

“*Actus non facit reum, nisi mens sit rea*”

An investigation into the treatment of *mens rea* in the quest to hold individuals
accountable for Genocide

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"In Lvov University, where I enrolled for the study of law, I discussed... with my professor[s] [the assassination of Talat on March 15, 1921 by Soghomon Tehlirian, who was a survivor of the murder of approximately one million Armenians in Turkey, and Tehlirian's acquittal by a German court]. They invoked the argument about sovereignty of states. "but sovereignty of states," I answered, "implies conducting an independent foreign and internal policy, building of schools, construction of roads, in brief, all types of activity directed towards the welfare of people. Sovereignty," I argued, "cannot be conceived of as the right to kill millions of innocent people." - Raphael Lemkin¹

I – Introduction

There exist a certain set of crimes that are so evil, when mentioned, the world sits up and takes notice. The most compelling of these kinds of crimes is what the International Criminal Tribunal for Rwanda has called "the crime of crimes."² International conventions refer to it as "an odious scourge."³ Scholars have named it "the ultimate crime, the pinnacle of evil."⁴ The common label for this egregious act is "genocide."⁵ It has amassed many more descriptors in its long history, but what it is, in essence, is "a form of one-sided mass killing"⁶ that is "a denial of the right to existence of entire human groups."⁷ It is a crime that "shocks the conscience of mankind, results in great losses to humanity, and is contrary to moral law."⁸ Regardless of the terminology used, it is clear that genocide is an especially grave act and one of utmost heinousness.

Throughout its history, the human race has shown a seeming propensity towards such grave acts of violence in times of conflict. Wars have been a fixture of society since "society" as we know it has emerged, and genocide has a habit of accompanying war like an abhorrent shadow. Many historical conflicts are now widely considered to have included at least some form of genocide. From the sacking of Carthage by the Romans in 14 B.C.E.,⁹ to the slaughter of Hereros in Africa by the Germans in 1904 and of Turkish Armenians by the "Young Turks" in the collapsing Ottoman empire in 1915,¹⁰ to "special wholesale massacres" perpetrated by the armies of Genghis Khan, Tamerlane, and Hitler,¹¹ genocide has a lengthy history. Similarly, the concept of holding individuals criminally responsible for "egregious conduct toward their fellow human beings"¹² has a long history, dating back at least to the 6th century B.C.E.¹³ This concept has only

¹ From the manuscript autobiography of Raphael Lemkin, as reprinted in Frank Chalk, "Redefining Genocide." Genocide: Conceptual and Historical Dimensions, ed. George J. Andreopoulos. 47-63. University of Pennsylvania Press (1994) at 47

² See *Prosecutor v. Kambanda*, Case no ICTR-97-23-S, Judgment and Sentence, para. 16 (Sept. 4, 1998) at <http://www.ictor.org/ENGLISH/cases/Kambanda/judgement/kambanda.html> As a note of reference, this Tribunal will hereinafter be referred to as the ICTR

³ See the Preamble of the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951) [hereinafter Genocide Convention], adopted by General Assembly Res. 260(III)(A), U.N. GAOR, 3d Sess., pt.1, at 174, U.N. Doc. A/810 (1948)

⁴ Symposium, *The Genocide Convention After Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity*, 92 *American Society of International Law. Proc.* 1, 1 (1998)

⁵ David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 *Texas International Law Journal* 233

⁶ See Chalk, supra note 1 at 52. This phrase is included in his "Research Definition of Genocide"

⁷ Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 *Fordham International Law Journal* 286-287 (December, 1999). These words were proclaimed by the General Assembly of the United Nations in 1946.

⁸ van der Vyver *Id.*

⁹ See Frank Chalk and Krut Jonassohn, *The History and Sociology of Genocidal Killings*, in Genocide: A Critical Bibliographic Review. Israel W. Charny ed., (1988). At 39, 42

¹⁰ See Barbara Harff, Genocide and Human Rights: International Legal and Political Issues (1984) at 3

¹¹ See Raphael Lemkin, Axis Rule in Occupied Europe (1944), at 80. See also Nersessian, supra note 5 at 246. Nersessian mentions common examples of historical genocides and also cites Chalk and Jonassohn, supra note 9, Harff, supra note 10, and Lemkin for discussions of commonly cited historical examples of genocide.

¹² Steven R. Ratner and Jason S. Abrams, Accountability for Human Rights Atrocities In International Law, Oxford University Press (2001), at 1

recently started to take hold in the annals of what is now referred to as “international law”¹⁴ and has become more significant after groundbreaking international conventions held around the turn of the 20th century¹⁵ and the commissions and criminal tribunals established following the World Wars.¹⁶ In fact, some scholars have said that international law is built upon the very idea of “applying legal rules and standards to the complex and chaotic backdrop of contemporary armed conflicts and episodes of mass atrocity [in] a bold – some would say futile – effort to fix individual responsibility for history’s violent march.”¹⁷ As the events of the world unfold, the realm of international law and its criminal statutes follow as a restraint on those who overstep the bounds of state sovereignty and fundamental human decency in ways that surpass any national legal system’s authority or ability to bring about retributive justice.

A recent trend on the world stage is the trial and punishment for genocide as a crime under international criminal statutes. While the crime had been committed throughout the centuries, it was not formally defined until legal scholar Raphael Lemkin did so in 1944,¹⁸ and not internationally codified until the Convention on the Prevention and Punishment of Genocide¹⁹ came into effect in 1951.²⁰ This Convention finally gave “the basis for the emergence of a norm of customary international law, with the force of *jus cogens*, which renders genocide punishable [and] subject to universal jurisdiction.”²¹ Continuing this trend, the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia in May of 1993.²² And while this tribunal held the promise of being the first international legal body with jurisdiction over genocide as a crime²³ and opened a new era in modern international criminal law and the prevention and punishment of genocide, the road to conviction has not been a smooth one.

Until the 1990’s there were very few prosecutions for the crime in any legal systems, and when such instances arose, the Genocide Convention’s definition proved vague and controversial.²⁴ Even in current trials involving genocide, the lacunae inherent in the definition leave the crime subject to disparaging interpretations and calls for statutory reform.²⁵

¹³ *Id* at 4-5

¹⁴ *Id*

¹⁵ By this I refer to such Conventions as the 1899 and 1907 Hague Conventions and the 1929 Geneva Conventions

¹⁶ Ratner and Abrams, *supra* note 12 at 5-6

¹⁷ Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 *Calif. L. Rev.* 77 (January, 2005)

¹⁸ See Nersessian, *supra* note 5 at 246. Lemkin coined the crime in his work cited *supra*, note 11

¹⁹ This treaty will be herein after referred to as the “Genocide Convention”

²⁰ See Nersessian, *supra* note 5 at 254, and generally 232-255 for a discussion of the evolution of genocide as a crime. This convention (herein after referred to as the Genocide Convention) was approved by the UN in 1948, but did not go into effect until the beginning of 1951. Also, see *Prevention and Punishment of the Crime of Genocide*, G.A. Res. 260 (III)(A), U.N. GAOR, 3rd Sess., 179th plen. Mtg. at 174, U.N. Doc. A/810 (1948) for the official UN documentation, as well as M. Cherif Bassiouni, *International Criminal Law Conventions and Their Penal Provisions* (1997) at 1224 for further commentary.

²¹ van der Vyver, *supra* note 7 at 286

²² See Ratner and Abrams, *supra* note 12 at 5 and 9. The tribunal will hereinafter be referred to as the ICTY

²³ See William A. Schabas, *Essay: Twelfth Annual Philip D. Reed Memorial Issue The Balkans Region: Legal Perspectives and Analyses Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal For the Former Yugoslavia*, 25 *Fordham Int’l L.J.* 23 (November 2001).

