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DOLUS SPECIALIS: HOW THE JUDICIAL INTERPRETATION OF GENOCIDAL INTENT DEVALUES GENOCIDE'S SPECIAL STATUS

By Dana Burns

HUMAN RIGHTS THESIS
PROFESSOR: Karoly Bard
Central European University
1051 Budapest, Nador utca 9
Hungary

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EXECUTIVE SUMMARY

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[1]

In the literature of international humanitarian law, there are countless epithets and synonyms for this crime: mass killing, eliminationism, an odious scourge, a crime without a name, the crime of crimes. These terms not only convey the horror of the crime but also drive at the challenges to its definition. Sixty years ago, scholars and politicians agreed on name and legal definition. According to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, genocide means one of five prohibited acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such. Yet, I challenge that the *ad hoc* International Criminal Tribunals, established by United Nations Security Council resolution in the wake of the Yugoslav and Rwanda violence, do not interpret *dolus specialis*, or genocidal intent, in line with this law.

Questioning how and why the judicial interpretation of genocidal intent varies, I intended to demonstrate that the confusion of genocide's collective commission with the perpetrators' individual intent. As measures of its collective nature, the courts adopted requirements of crimes against humanity, namely their "widespread or systematic" commission, requiring a plan or policy, against vulnerable "civilian populations." Therefore these interpretations diminish the genocide's special intent and status.

In the interpretation of genocidal intent, judges assume the perspectives of their social psychologist peers. Similarly, I combined social psychologist James Waller's individualist model of intent and international lawyer George Fletcher's collectivist view of perpetration. Waller dismisses the prominent, single variate explanations for perpetrators' participation—extraordinarily evil groups, ideology, psychology, and personality—and develops a

[1] *France et al. v. Göring et al.*, (1946) 22 International Military Tribunal 203.

multifactoral model of individual commission. On the other hand, Fletcher argues that collectives violate international humanitarian law, which in turn penalizes individuals. In analyzing the interpretation of genocidal intent as articulated by the International Criminal Tribunals of the former Yugoslavia and Rwanda and the Court of Bosnia Herzegovina, I applied social psychology to international law. To test my hypothesis, I conducted a multiple-case study and analyzed the judgments in which the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) as well as the War Crimes Section of the Court of Bosnia Herzegovina (WCS BiH) acquit and convict individuals of genocide.

I found that the courts employed the jurisdictional elements of crimes against humanity and required planning, systematization, and widespread attacks as "presumptions of fact" from which to infer genocidal intent. However, they also developed contextual analysis of parts of *dolus specialis*, recognizing that genocide may not always be gross and systematic but efficient and selective. Given the "difficult[y], even impossibl[ity], to determine […] in the absence of a confession from the accused"[2] his intent as well as legal focus of the Tribunals and the Court of Bosnia Herzegovina, the courts rarely discussed the accused's psychological motivation. Their reliance on evidence of planning and systematization demonstrates, though, that they preferred the evil collective thesis as an explanation for genocide's perpetrator. Unfortunately, genocides "are never hindered by a lack of willing executioners."[3]

[2] *Prosecutor v. Jean Paul Akayesu*, Trial Judgment, Case No. ICTR-96-4-T, T.Ch.I., 2 September 1998, par. 523.
[3] J. Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (2002), 15.

CHAPTER ONE: INTRODUCTION

Volitional destruction because of an individual victim's group identity denies her agency, equality, and dignity. Although the United Nations human rights mechanisms prohibit discrimination,[4] discrimination can and has become destructive. At that destructive nadir, the Genocide Convention should prevent such gross affronts to human dignity.

Genocide involves "the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such,"[5] according to the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). I, unlike other scholars, do not debate this definition. Yet, I will introduce genocide's alternative formulations because in addition to the material elements, they address the mental element of the crime.

1.1 A Crime Without a Name

Polish jurist Raphael Lemkin coined the crime and, almost prophetically; this advocate would lose forty family members in the Holocaust. And ten months after Hitler's appointment as Chancellor, he proposed the criminalization of "the premeditated destruction of national, racial, religious and social collectivities."[6] This biological destruction, Lemkin defined as 'barbarism' and its cultural counterpart—"the systematic and organized destruction of […] art and cultural heritage"—as 'vandalism.' These predecessors to genocide were planned: "premeditated," "systematic," and "organized."

In his 1944 *Axis Rule in Occupied Europe*, Lemkin finalized the definition but still required planning as an element of the crime. Combining barbarity and vandalism, the Greek root for nation ('genos'), and the Latin root for murder ('cide'), he defined 'genocide' as "a coordinated plan of different actions aiming at the destruction of essential foundations of the

[4] C.M. Bassiouni, *Crimes against Humanity in International Criminal Law* (1999), 328.
[5] 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 *UNTS* 277 (1948), Article II.
[6] A. Jones, *Genocide: A Comprehensive Introduction* (2006), 9.

life of national groups, with the aim of annihilating the groups completely."[7] Having defined the atrocity, Lemkin dedicated himself to its criminalization.

On 9 December 1948, the United Nations General Assembly unanimously adopted the Genocide Convention, according to which, "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."[8]

In addition to genocide, the Convention punishes four other acts: attempt to commit genocide, conspiracy to commit genocide, and direct and public incitement to commit genocide, as well as complicity in genocide.[9] The literature confusingly describes the latter list as "punishable acts" and the former as "prohibited acts." For clarity, I will refer to punishable acts and material offenses. Thus the perpetrator can commit these punishable acts through any of the enumerated material offenses along with the necessary mental element.

Although the United Nations Convention drew from Lemkin's definition, scholars disagree whether the concept, as opposed to the crime, of genocide itself requires intent. On one extreme, social scientists have coined other special intent, eliminationist[10] crimes: "culturecide, democide, ethnocide, femicide, gendercide, gernotocide, gynocide, politicide [and] ethnic cleansing, gendered atrocity, genocidal killing, genocidal massacre, genocidal rape, Holocaust, state crime, and state sponsored mass murder."[11] At the other end,

[7] S. Straus, 'Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide', (2001) 3 *Journal of Genocide Research* 349, at 360.
[8] Genocide Convention, Art. II.
[9] Genocide Convention, Art. III.
[10] D.J. Goldhagen, *Worse Than War: Genocide, Eliminationism, and the Ongoing Assault on Humanity* (2009).
[11] S. Stein, 'Conceptions and Terms: Templates for the Analysis of Holocausts and Genocide', (2005) 7 *Journal of Genocide Research* 171, at 196, note 2.

anthropologist Nancy Scheper-Hughes expands genocide's definition and eliminates genocidal intent. Her genocidal continuum defines the "everyday violence" or "peace-time crime," which, for instance, adult children inflict on their aging parents by assigning their care to professional facilities, as microcosms of and sanctions for genocide.[12] Though I return to these "ordinary men" and structuralist arguments later, now I note the extremity of her unintentional continuum.

For comparison, other scholars include intent in their alternative definitions. In 1951, Pieter Drost defined the crime as "deliberate destruction."[13] Similarly, Helen Fein requires "sustained purposeful action."[14] Frank Chalk and Kurt Jonassohn, co-directors of the Montreal Institute for Genocide Studies, and Leo Kuper, professor at the University of California Los Angeles, returned to the Convention's "intent." According to Chalk and Jonassohn, genocide constitutes "a form of one-sided mass killing in which a[n…] authority intends to destroy a group."[15] In his comparative studies, Kuper prefers the Convention's definition.

Usually, social scientists dislike the Genocide Convention. It protects ethnic, national, racial, and religious groups to the exclusion of economic, gender, political, and social groups. It prohibits biological or physical destruction but not cultural or linguistic death. Regardless of their opinions of the Convention, scholars agree that intent is essential to the crime of genocide. I emphasize this agreement rather than engage these alternatives; the judicial institutions relevant to this project have transposed verbatim the Convention's definition into their Statutes or Criminal Codes. Again, the Convention requires special intent.

[12] N. Scheper-Hughes, 'The Genocidal Continuum: Peace-Times Crimes', in J.M. Mageo (ed.), *Power and the Self* (2002) 29, at 30.
[13] P.N. Drost, *The Crime of the State* (1959), Vol. II, 125, quoted in F. Chalk and K. Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (1990), 30.
[14] H. Fein, *Genocide: A Sociological Perspective* (1990), 24.
[15] F. Chalk and K. Jonassohn, 23.

1.2 A Crime of Special Intent

Whereas any crime involves *mens rea*, the Convention elevates this element to a "special" or "specific" standard, *dolus specialis*. Each enumerated act requires *mens rea*, such that "stripped of genocidal intent, the prohibited acts independently stand as punishable criminal acts."[16] Thus *dolus specialis* elevates these crimes to genocide, in imposing not the highest intentional standard but a secondary intentional element.[17] Since "*this additional mental element* […] has *no pendant in the actus reus*,"[18] instead of literately translating *specialis* as "special," Kai Ambos, professor of international criminal law at Georg-August Universitaet Goettigen, more logically characterizes genocidal intent as "surplus."[19]

In modern criminal law, *mens rea* "must correspond to all the material elements of the *actus reus*"[20] and occurs as *dolus eventualis*, *dolus indirectus*, or *dolus directus*. First of all, intent differs from motive. Motive describes the incentive for which an individual acts, and as will be discussed, intent describes the determination with which he or she acts. In crimes of *dolus eventualis*, the perpetrator can envision possible, though uncertain and undesired, consequences. He or she commits the act regardless of those consequences, or recklessly. Johan van der Vyver offers the following example: A intends to kill B, and foreseeing that killing the driver B may injure or kill passenger C, A nevertheless or recklessly kills B. So A is responsible for the harm to C under *dolus eventualis* despite not desiring this harm.[21] Advertent recklessness, however, does not constitute negligence. Negligence requires a deviation from the reasonable standard of care; where a reasonable individual can anticipate the uncertain and undesired consequences of his or her act, a negligent criminal cannot. And

[16] D. Alfonzo-Maizlish, 'In Whole or in Part: Group Rights, the Intent Element of Genocide, and the "Quantitative Criterion"', (2002) 77 *New York University Law Review* 1369, at 1381.
[17] K. Ambos, 'What Does "Intent to Destroy" in Genocide Mean?'. (2009) 91 *International Review of the Red Cross* 833, at 845.
[18] R. Arnold, 'The Mens Rea of Genocide under the Statute of the International Criminal Court', (2003) 14 *Criminal Law Forum* 127, at 132.
[19] Ambos, 835.
[20] Arnold, 131.
[21] J.D. van der Vyver, 'Prosecution and Punishment of the Crime of Genocide', (1999) 23 *Fordham International Law Journal* 286, at 307.

negligence does not necessarily constitute omission, which occurs under *dolus indirectus* and *dolus directus*. In some domestic systems, however, individuals may be held criminally liable for negligent omission.

