to sentence the killer. Subsequently, one is to investigate whether the legal text contains some provision modifying*

As the contemporary theory of criminal law emphasises, such a general definition of the sanctioned norm requires a number of additional restrictions limiting its scope. For the purposes of this chapter, four are worth mentioning here. According to the first assumption, the behaviour regulated by the sanctioned norm is only "an act" when it is caused by the will of its subject.[9] The second assumption holds that only behaviour that is socially unacceptable–that is, behaviour by which its subject violates the rules of conduct considered binding in society with respect to a legally protected good–can be covered by the sanctioned norm.[10] The third presumption, which occurs when the causing of a specific effect is prohibited under penalty, assumes that the scope of regulation by the sanctioned norm is only extended to the effect caused by the perpetrator (this refers to the causal relationship, that is, the ontological basis for imputing the effect) and attributable to the perpetrator due to the fulfilment of the conditions for its objective imputation (this refers to the normative relationship, that is, the normative basis for imputing the effect).[11] Finally, an important rule limiting the scope of regulation by the sanctioned norm concerns the requirement that the form of the subjective feature of the criminal act must be located within this scope.[12]

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the content of the expression of N1, N2, or N3. The solution to the problem needs only knowledge of the complete legal text but also of Polish juristic doctrine formulating the particular directives of interpretation. Those directives are not codified and the interpreter sometimes has to choose from among directives to be applied. For instance, he has to decide about the connection between art. 148 para. 1 PPC and the provisions concerning self-defence, necessity, execution of a capital punishment, between the basic provision in question and the other provision of a special part. Of PPC, the transitional provisions, and so on. In the result of the accepted particular directives, after appropriate modifications, expression N1 assumes the following shape: "Any man who is not a mother acting towards her child under influence and in the time of parturition, and who is not a person under the influence of deep emotion, on demand and under a pity acting in self-defence repealing the direct lawless attempt against some social or individual good (without excessus defensionis), and is not an authorised person executing the death penalty, and who is not a person acting against enemy in the war time in the way defined by the material law, in every circumstances beginning from the 1 January 1970 ought to forbear from killing and even not to attempt to kill other man." (Homicide in other circumstances is forbidden by other provisions of special part of PPC.) The above formulated expression is not a sufficiently precise norm of conduct, because it contains some equivocal terms. For instance, it is necessary to fix the exact meaning of the term "to kill." It must be explained whether the behaviour in question consists in causing the clinical or biological death, the active behaviour or omission of some activity, the killing of other man or also a suicide. Fixing of a strictly univocal meaning of the considered expression is difficult because there is a lack of explaining provisions and the linguistic context is not very useful in this case. Thus, the interpreter must use the functional rules of interpretation to establish a precise sense of the norm-shaped expression and to formulate an adequate legal norm. Subsequently, he is to realise the task of much more complicated interpretation of the expressions N2 and N3 taking into account a lot of provisions modifying the content of those expressions'. See Zieliński, 1987. pp. 175–177.

9 Many works deal with the concept of "act" in the Polish science of criminal law. See, for example, Wolter, 1956.; Kubicki, 1975.; Mącior, 1990.; Konieczniak, 2002.; Pohl, 2017. See also Wright, 1963. and Patryas, 1988. pp. 9–76.

10 This condition is particularly emphasised when explaining the structure of unintentional crimes. In Polish literature, see first and foremost, Mącior, 1968.; Buchała, 1971.; Byczyk, 2016.