²⁴ See Ratner and Abrams, *supra* note 12 at 26

²⁵ *Id* at 43-45

These jurisprudential conflicts are often compounded by doctrinal controversies in tribunal statutes²⁶ and ambiguities in the customary international law.²⁷ This paper focuses on these doctrinal controversies and examines how genocide is and has been addressed by modern tribunals, with special emphasis on the subjective *mens rea* (mental element) required for genocide. I contend that these doctrinal controversies and statutory ambiguities leave the door open for prosecutorial strategies that fatally undermine tribunal fairness and sound jurisprudence. Since there are nebulous terms in genocide statutes and since statutes do not fully elaborate, many ways of interpretation are theoretically possible. This can cause discrepancies when genocide is applied in practice, especially in relation to the proof required to show genocidal *mens rea*. I also contend that as charges of genocide are presented more frequently at trial, its scope is being enlarged – especially as it relates to superior liability and joint criminal enterprise. The primary research method for this paper is an examination of legal research and ad hoc tribunal judgments along with interviews of tribunal personnel.

II – Genocide as a Crime Under International Law

By the turn of the twentieth century, the international community was beginning to solidify a growing feeling of moral duty - nations began to come together and recognize the need to protect all of the world’s citizens from the “abuses of states.”²⁸ The results of this moral alliance included the Hague Convention of 1899 and 1907, the latter of which specified that “the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized people, from the laws of humanity, and the dictates of public conscience.”²⁹ This was a key step in the formulation of international laws that continued throughout the 20th century, but was not the first. Countries such as France, Great Britain, and the United States had long held to a belief of a right to intervene on behalf of persecuted minorities, and had done so in Eastern Europe, Russia, Turkey, and Latin America.³⁰ As the time of “the War to end all Wars” approached, protecting innocents in times of conflict was a time-honored and respected tradition.

It was not until after WWII that Polish scholar Raphael Lemkin, published his *magnum opus de juris*—a study of Nazi policies and atrocities during World War II called Axis Rule in Occupied Europe. As scholars note, it “extended the notion that international law contains unarticulated laws of humanity”³¹ and argued for the acceptance of a previously unnamed crime within the penumbra of international criminal law. His neologism for this crime was “genocide” – meant

²⁶ See generally Danner and Martinez, supra note 17 for an examination of some of the most pressing examples of conflicting statutory interpretation along with Chile Eboe-Osuji, ‘Complicity in Genocide’ versus ‘Aiding and Abetting Genocide,’ *Journal of International Criminal Justice*, Volume 3, No. 1 (March 2005), 56-81

²⁷ See Nersessian, supra note 5, at 276

²⁸ Matthew Lippman, “Genocide” From International Criminal Law, Second Edition, Volume I: Crimes. Ed. M. Cherif Bassiouni. (1999) 589-613 at 589

²⁹ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 3 Martens Nouveau Recuei 461, 36 Stat. 2277. Reprinted in Lippman supra.

³⁰ See Lippman, supra note 28 at 589

³¹ See Lippman, supra note 28 at 590

to combine the ancient Greek word *genos* (race) and the Latin-based suffix *cide* (killing) – and it was used to describe “the destruction of a nation or of an ethnic group.”³² As Matthew Lippman relates, “Lemkin noted that international jurisprudence had increasingly recognized the importance of preserving national groups. These collectivities contributed to the cultural and intellectual enrichment of global society, but often lacked the power and resources to defend or perpetuate themselves.”³³ Thus, the crux of Lemkin’s genocide was the protection of the collectivity in which cultures exist together.

Notably, Lemkin also expressed the notion that the establishment of a concrete and comprehensive international agreement prohibiting genocide in wartime and in peace would “highlight the international community’s condemnation of this awful atrocity.”³⁴ Thus, in December of 1946, the UN adopted Resolution 96(I) to formally recognize genocide as “crime under international law,”³⁵ but this resolution still fell short of clarifying the crime’s legal underpinnings. By this time, it was clear that genocide was a grave transnational offense, but no one seemed to agree as to what specifically it entailed. Eventually, after an internal legal investigation and much international debate, the UN unanimously adopted Resolution 260(A)(III) – the International Convention on the Prevention and Punishment of the Crime of Genocide.³⁶

While a step in the right direction, problems quickly arose. International resolutions such as this are often drastically influenced by political tensions between nations and the political agendas of UN actors. It is widely discussed by scholars that “[t]he drafting of the Genocide Convention was profoundly influenced by the Holocaust and the Cold War. Tension existed between the desire to condemn the atrocities committed by Nazi Germany and the aspiration to prevent future acts of genocide. The United States and the Soviet Union also opposed language which each anticipated might be used to criticize or condemn their conduct.”³⁷ While the Genocide Convention gave the international community the criminal statute that it needed to solidify genocide as a crime in its own right, it was not a perfect legal document by any means. In fact, many of its terms and phrases still remain nebulous and open to diverse interpretations.

In defining genocide, Article II of the Genocide Convention states:

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 of the group to another group.³⁸

³² See Lemkin, *supra* note 11 at 79

³³ *Id.* at 590

³⁴ *Id.*

³⁵ G.A. Res. 96(I), U.N. GAOR, U.N. Doc. A/64 Add. 1, at 189 (1946). See also Lippman, *supra* at 594 and n. 42.

³⁶ 3 U.N. Gaor, 179th plen. Mtg., at 851 (1948). See also Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. Also see the Lippman and Nersessian articles and the Ratner and Abrams book all cited *supra* for thorough examinations at the evolution of the Genocide Convention and its wording.

³⁷ See Lippman, *supra* note 28, at 596

³⁸ See Genocide Convention, *supra* note 20, Article II

This definition has been subsequently analyzed as a bifurcation into two distinct elements, namely the “requisite intent” clause of the crime detailed in the chapeau of the definition, also known as the mental element of the crime or the *mens rea*, and the list of prohibited acts, known as the *actus reus*.³⁹ In both of these elements, the definition is presented in a fairly vague manner. Many components within both the chapeau and the list of crimes are not elaborated upon in any statutes, and in fact, much debate still rages upon the “shortcomings” of this definition.⁴⁰ Perhaps most of all, there is disagreement about the ambiguities of the “intent” clause, and how the *mens rea* component has been addressed in the Genocide Convention, ICTY, ICTR, and International Criminal Court statutes.⁴¹ Unfortunately, there has been little actual doctrine propagated by judicial bodies to fill in these legal gaps. Most theoretical and jurisprudential developments in respect to the crime of genocide have been hashed out in academic journals and special UN committees.⁴² The concept of *mens rea*, fifty years after it was applied in the Genocide Convention definition, is still “susceptible to remarkably divergent interpretations,”⁴³ and there is nothing any international statute that requires one specific interpretation.

III - Mens Rea: The Mental Element

A fundamental principle in many legal systems, especially those in the Anglo-American common law tradition, is expressed by the Latin phrase “*actus non facit reum nisi mens sit rea*,” which translated means “the act is not culpable unless the mind is guilty.”⁴⁴ This delineates the two-fold requirement for every substantive crime; namely for every crime there is an *actus reus*, or the physical act that constitutes the crime, and the *mens rea*, or the mental element of varying standards that is held by the perpetrator.⁴⁵ This has been a fundamental principle of legal systems and was valued by jurists as far back as Joel Prentiss Bishop.⁴⁶ The crime of genocide has its intent clause in its chapeau - specifically the “intent to destroy, in whole or in part [a protected group], as such.”⁴⁷ This element is the crucial part of the crime of genocide because it distinguishes the crime from more ordinary ones, like murder,⁴⁸ and it relates genocide to other

³⁹ See Report of the International Law Commission on the Work of Its Forty-Eighth Session, U.N. GOAR, 51st Sess., Supp. No. 10, at 87, U.N. Doc. A/51/10 (1996). Also, see Alexander K.A. Greenawalt, Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, 99 Columbia Law Review (December, 1999) at 2264-2265

⁴⁰ See Nersessian, supra note 5, at 235 and Greenawalt, supra, at 2260-2264

⁴¹ Much scholarly research exists about the ambiguities of the Genocide Convention definition of genocide and a few examples are contained in these footnotes. Also, trial chambers have commented on the meaning of the genocide definition in many cases, notably the Akayesu, Kambanda, and Kayishema decisions of the ICTR at <http://www.ictt.org/ENGLISH/cases/completed.htm> and the Krstic, Jelusic, and Karadzic/Mladic cases at <http://www.un.org/icty/cases/indictindex-e.htm> Hereinafter, the International Criminal Court will be referred to as the ICC.