Negligent liability occurs from uncertain consequences, but crimes of *dolus indirectus* and *dolus directus* involve certain ones. In events of indirect intent, the perpetrator acts despite its certain, undesired consequences. In crimes of direct intent, the perpetrator desires those consequences. *Dolus indirectus* and *directus* correspond to knowledge and purpose, also confusingly called intent, respectively.[22]

1.2.1 Legal Commentary

However surplus, genocidal intent remains separate from motive. In fact, the Committees drafting the Convention removed any motivation requirement. They anticipated an affirmative defense, claiming reasons outside the Convention's required list.[23] Similarly, motive's addition might exclude future, intentional group destruction. Thus the drafters resolved to forbid destruction for any reason,[24] rather than to describe intentional group destruction through an exhaustive enumeration. Some drafting states, later scholars, and even international prosecutors read the Convention's "as such" phrase as a motive requirement: the perpetrator commits genocide against individuals from a collective because of their membership in that collective.[25] The Trial and Appeal Chambers of the International Criminal Tribunals for the former Yugoslavia and Rwanda, though, reaffirm the intention of the drafters and dismiss this interpretation.

The drafting Committees and the interpreting Tribunals also reject a premeditation requirement. "The psychological moment of plotting [is] not necessary for classifying an act

[22] van der Vyver, 306-7. Please note that this introductory summary does not address all idiosyncrasies of or differences between national criminal law systems.
[23] W. Schabas, *Genocide in International Law: Crime of Crimes* (2009), 247.
[24] Schabas, 247.
[25] G. Lewy, 'Can There Be Genocide without the Intent to Commit Gneocide?', (2007) 9 *Journal of Genocide Research* 661, at 662.

of intended destruction as genocide."[26] In fact, premeditation is "superfluous given the special intention" with which an individual commits genocide.[27] Although premeditation constitutes the planning of crime, it differs from a genocidal plan or policy. An individual may participate in genocide with knowledge of a plan but need not premeditate his or her personal contribution to the criminal attack.[28] Neither do the Tribunals require a plan,[29] though "it would appear that it is not easy to carry out genocide without a plan or organization."[30] As I will discuss, the judges emphasize the crime's planned commission and assume this plan exists at the level of the state or a para-statal entity. In other words, the Genocide Convention, if not the *ad hoc* Tribunals, allows for a "lone genocidaire."[31]

Just as one individual can commit genocide, genocide need not destroy a group. Neither the Convention nor the courts establish a "numerical threshold."[32] Yet, genocide's *mens rea* includes the phrase "in whole or in part"—"the intent to destroy in whole or in part a […] group, as such." A genocidaire can intend either a group's whole destruction or, as I explore shortly, its substantial but partial elimination. "The crime of genocide is completed as soon as prohibited acts are committed against group members with the requisite intent aimed at the group, whether or not those acts actually result in the group's destruction."[33] Thus the Convention distinguishes between attempted and partial destruction. In the crime of attempted genocide, the accused does not realize his or her intent; he or she does not commit a prohibited act. In the crime of genocide, the accused can intend partial destruction. The

[26] N. Robinson, *The Genocide Convention: A Commentary* (1960), 60, quoted in D. Nersessian, 'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals', (2002) 37 *Texas International Law Journal* 231, at 268.
[27] *Prosecutor v. Goran Jelisić*, Trial Judgment, Case No. IT-95-10-T, T.Ch.I., 14 December 1999, par. 100.
[28] Schabas, 226.
[29] G. Verdirame, 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals', (2000) 49 *International and Comparative Law Quarterly* 578, at 587.
[30] *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Trial Judgment, Case No. ICTR- 95-01-T, T.Ch.II., 21 May 1999, par. 94.
[31] G. Fletcher, 'The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt', (2002) 111 *Yale Law Journal* 1499, at 1523.
[32] *Prosecutor v. Laurent Semanza*, Trial Judgment, Case No. ICTR-97-20-T, T.Ch.III., 15 May 2003, par. 316.
[33] D. Nersessian, 'Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity', (2007) 43 *Stanford Journal of International Law* 221, at 246.

International Law Commission (ILC) further clarifies this differentiation as well as partial destruction: "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. Nonetheless the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group."[34]

'Substantial', according to the United Nations Commission of Experts investigating violations of international humanitarian law in the former Yugoslavia ("Commission of Experts"), means substantial numbers or substantial members. Therefore the destruction of a group's leadership or a group within a territory demonstrates substantial, partial intent,[35] "but not necessarily a 'very important part,'" according to the International Commission of Inquiry on Darfur.[36] Although, the drafters included the phrase "in part" because they anticipated the accused's defense that genocide occurs only if all individuals in a victim group die, the Commissions' clarifications allow judges to interpret genocidal intent in context. Unfortunately for the victims, instances of genocide are more obvious when there are more victims. Regardless of the allowances for and emphases on complex, contextual interpretations, "the challenges of objectively proving, in a judicial context, a genocidist's state of mind" remain.[37]

To facilitate the prosecution of genocide, scholars propose lower levels of *mens rea* necessary for the material offenses and equivalent to *dolus specialis*. Although the "intent to destroy" implies desire, Kai Ambos correctly reminds us that "special" or "specific" intent "does not necessarily refer to the degree or intensity of the intent."[38]

At the opposite extreme from intent, Professors Otto Triffterer, Alicia Gil Gil, and Claus Kress propose that advertent recklessness suffices as *dolus specialis*. Triffterer

[34] Draft Code of Crimes against the Peace and Security of Mankind, 1996 YILC Vol. II (part 2), at 126, quoted in Schabas, 236.
[35] Schabas, 236-7.
[36] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (2005), par. 506.
[37] Nersessian, 'The Contours of Genocidal Intent', 236.
[38] Ambos, 845.

endorses *dolus eventualis* for the constituent offenses as well as the intent to destroy.[39] The Trial Chamber of Yugoslavia Tribunal theoretically upheld Triffterer's analysis in *Prosecutor v. Brđanin*; it "does not rule out" when the accused knew of the natural and foreseeable consequence that the joint criminal enterprise in which he participated, though not aimed at genocide nevertheless developed the intent to destroy.[40] The Rome Statute of the International Criminal Court, however, demonstrates international consensus around the knowledgeable commission of international crimes, and so dismisses this lowest level of *mens rea*. "A person shall be criminally responsible and liable for punishment […] only if the material elements are committed with intent and knowledge."[41] Although the Rome Statute does not control the *ad hoc* Tribunals, neither have they applied the *Brđanin* standard.

> Gil Gil and Kress propose recklessness in relation to the *actus reus* only.
>
> As to these constituent acts, e.g., the killing of a member of the group in the case of genocide, *dolus eventualis* would be sufficient, combined however with intention in the sense of the unconditional will with regard to the remaining acts—i.e. the killing of the other members of the groups necessary to bring about the final result of the crime, or at least knowledge of the co-perpetrators' intention to that effect.[42]

Thus they, as do international criminal lawyers Alexander Greenwalt, Hans Vest, and John Jones adopt a "mixed individual-collective point of reference."[43] Gil Gill and Kress characterize reckless destruction against a violent backdrop as genocide; whereas Greenwalt, Vest, and Jones argue for a knowledge-based interpretation for low-level perpetrators' intent. According to Greenwalt, "genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or

[39] O. Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', (2001) 14 *Leiden Journal of International Law* 399, quoted in Ambos, 840.
[40] *Prosecutor v. Radoslav Brđanin*, Trial Judgment, Case No. IT-99-36-T, T.Ch.II., 1 September 2004, par. 710-11.
[41] 1998 Rome Statute of the International Criminal Court, 2187 *UNTS* 3 (1998), Art. 30(1).
[42] A. Gil Gil, *Derecho Penal Internacional: Especial Consideracion Del Delito De Genocidio* (1999), quoted in Ambos, 840.
[43] Ambos, 841.

manifest effect of the campaign was the destruction of the group in whole or in part."[44] Unfortunately, these situations more accurately resemble crimes against humanity.

As investigated later, the international criminal tribunals require the *mens rea* with which an accused engages in crimes against humanity to correspond to his or her knowledge of the crimes' scale and organization. The Convention does not distinguish between superiors and subordinates, but declares liable "persons committing genocide […] whether they are constitutionally responsible rulers, public officials or private individuals."[45] *Dolus eventualis* and *dolus indirectus* are easier to demonstrate. In the first instance, the prosecutor need only prove the crime was a natural and foreseeable consequence, and in the latter, the prosecutor can prove the accused could not have not known about the crime. Nonetheless, these standards raise questions as to an individual perpetrator's knowledge of a plan and willful participation therein.[46] And at this point, the history of the crime and the psychology of the accused intervene.

1.3 Holocaust History, Social Psychology, and Genocidal Intent

Given this project's concentration on criminal law, this literature review has ignored genocidal intent, so to say, in practice. For explanations of genocidal intent, I instead turn to social psychology and Holocaust history. Just as genocide scholars disagree about the crime's definition, social psychologists and Holocaust historians debate the nature of destructive intention, whether it is individual or collective, ideological or pathological.

In a more than "remotely plausible-sounding patchwork explanation,"[47] James Waller dismisses unicausal theories of "extraordinary human evil." To these situations, the scholar affiliated with the Auschwitz Institute for Peace and Reconciliation and Cohen Chair of

[44] A.K.A. Greenwalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation', (1999) 99 *Columbia Law Review* 2259, at 2288.
[45] Genocide Convention, Art. IV.
[46] Schabas, 207-10.
[47] D.J. Goldhagen, 'Explaining the Perpetrators' Actions: Assessing the Competing Explanations', in A. Jones (ed.) *Genocide: Perpetrators, Victims, Bystanders, Rescuers* (2008), Vol. IV, at 129.

Holocaust and Genocide Studies at Keene State College adds cultural, psychological, and social processes. He includes collectivist values, authority orientation, social dominance, us-them thinking, moral disengagement, blaming the victims, professional socialization, group identification, and binding factors of the group. Though his *Becoming Evil: How Ordinary People Commit Mass Killing and Genocide* focuses on "ordinary," low-level perpetrators, the data on which he relies focus on architects and authors and the conclusions which he reaches thus likewise apply to the high-level accused before the International Criminal Tribunals and the Court of Bosnia and Herzegovina.