11 In Polish literature, J. Giezek devoted special attention to these issues. See Giezek, 1994.

12 See Pohl, 2007, pp. 110–134.

The derivative conception of legal interpretation also stresses the need to indicate the central provision containing the indicated norm (legal qualification)–the provision that serves as the basis for the legal qualification of the offender's criminal act.[13] Here, it should be noted that for all crimes under the jurisdiction of the ICC, the provision of the Statute containing the norms prohibiting the commission of crimes is Article 25(2). As the legislator indicates in this article, a person who has committed a crime under this jurisdiction is individually criminally responsible and punishable under the Statute. Of relevance here, the provision of Article 6 of the Statute, which defines the term "genocide", makes the content of this norm adequate. Its role in establishing the content of the grounds for statutory criminal responsibility for genocide is of core importance. After all, as is well known, it is this provision that defines the concept of genocide under the Statute. Nevertheless, Article 6 does not indicate that genocide as defined therein is a prohibited act, as it lacks deontic expression. According to theory of criminal law, the legal qualification of the offender's act does not contain additional provisions that define the expression relevant to criminal responsibility. It should be noted, however, that this view is only accurate for such regulations where the verbal shape of the main provision allows for identifying the prohibited behaviour, that is, the basis for the offender's criminal liability. This is clearly not the case in Article 25(2) of the Statute. Therefore, it should be assumed that the legal qualification of genocide must also include Article 6 of the Statute. Indeed, its absence in this legal qualification would eliminate its function of indicating which crime under the jurisdiction of the ICC has been committed by the perpetrator.

Having established the above assumptions, it is now possible to proceed to a preliminary characterisation of the content of the sanctioned norms prohibiting genocide in terms of the Statute. Given the definitional function indicated above, the point of departure here must be Article 6 of the Statute, which states:

> *For the purposes of this Statute, "genocide" means any of the following acts committed with the intent to destroy in whole or in part a national, ethnic, racial or religious group, such as:*
> *(a) the murder of group members;*
> *(b) causing serious bodily harm or mental health disorder of group members;*
> *(c) the deliberate creation for a group of living conditions calculated to cause its total or partial physical destruction;*
> *(d) the application of measures to stop births within the group;*
> *(e) forcibly transferring children of group members to another group.*

13 See Zieliński, 1987. p. 173. M. Zieliński stated this directly: *'First of all, in the "distinguishing stage," the interpreter should perform the preliminary multi-sided analysis of the given provision or rather of a set of provisions in question. The interpretation of a provision which contains a conjunction of propositions must be realised by the separate analysis of those elements of the provision. The interpreter must recognise the position of a given provision in the structure of the legal text as a basic provision or as a subsidiary one […]'.*

As shown above, Article 6 is a collection of several provisions marked with separate letters. Each of these provisions provides the definition of genocide. From a semantic perspective, it can be said that the legislative technique used in Article 6 of the Statute–a direct reference to the technique used in Article 2 of the Convention on the Prevention and Punishment of the Genocide–enables us to delimit the scope of the name/term "genocide" in the Statute (descriptive perspective) by indicating that genocide consists of the behaviours described in Article 6. However, this stance may be deceptive from a normative point of view, as it does not adequately communicate the fact that genocide is prohibited not under one sanctioned norm, but under many sanctioned norms. Indeed, from a normative point of view, based on the aforementioned assumptions on the structure of the legal norm, Article 6 of the Statute presents itself as a collection of provisions containing various sanctioned norms. Put briefly, one can say that the multiplicity of legal provisions is determined by grammatical and punctuation elements, while the multiplicity of legal norms is established by the generic difference of behaviours specified in these provisions. It is worth reiterating that the object of a norm, and thus the central component of its scope of regulation, comprises only one type of behaviour.[14] Clearly, Article 6 of the Statute indicates various behaviours.

The observation above is crucial from a practical point of view, as it allows for the precise formulation of the legal qualification of behaviours bearing the hallmarks of genocide. As the outline of the normative content of Article 6 demonstrates, in this article, the legislator provides the basis for such an interpretation of Article 25(2) of the Statute in the context of genocide. Accordingly, it is necessary to speak not of one crime of genocide but of many different crimes of genocide–crimes distinguished on the assumption that the criminalisation of genocide is founded on many sanctioned norms prohibiting various types of behaviour.

Given the limited scope of this chapter, it is impossible to present all of these norms in detail. Put simply, because of the definition of genocide set out in Article 6 of the Statute, we can distinguish the following sanctioned norms: first, prohibition of the killing of members of the protected group; second, prohibition of the infliction of grievous bodily or mental harm on members of the protected group; third, prohibition of the creation of living conditions for the protected group calculated to bring about its physical destruction in whole or in part; fourth, prohibition of the use of measures aimed at stopping births within the protected group; and fifth, prohibition of the forced transfer of children of members of the protected group to another group.