⁴² See Nersessian, supra note 5, at 235

⁴³ Id. At 2264

⁴⁴ John R.W.D. Jones, “Whose Intent is it Anyway?” Genocide and the Intent to Destroy a Group. *Man’s Inhumanity to Man*. L.C. Vorah *et al.* (eds.) 467-480 (Kluwer Law International 2003) at 470 This Latin maxim dates back to prominent English jurist Edward Coke in his work *Institutes*, Part II (1797 edition) chapter 1, folio 10

⁴⁵ Id.

⁴⁶ “If a case is really criminal, if the end sought is punishment and not the redress of a private wrong, no circumstance can render it just, or consistent with sound jurisprudence, for the court or a jury to condemn the defendant unless his mind is guilty. J Bishop, *Bishop on Criminal Law* § 291.1 (9th ed. 1923) as reprinted in Pamela Hediger. *Mens Rea: The Impasse of Law and Psychiatry*, 26 *Gonz. L. Rev.* (1991) at 615

⁴⁷ See Prosecutor v. Jelusic, case number IT-95-10, Judgement, 14 Dec. 1999, para. 62 and 66-68

⁴⁸ See Ratner and Abrams, supra note 12, at 35-36

international crimes like persecution within crimes against humanity.⁴⁹ Unless the required intent is present, “no act, regardless of how atrocious it might be, can constitute genocide.”⁵⁰

The short *mens rea* clause, while it is genocide’s distinguishing characteristic, has caused much trouble for jurists, tribunal actors, and scholars. Laying out the fundamental conflict of the concept of *mens rea* as applied to international law statutes, Greenawalt notes “with its use of the word ‘intent,’ the Genocide Convention appeals to a central concept of criminal culpability. The problem is that the historical understanding of criminal intent has eluded uniform understanding.”⁵¹ According to legal scholars and traditions, *mens rea* can take one of three forms:

- 1.) *dolus directus* (direct intent), where the consequences of an action were both foreseen and desired by the perpetrator. Here, a perpetrator desires the death of a victim and foresees that a certain act will bring about the death of the victim;
- 2.) *dolus indirectus* (indirect intent), where secondary consequences in addition to those desired by a perpetrator of an act were foreseen by the perpetrator as a certain result, although the perpetrator did not specifically desire these secondary consequences, he still committed the act with knowledge of them; and
- 3.) *dolus eventualis*, where a perpetrator foresees consequences other than those directly desired as a possibility, and not necessarily a certainty, but nevertheless proceeds with a criminal act.⁵²

Understandably, various national legal systems have different views on these intent standards. As noted genocide scholar William Schabas explains,

“The *dolus specialis* concept is particular to a few civil law systems and cannot sweepingly be equated with the notions of ‘special’ or ‘specific intent’ in common law systems. Of course, the same might equally be said of the concept of ‘specific intent,’ a notion used in the common law almost exclusively within the context of the defense of voluntary intoxication.”⁵³

In common law legal systems, the exact mental requirement and *mens rea* standard may vary from crime to crime, but generally the more serious crimes require a more strict intent requirement, while less serious crimes may require a “less culpable state of mind”⁵⁴ – simple negligence for manslaughter charges or no mental requirement for automobile speeding tickets, for example.

Civil law has different interpretations of intent. Under French law, the meaning of “intent” has caused some confusion since French courts have applied both strict concepts like *dolus directus*, as well as a more loosely defined concept of *dol general*, which is understood to mean “the conscious and voluntary action to violate the law.” German law defines some crimes in terms of a deliberate desire to achieve predetermined consequences, but deals with criminal intent as a whole in terms of an acceptance of or willingness to realize possible criminal consequences. Furthermore, in

⁴⁹ The crime of persecution, while it does require acts directed at a group because of group membership, it does not require the accused to intend to “destroy [the group] in whole or in part.” See also Jelesic Judgement, para. 68 at www.icty.org for a brief comparison between genocide and persecution.

⁵⁰ See Ratner and Abrams, *supra* note 12 at 36

⁵¹ Alexander K.A. Greenawalt, Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, 99 *Columbia Law Review* (December, 1999) at 2266

⁵² For thorough discussion of one view of intent, see van der Vyver, *supra* note 7 at 306-308. Here, the author explains how he would divide intent into three distinct subcategories, namely *dolus directus*, *dolus indirectus*, and *dolus eventualis*, and also explains how *dolus eventualis* is different from criminal negligence (where in such a case, a perpetrator does not foresee or understand consequences of his actions in a case where a reasonable person would be able to). See also Nersessian, *supra* note 5, at 263-264

⁵³ William A. Schabas, The Jelesic Case and the Mens Rea of the Crime of Genocide, 14 *Leiden Journal of Intl Law* 129 (2001)

⁵⁴ See Jones, *supra* note 44 at 470 - 471

Yugoslavian law, there is only a single, broad intent standard where criminal liability is solely extended to those who perform acts knowing that they could have criminal consequences.⁵⁵

Thus, the meaning of “intent” can be ambiguous, and genocide statutes were authored by an international assemblage of representatives from countries with different penal codes, legal systems, and philosophies. The United Nations in particular is a mix of countries with different legal systems whose practices and interpretations may even contradict each other – common law systems often disagree with continental (civil) law systems about legal reasoning, trial procedures, and precedent. In addition, the UN is a political, not a legal, organization at the mercy of “political forces, pressure groups and blocs, in an arena where delegates pursue the divisive interests of the states they represent.”⁵⁶ Therefore, clear definitions and consensus on any legal matter are difficult, and questions persist about what form(s) of intent *should* be required in definition of genocide.

The preferred interpretation among jurists and legal scholars dictates that genocide is a crime of specific or special intent, where a perpetrator targets victims especially on the basis of their group membership and has a distinct desire to cause the destruction of the group itself.⁵⁷ The trial chambers of the ICTY and ICTR seem to prefer this type of a definition since the terms *dolus specialis* and “special intent” have been used in judgments to describe the *mens rea* of genocide.⁵⁸ This is not surprising since that definition most closely corresponds with the sentiments expressed by Raphael Lemkin in his creation of the first genocide definition.

The idea of *dolus specialis* however, is still fairly ambiguous. Some scholars have said it should be equated directly with *dolus directus* because both concepts require a perpetrator to have the will to bring about genocidal consequences and a specific desire to do so.⁵⁹ This would seem logical since the idea of “specific” intent connotes the idea of the direct discriminatory desire of *dolus directus* and “special” intent connotes the idea that the intent standard is one that is more narrowly focused. In spite of this, another line of reasoning exists about the components of genocidal intent that takes into account the ICC’s attempts at elaborating on the concept. In ICC statutes, “intent” is defined as a “person means to cause [the] consequence or is aware that it will occur in the ordinary course of events.”⁶⁰ This would seem to imply that genocidal intent includes both *dolus directus* and *dolus indirectus* (through the use of the phrase “is

⁵⁵ See Greenawalt, *supra* note 51 at 2266-2270 for a discussion of how various national systems define, or attempt to define, criminal intent. Here these systems are contrasted with the MPC of the United States and the question is raised as to whether “intent” has a special meaning within the context of genocide statutes.

⁵⁶ Nersessian, *supra* note 5 at 236

⁵⁷ See Greenawalt, *supra* note 51 at 2264. Here the author states “As regards the question of intent, the prevailing interpretation assumes that genocide is a crime of specific or special intent, involving a perpetrator who specifically targets victims on the basis of their group identity with a deliberate desire to inflict destruction upon the group itself.”