1.3.1 An Evil Self

Waller dismisses the theories that genocidaires are inherently evil and psychologically insane. The Allies propagated the Nazis' insanity defense: "for most of the mental health professionals assigned to Nuremberg, the question was not *if* they would find psychopathology among the defendants, but simply *how much* psychological disturbance."[48] Surprisingly, intelligence tests revealed the Nuremberg defendants as genius. Rorschach inkblot psychological tests, however, proved less conclusive if not equally surprising. The American Army-assigned psychiatrist Douglas Kelley and psychologist Gustave Gilbert neither collaborated nor concurred on the analysis of the Nuremberg Rorschachs. Whereas Gilbert espoused the mad Nazi thesis, Kelley championed the defendants' sanity, such that he felt compelled to conclude "not only that such personalities are not unique or insane but also that they could be duplicated in any country of the world today."[49] In 1975, colleagues reviewing the data sustained Gilbert, but within the decade, another team supported Kelley, even with 200 additional tests from rank-and-file Danish collaborators.

If the contradictory conclusions, which reveal the sensitivity of and so questions around Rorschach tests, didn't dismiss the "mad Nazi" thesis, then the historical record does.

[48] Waller, 62.
[49] D. Kelley, 'Preliminary Studies of the Rorschach Records of the Nazi War Criminals', (1946) 10 *Rorschach Research Exchange* 45, at 47, quoted in Waller, 64.

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On one hand, the Nazi bureaucracy undertook "a systematic effort […] to weed out all those who might derive pleasure from what had to be done"[50] in order to staff the Einsatzgruppen mobile killing units assigned to extermination at point-blank-range. On the other hand, University of North Carolina professor Christopher Browning reports that Reserve Police Battalion 101 "was the 'dregs' of the manpower pool available at that stage of the war."[51] Yet, these men, too old for combat service and too little indoctrinated for office work, assisted the Einsatzgruppen in the East.

When the "mad Nazi" thesis failed, the psychiatric and psychological experts postulated a "Nazi personality." Yet, those experts studying the Nuremberg and Copenhagen Rorschachs failed to identify sufficient similarity. Concluding that the commonalities predispose individuals to authoritarian ideologies, rather than produce their allegiance, the authors of *The Quest for the Nazi Personality: A Psychological Investigation of Nazi War Criminals* added that, "just about anyone could have joined the Nazi movement."[52] In 1950, University of California at Berkeley researchers identified that the authoritarian personality was the explanation. Their F-, as in fascist, scale measuring this personality, suffered ideological and empirical criticism. It ignored leftist authoritarianism and allowed a response pattern. Like the "mad Nazi" thesis, the "Nazi personality" theory failed to address the heterogeneity within the perpetrator group.

Similarly, Waller rejects Stanley Milgram's agentic personality and Robert Jay Lifton's doubling to explain genocide and mass killing. In Milgram's 1960s experiment, the experimenter-"authority" instructed the participant-"teacher" to administer increasingly severe electrical shocks to the actor-"student" for wrong answers to a "paired-associate" test. Sixty-five percent of participants obeyed, inflicting up to 450 volts, from which Milgram

[50] Waller, 71.
[51] C. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (1998), 165.
[52] E. Zillmer et al., *The Quest for the Nazi Personality: A Psychological Investigation of Nazi War Criminals* (1995), 181, quoted in Waller, 80.

concluded "that Arendt's conception of the banality of evil comes closer to the truth than one might dare imagine […] Ordinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process."[53] To explain this obedience, Milgram hypothesized that being the agent to the authority triggered the former's agentic state.[54] In the agentic state, "man feels responsible *to* the authority directing him but feels no responsibility *for* the content of the actions that the authority prescribes" [emphasis in original].[55]

Despite empirical criticism, Lifton similarly postulated a "double" to explain doctors' participation in the Third Reich. Acting on their ideological commitment to the German "biocracy," the governmental embodiment of the Nazi racial project, the doctors created an Auschwitz self. This "division of the self into two functioning wholes, so that a part-self acts as an entire self"[56] in turn sheltered the physical and moral life the primary self. Whereas Lifton proposed doubling as the "only, or even central explanation," Waller rejected a second self as a "short-term adaptive mechanism." Since criminals doubled themselves as well as abused alcohol to escape responsibility, guilt, and shame, Waller concluded that "doubling, rather than a *cause* of evildoing, can be seen as a *consequence*" [emphasis in original].[57] Lifton's theory corresponds neither with evidence from social psychology nor research on ideological killings, as I will discuss shortly.

1.3.2 An Evil Collective

Arguing for a collective conceptualization of international crimes, George P. Fletcher acknowledges that "the mind of the law may speak in the language of liberal individualism,

[53] S. Milgram, *Obedience to Authority: An Experimental View* (1974), 6, quoted in Waller, 113.
[54] Waller, 114.
[55] Milgram, 145-6, quoted in *Ibid.*
[56] R.J. Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (1986), 418, quoted in Waller, 119.
[57] Waller, 120.

but its heart lies in the disfavored ideas of collective action and collective guilt."[58] According to Fletcher and his colleague Elies van Sliedregt, "violations of international humanitarian law connote 'system-criminality' or 'collective wrongdoing' […] System-criminality invariably connotes a plurality of offenders."[59] In other words, collectives violate international humanitarian law, which in turn penalizes individuals. Sliedregt hit it on the nose; her word choice—system and systematic—repeat the jurisprudence of the Tribunals, and as of 2002, that of the International Criminal Court. War crimes and crimes against humanity are also collective in the sense that these bodies conceptualize them as "widespread or systematic." Although the Rome Statute only prioritizes the prosecution of war crimes "when committed as part of plan or policy or as part of large-scale commission of such crimes," in other words, confers a discretion on the Office of the Prosecutor, the Chief Prosecutor Luis Moreno-Ocampo declined to investigate the situation in Iraq on exactly this ground.[60] On the other hand, genocide technically attacks a group *qua* group and theoretically attacks humanity—"at all periods of history genocide has inflicted great losses on humanity."[61] To the extent that genocide endangers communities and undermines humanity, I agree with Fletcher and van Sliedregt. When that argument stretches to require either multiple victims or multiple perpetrators, I disagree.

Fletcher makes this case, however, to mitigate punishment. In a criminal society, the individual perpetrator exercises less responsibility because collective denies the individual's "second-order power of self-correction," or power to evaluate his or her participation

[58] Fletcher, 1526.
[59] E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), 5.
[60] http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf, 8-9.
[61] Genocide Convention, Preamble.

morally.[62] This denial implicates not only ideological and structuralist critiques of individual intention but also theories of the "extraordinary" collective.

The theory of the evil collective, which Gustav LeBon, Sigmund Freud, and Reinhold Niebuhr endorsed but which Waller challenges, posits that groups dominate individuals' moral decision-making. Regardless of whether groups are intellectually less capable, more emotionally disposed, or inherently evil, Waller prefers "collective potentiation:" "when more members of a group engage in a specific action, and they do so sooner and more energetically," and for either positive or negative.[63] This theory resonates with Fletcher's introduction of Romanticism, or the 18th century philosophy in which the collective subsumes the individual.[64] As Fletcher notes, from the liberal perspective, Romanticism glorified the most immoral experiences, but for the Romantic, the nation at war was ideal.

Given the collective's potential, Waller turned to ideology as an explanatory factor for evil. Most aggressively, Daniel Jonah Goldhagen, author of the 1996 *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*, accepts ideology as the only motivation for "ordinary men's" participation in the Holocaust.

> Not economic hardship, not the coercive means of a totalitarian state, not social psychological pressure, not invariable psychological propensities, but ideas about Jews that were pervasive in Germany, and had been for decades, induced ordinary Germans to kill unarmed, defenseless Jewish men, women, and children by the thousands, systematically and without pity.[65]

So critiqued and dismissed, especially by Christopher Browning's *Ordinary Men:* The *Reserve Police Battalion 101 and the Final Solution in Poland*, I will not engage with Goldhagen's reductionism. Yet, he did not abandon eliminationism. In 2010's *Worse than War: Genocide, Eliminationism, and the Ongoing Assault on Humanity*, Goldhagen thankfully acknowledges the multiplicity of conditions that contribute to mass murder but

[62] Fletcher, 1542.
[63] Waller, 36.
[64] Fletcher, 1508.
[65] D.J. Goldhagen, *Hitler's Willing Executions: Ordinary Germans and the Holocaust* (1997), 9, quoted in Waller, 39.

asserts the centrality of leader's "the worldviews, aspirations, and more framework, the prejudices and hatred, and the personalities," or ideology.[66] I agree with Waller's assessment; I appreciate Goldhagen's, and Browning's individual emphasis, and although in *Worse than War*, Goldhagen offers more nuance, his ideological emphasis separates genocide from reality. In other words, genocide remains an "extraordinary evil," which ordinary men cannot repeat.

Unfortunately, a structuralist understanding separates the perpetrator from his or her crimes. Thankfully, Meiji University's Associate Professor Akio Kimura attributes genocide to structure and intent. "The causes of genocide are always, and necessarily double: to describe when and through whom so-called intention emerged in a particular situation, and also to disclose and criticize the overall structure […] which enabled that particular intention."[67] Kimura's structurally-enabled intention reminds of Fletcher's societally-diminished "second-order power of self-correction." According to the each scholar, structure influences but does not dictate intent.

Although I adopt a similar interpretation of genocidal intent—an individual but contextual intention—I analyze judge's interpretation of genocidal intent. It stands to see on which sources—psychology, ideology, or structure—they rely.

In the interpretation of genocidal intent, judges assume the perspectives of their social psychologist peers. Similarly, I combine social psychologist James Waller's individualist model of intent and the collectivist view of perpetration as advanced by international lawyers George Fletcher and Elies van Sliedregt. Waller employs the language of evil and insanity, in part because the traditional explanatory theories adopted these terms. The post-World War II trials demonstrate the extent to which internally qualified jurists believed that the Nazi war criminals were crazed or evil: the Third Reich, in the words of Judge Parker, was

[66] Goldhagen, *Worse Than War*, 73.
[67] A. Kimura, 'Genocide and the Modern Mind: Intention and Structure', (2003) 5 *Journal of Genocide Research* 405, at 417.