Of course, each of these norms should be supplemented by information specifying its addressee and the circumstances of its application. Such information should be added immediately and without difficulty. After all, there is no doubt that the addressee of these norms is, in principle, any human being (due, inter alia, to the irrelevancy of the public function underlined by Article 27 of the Statute), and that the

14 See Pohl, 2007.

circumstances of their application extend to all situations, in accordance with Rafał Lemkin's initial contention that genocide is a crime in both wartime and peacetime.[15]

The indicated norms should also be supplemented with information specifying the form of the subjective aspect required by Article 6 of the Statute for each variant of genocide, that is, the intention to destroy the protected group in whole or in part.

The observation that Article 6 of the Statute provides a basis for interpreting Article 25(2) in the context of genocide (i.e. that the provision of the latter contains different sanctioned norms prohibiting "varieties of genocide") is relevant in cases where the perpetrator has committed genocide by violating more than one of the indicated norms. Certainly, in the given situation, the adequate legal qualification of these behaviours will be legally complex, a fact reflected in the need to point to the relevant (as distinguished in Article 6 of the Statute) provisions (a, b, c, d, e). In short, the outlined normative analysis, one centred on the legal norm and the distinction between legal norm and legal provision, allows us to resolve the issues of unity and multiplicity of offences. There is no doubt that a competing approach may lead to a lack of precision in this sphere, which, as is well known, may consequently be perceived as a serious violation of substantive law not respecting the principle of material truth.

These nomological findings should also be applied to the interpretation of Article 25(3) of the Statute, according to which:

> *Criminal liability and punishment for crimes within the jurisdiction of the Court shall be imposed under this Statute on a person who:*
> *(a) commits such a crime alone, jointly with another person or through another person regardless of whether that other person is criminally liable;*
> *(b) orders, induces or solicits the commission of such a crime, whether committed or attempted;*
> *(c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise contributes to the commission or attempt thereof, including providing the means for the commission thereof;*
> *(d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose; such contribution must be intentional and must:*
> *(i) be undertaken for the purpose of facilitating the criminal activity or criminal purpose of the group, where the activity or purpose involves the commission of a crime within the jurisdiction of the Court; or*
> *(ii) be undertaken with knowledge of the group's intention to commit the crime;*
> *(e) in the case of the crime of genocide, directly and publicly incites the commission of genocide;*
> *(f) attempts to commit such a crime by undertaking actions initiating its commission, but such commission does not occur for reasons beyond the person's intention; however, a person who abandons efforts made to commit a crime or*

15 See Lemkin, 1944. p. 79. See also Nsereko Ntanda, 2000.

otherwise prevents its commission shall not be liable to punishment under this Statute if the person completely and voluntarily abandons the criminal intent.

Without undertaking a detailed interpretation of Article 25(3), it should be pointed out that provision Article 25(3)(a) indicates that the previously distinguished sanctioned norms prohibiting genocide can also be violated jointly with another person. This framing constructs the formula of co-perpetration.[16] The theory of criminal law raises doubts as to whether is it co-perpetration in the case of an arrangement characterised by the division of roles, that is, an arrangement where the co-perpetrators do not realise all of the objective elements of the aforementioned variant of the genocide, but only part of them. Accepting the variant that co-perpetration consists of the partial realisation of the statutory features of a given crime–a variant supported by both ICC jurisprudence and the literature—introduces another sanctioned norm into the legal system, one that prohibits the partial realisation of the genocide elements.

However, the normative status of the crime of genocide committed through another person—behaviour considered the most closely connected to the construction of indirect perpetration—is debatable.[17] The construction of indirect commission is highly questionable, as it is based on the assumption that a prohibited act can be committed via a behaviour different from that of "the perpetrator" (direct perpetrator), namely, the behaviours indicated in points a–e of Article 6. The problematic nature of the construction of indirect perpetration is also due to its dependent (accessory) character. Given that the condition for the realisation of indirect perpetration is the performance of the forbidden act by the direct perpetrator, it follows that the non-performance of the crime of genocide entails the absence of indirect perpetration. Nevertheless, there is no doubt that in the modern theory of criminal law, constructions based on such dependency have been abandoned in favour of an individualistic perspective, as the former violate the standard of equality and are incompatible with the scheme of the legal norm.