⁵⁸ In *Prosecutor v. Kambanda*, the ICTR Trial chamber stated that “The Crime of genocide is unique because of its element of *dolus specialis* (special intent).” Similarly, in the closing paragraph of the judgment of *Prosecutor v. Jelusic*, the ICTY Trial chamber concluded that “it has not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide.”

⁵⁹ See van der Vyver, *supra* note 7, at 308

⁶⁰ *Id*

aware” and “will occur”), but not *dolus eventualis*.⁶¹ This alternative approach is referred to as a “knowledge-based intent standard” and holds a broader definition of intent since more than one type of mental state can satisfy its requirements.⁶² On its face, it still holds true to the generally understood view of genocide as a “targeted crime,” but instead relies a slightly different view of “intent” that corresponds more closely to the concept of *dolus indirectus*, since knowledge of the goal or consequences of a course of action alone would adequately satisfy this requirement.

A knowledge-based interpretation of intent does not seem to have been applied in practice, however. In fact, decisions from the ad hoc international tribunals have sometimes rejected this alternative approach in regards to genocide.⁶³ In *Prosecutor v. Akayesu*, the ICTR Trial Chamber held that a perpetrator is culpable for genocide “when he commits a [prohibited act] with the clear intent to destroy, in whole or in part, a particular group.”⁶⁴ This particular wording, namely “clear intent to destroy” strongly indicates a purpose to destroy a group, and as such, only *dolus directus* can be sufficiently inferred – mere knowledge of destructive consequences simply falls short of being an adequate deduction of the meaning of such a purposeful phrase.⁶⁵ Accordingly, in *Prosecutor v. Jelusic*, the ICTY Trial Chamber decided that the defendant “could not be found guilty of genocide if he himself did not share the goal of destroying in part or in whole a group even if he knew that he was contributing to or thought his acts might be contributing to the partial or total destruction of a group.”⁶⁶ And similarly, in the ICTY’s *Prosecutor v. Krstic* case, the Trial Chamber specifically adopted the purposeful standard (i.e. *dolus directus*) for genocidal liability.⁶⁷

In addition to being frowned upon in practice by tribunal chambers, the knowledge-based standard also certainly has its detractors among analysts and theorists. One scholar states:

“[Some have] argued that the requirement of genocidal intent should include... cases where *mens rea* takes on the form of *dolus indirectus*. Since special intent is an essential element of genocide and special intent will always require a certain manifestation of *dolus directus*, this proposed transformation of genocidal intent is way out of line. Destruction of the group will always be the primary objective of the principal perpetrator while *dolus indirectus* applies to secondary consequences beyond those actually desired by the perpetrator.”⁶⁸

As repeatedly held by courts and scholars the most logical and most used interpretation of genocidal intent corresponds *mens rea* with a concept of *dolus directus* because *dolus indirectus* or any lesser intent requirement are simply too broad in scope. Since genocide is a crime that is so severely punishable and requires a special form of intent, it necessitates a *mens rea* component that is as direct and focused as possible. Otherwise, *mens rea* becomes too broad and invites the

⁶¹ Id

⁶² See Greenawalt supra note 51 at section III for a discussion of this view, with emphasis on 2288-2289

⁶³ See Nersessian, supra note 5 at 264.

⁶⁴ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (ICTR Trial Chamber Sept. 2, 1998) at <http://www.ictor.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>

⁶⁵ See Nersessian, supra note 5, at 264

⁶⁶ *Prosecutor v. Jelusic*, Case No. IT-95-10, P 86 (ICTY Trial Chamber Dec. 14, 1999) at <http://www.un.org/icty/jelusic/trial1/judgement/index.htm>

⁶⁷ See Nersessian, supra note 5, at 265 who refers directly to the judgment of the ICTY Trial Chamber in the *Krstic* case e.g. *Prosecutor v. Krstic*, Case No. ICTY-98-33-T (ICTY Trial Chamber Aug. 2, 2001), at <http://www.un.org/icty/krstic/TrialCI/judgement/index.htm>

⁶⁸ Id. at 85

importation of the crime of genocide into situations where it does not belong. Alarming, recent developments of certain criminal doctrines may be undermining, and even contradicting, this notion. It seems that the door is opening ever wider for the acceptance of a knowledge-based interpretation, or – even further – a standard that may effectively invalidate the *mens rea* requirement entirely.

IV – Genocidal *Mens Rea* In Practice: Inferring Intent and The Rise of JCE and Command Responsibility

One of the main tenets of criminal law is the notion of individual criminal responsibility. The German Criminal Code states, “The guilt of the perpetrator is the basis for determining punishment.”⁶⁹ The French Criminal Code states, “One may be held criminally responsible only for his own actions.”⁷⁰ The ICTY Appeals Chamber in Tadic stated,

“[T]he foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*). In national legal systems this principle is laid down in Constitutions, in laws, or in judicial decisions. In international criminal law the principle is laid down, *inter alia*, in Article 7(1) of the Statute of the International Tribunal.”⁷¹

Truly, the law is “no stranger to the idea of holding individuals responsible for egregious conduct toward their fellow human beings. Domestic criminal law...evolved precisely to regulate this behavior.”⁷² This all relates to an important notion: individual accountability for crimes is a vital foundation of legal systems of every kind, and it is an effective vehicle for protecting greater humanity from the evils of a few. It is necessary to ascribe fault for the purposes of retribution and the deterrence of future crimes, but also for laying a foundation for sound jurisprudence.

This culpability principle also serves to regulate competent trials from degrading into a show of guilt by association. Ascribing fault in that way has been deemed wholly unacceptable by both national⁷³ and international courts.⁷⁴ Culpability by association undermines fundamental legal fairness and sound jurisprudence, and, if unchecked, can degenerate legality to a point where the innocent are deemed guilty for wrongs in which they had no part. It is better to exonerate the guilty if doing so means preventing convictions of the innocent – the concepts of prosecutorial burden of proof and “innocent until proven guilty” are testaments to this.

Correspondingly, true criminal trials are based heavily on a notion of preserving the rights of the defendant. The aforementioned culpability principle, along with the commonly held beliefs in *nullum crimen sine lege* (“no crime without law”) principles, prohibition against *ex post facto* punishment, and *habeas corpus* requirements are all examples of the defendant-centered nature of criminal law. Complementary to these tenets is another principle that is referred to as the

⁶⁹ See Danner and Martinez, supra note 17, at 83 and n20

⁷⁰ Id at 83 and n21

⁷¹ Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ICTY Appeals Chamber (July 15, 1999), at para. 186

⁷² See Ratner and Abrams, supra note 12, at 3

⁷³ The U.S. Supreme Court has called guilt by association a “thoroughly discredited doctrine” in *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959). See also Danner and Martinez, supra note 17 at 85

⁷⁴ The International Military Tribunal at Nuremberg stated that “criminal guilt is personal, and that mass punishments should be avoided.” In Judgment, in Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945 – 1 October 1946, (1947) at 256. See also Danner and Martinez supra.

“rule of lenity.” This is the “widespread requirement that ambiguous criminal statutes be construed in accordance with the interpretation most favorable to the accused.”⁷⁵ This, in particular, is a vital concept for international tribunals because of the inherent ambiguity and lack of developed jurisprudence of international law. It is an important way of settling legal disputes that are not solved by statutes. In fact, one of the ICTY Trial Chambers has called the rule of lenity a “solid pillar on which the principle of legality stands,” and added that “no criminalisation process can be accomplished and recognized” without it being upheld.⁷⁶

It has also been said that fostering “peace and reconciliation through the attribution of responsibility to individual defendants depends greatly on the perceived legitimacy of the trial. To the extent that the trial is viewed as illegitimate scapegoating, it may inhibit rather than promote reconciliation.”⁷⁷ Recent developments from the ad hoc tribunals may, in fact, be toeing the line that separates a just court from illegitimacy. Ad hoc tribunal cases have seen increased importance placed on the doctrines of Joint Criminal Enterprise and Command Responsibility to attribute fault to those who may not have been responsible in the direct commission of crimes. And, while these may be useful modes of convicting those who otherwise would slip through the grasp of just prosecution, the extent to which they are used inappropriately may affect tribunal legitimacy, as well as taint the Tribunals’ jurisprudential legacy by undermining and compromising established principles of fairness and sound moral reasoning.