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"soulless."[68] The almost scientific pilgrimage to the Nuremberg and Copenhagen Rorschachs, despite their persisting indeterminacy, expresses the continuing desire to label and so lock away the Mad or evil Nazi. Yet, Waller defines "evil as the deliberate harming of humans by other humans."[69] Thus my use of this terminology reflects either the original hypothesis or Waller's analysis. Certainly, international criminal law has evolved and accepted that genocidaires, at least in terms of their spiritual and spiritual state are "ordinary men." In analyzing the interpretation of genocidal intent as articulated by the International Criminal Tribunals of the former Yugoslavia and Rwanda and the Court of Bosnia Herzegovina, I apply psychology to law.

Questioning how and why the judicial interpretation of genocidal intent varies, I intend to demonstrate that these tribunals confuse genocide's collective commission with the perpetrators' individual intent. As measures of the genocides collective nature, the tribunals adopt requirements of crimes against humanity, namely the "widespread or systematic" commission, requiring a plan or policy, against vulnerable "civilian populations." Therefore these interpretations diminish genocide's special intent and status.

[68] *France et al. v. Göring et al.*
[69] Waller, 13.

CHAPTER TWO: RESEARCH DESIGN

To test my hypothesis, I conducted a multiple-case study and analyze the judgments in which the International Criminal Tribunals for the former Yugoslavia and Rwanda as well as the War Crimes Section of the Court of Bosnia Herzegovina acquit and convict individuals of genocide.

Concentrating on the former Yugoslavia, I compared the statements of the trial and appellate chambers of the international tribunal, the Yugoslavia Tribunal and the domestic courts, the War Crimes Section of the Court of Bosnia Herzegovina. Given the interrelated nature of the two Tribunals, I considered the Rwanda Tribunal's appellate and trial chambers, too. Obviously, the inclusion of the Rwanda Tribunal would have privileged this project's extension of the domestic Rwandan courts. Rwanda's response to the genocide, the "truth and reconciliation" style gacaca courts, have resulted in thousands of guilty pleas, which were beyond my ability to include and which do not included the judges' interpretations of genocidal intent.

I identified these Tribunals because of their simultaneous, prominent, and successful application of the Genocide Convention. Again, as contemporaneous bodies, the Tribunals influence each other. Legal developments, namely the drafting of the Rome Statute of the International Criminal Court, Bosnia and Herzegovina's application against Serbia and Montenegro before the International Court of Justice, and the International Commission of Inquiry on Darfur, have intervened in the interpretation genocidal intent. This intervention, however, is only temporal; they repeat the Tribunals' interpretation and so reflect the Tribunals' significance in international criminal law.

Similarly, the Tribunals' Statutes succeeded in including genocide as a separate crime in their jurisdictions, as opposed to the crime's exclusion from the Charter of the

International Military Tribunal at Nuremburg and the subsequent denazification trials. Similarly, the *ad hoc* Tribunals remain the only international institutions to convict individuals of the crime. Even though the indictment against Eichmann included genocide—interestingly as a crime against humanity committed against non-Jews—the Israeli Supreme Court acquitted him on this charge. Ultimately, Eichmann hung for crimes against the Jewish people, which required a genocidal intentional element, did not constitute genocide.

Finally, I preferred the Tribunals because of their prominence in the interpretation of international criminal law. As evidence of their significance, I compared the Tribunals and the War Crimes Section of the Court of Bosnian Herzegovina. Although states beside Bosnia Herzegovina have held domestic trials, the Court of Bosnia Herzegovina is the domestic partner of the UN tribunal. In order to complete its case load by the extended deadline of 2014, the Yugoslavia Tribunal has transferred middle- and low-level accused domestic courts. In fact, the international tribunal has transferred more cases to the domestic court than to those of the former Yugoslavia's other successor states. Thus the Court of Bosnia Herzegovina also offers continuity.

The Statutes of the Tribunals and the Criminal Code of Court of Bosnia Herzegovina reproduce verbatim Article II of the Genocide Convention, and "the interpretation of any of these analogous documents is persuasive evidence of a plausible interpretation of the Genocide Convention"[70] itself. Since this study analyzed the legal interpretation of genocidal intent, samples which legally interpret genocidal intent prove reliable. In other words, these cases are reliable.

Reading the legal findings related to genocide, I analyzed the terminology and structure. As significant, I scrutinized terminology related to the definitions of genocidal intent: forms and synonyms of the words 'intent' and 'destroy', references to the geographic

[70] Nersessian, 'The Contours of Genocidal Intent', 242.

distribution and total quantity of victims or scale and scope of atrocities, and identifications of the victim.s Whereas analysis of word choice occurs within sentences, I alo observed the judgments' overall structure: where words or phrases occurred within the judgment. Finally, I examined the Tribunals' and the Court's expression of its opinion, namely value judgments. From these sources, I studie how the ICTY, ICTR, and WCS BiH interpreted intent.

To demonstrate this research design, I will analyze a paragraph, which piqued my interest in the Tribunals' interpretations.

> The words and attitude of Goran Jelisić as related by the witnesses essentially reveal a disturbed personality. Goran Jelisić led an ordinary life before the conflict. This personality, which presents borderline, anti-social, and narcissistic characteristics and which is marked simultaneously by immaturity, a hunger to fill a 'void' and a concern to please superiors, contributed to his finally committing crimes. Goran Jelisić suddenly found himself in an apparent position of authority for which nothing had prepared him. It means little whether this authority was real. What does matter is that this authority made it even easier for an opportunistic and inconsistent behavior to express itself. […] In conclusion, the acts of Goran Jelisić are not the physical expression of an affirmed resolve to destroy in whole or in part a group as such.[71]

Despite Jelisić's verbally expressed goal,[72] the Chamber relied on his "acts." The Tribunals' jurisprudence allows inference from the accused's behavior "in the absence of a confession."[73] Obviously, Jelisić did not confess, but witness testimony and his self-presentation confirm an intent to destroy: "He also presented himself as 'Adolf' at his initial hearing before the Trial Chamber on 26 January 1998 […] He reportedly added [to one witness…] that the 'balijas' had proliferated too much and that he had to rid the world of them."[74] Dismissing Jelisić's statements and excusing his actions as "opportunistic and inconsistent" and even "random,"[75] the Chamber reveals its preference for systematic, planned destruction. Unlike the common plan or purpose of a joint criminal enterprise, which

[71] *Jelisić*, Trial Judgment, par.105 & 107.
[72] *Ibid.*, par. 102.
[73] *Akayesu*, Trial Judgment, par. 523.
[74] *Jelisić*, Trial Judgment, par. 102.
[75] *Ibid.*, par. 106.

"may materialize extemporaneously,"[76] genocidal intent before the Jelisić Trial Chamber must be a physically expressed, "affirmed resolve."

Again, the Chamber excuses Jelisić: his "borderline, anti-social, and narcissistic" personality "marked by immaturity, a hunger to fill a 'void' and a concern to please superiors" motivated the crimes. In fact, this personality explains his statements and thus the Chamber's dismissal of them. Relying on the report of expert psychiatrist van de Bussche[77] and the bad-seed theory, the Yugoslav Tribunal acquitted Goran Jelisić of genocide.

Political discourse constrains genocide's judicial definition. For instance, as Sir Geoffrey Nice revealed at a May 2011 Oxford Transitional Justice Research Seminar, the Trial Chamber "exerted informal, behind the scenes pressure" on the Office of the Prosecutor to drop the genocide charge.[78] The Convention resulted from political compromise, notably the exclusion of cultural genocide and political groups. Similarly, the Convention is invoked during armed, often political conflict. Thus any research on genocide provokes controversy as to what acts constitute genocide, who constitutes a victim or a perpetrator, how to resolve the conflict and how to punish the crime. To avoid engaging these ethnic and political issues, this research proposes neither a definition of nor policy for genocide. Rather, this research in accepting the Genocide Convention's definition aimed to move beyond the debate on genocide's definition. Similarly, this study examined the effects of that academic debate on the term's legal application.

"No matter how inventive, ingenious, or tortuous the reasoning, one cannot construct an even remotely plausible-sounding patchwork explanation."[79] Instead of dismissing his colleagues' explanations of Nazi perpetrators' motivations, Daniel Goldhagen could more

[76] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Trial Judgment, Case No. IT-02-60-T, T.Ch.I. Sec.A, 17 January 2005, par. 699.
[77] *Jelisić*, Trial Judgment, par. 105, note 162.
[78] Sir Geoffrey Nice QC, 'International Criminal Courts: The Advocates' Perspective,' Oxford Transitional Justice Research Seminar, 16 May 2011, http://beta.podcasts.ox.ac.uk/international-criminal-courts-advocates-perspective.
[79] Goldhagen, 'Explaning the Perpetrators' Actions', 129.

appropriately direct his criticism at the Rwanda Tribunal. In *Barayagwiza, et al*., the Rwanda Tribunal tortuously, or so circuitously as to approach contradictorily, finds that "the fact that the media intended to have this effect [to incite the commission of genocide] is evidenced in part by the fact that it did have this effect."[80] Just as Goldhagen assessed competing explanations, the Tribunal dismisses the specific intent standard.

Dolus specialis distinguishes genocide from war crimes and crimes against humanity: the intent to destroy, in whole, or in part, a national, ethnical, racial, or religious group, as such. In *Barayagwiza, et al*., the Tribunal admits its abandonment of specific intent, but in other cases, the Tribunals dismiss or diminish evidence of individual intent in favor of evidence of genocide's collective commission. "In the absence of a confession from the accused,"[81] I accept the difficulty, and even impossibility, of determining genocidal intent. But the Tribunals should more seriously consider the accuseds' statements and their discrimination against the victim group. Discrimination could easily influence this judicial fact-finding given the ILC's interpretation of substantiality. Instead the Chambers evaluate intent in terms of crimes against humanity: a "widespread or systematic attack", evidenced as a genocidal plan, against vulnerable, "civilian populations."

According to the ICTR Statute and ICTY practice, crimes against humanity are "committed as part of a widespread or systematic attack against any civilian population."[82] And the Tribunals have assumed this definition for genocidal intent as well. Given the difficulty in establishing *dolus specialis*, the Tribunals allow that an accused's "intent can be inferred from a certain number of presumptions of fact:" [83]

> The general political doctrine which gave rise to the acts possibly covered by the definition […] the repetition of destructive and discriminatory acts […] the perpetration of acts which violate, or which the perpetrators themselves consider to

[80] *Prosecutor v. Ferdinand Nahimana et al.*, Trial Judgment, Case No. ICTR-97-19-T, T.Ch.I., 3 December 2003, par. 1029.
[81] *Akayesu*, Trial Judgment, par. 523.
[82] Statue of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), Art. 3.
[83] *Akayesu*, Trial Judgment, par. 523.