Most significantly, however, the framing of the form of perpetration of the crime of genocide appears to violate the principle of *nullum crimen sine lege,* because the provision of Article 25(3)(a) of the Statute does not indicate what the conduct of the perpetrator would comprise in the case of indirect perpetration. The connection with indirect perpetration suggests the idea that the discussed concept is based on conduct consisting of directing the execution of a crime of genocide and instructing a dependent person (i.e. someone dependent on the person who gives the instructions) to execute that crime. Therefore, the question of the sanctioned norms prohibiting indirect perpetration is one that requires in-depth analysis. Here, too, the role of ICC case law cannot be overestimated. An adequate clarification of perpetration through

16 This formula has been the subject of many works in the Polish science of criminal law. See, for example, Tyszkiewicz, 1977.; Kardas, 2001, pp. 446–491.

17 This construction has also been the subject of many works in the Polish science of criminal law. See, for example, Buchała and Kubicki 1988,; Kardas, 2001, pp. 261–278.

another person by the Elements of Crimes should also be recommended. Of course, this recommendation might be problematic due to the wording of Article 9(1) of the Statute, as this provision *verba legis* indicates that the Elements of the Definition of Crimes are only intended to assist in interpreting and applying Articles 6–8 of the Statute. Arguably, however, the close connection between the crime defined in these provisions and indirect perpetration (a connection in that indirect perpetration is a means of committing the crime) ultimately allows for the inclusion of such an explanation in the Elements of Crimes. The question of how to frame this definition requires further research. That said, it may suffice to reformulate this definition to indicate that indirect perpetration is the act of directing or ordering the execution of a crime by a person who is actually or formally dependent on the principal.

The conduct set out in Article 25(3)(b) poses fewer difficulties as forms of behaviour constituting indirect perpetration. In case of behaviours typified in Article 25(3)(b) (i.e. the commission, incitement, and inducement to commit the crime of genocide), sanctioned norms are separated from norms prohibiting particular varieties of the crime of genocide (typified in Article 6). This is due to the indisputable fact that the conduct indicated is of a different kind to that defined in Article 6 of the Statute. They can thus be referred to as so-called "non-executive forms" of criminal collaboration. It is also worth emphasising that, in the case of non-executive forms, the violation of the sanctioned norms is independent of the execution of the crime of genocide. In short, the crimes set out in Article 25(3)(b) are formal offences. It is also worth noting that the wording of Article 25(3)(b) is not perfect. Indeed, listing "persuasion" alongside "inducement" is superfluous, as, according to the semantic perspective, persuasion is a means of inducement.

On the other hand, the scope of Article 25(3)(c) of the Statute raises serious problems of interpretation. This provision criminalises the contribution to the commission or attempted commission of the crime of genocide by facilitating its commission or attempted commission. The mentioned article indicates that aiding and abetting are examples of how this contribution can be realised. However, aiding and abetting as mentioned in this provision are flawed constructions from a legal stance, as they do not indicate the connected behaviours.[18] In short, Article 25(3)(c) does not indicate either the conduct to which aiding and abetting would be relativised or the conduct to which the instigator would incite. Consequently, the exemplary enumeration of aiding and abetting in Article 25(3)(c) fails to fulfil its intended role because it does not bring us any closer to understanding the phrase "the contribution to the commission or attempted commission" of the crime of genocide. Consequently, in addition to the explanatory interpretation of the ICC, it would be appropriate to recommend clarifying these issues in the Elements of Crimes. Evidently, contribution

18 It is clear that abetting and aiding are constructs that require relativisation towards the other person's behaviour; for instance, there is no general abetting, but there is abetting to genocide. In the Polish legal literature, this condition in the construction of abetting and aiding has been emphasised in many works, including: Pohl, 2019. pp. 202–206.

to the crime of genocide is a highly indeterminate form of behaviour. For this reason, it is challenging to consider "the contribution to the crime" as an appropriately defined object of criminal law regulation, underscoring the need for its clarification in the Elements of Crimes.

Among the issues related to Article 25(3)(c), the only passage of this provision that seems to be correctly formulated is the final passage, which indicates that providing means for the commission of the crime of genocide is prohibited under penalty. Although this passage is an example of a casuistic regulation, in Article 25(3)(c), the legislator *expressis verbis* indicates that the act of "providing the means" is included in the crime of genocide. Therefore, the genocide context is directly connected with the prohibited behaviour in the text of the Statute. An essential element of the norm prohibiting contribution to genocide is the condition that the contribution is carried out with the aim of facilitating the commission or attempted commission of the crime of genocide. In this respect, *mens rea* takes the form of a direct intention (*dolus coloratus*). Putting aside the legitimacy of the use of direct intent, this choice might be considered controversial because it excludes behaviour not conducted with the aim of facilitating the commission or attempted commission of genocide. Arguably, it would be better to use the construction of "broad intention" here, including the formula of *dolus eventualis*.