The Statute of the ICTY includes two separate modes of criminal responsibility in Article 7.⁷⁸ Under Article 7(1), an individual may incur criminal culpability via the doctrine of individual criminal responsibility, which is liability based on direct commission of crimes. Here, if a defendant “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime... [he] shall be individually responsible for the crime.”⁷⁹ An accused may also stand trial at the ICTY for violations of international law based on his responsibility as a superior, as delineated in Article 7(3). This mode may be included in addition to or instead of individual criminal responsibility and involves an obligation of superiors with *de facto* or *de jure* authority in any hierarchical structure - military or civilian - to either prevent or punish subordinates for violating international laws.⁸⁰ Article 7(3) of the ICTY statute states, “the fact that any of the acts referred to in Articles 2 to 5⁸¹ of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such

⁷⁵ Danner and Martinez, supra note 17, at 84

⁷⁶ See Danner and Martinez supra at 84-85 and also reference Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment (Nov. 16, 1998), ICTY Trial Chamber, at para. 402

⁷⁷ Danner and Martinez, supra note 17, at 97

⁷⁸ The ICTR includes identical text in Article 6 of its Statute

⁷⁹ Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 7(1). This statute is available at www.icty.org

⁸⁰ See Kirsten M. F. Keith, The Mens Rea of Superior Responsibility as Developed by ICTY Jurisprudence. 14 Leiden Journal of International Law (2001) at 617-618

⁸¹ These articles list all of the acts criminalized by the statute, and thus punishable by the Tribunal

acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”⁸² The entire ambit of “command responsibility” involves two different forms of liability. One involves direct or active involvement by a commander – i.e. a commander takes active steps to bring about criminal consequences by, for example, ordering his subordinates to commit a crime or by planning a criminal scheme. This type of liability falls squarely within the scope of individual responsibility under Article 7(1) previously mentioned.⁸³ The second form of command responsibility is the indirect or passive command responsibility mentioned in Article 7(3) of the ICTY statute. Here, a commander is liable for acts of omission rather than acts of commission, and this is what is generally meant when the term “command responsibility” is used.⁸⁴

When attempting to convict defendants in positions of authority, this latter form is useful since direct evidence that a commander actually ordered those under his authority to commit crimes is not always available.⁸⁵ Therefore, Article 7(3) of the ICTY Statute is especially valuable in many criminal proceedings and gains increased importance the higher up the command chain an accused operated. Not surprisingly, Command Responsibility is a doctrine that has had an important history in international law dating back even to the Nuremberg trials.⁸⁶ However, with the emergence of genocide as its own distinct crime – and one that involves a stringent *mens rea* requirement at that – the doctrine of command responsibility creates some theoretical conflicts.

Command Responsibility as illuminated in ICTY cases has three provisions. They are:

1. the existence of a superior-subordinate relationship of effective control;
2. the existence of the requisite *mens rea*, namely the superior knew or had reason to know that the criminal act was about to be or had been committed;
3. the commander failed to follow the necessary course of action to prevent or punish the offense committed.⁸⁷

The relevant *mens rea* standard, therefore, is delineated with the wording “knew or had reason to know.” This means that superior liability under Article 7(3) involves a knowledge-based intent standard.

This is perfectly acceptable when using 7(3) liability to incriminate an accused of any crime committed that has that same standard or a broader one, which conspicuously should leave out the crime of persecution under crimes against humanity, as well as the crime of genocide. Both of which have a direct intent standard that should logically not be proven with any more generalized standard, as discussed previously. There is simply a fundamental problem in trying to reconcile the specific intent required for genocide with the knowledge-based intent of Command Responsibility. The

⁸² See ICTY Statute, *supra* note 79, Article 7(3)

⁸³ See Danner and Martinez, *supra* note 17, at 120-122

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See generally Andrew D. Mitchell, Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes, 22 Sydney L. Rev. (September, 2000) with emphasis on 383

⁸⁷ See Danner and Martinez, *supra* note 17 at 122, as well as Keith, *supra* note 80 at 618. The landmark ICTY decisions that delineated the requirements for superior liability are generally referred to as the Celebici cases of Prosecutor v. Delalic et al., Case No. IT-96-21, Judgment (Nov. 16, 1998), ICTY Trial Chamber, at para. 346. Also see Prosecutor v. Blaskic, Case No. IT-95-15-T, Judgment (Mar. 3, 2000), ICTY Trial Chamber, at para. 294 and Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment (Feb. 26, 2001), ICTY Trial Chamber, at para. 401

genocide statute hinges on the principle that any perpetrator of the crime needs to hold the required *mens rea* himself, individually, and cannot be guilty if the appropriate *mens rea* has not been attributed to him. Wrongly importing this intent from a subordinate who perpetrates genocide onto a superior who simply “knew or had reason to know” about the crime is a fundamental misappropriation of the concepts of genocide and *mens rea*. Just because a subordinate possessed the requisite intent of genocide does not in any way implicitly mean that a superior shares it. To think otherwise contradicts the individual culpability principle and drags any judicial decision with such reasoning into a quagmire of confused correlations and flawed inferences.

As wrong it would seem, some ad hoc Tribunal chambers have done this - and bungled yet other concepts relating to genocidal *mens rea*. Command Responsibility has been coupled with genocide since the very beginning. In fact, the first international criminal trial ever to involve a conviction of genocide – the Akayesu trial of the ICTR – relied on principles of Command Responsibility for its genocide decision. The ICTR’s track record on subsequent command responsibility for genocide cases “indicate a profound judicial malaise with the entire concept.”⁸⁸ Alexander Zahar, a former Associate Legal Officer for the ICTR agrees⁸⁹ and illustrates one particular example of this “malaise” that originated in Akayesu. The Trial Chamber stated in paragraph 489 of its Judgment,

“it is necessary to recall that criminal intent is the moral element required for any crime and that, where the objective is to ascertain the individual criminal responsibility of a person accused of crimes falling within the jurisdiction of the Chamber... it is certainly proper to ensure that there has been malicious intent, or at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent.”⁹⁰

In response, Zahar states,

“The Chamber concluded that this criminal intent is necessary also for command responsibility. But this is misleading. Command responsibility is not itself a crime. It is a form of individual criminal liability, a mode of participation in a crime that does not involve commission, presence, or even support for the crime. The crime is committed by subordinates; the alleged superior becomes associated with it (and responsible for it) if the elements [of the charged crimes] are fulfilled, including the knowledge element (but not, as asserted above, “malicious intent or its equivalent).”⁹¹

Thus, Zahar echoes that the *mens rea* requirement for the doctrine of Command Responsibility stops at “knowledge.” Any sort of direct intent is not a part of Command Responsibility provisions. Otherwise, there would be a misappropriation of modes of liability, for if an accused did possess “malicious intent,” he would therefore have acted purposefully and actively, and thus be responsible under ICTY Article 7(1) or the ICTR’s corresponding Article 6(1).

Matters are further confounded if an accused acted, in the words of the *Akayesu* chamber, with “negligence... so serious as to be tantamount to acquiescence.” Most likely in that situation, a perpetrator would be acting with a *mens rea* that corresponds to mere “negligence” or possibly “knowledge” – neither of which could reasonably satisfy the *mens rea*

⁸⁸ William Schabas, *Genocide in International Law: the Crimes of Crimes*, (Cambridge University Press, 2000) at 309.