> violate the very foundation of the group—acts which are not in themselves covered by the list […] but which are committed as part of the same pattern of conduct […—] the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group.[84]
>
> The general context of the perpetration of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or others […] the scale of atrocities, their general nature, in a region or a county, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups.[85]
>
> The perpetrator's actions […] the number of group members affected […] words or deeds […] a pattern of purposeful action […] the physical targeting of the group or their property, the use of derogatory language toward members of the targeted group, the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing.[86]

From these sources the Tribunals claim to, and do, infer intent. Judgments specify the geographic scope of atrocities, the number of victims as well as the extent of their injury. Just as Waller argues that a composite theory best describes genocidaires' participation, multiple sources of genocidal intent are more convincing. "Only in collaboration will we come to a fuller understanding of our inhumanity to each other."[87] Reference to multiple sources, in fact, should prevent the preference of sources less likely to divulge individual criminal responsibility. Unfortunately, the Tribunals and the Court of Bosnia Herzegovina emphasize those presumptions of fact that tend to prove collective commission as opposed to individual intention.

[84] *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Decision of Trial Chamber I [on the Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence], Cases Nos. IT-95-5-R61 and IT-95-18-R61, T.Ch.I., 11 July 1996, par. 94-5, quoted in *Ibid*., par. 524.
[85] *Akayesu*, Trial Judgment, par. 523.
[86] *Kayishema and Ruzindana*, Trial Judgment, par. 93.
[87] Waller, 10.

CHAPTER THREE: "WIDESPREAD OR SYSTEMATIC"

While including the perpetrator's discrimination of the victim population, these sources, in the Tribunals' interpretations, emphasize the crime's planned and widespread commission—"the repetition of destructive and discriminatory act," "a pattern of purposeful action," "the scale of atrocities," "the methodical way of planning." According to the Tribunals, genocidal plans evolve at the highest levels and involve the general population. For instance, the Arusha-based Rwanda Tribunal found "that the massacres of the Tutsi population were indeed 'meticulously planned and systematically co-ordinated' by top level Hutu extremists in the former Rwandan government […] This plan could not have been implemented without the participation of the militias and the Hutu population."[88] Similarly, the War Crimes Section of the Court of Bosnia and Herzegovina supported its finding of genocide in the United Nations safe area Srebrenica because the mission was "approved and overseen by those 'at the top.'"[89] The truth of those statements distracts from the fact that those facts, along with the vulnerability of the victims, do not prove individual criminal responsibility, particularly, individual intent.

3.1 Systematic

The International Tribunals introduced planning as an indication of *dolus specialis*. For the final text of the Genocide Convention, the drafters rejected Lemkin's proposed planning requirement:[90] "there was nothing in the Statute or in customary international law […] which required proof of the existence of a policy or plan to commit these crimes."[91] Yet, the

[88] *Kayishema and Ruzindana*, Trial Judgment, par. 289.
[89] *Prosecutor's Office of Bosnia Herzegovina v. Petar Mitrović*, First Instance Verdict, Case No. X-KR-05/24-1, 29 July 2008, pg. 106.
[90] Schabas, 207 & 209.
[91] *Prosecutor v. Dragoljub Kunarac et al.*, Trial Judgment, Case No. IT-96-23-T, T.Ch.I., 22 February 2002, par. 98, quoted in C. Kreβ, 'The Crime of Genocide under International Law', (2006) 6 *International Criminal Law Review* 461, at 469, note 39.

Yugoslavia and Rwanda Tribunals established planning as evidence of genocidal intent. They may include planning because of a conclusion explicit at the Nuremberg Trials and implicit in the Eichmann judgment about genocidal perpetrators. If, the International Military Tribunal for the Major War Criminals of the European Axis required a conspiracy or common plan for conviction of war crimes and crimes against humanity.[92] Similarly, from the District Court of Jerusalem's ruling, it was inferred that "an ordinary individual such as Eichmann had done the most extraordinary things because of his position within a murderous bureaucracy, rather than because of something about his personality."[93] The Eichmann trial rejected the Mad Nazi thesis; after examination, a psychiatrist reportedly said of the accused that he is "more normal, at any rate, than I am after having examined him."[94] Into this vacuum, the theory of the evil collective rushed, and so perhaps the Tribunals and the Court of Bosnia Herzegovina prefer evidence of collective commission, chiefly planned, systematic attacks.

Additionally to its previous articulations that "a pattern of purposeful action […] the methodical way of planning, the systematic manner of killing"[95] prove intent, Trial Chamber II of the Rwanda Tribunal held that "the consistent and methodical pattern of killing is further evidence of the specific intent."[96] A Trial Chamber of the Yugoslavia Tribunal, however, ruled that "that the alleged perpetrator must have committed his crimes as part of a wider plan to destroy the group as such."[97] Within seven months but across seven thousand kilometers, these expert interpretative bodies reversed the significance of genocidal planning: from possible evidence to a required element of genocidal intent. These holdings in *Jelisić* and

[92] Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics for the Prosecution of the Major War Criminals of the European Axis (1951) 82 *UNTS* 279.
[93] Cole, T. 'Adolf Eichmann', in *Selling the Holocaust: From Auschwitz to Schindler: How History is Bought, Packaged, and Sold* (2000), 70.
[94] H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963), 25.
[95] *Akayesu*, Trial Judgment, par. 61.
[96] *Kayishema and Ruzindana*, Trial Judgment, par. 535.
[97] *Jelisić*, Trial Judgment, par. 66.

later in *Krstić*, however, remain anomalous. One month after the *Jelisić* Appeals Chamber's rejection of the planning requirement,[98] *Krstić* Trial Chamber ruled that "the requirement in Article 5 that the [crimes against humanity] be part of a widespread or systematic attack against a civilian population is comprised within the genocide requirement that there be an intent to destroy a specified type of group."[99] Neither the Rwanda Tribunal judgments nor the subsequent Yugoslavia Tribunal judgments, however, affirm this holding. In fact, whereas the *Stakić* judgment ignores planning, the *Brđanin* trial judgment repeats the *Jelisić* appeal judgment's rejection.[100] After four years of conflicting jurisprudence, the *ad hoc* Tribunals confirmed planning as, not a element, rather evidence of genocidal intent.

As Kreß asserted in reference to the *Kunarac et al*. judgment, but which correctly applies to any of the Tribunals' contradictory statements on this issue,

> one can only note with the greatest measure of astonishment that such an extremely far-reaching judicial statement [that neither the Genocide Convention nor customary international law require planning] has not been supported by the most careful and complete legal reasoning in the text of the judgment itself but simply by a list of texts and cases put together in a footnote without any further explanation.[101]

Each judgment professes a rejection of genocidal planning, while relying on such planning to evidence genocidal intent. For instance, the *Brđanin* trial judgment found that "the authorities of Teslić elaborated a list of Bosnian Muslim and Bosnian Croat individuals that were to be targeted," or planned their destruction.[102] This factual finding of serious bodily or mental harm[103] also constituted evidence of a discriminatory campaign.[104]

The Tribunals' position reflects the literature, which, in turn, reflects history. Writing about the Nazi Holocaust, though referring to Carthage's destruction as well the Crusades, Lemkin required a genocidal plan. Perhaps because in history, governments implemented

[98] *Jelisić*, Appeal Judgment, par. 48.
[99] *Prosecutor v. Radislav Krstić*, Trial Judgment, Case No. IT-98-33-T, T.Ch.I., 2 August 2001, par. 682.
[100] *Brđanin*, Trial Judgment, par. 705, quoting *Jelisić*, Appeal Judgment, par. 48.
[101] Kreβ, 469, note 90.
[102] *Brđanin*, Trial Judgment, par. 889.
[103] Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), Art. 4(2)(b).
[104] *Brđanin*, Trial Judgment, par. 981-982.

these plans, scholars, namely, "Morris and Scharf note that 'it is virtually impossible for the crime of genocide to be committed without some or indirect involvement on the part of the State.'"[105] Reflecting on the drafters' exclusion of premeditation, Trial Chamber I of the Yugoslavia Tribunal seemed to clarify that a genocidal policy evidences state involvement not individual purpose. "It ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such."[106] Opposing authorship to execution, the Chamber declares that it could convict Goran Jelisić of genocide "therefore only as a perpetrator."[107] Although the Chamber allows a "lone genocidaire," it rejects that Jelisić, a man who presented himself to the Chamber as the Serbian Adolf and proclaimed the intention kill the Muslim of Brčko,[108] committed genocide. Confusingly, the Tribunal denies Jelisic's individual responsibility because his destructive acts were capricious and personally initiated,[109] in other words, evidenced a disturbed personality but not destructive planning. Again, the District Court of Jerusalem in Eichmann rejected the Mad Nazi thesis and the United Nations international criminal tribunals prefer the theory of the evil collectivity. Where both theories fail, the Tribunal acquits.

3.1.1 Multiple Perpetrators

Thus the Tribunals infer genocidal planning from authorities' involvement and their instigation of the general population. "Persons in positions of authority used hate speech and mobilized their subordinates, such as the gendarmes, the communal police, and the militias, who in turn assisted in the mobilization of the Hutu population to the massacre sites."[110]

[105] *Kayishema and Ruzindana*, Trial Judgment, par. 94.
[106] *Jelisić*, Trial Judgment, par. 100.
[107] *Ibid.,* par. 99.
[108] *Ibid.*, par. 102.
[109] *Ibid.*, par. 106.
[110] *Kayishema and Ruzindana*, Trial Judgment, par. 312.

Enumerating the authorities or organizations involved, as in this passage, the judgments emphasize genocide's state-sponsorship and systematization. In *Prosecutor v. Clement Kayishema and Obed Ruzindana*, the Rwanda Tribunal emphasized Kayishema's intentionality through his leadership. "At Bisesero, evidence proves that Kayishema was leading and directing the attacks […] Kayishema [brought the attackers] in the trucks belonging to the Prefecture."[111] Though referencing his discriminatory and encouraging statements, the Chamber relies on Kayishema's role in the pattern as evidence of intent. Leadership assumes knowledge. As the Rwanda Tribunal ruled, the military's "organized structure of reporting and monitoring systems has been cited as a factor that could facilitate the showing of actual knowledge."[112] Similarly, the Tribunal ruled in reference to knowledge within a hierarchical, military structure, that "lack of knowledge, therefore, can only be the result of criminal negligence."[113] Knowledge assumes consent, or at least the possibility to refuse to participate. Thus the Chamber's inference of intent is logical as far it assumes a plan which Kayishema could refuse.