The solution adopted in Article 25(3)(d) should be considered a development of the construct of contribution to the commission or attempted commission of the crime of genocide. This provision refers to any other intentional contribution to the commission or attempted commission of the crime of genocide by a group of persons acting with a common purpose. This regulation is partly redundant. As noted earlier, when the contribution is made for the purpose of facilitating the crime of genocide, it falls within the scope of Article 25(3)(c). In contrast, this regulation is of core value when the contribution to the commission or attempted commission of genocide by the group is carried out by an individual who is aware that the given group has an intention to commit this crime.

At first glance, the regulation under Article 25(3)(e) seems to be redundant. After all, the provision refers to direct and public incitement to commit genocide and, as mentioned, incitement to the crime of genocide is already regulated by Article 25(3)(b). However, deeper analysis of Article 25(3)(e) leads to the conclusion that, according to the Statute, incitement includes conduct that does not necessarily have an individualised recipient (addressee) *ad incertam personam*. It is precisely this kind of incitement that Article 25(3)(e) deals with. That said, national legislators rarely recognise this construction.

Finally, according to Article 25(3)(f), attempting the crime of genocide is also prohibited conduct. This provision specifies that "an attempt" refers to the taking of action that initiates the commission of a crime. It thus opts for a narrow view of "an attempt", with the initiation of the performance of a prohibited act considered the minimum condition for an attempt. Such a narrow approach to the attempt to commit the crime of genocide is an unconvincing solution. Numerous national

criminal law systems adopt a different conception, according to which an attempt is behaviour that starts earlier, namely, at the moment the perpetrator directly aims at performing a prohibited act.[19] Moreover, the narrow view of "an attempt" is surprising because the Statute does not provide for the criminalisation of the preparation to the crime of genocide.

The normative analysis outlined above and tentatively sketched here reveals several weaknesses in the Statute concerning the definition of the grounds of criminal responsibility for the crime of genocide. Although these weaknesses will be addressed to a greater or lesser extent by the jurisprudential activity of the ICC, it is worth keeping in mind that the Court's activity in this regard is limited by the norms of Article 22(2) of the Statute, which prescribe a strict interpretation of the definition of crimes and prohibit the use of analogy resulting in an extensive interpretation of the definition of crimes. A recommended solution is to improve the substantive quality of specific provisions of the Statute by introducing appropriate explanations to the Elements of Crimes. I consider this means of amendments to be the most practical, particularly as it is widely established that doing so is unlikely to lead to the revision of the provisions of the Rome Statute. I thus believe that such changes are advisable.

While this issue lies beyond the remit of this chapter, it is worth noting that there are growing doubts in the literature regarding the inclusion of the scope of protected groups in the definition of genocide under Article 6. Indeed, this view rightly observes that groups other than those indicated in current version of Article 6 should also be included. Personally, I find opinions postulating the inclusion of political groups, groups with a different perspective on life, and social groups to be most persuasive. The proposed solution is nothing new. Indeed, it is partly provided for by the Polish Penal Code in Article 118, § 1 of which reads:

> *Anyone who murders or causes grievous bodily harm to a person belonging to any ethnic, racial, political or religious group, or a group with a different perspective on life, with the purpose of partially or completely annihilating such group shall be liable to imprisonment for a minimum term of 12 years or life imprisonment.*

Moreover, according to § 2:

> *Anyone who, acting with the intention specified under § 1, creates living conditions threatening the biological annihilation of the members of such a group, or uses means to prevent births within this group, or forcibly removes children from those belonging to such a group, shall be liable to imprisonment for a minimum term of 5 years to 25 years' imprisonment.*

19 The Polish criminal law literature contains many works on the construct of attempting to commit a crime. See, for example, Rejman, G. 1965. For instance, according to the Polish Penal Code: 'Anyone who intends to commit a prohibited act and makes a direct attempt that is subsequently not completed shall be held liable for an attempt' (Article 13 § 1).

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