⁸⁹ See generally Alexander Zahar *Command Responsibility of Civilian Superiors for Genocide*, 14 *Leiden J. of Int’l Law* (2001), with emphasis on 596

⁹⁰ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), ICTR Trial Chamber, para. 489

⁹¹ See Zahar, *supra* note 89, at 596

requirement for genocide. Alternatively, if the accused acted with negligence that was a manifestation of malicious intent to derelict his duty – and thus on purpose – he would have acted with a purposeful intent, and thus could be responsible for genocide, but not as a superior under article 7(3)/6(3).⁹² In that case he would have acted actively and purposefully to assist in the commission of genocide, and thus could incur individual liability under Article 7(1)/6(1) for genocide under one of its subheadings, most likely “aiding and abetting” genocide or “complicity” in genocide.

The ICTR further confuses matters by charging accused for genocide both under Article 6(1) and Article 6(3).⁹³ ICTY indictments commonly engage in this practice as well.⁹⁴ This approach is problematic in genocide cases that place extreme importance on intent standards because, as noted earlier, direct liability and command responsibility liability involve different *mens rea* elements. If an accused is indicted for a count of a genocide that happened on or about a specific date and in a specific location, he was either directly involved in the commission of said crime or was indirectly involved. Both situations would be mutually exclusive of the other. Any one person can’t have been directly and indirectly involved with the same single instance of genocide just as any one person can’t hold more than one mental state at the same time in regards to the same act. If a situation arises where a person is directly involved in some aspect that contributed to genocide and indirectly involved with another aspect that contributed to the same count of genocide, two separate acts have been committed that have different *mens rea* components that will satisfy different modes of liability. It is jurisprudentially unsound to convict a single person of committing a crime and being an accessory to the same crime at the same time, for it is a textbook example of what American courts call “double jeopardy.” And while it is possible for a theoretical war criminal to hold different mental states regarding multiple crimes, and to be liable for different crimes under either mode of liability, indictments are not specific enough to enumerate whether this is the case. Instead their lack of specificity skips pertinent details and leaves logical conflicts for Chambers to sort out in trial.

Not only is this approach flawed, but also “arguably unfair to the defendant.”⁹⁵ As defense attorney Peter Morrissey lamented in an interview,⁹⁶ indictments are not very clear to the defense team. Often times a defense team could work on a case from a certain angle, only to be surprised when that angle turns out to be irrelevant when judges interpret the indictments and prosecutorial cases. He stated, “If you disprove something in the indictment, what good is it?”

⁹² Whenever this notation is used, the first number (in this case 7(3) corresponds to the ICTY statute, and the second number corresponds to the identical section of the ICTR statute.

⁹³ For examples of this, see ICTR indictments in the Kayishema & Ruzindana case and the Musema case. Kayishema was in fact convicted of counts of genocide under both Articles 6(1) and 6(3) *at the same time*, as was Musema. These are meant to be illustrative, not exhaustive, examples.

⁹⁴ For an example of charging counts of genocide under both Articles 7(1) and 7(3), see the indictment in the Karadzic & Mladic case and the indictments of Biljana Plavsic and Momcilo Krajisnic at www.icty.org. These are illustrative, not exhaustive, examples.

⁹⁵ See Zahar, *supra* note 89, at 598

⁹⁶ This interview took place during early June 2005 at the ICTY in The Hague, Netherlands. Mr. Morrissey is lead defense counsel in the Halilovic case.

It's not clear all the time." Mr. Morrissey's sentiments are illustrative of a feeling of the ICTY's fundamental bias against an accused that is shared by many defense teams.⁹⁷

This practice of muddling modes of liability in indictments, as well as the use of extended culpability associations in general, may correspond to prosecutorial desire to secure as many convictions as possible. While not inherently a problem, it can become one if prosecutors charge a person with responsibility for crimes under every conceivable heading and then pick and choose what angles to present or ignore in trial. It is the legal equivalent to grabbing a fistful of darts, lobbing them all at a dartboard, in hopes that at least something will stick. Realistically, it is not an unexpected strategy since no prosecutor would want to discount any chance she has at winning a case. Convictions bring worldwide recognition to the tribunal and also increased praise for placing blame on an individual for the crimes that occurred in Rwanda and the former Yugoslavia. A results-oriented attitude like this makes even more sense given the UN's completion schedule that puts a deadline on all tribunal work.⁹⁸ A conviction for "genocide" signals to the world that something concrete has been accomplished. Since the ad hoc Tribunals, as functionaries of the UN, are political bodies as well as legal ones, any good public show of approval is definitely an important interest of the tribunal. However, an overly conviction-hungry practice, for whatever reason it is favored by a prosecutorial team, too-often compromises the ability for accused to know what they are charged with and why, and this certainly violates the "rule of lenity" and fundamental fairness to defendants valued in true criminal trials.

As much as misapplication of the Command Responsibility doctrine in genocide cases may lead to flawed trials and judgments, it is not the only possible jurisprudential incongruity that may scar tribunal work. With the potential for sweeping culpability associations, the theory of Joint Criminal Enterprise (JCE) can be an effective tool for prosecutors to bring criminals to justice. In the forty-two indictments filed between 25 June 2001⁹⁹ and 1 January 2004, a full twenty-seven "rely explicitly on JCE"¹⁰⁰ and seven more refer to it implicitly.¹⁰¹ This means that 81% of confirmed indictments¹⁰² during that time period rely on this doctrine.

So, like Command Responsibility, JCE is an important legal tool that helps incriminate those that may not have directly committed crimes. If there has been an establishment of some sort of concrete agreement between parties to

⁹⁷ This sentiment was echoed in interviews conducted with members of the Limaj, et al defense teams and by Joeri Maas, Head of the Office of the Association of Defense Council at the ICTY held in late May/early June 2005 at the ICTY in The Hague, Netherlands.

⁹⁸ The adopted completion strategy calls for the end of all trials by 2008, in a UN Security Council on 13 June 2005, ICTY President Theodore Meron stated that it would take until 2009. The completion strategy, set forth in UN Security Council resolution 1503 and reaffirmed in Resolution 1534 offers a deadline of 2010 for the completion of all ad hoc tribunal work.

⁹⁹ This date is significant because it is when the first indictment to rely explicitly on JCE was confirmed. See Danner and Martinez, *supra* note 17, at 107

¹⁰⁰ Danner and Martinez, *id* at 107-108

¹⁰¹ *Id.* As Danner and Martinez relate, saying that a defendant acted "in concert" with others has been ruled by trial chambers to implicitly refer to JCE.

¹⁰² 34 of 43 indictments equates to 81%

commit wrongdoings, JCE allows for all perpetrators who were a part of this “common criminal plan” to be held responsible for the actions of others participating in the plan whether or not all the wrongdoings were desired by all involved. As ICTY Associate Legal Officer Tilman Blumenstock summarizes, to apply JCE,

“There must be a plurality of persons, with responsibility arising if one of them takes action in furtherance of a common design, plan, or purpose, be it through direct or indirect assistance. The understanding or agreement between the members of a ‘joint criminal enterprise’ need not be express, and... the accused does not necessarily need to have intended the concrete criminal result... [it may suffice] that he or she was simply aware that a certain result was a possible consequence of the execution of the enterprise.”¹⁰³

As such, JCE can take the form of one of three categories:

- 1.) **JCE Category One:** All of the participants in the joint criminal enterprise, acting in furtherance of a common plan, possessed the same criminal intention. An example would be where a group develops a plan to forcibly remove a number of people from an area, and although each member of the group may carry out a different role, each has the same intent to remove that segment of a population from an area.
- 2.) **JCE Category Two:** All of the participants in the joint criminal enterprise were members of military or administrative groups acting pursuant to a common plan, where the accused held a position of authority within the command structure; although, he did not physically commit any of the crimes charged, he actively participated in enforcing the common plan by aiding and abetting the other participants in the joint criminal enterprise who did commit them. A telling example would be that of a concentration camp where prisoners are subjected to inhumane treatment pursuant to the joint criminal enterprise.
- 3.) **JCE Category Three:** All of the participants were parties to a common plan to pursue one course of action, where one of the persons carrying out the agreed plan also commits a crime which, while outside of the scope of the common plan, was nevertheless a natural and foreseeable consequence of executing the common plan. An example would be where a group develops a plan to forcibly remove a number of people from an area, and with the result that, in the course of said action one or some of those being removed is killed.¹⁰⁴

A prevailing concept with JCE, therefore, is culpability based on a general group-oriented intent. A group of people agrees to the same plan and acts collectively to further it. Not every person involved has to participate in every aspect of the common plan, or even know about every part of the plan as it is being carried out.¹⁰⁵ In regards to JCE’s application to genocide cases, which tend to involve hundreds of people, both perpetrators and victims, this is facially useful because it would be near impossible for a prosecutor to be able to prove that any accused had specific knowledge of every person operating within any sort of criminal organization involved in genocide. In fact, it is even questionable whether that kind of knowledge could ever be possible. When dealing with a conflict that involved thousands of people and hundreds of criminal acts over hundreds of square miles – often times with criminal acts happening on different sides of a country or even in different countries all together, as was the case with the Yugoslav conflict of the 1990’s, it would be extremely implausible that anyone would be able to have detailed knowledge of all of the possible criminal actions of those operating around him. Just as commanders cannot be expected to have explicit information regarding the actions of all members of the chain of command under them, members of JCE’s are subject to the same lenience regarding co-actors.