Again, although "there is no requirement that this policy must be adopted formally as the policy of a state," the Chambers have defined systematic as "thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources."[114] Systematization, especially evidence of multiple, hierarchically organized perpetrators draws on the legal scholarship. Gil Gil, Greenwalt, Jones, Kress, and Vest adopt a two-tiered model of perpetration: those who organize or plan and those who commit. Thus these resources include, among the obvious finances and weapons, the general population who perpetrate the crimes at the incitement or instigation of these authorities.

[111] *Ibid.*, par. 536.
[112] *Blagojević and Jokić*, Trial Judgment, par. 792.
[113] *Prosecutor v. Alfred Musema*, Trial Judgment, Case No. ICTR-96-13, T.Ch.I., 27 January 2000, par. 142.
[114] *Akayesu*, Trial Judgment, par. 580.

"Military and civilian officials perpetuated ethnic tensions prior to 1994"[115] and "as a result of the diffusion of the anti-Tutsi propaganda, the killings 'started off like a little spark and then spread.'"[116]

3.2 Widespread

According to the Tribunals, the spreading, or more appropriately the widespread occurrence, of these attacks also evidences genocidal intent. According to the letter of the law, neither systematic nor widespread destruction are elements of genocide. These findings demonstrate the confusion of genocide's collective commission with the perpetrators' individual intent and the introduction of elements of crimes against humanity instead of findings of genocidal intent. At first glance, genocidal crimes require partial but presumably substantial destruction. On closer inspection, genocidal intent requires the intent for partial destruction. Alonzo-Maizlish almost underemphasizes, considering this observation's footnoted placement, that "the puzzle […] whether 'in whole or in part' modifies 'destroy' or 'group' […] is immense."[117] Despite the presumption that genocide requires large numbers of victims, the Convention does not establish a "qualitative criterion."[118] The former interpretation—intent for entire destruction, though partial achievement—could change every historical episode of genocide to attempted genocide. Since the Convention's entry into force and through its enumerated acts, no group has been wholly destroyed. Alonzo-Maizlish explains, "if intent exists only when an accused intends to destroy the whole group, then factual limits on the ability of a perpetrator to succeed at genocide—such as a geographic or territorial limitation—could *a fortiori* defeat the intent element itself."[119]

Scholars and the Tribunals, however, agree on the latter interpretation. The accused must neither achieve nor even intend "the complete annihilation of a group from every corner

[115] *Kayishema and Ruzindana*, Trial Judgment, par. 279.
[116] *Ibid*., par. 282.
[117] Alonzo-Maizlish, 1385, note 76.
[118] *Ibid*., 1380.
[119] *Ibid.*, 1385, note 76.

of the globe."[120] According to the *travaux préparatoires* of the Rome Statute, "there is a minimal quantity threshold of at least one victim."[121] In addition to being minimal, this threshold is reasonable. A qualitative criterion would undermine the Convention's object and purpose of protecting the right of group existence. Instead judicial interpretation requires that the accused destroy one member of a group because of that individual's real or perceived membership in that collective with the intent to destroy at least a substantial part of the group. Unfortunately, large numbers or widespread attacks evidence intent more obviously.

The Tribunals have significantly developed the 'substantial' criterion, which an early commentator on the Convention, Nehemiah Robinson, introduced. "The intent to destroy a multitude of persons of the same group must be classified as genocide even if these persons constitute only a part of a group either within a country or within a region or within a single community, provided the number is substantial."[122] Robinson expressed this interpretation before a United States Senate Foreign Relations Sub-Committee. In the 1950s, the United States Congress proposed an 'understanding,' and in the 1970s, the Carter and Nixon presidencies considered implementing legislation along similar lines: *dolus specialis* referring to a substantial part.[123] In the words of the American Bar Association, substantiality avoids prosecution for "driving five Chinamen out of town." Likely having read the Sub-Committee's hearing records, George Fletcher draws on this example. He rejects genocide's "counterintuitive" extension to the imagined crime in which a Sinophobe murders two Chinese people. In his interpretation, genocide epitomizes "collective conflict,"[124] or in the Tribunals' interpretation, planned attacks on vulnerable populations. International humanitarian law proscribes this violence as crimes against humanity and war crimes and requires only an intention for partial destruction of a protected group for genocide.

[120] Drost, 89, quoted in *Semanza*, Trial Judgment, par. 316.
[121] Arnold, 137.
[122] LeBlanc, 371.
[123] LeBlanc, 370 & 376.
[124] Fletcher, 1524.

3.2.1 Geography

To reach a finding of substantial destruction, the Tribunals and the Court of Bosnia Herzegovina endorsed the geographic criteria advanced by independent experts. In light of the interpretations of Robinson, the Commission of Experts, and the International Law Commission, the Trial Chamber in *Prosecutor v. Goran Jelisić* ruled that "international custom admits the characterisation of genocide even when the exterminatory intent only extends to a limited geographic zone."[125] Thus the Tribunals include a geographic element in genocidal intent. Geography is an essential, if less acknowledged, element of genocide. Tim Cole, expert in the developing field of Holocaust geography, poetically writes, these tragedies, which "we are accustomed to think of […] as having no landscape—or at best of emptied of features and color, shrouded in night and fog, blanketed by perpetual winter, collapsed into shades of dun and gray," were executed by "fully qualified architects."[126]

I repeat Cole's phrase aware of structuralist Akio Kimura's critique: the common synonyms for genocide perpetrators, 'authors' and 'architects,' imply intentionality.[127] The *sine non qua* of genocidaires is their intent to destroy. If not planned in the Tribunals' sense, then genocides are at least plotted on the map of collective memory—Srebrenica being synonymous for the worst European massacre since World War II. As well, they are attempts to permanently alter the ethnic and political maps. Geography is a perfectly reasonable tool to conceptualize a psychological state because of the perpetrators' expression of their motivations as mythologized associations with land. Propaganda about "Greater Serbia" or the Niltoic Tutsi evidences this fact.

The ICTY consults geographic scope to define genocide's substantiality. I will discuss "substantiality" or partial destruction shortly, but for this discussion, it suffices to remember that genocidal intent is the "intent to destroy, in whole or *in part*." According to

[125] *Jelisić*, Trial Judgment, par. 83.
[126] T. Cole, *Holocaust City: The Making of a Jewish Ghetto* (2003), 2.
[127] Kimura, 405.

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the Appeal Chamber in *Prosecutor v. Radislav Krstić*, "the area of the perpetrators' activity and control as well as the possible extent of their reach"[128] facilitate that determination. The *ad hoc* Tribunals and the permanent International Court of Justice balance the perpetrators' intent against their control.[129] Thus, the *Blagojević and Jokić* trial judgment found the geographically limited Bosnian Muslims of Srebrenica constituted "a substantial part of the Bosnian Muslim group."[130] In *Prosecutor v. Momčilo Krajisnik*, the Yugoslav Tribunal elaborated that "approximately 40,000 Bosnian Muslims of Srebrenica […met] the substantiality requirement."[131] Therefore the Convention's interpretations specify the measurements of partiality, and the Tribunals' jurisprudence does not require but recommends geography as a measurement.

In other words, geography serves a limiting function before the Yugoslavia Tribunal. The Rwanda Tribunal, however, insists on widespread attacks. Thus *Kayishema and Ruzindana* specifies that Tutsi killed in Kibuye prefecture, specifically at the Catholic Church and Home Saint Jean Complex, came from the hills of Bishunda, Burunga, Gitesi, Karongi, and Kavi.[132] The judgment pinpoints the location of their death as well as the place of their origin. Widespread ethnically-targeted violence could serve as evidence of the intent to destroy "in whole." In fact, the earlier *Akayesu* judgment substitutes 'entire' for widespread destruction. "Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the commune of Taba, but also throughout Rwanda, the Chamber is also able to infer, beyond reasonable doubt, the genocidal intent of the accused."[133] Unlike the Trial Chambers of the Yugoslavia Tribunal that evaluate intent in a

[128] *Krstić*, Appeal Judgment, par. 12-14, quoted in *Brđanin*, Trial Judgment, par. 702.
[129] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice, Judgment of 26 February 2007, [2007] ICJ Rep. 43, par. 199.
[130] *Blagojević and Jokić*, Trial Judgment, par. 673.
[131] *Prosecutor v. Momčilo Krajisnik*, Trial Judgment, Case No. IT-00-39-T, T.Ch.I., 27 September 2006, par. 833.
[132] *Kayishema and Ruzindana*, Trial Judgment, par. 302.
[133] *Akayesu*, Trial Judgment, par. 730.

limited geography, those of the Rwanda Tribunal prove genocidal intent by the commission of a material offense against a violent backdrop. As well, the linguistic substitution of genocide's terminology for that of crimes against humanity demonstrates the reliance on one category of crimes to prove another.

3.2.2 Substantial

Correlated to 'widespread' is 'substantial.' The Chambers find partial destruction not only in "the scale of atrocities, their general nature, in a region or a county"[134] but also in "the number of group members affected,"[135] and those members' standing within the group. The latter sources correspond with scholarly interpretations, namely those of the Commission of Experts, the ILC, and Nehemiah Robinson. In the Tribunals' words, substantial intention

> may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.[136]

A qualitative substantiality evinces a contextual understanding of annihilation. Though imposing a strict threshold of intent, the Genocide Convention allows for such nuance. For instance, the crime may be committed by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. [137] More significantly, contextual interpretations demonstrate the Tribunals return to the text of the Convention and rejection, if momentarily, crimes against humanity's jurisdictional elements.

Genocide, according to some scholars, is an efficient solution. Acknowledging intentionality, Dartmouth College Associate Professor Benjamin Valentino argues that "mass killing should be recognized as a goal-oriented policy calculated to achieve leaders' most

[134] *Akayesu*, Trial Judgment, par. 523.
[135] *Kayishema and Ruzindana*, Trial Judgment, par. 93.
[136] *Jelisić*, Trial Judgment, par. 82.
[137] Genocide Convention, Art. II(c).

important political and military objectives with respect to other groups."[138] Schabas extends the argument: genocide is the "last resort of the frustrated 'ethnic cleanser.'"[139] In the execution of this 'strategy,' qualitatively substantial destruction is more logical and less expensive than quantitatively substantial extermination. The judicial record of "mass killing in the twentieth century"[140] supports genocide's efficient implementation as qualitatively substantial destruction. The jurisprudence of the Rwanda Tribunal proves that "the members of the Interahamwe and other armed militant Hutu began a campaign of persecution against the Tutsis based on the victims' education and social prominence."[141] Similarly, the *Brđanin* Trial Chamber found that prominent Bosnian Muslim civilians, including religious and professional leaders, suffered especially harsh and humiliating treatment.[142] In other words, genocidaires target groups *qua* groups and target individuals for their standing within those collectives. Including this contextual explanation of genocidal intent, the Tribunals understand that genocide may not be only systematic, but also selective.