¹⁰³ Tilman Blumenstock, *The Judgment of the ICTY in the Brdjanin Case*, *Leiden Journal of International Law*, vol. 18, No. 1 (March 2005) at 71.

¹⁰⁴ Eboe-Osuji, *supra* note 26, at 64-65 and n. 32. See also *Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, Prosecutor v. Milutinovic, Sainovic and Ojdanic*, Case No. IT-99-37-A, Appeals Chamber, 21 May 2003, as well as *Prosecutor v. Brdjanin*, Case No. IT-99-36, Trial Chamber Judgment 1 September 2004.

¹⁰⁵ See Daryl A. Mundis and Fergal Gaynor, *Current Developments at the Ad Hoc International Criminal Tribunals*, *Journal of International Criminal Justice*, Volume 3, No. 1 (March 2005) at 277-279. This idea that intricate knowledge of every aspect is not necessary for a member of a JCE has been put forth most prominently by the Brdjanin Trial Chamber of the ICTY. See specifically the Trial Chamber Judgment of that case (IT-99-36-T) at para. 264

Ideally, at least in JCE categories I and II, all members of a JCE will share the same criminal intent. Therefore, if the shared and agreed upon intent of the JCE is genocidal, all members of the JCE will rightly have the required *mens rea* for the crime of genocide and can be convicted for that crime. For those types of circumstances, prosecutors could appropriately file a charge of aiding and abetting genocide, planning genocide, or conspiracy to commit genocide. But that begs an important question: since those three charges, and arguably others that could involve a JCE, can still be put forth without alleging a JCE, what is the point of such a doctrine? JCE is not mentioned anywhere in any tribunal statute, and has therefore basically arisen due to judicial fiat and used in trials by prosecutors. There is an inherent flaw with this, too: judicial fiat is a purely common-law concept – continental law countries pay no attention to legal precedents, and the ad hoc tribunals are composed of common law and continental law judges and lawyers. Tribunal actors from continental law countries may be reluctant to use such an ill-defined, un-tested principle. Additionally, in the common law-continental law debate, who is to say which side is “better” or “right” about the use of precedent? It very well may be that a continental law approach is more appropriate for international criminal trials than a common law approach due to the increased ease of fostering truth-telling and victim reconciliation, which would mean that a heavy reliance on a notion derived purely from fiat may be inappropriate. Furthermore, the issue remains that the use of a doctrine by a prosecutor for some sort of crime does not inherently make that such use correct. As shown supra in the case of command responsibility, not all prosecutorial tactics are well-reasoned, well-supported, or even logically sound.

In fact, I argue that JCE is one instance where a doctrine has been misapplied to the crime of genocide. JCE involves three distinct categories, and in each doctrine fails when applied to genocide. The first failure is evident in a JCE category I case where all participants had the same intent. From the outset, this scenario is suspect since it may very well be impossible to ever find a situation where all of the members of an alleged JCE shared exactly the same intent, let alone prove it in trial. However, I will continue in a hypothetical to illustrate that even in the most genocide-friendly scenario, JCE is problematic. If it were determined that such a JCE perpetrated genocide, all the members, who share the same intent, would rightfully hold a genocidal intent, and any member of this type of JCE would pass the *mens rea* requirement of genocide. However, JCE is premised on the fact that not all members of the collective need to act in furtherance of the plan in the same way. It may very well be that even though there was a JCE, only a portion of the members actually committed any genocidal acts. The remaining portion would merely have held the intent to do so and lacked the required *actus reus*. Some of this partition may have aided and abetted, planned, or conspired to commit genocide, but as far as strict individual liability is concerned, they did not actually commit genocide. As such, they could not be rightly brought up under individual commission of genocide due to their specific participation in a JCE alone.

The individuals that were merely part of the JCE and shared the same intent but did not act in any way that contributed to the genocide, would only be guilty of having a genocidal *mens rea*, which is not a crime. Persons can be convicted for some crimes by holding the requisite *actus reus* of that crime but no criminal *mens rea* – a crime like involuntary manslaughter is an example of this principle – but in the case of genocide, even this is not possible. Moreover, no one can be punished for his thoughts alone. Until those thoughts manifest themselves into a criminal action, such a thinker is an innocent man, criminally speaking. Thoughts need to produce action for criminality to occur and it is common sense that no one should be taken to trial for a crime that was not even committed.

JCE category II is very similar to category I and has the same pitfalls, but involves a military construct. It is when examining JCE category II that bigger holes in the application of the JCE doctrine to genocide are visible. As illustrated supra, any kind of a JCE can run the risk of removing the *actus reus* from the genocidal equation. However, JCE III, the most extended form of a JCE, further leaves the door open for the removal of even the *mens rea* aspect of the crime. In this form of JCE, the members agree to a certain plan of action, but some members act outside of the intended plan. Two situations can therefore arise when using this part of the doctrine to affix culpability. First, a JCE could exist where all members shared a genocidal intent but did not actually commit directly or plan, aide, or abet any genocidal acts. As delineated above, the members of the JCE would be innocent of genocide because, while the *mens rea* requirement was met, the *actus reus* requirement was not. If a person in the JCE then acted outside the scope of the rest of the JCE and committed the genocidal act, thus creating a JCE category III association, the individuals alone would be responsible for genocide (assuming they still possessed the requisite intent), not the entire JCE. The JCE doctrine as it is treated now still leaves open the possibility that courts would convict the other participants of such a JCE, even though they would be legally innocent. If it could be shown that those other members did anything to facilitate the rogue member that acted outside of the JCE's scope, then not only would a JCE III relationship not truly exist, the whole JCE doctrine would not be necessary because those individuals would be guilty of aiding and abetting or planning in their own right, regardless of their association with any criminal enterprise.

Second, a JCE could exist where the members do not share a genocidal *mens rea* and a member acts outside of the scope of the JCE and commits a genocidal act with genocidal intent. A JCE category III situation would also be formed in this case and the nonconforming member would be individually culpable of genocide. If the JCE doctrine were to be applied here though, all of the members of the JCE could be brought up on genocide charges for the actions of the one member who acted outside, unrelated to, and perhaps even contrary to the enterprise in place. This is problematic not only because the members of the JCE would lack the *actus reus* requirement, but would also lack a genocidal *mens rea*. Genocide is a crime that has two requirements, and by applying JCE category III culpability, persons could be brought up

on charges without meeting *any* of the requirements of the crime. Persons who did not commit genocide, nor ever intended to, could suddenly find themselves charged with the crime simply because they were in a low-level criminal organization and happened to have ties to a maverick genocidal perpetrator. This would be guilt by association – the scourge of any legal system – realized in the application of possibly the most serious crime punishable by any law.

JCE is fundamentally premised on culpability arising not from committing a crime, but on a relationship with someone who did commit a crime unrelated to anyone else’s intent or crimes. JCE’s are nebulous criminal associations that can take the form of a civilian group, a military group (JCE II), or even a governmental organization (as is the case with the highest Serbian leaders now on trial at the ICTY). Applying the JCE doctrine to genocide not only allows for the removal of an *actus reus*, but also the requisite *mens rea*, and in doing so completely undermines all that the crime stands for and was designed by Raphael Lemkin to combat. JCE can allow for individuals to be guilty of the “crime of crimes” simply by being in the wrong place at the wrong time and having an awareness of one wrong person.

If taken logically through to the extremes of its reach, JCE category III can have an alarmingly broad scope. If, for example, one genocidal perpetrator existed in a military construct, and that military was corrupt enough to be considered a criminal enterprise because it perhaps killed a few civilians and stole some property in an occupied town, there is nothing to stop the entire military regime of now being culpable through JCE of the one lone genocidal perpetrator’s actions. This can also happen if a genocidal perpetrator existed in a government – suddenly one lone actor’s genocide holds an entire government prosecutable for the crime regardless of each government member’s actions or intentions. This is all the more troubling considering it is not very far fetched - prosecutors have considered the Serbian government a JCE in a myriad of cases.¹⁰⁶ What happens when an American soldier goes AWOL in Iraq and commits murder in an attempt to eradicate all Muslim fundamentalists? This soldier could be liable for genocide, but the doctrine of JCE would hold that the members of the soldier’s unit, his commanders, all the US military leadership, and the President of the United States would be liable for genocide as well.

The surprising facet of the genocide and JCE conflict is that in none of the interviews I conducted with ICTY judges, prosecutors, legal aides and clerks, and defense attorneys had any insight as to how JCE and genocide could be reconciled. Top ranking members of the office of the prosecutor even expressed open frustration and confusion with the doctrine. One prominent ICTY prosecutor even remarked that he was “not sure anyone around here [at the ICTY] completely understands it.”¹⁰⁷ Even the ICTY judiciary was conflicted about the proper use of JCE in trials. One judge

¹⁰⁶ See the indictments against Slobodan Milosevic, Momcilo Krajisnic, or Radovan Karadzic at www.icty.org for examples of the characterization of a governmental group as a JCE

¹⁰⁷ Interview with a top member of the office of the prosecutor, who spoke so candidly on the condition that he would remain anonymous. The interview took place in early June of 2005 at the ICTY in The Hague, Netherlands.

stated about JCE in interview that “if there was any area that the Tribunal has confused the law, that may be it.”¹⁰⁸

Another related that some judges “have great difficulties with JCE... so some judges try to avoid using [it]” and elaborated, “Some have very serious reservations with the third instance of JCE.”¹⁰⁹

Perhaps the most forthright about JCE of any tribunal actor that I encountered was the defense team of the *Limaj* case. Calling JCE “essentially an invention of the tribunals in international law that is dangerously close to ‘liability for membership,’” one member of the team explained that the problem was not in the legal “theory, but in practice.”¹¹⁰ The defense team bemoaned the fact that they essentially “[saw] *mens rea* diluting”¹¹¹ from intent to negligence or recklessness to knowledge to no knowledge or participation whatsoever. One member declared, “Now every piece in the machine is a *genocidaire*.”¹¹² The defense team was increasingly critical because they viewed genocide as being “devalued” and “just a name” but related that “genocide still means something to the press, but here it has been made into just another crime.”¹¹³ The crime of genocide, in the eyes of those who deal with it daily, has become something that still garners international attention, but has fallen victim to questionable tactics and a generous helping of what defense attorney Richard Harvey called “making it up as you go along.”¹¹⁴

V - Conclusion

Genocide is a crime that is premised on an individual’s desire to destroy an entire group. It was coined in the aftermath of WWII to describe the actions of the Nazis by a victim of the crime who knew all too well the effects of being singled for destruction based on his ethnic identity. It hinges on two vital components, the *actus reus* and the *mens rea* – both of whom must be satisfied for a criminal to be guilty of the crime of genocide. As recent international tribunal jurisprudence is showing, however, the crime genocide is running the risk of being devalued due to misapplication, misuse, and abuse of the Command Responsibility and Joint Criminal Enterprise culpability association doctrines.

Both of these doctrines make it very easy for a prosecution to circumvent the *actus reus* requirement and undermine the notion that an individual is not guilty by thoughts alone. Particularly troubling though is the application of JCE to genocide cases. JCE does have its uses in criminal trials, and as ICTY judge Ian Bonomy related, it is applicable

¹⁰⁸ Interview with an ICTY judge, who spoke so candidly on the condition that he would remain anonymous. The interview took place in early June of 2005 at the ICTY in The Hague, Netherlands.

¹⁰⁹ Interview with a different ICTY judge than the note supra, who also spoke so candidly on the condition that he would remain anonymous. The interview took place in late May of 2005 at the ICTY in The Hague, Netherlands.

¹¹⁰ The quotes from the *Limaj* team came from an interview I had with them in early June of 2005 at the ICTY in the Hague, Netherlands. The team included Michael Mansfield, Gregor Guy-Smith, Richard Harvey, Michael Topolski, and Steven Powles. The interview also included Guénaél Mettraux, who was serving as counsel for Sefer Halilovic.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

when conspirators are “playing different instruments but ultimately the same tune.”¹¹⁵ However, when applied to genocide charges, not only does this doctrine run the risk of removing an act requirement from the equation, but it theoretically allows a dodging of the *mens rea* requirement as well. By allowing for the elimination of both the *actus reus* and *mens rea* of genocide, JCE is adverse to the vital principle of individual culpability, as well as the fundamental definition of genocide as a destructive, intentional crime. The doctrine also runs the risk of undermining the fairness and justness of the ad hoc tribunals – and can effectively denigrate the “crime of crimes” to a meaningless buzzword that can be thrown around to any defendant at will as long as that defendant fell in with the wrong crowd, or was part of any organization, including a government or military.

The application of JCE is made all the more important because of its prominent role in the major criminal trials coming out of the ad hoc tribunals. For years to come, the international community will remember the cases against Milosevic, Krstic, Jelicic, and Krajisnic and will remember how these courts addressed the crime of genocide and the doctrines of Command Responsibility and Joint Criminal Enterprise. In particular, JCE is a dangerous doctrine that can undermine how the ad hoc tribunal verdicts are received not only by future courts, but by the victims, witnesses, and perpetrators of the unspeakable atrocities that occurred in Rwanda and the former Yugoslavia. In fact, much of how the ICTY in particular will be judge by future courts and legal scholars will be in how well it reconciles the interests of convicting criminals with the need to put forth soundly reasoned opinions that will stand the test of time and speak to the fairness and the justice of the ad hoc tribunal process. For, as the Honorable Judge Theodore Meron, President of the ICTY, stated, “The revolution of international criminal law is quite spectacular, but it is still in progress.”¹¹⁶

What is certain for now is that a strict handling of the genocide statutes and JCE and a close watch over the fundamental principles of such legal concepts is necessary. To this end, some have already argued that “the role of a strict standard is to prevent doctrinal expansion along a slippery slope that destroys the particular focus of the prohibition against genocide by converting almost every act of large-scale destruction into a form of genocide.”¹¹⁷ Genocide was never intended to be used recklessly, and it is a crime that carries so much weight that it must be treated with the utmost care and sensitivity. And in order for any of the jurisprudence from the ad hoc tribunals to last, courts must find better ways to uphold the letter and the spirit of the laws outlawing genocide without compromising rulings with reasoning based on problematic culpability associations. All courts are involved in balancing competing interests. Finding a proper balance between the need to convict with and the need to uphold the principles of individual criminal responsibility and trial fairness becomes even more important when the whole world is watching.

¹¹⁵ Interview with Honorable Judge Bonomy in early June of 2005 at the ICTY in The Hague, Netherlands.

¹¹⁶ Interview with the Honorable Judge Meron in early June 2006 at the ICTY in The Hague, Netherlands.

¹¹⁷ Greenawalt, *supra* note 51 at 2287-2288