Qualitative substantiality does not privilege the rich and powerful, but recognizes individuals' significance for group survival. Whereas the infamous "Kasztner train" rescued 1,700 wealthy Hungarian Jews,[143] the Tribunals jurisprudence protects community leaders for "the impact that their disappearance would have upon the survival of the group as such."[144] Thus the targeting of numerically and relatively few Bosnian Muslim policemen, physicians, and religious leaders as found in *Brđanin* constituted genocide. Without medicals doctors and religious leaders, the community is vulnerable to physical and psychological harm. For instance, the police defend the community against external threats. This survival standard for

[138] B. Valentino, 'Final Solutions: The Causes of Mass Killing and Genocide', (2000) 9 *Security Studies* 1, at 29.
[139] *Brđanin*, Trial Judgment, par. 982, quoted Schabas, 201.
[140] Valentino, 29.
[141] *Kayishema and Ruzindana*, Trial Judgment, par. 293.
[142] *Brđanin*, Trial Judgment, par. 813, 843, 851, 863-4, 870, 880-1, & 893.
[143] 'Kasztner, Rudolf (Israel) (1906-1957)', in W. Laquer and J.T. Baumel (eds.), *The Holocaust Encyclopedia* (2001).
[144] *Jelisić*, Trial Judgment, par. 82.

qualitative substantiality applies to the crime's mental element, and so it is a persuasive interpretation of partial destruction because it agrees with the crime's physical element. For instance, the Tribunals have elaborated "causing serious bodily or mental harm" as that which "results in a grave and long-term disadvantage to a person's ability to live a normal and constructive life."[145] tThe *Akayesu* trial judgment also found that sexual violence, though not in and of itself a genocidal act, committed with *dolus specialis*, constituted destruction because it furthered "the process of the destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself."[146] Similarly, the *Krstić* appeal judgment elaborated on the genocidal repercussions of ethnic cleansing: "the transfer completed the removal of all Bosnian Muslims from Srebrenica, thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself."[147] This interpretation of "in part" thus recognizes genocide's potential longer-term effects and genocidaire's potential efficiency considerations.

Numerically limited but substantially partial destruction may prove strategic for reasons other than efficiency. The *Krstić* appeal judgment and the *Trbić* first instance judgment mention Serbrenica's strategic and symbolic importance. "Srebrenica (and the surrounding Central Podrinje region) were of immense strategic importance to the Bosnian Serb leadership […] In addition, Srebrenica was important due to its prominence in the eyes of both the Bosnian Muslims and the international community."[148] In terms of qualitatively substantial destruction, the Yugoslavia Tribunal and the Court of Bosnia Herzegovina consider essential survival and emblematic representation.[149] Just as survival considerations harmonize the material offenses and mental element case law, the symbolic factors

[145] *Blagojević and Jokić*, Trial Judgment, par. 645.
[146] *Akayesu*, Trial Judgment, par. 732.
[147] *Krstić*, Appeal Judgment, par. 31.
[148] *Krstić*, Appeal Judgment, pars. 15 & 16. See also *Prosecutor's Office of Bosnia Herzegovina v. Milorad Trbić*, First Instance Verdict, Case No. X-KR-07/386, 16 October 2009, pars. 784-5.
[149] *Krstić*, Appeal Judgment, par. 12.

complement jurisprudence on genocide's protected groups, namely their subjective identification.

Occasionally, similar contextual interpretations appear in the Tribunals' description of quantitative substantiality. A Trial Chamber of the Rwanda Tribunal noted that "Bisesero Hill was strewn with dead bodies 'like small insects which had been killed off by insecticide.'"[150] With the poetic horror that typifies genocide studies literature, this description captures the destruction perhaps better than the Tribunals' preference for statistics. For instance, the *Kayishema and Ruzindana* judgment reported "the number of the victims of the genocide at approximately 800,000 to one million, nearly one-seventh of Rwanda's total population."[151]

The Tribunals' occasional overemphasis of quantitative substantiality lacks imagination and misinterprets genocide. The *Krstić* Appeal Chamber and the *Brđanin* Trial Chamber, repeating, misinterpreted the crime along these lines. Opposed to almost every scholar who agrees on genocidal intent as the distinguishing characteristic, those two judgments argued that "genocide's defining character [i]s a crime of massive proportions."[152] Given the enormity of the Holocaust's historical example, genocide's large scale is logically presumed. Quantitative substantiality may also be compulsory, however, because the *ad hoc* Tribunals and the permanent International Criminal Court investigate and prosecute cases of a threshold severity.

Yet, neither poetic descriptions nor statistics of destruction prove *dolus specialis*. As the *Mitrović* trial judgment and the subsequent judgments before the War Crimes Section of the Court of Bosnia Herzegovina affirm

> for the purposes of determining intent, it is not critical that the exact number of Bosniaks killed by the Accused be precisely calculated. What is important is that the Accused participated in killing a great many people in the warehouse that day. What

[150] *Kayishema and Ruzindana*, Trial Judgment, par. 529.
[151] *Kayishema and Ruzindana*, Trial Judgment, par. 291.
[152] *Krstić*, Appeal Judgment, par. 8 & *Brđanin*, Trial Judgment, par. 701.

> is even more important is that the Accused, as other members of the Detachment who participated in the killings, made it clear by their actions that their intent was that *all* the Bosniaks in the warehouse be killed, no matter now large the number.[153]

While the *actus reus* must affect one or more members of an ethnical, national, racial, or religious group, the *mens rea* does not requires actual destruction: "the crime of genocide is completed as soon as prohibited acts are committed against group members with the requisite intent aimed at the group, whether or not those acts actually resulted in the group's destruction."[154] Or as the International Criminal Court interpreted the Tribunals' expressed though generally unobserved case law, "it is irrelevant whether the conduct in question is capable of posing any concrete threat to the existence of the targeted group, or a part thereof."[155] Combining these extremes and capturing intent, some judgments refer to the accused's statements. For instance, the *Gacumbitsi* judgment cites the Accused's instructions to prevent escape: "he also asked boatmen to remove their canoes from the river to prevent the Tutsi from using them to cross the river."[156] This statement as opposed to the numbers actually killed or the description of the aftermath thus demonstrate, as opposed to allow the inference of, the accused's intent.

In this vein, the *Ndindabahizi* judgment held that one murder committed with the requisite intent constituted genocide.[157] This holding is reminiscent of the Israeli Prosecutor Gideon Hausner's attempts to prove that Adolf Eichmann, a cog in the machine, had bloods on his hands as well. Hausner tried to establish that the direct perpetration of the Transportation Administrator of the "Final Solution to the Jewish Question" not because he sent millions to their death but because he killed a boy in cold blood.[158] The Tribunals repeat

[153] *Mitrović*, First Instance Verdict, p. 109. See also *Prosecutor's Office of Bosnia Herzegovina v. Milos Stupar et al.*, First Instance Verdict, Case No. X-KR-05/24, 9 September 2009, p. 118.
[154] Nersessian, 'Comparative Approaches to Punishing Hate', 246.
[155] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, P.T.Ch.I., 4 March 2009, par. 119.
[156] *Prosecutor v. Sylvestre Gacumbitsi*, Trial Judgment, Case No. ICTR-01-64-T, T.Ch.III., 17 June 2004, par. 276.
[157] *Ibid.*, par. 471.
[158] T. Cole, 'Adolf Eichmann', 69.

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this exercise, abandoning statistics to focus on individual victims.

CHAPTER FOUR: "CIVILIAN POPULATION"

The 1948 Convention specifies genocide's victims belong to a national, ethnical, racial, or religious group and are face destruction because of that group membership. In 1960 Robinson explained the group element of *dolus specialis* as "a specific motive for the act, derived from the peculiar characteristics of the group."[159]

4.1 National, Ethnical, Racial, or Religious

In early judgments, the Chambers struggled as to whether the Convention protected the victims. In other words, the first judges debated whether Bosnian Muslims, Bosnian Croats, and Tutsi constituted ethnic, national, racial, or religious groups. According to *Akayesu*, members of national groups "are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties;" members of ethnic groups "share a common language or culture;" members of racial groups have "hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors;" and religious groups "share the same religion, denomination or mode of worship."[160] This seriatim approach, as Diane Marie Amman terms this early, abortive effort, failed to explain the differences among Rwandans; Hutu and Tutsi shared nationality and race, and they largely spoke the same language and practiced the same religion. To ensure the Convention's application to this obvious genocide, the Chamber referred to the *travaux préparatoires*. Another, though equally specious, interpretation defined protected groups as "'stable' […] constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups, which one joins through individual voluntary commitment."[161] Yet, the *travaux* infrequently mention group stability and

[159] Robinson, 60.
[160] *Akayesu*, Trial Judgment, par. 512-515.
[161] *Ibid.*, par. 511.

permanence as grounds for protection, and the United Nations had previously confirmed the human right to change nationality and religion.[162] Despite its flawed legal analysis, the Rwanda Tribunal's stable and permanent interpretation survived, albeit in modified form, in that Tribunal's jurisprudence and foreshadowed the Yugoslavia Tribunal's alternative theories of group identification.

The *Jelisić* trial judgment replaced these "positive" identifications with a "negative approach." The previous definitions of protected groups were "positive" in that they distinguished the victim and the perpetrator according to "positive" criteria.[163] On the other hand, the *Jelisić* Chamber, inspired by the Commission of Experts' report, "identif[ied] individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics."[164] Addressing neither antecedent—*Akayesu*'s "stable and permanent" standard and *Jelisić*'s negative identification—the *Kristić* trial judgment explicitly rejected the seriatim approach in favor of an ensemble one. Trial Chamber I interpreted the four protected groups as synonymous with national minorities.[165] The ensemble approach "did not explicate, either in its statement of law or its application of that law to the facts, the mechanics of interpreting separate words as a whole. All the judgements seemed to want a firmer teleological grounding, a *raison d'agir*, a reason to choose and apply a particular method of determining whether a defendant possesses the requisite group mentality."[166]

Resolving this confusion, the *Rutaganda* and *Jelisić* trial judgments introduced subjective identification. "The victim is perceived by the perpetrator of genocide as

[162] Schabas, 133.
[163] *Stakić*, Trial Judgment, par. 512. See also *Jelisić*, Trial Judgment, par. 71.
[164] *Jelisić*, Trial Judgment, par. 71.
[165] D.M. Amman, 'Group Mentality, Expressivism, and Genocide', (2002) 2 *International Criminal Law Review* 93, at 112.
[166] Amman, 113.

belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group."[167] Although *Rutaganda* still discussed the objective criteria of stability and permanence, the Chamber allowed case-by-case assessment from objective and subjective perspectives. Similarly, *Jelisić* prioritized negative identification but referred to the perpetrator's stigmatization.[168] The Yugoslavia Tribunal increasingly relied on these interpretations. In a dissenting opinion that became a persuasive interpretation, Judge Mohamed Shahabuddeen defined a group. "A group is constituted by characteristics—often intangible—binding together a collection of people as a social unit."[169] The *Blagojević and Jokić* trial judgment, continued: "a group is composed of its individuals, but also of its history, traditions, the relations between its members, the relationship with other groups, the relationship with the land."[170] These definitions facilitated the *Stakić* Appeal Chamber's rejection of the negative group identification and reliance on multifaceted definitions of protected groups. To this end *Stakić* drew inspiration from Lemkin, quoting that genocide would cause "disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups."[171]

While reconciling on a combination objective-subjective identification of protected groups, the Tribunals, and so especially the Court of Bosnia Herzegovina, essentially rely on previous findings. For instance, even in the early *Ntakirutimana* judgment, the Trial Chamber held that "it is not disputed that in Rwanda in 1994, the Tutsi were perceived as members of an ethnic group."[172] From the Convention's literal text, the Chamber's next task would be an assessment of the perpetrator's intent to destroy the group *as such*.

[167] *Prosecutor v. George Rutaganda*, Trial Judgment, Case No. ICTR-96-3-T, T.Ch.I., 6 December 1999, par. 55.
[168] *Jelisić*, Trial Judgment, par. 70.
[169] *Krstić*, Appeal Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, par. 50.
[170] *Blagojević and Jokić*, Trial Judgment, par 666.
[171] *Stakić*, Trial Judgment, par. 21, quoting R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (2005), 79.
[172] *Prosecutor v. Elizaphan and Gérard Ntakirutimana,* Trial Judgment, Case No. ICTR-96-17-T, T.Ch.I., 21 February 2003, par. 780.

4.2 Group As Such

According to the Convention, the perpetrator intends to destroy, in whole or in part, an ethnical, national, racial or religious group, as such. According to the Appeal Chamber, "the words 'as such,' which conclude the statement of intent […] mean that one of the proscribed acts was committed against a victim *because* of his or her membership in the protected group, but not necessarily *solely* because of that membership."[173] In fact, the *Ntakirumtimana* appeal dismisses as "immaterial" targeting on solely group membership grounds or for other reasons.[174] Thus the Appeal Chamber separates not only criminal motive but also discriminatory intent from *dolus specialis*. "Evidence demonstrating ethnic bias, however reprehensible, does not necessarily prove genocidal intent."[175] Yet, the Prosecutor establishes the accused's discriminatory intent so that the Chamber finds that the accused committed a genocidal act against a victim because of the victim's identity.

As credible evidence of discriminatory intent, the *Akayesu* and *Kayishema and Ruzindana* judgments established "the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group;"[176] "the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups;"[177] and "the physical targeting of the group or their property, the use of derogatory language toward members of the targeted group."[178] The *Brđanin* Chamber emphasizes that the Bosnian Serb military occupation of Kotor Varoš municipality and their detention of Bosnian Muslims and Bosnian Croats began on "the first day of Bajram."[179] The coincidence of this operation and mistreatment with an Islamic religious holiday demonstrates discriminatory intent, but as the

[173] *Krajišnik*, Trial Judgment, par. 856.
[174] *Ntakirutimana*, Appeal Judgment, par. 304.
[175] *Stakić*, Appeal Judgment, par. 52.
[176] *Karadzic and Mladić*, Decision of Trial Chamber I, par. 94-5.
[177] *Akayesu*, Trial Judgment, par. 523.
[178] *Kayishema and Ruzindana*, par. 93.
[179] *Brđanin*, Trial Judgment, Par. 816.

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Stakić Appeal Chamber expressed, not necessarily destructive intent and certainly not individual responsibility. Such findings, nevertheless, correspond to the object and purpose of the Convention: to protect the rights of groups to exist.

Occasionally, instead of identity-based discriminatory intent, the Chambers stress individual victims, thus undermining the "group as such" requirement. For instance, the Karera judgment identifies that three communal policemen and Interahamwe militiamen under Karera's *de facto* control killed four Tutsi: Kabahaye, Murekezi, Ndingutse, and Palatin Nyagatara.[180] Unlike the Tribunal-imposed jurisdictional elements of crimes against humanity, which emphasize the difficulty of establishing genocidal intent, the focus on individuals demonstrates another frustration with genocide. Including these individuals puts "blood, not just ink"[181] on the hands of otherwise high- and mid-level architects.

As Gideon Hausner, the Israeli Attorney-General and therefore the prosecutor in the state's case against Adolf Eichmann, introduced a single murderous episode, "we did not make it the subject of a specific charge—it would not do to single out this one Jewish boy from the six million victims—but the incident was certainly indicative of Eichmann's attitude and so we introduced evidence on it."[182] The *ad hoc* Tribunals likely follow this logic. Judge Shahabuddeen confirmed this practice in his separate opinion; "if the indictment does refer to [individual victims], it is only by way of illustration of the crimes."[183] Similarly, the *Akayesu* judgment introduced evidence that the accused, two Interahamwe militiamen, and one communal policeman beat a 69-year old Hutu woman. The Chamber painstakingly details the woman's torment but concludes "although the above acts constitute serious bodily and mental harm inflicted on the victim, the Chamber notes that they were committed against a Hutu woman. Consequently, they cannot constitute acts of genocide against the Tutsi

[180] *Prosecutor v. François Karera*, Trial Judgment, Case No, ICTR-01-74-T, T.Ch.I., 7 December 2007, par. 535.
[181] Cole, 69.
[182] *Ibid.*
[183] *Gacumbitsi*, Appeal Judgment, Separate Opinion of Judge Shahabuddeen, par. 8.

group."[184] Like Hausner, the Prosecutor of the Rwanda Tribunal introduced evidence not of a separate offense or a constituent act but as corroboration of the accused's cruelty.

On the other hand, the *Brđanin* Trial Chamber specified that "Dr. Muahmuljin was beaten with special virulence."[185] "Enver Burnic, a Bosnian Muslim former policeman, was taken outside on St. Vitus' day (28 June) […] he was told at the time that a bullet was too costly a way for him to die."[186] These acts reveal not only the accused's viciousness but, more significantly, his intent to destroy a protected group. This evidence combines discriminatory intent—the acts occurred on a day celebrated within the Serbian community—and destructive acts—they targeted individuals influential within the Bosnian Muslim community. Some cases illustrate specific group victimization, such as the *Ndindabahizi* judgment. Combining the sources from which the Tribunals propose the inference of genocidal intent, *Ndindabahizi* held "many thousands were killed that day because they were Tutsi. The events at Gitaw Hill formed part of a wider context of ethnically motivated massacres of Tutsi throughout Rwanda, including Kiguye Prefecture."[187]

Unfortunately, the Tribunals rarely follow the examples of *Brđanin* and *Ndindabahizi*. Just as they added a "widespread or systematic" definitional element to genocidal intent, they instead have imposed a vulnerability condition on the crime's victims.

4.3 Vulnerable

The *actus reus* allows elaboration of the suffering that the victims endured. For instance, the Tribunals have held that "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include subjecting a group of people to a subsistence diet, systematic expulsion from their homes and deprivation of essential

[184] *Akayesu*, Trial Judgment, par. 721.
[185] *Brđanin,* Trial Judgment, par. 863.
[186] *Ibid.,* par. 881
[187] *Prosecutor v. Emmanuel Ndindabahizi*, Trial Judgment, Case No. ICTR-01-71-T, T.Ch.I., 15 July 2004, par. 460.

medical supplies below a minimum vital standard."[188] This interpretation strays neither from the ordinary meaning nor the object and purpose of the Genocide Convention and, in fact, reflects the historical realities of genocide. As the *Musema* trial judgment implies, however, disease, forcible transfer, and starvation inflicted on civilians and refugees, including women, children, and the elderly would not amount to genocide.

The Genocide Convention requires that the perpetrator commit the enumerated acts against a national, ethnical, racial, or religious group with the intent to destroy. Crimes against humanity require an attack on a civilian population, and war crimes, specifically Grave Breaches of the Geneva Conventions of 1949 and violations Article 3 common to the Geneva Conventions and Additional Protocol II of 1977, also protect civilians as well as prisoners of war.[189] According to the principle of effective interpretation[190] and the *Akayesu* trial judgment, "offences under the Statute […] have different elements and, moreover, are intended to protect different interests."[191]

Yet, that judgment and others specify that the accused targeted civilians, refugees, women, children, and the elderly. "The majority of the Tutsi victims were non-combatants, including thousands of women and children, even foetuses."[192] The Genocide Convention protects men and women, adults and children equally because neither the *actus rea* nor the *mens rea* impose sex or age qualifications on the protected groups. Rather the Convention's punishment of "measures intended to prevent births"[193] could include the killing of one sex, and its substantiality requirement could include the murder of only children. The *Kayishema and Ruzindana* judgment emphasized not only the victims' non-combatant and thus protected

[188] *Musema*, Trial Judgment, par. 157.
[189] Statute of the International Criminal Tribunal for Rwanda, Arts. 3 & 4. Statute of the International Criminal Tribunal for the former Yugoslavia, Arts. 3-5.
[190] *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 9 April 1949, [1949] ICJ Reports 1, p. 24.
[191] *Akayesu*, Trial Judgment, par. 469.
[192] *Ibid*., par. 128.
[193] Genocide Convention, Art. II(d).

status under the Geneva Conventions but also their vulnerability and virtuousness, contrasting their innocence with the accused's moral and legal guilt. "Kayishema not only knew, and failed to prevent, those under his control from slaughtering thousands of innocent civilians; but he orchestrated and invariably led these bloody massacres."[194] Neither the moral guilt nor legal responsibility of Kayishema's victims would excuse genocide because of the irrelevance of the motive in the crime of genocide.[195] If read as synonymous with civilians, innocence loses any independent meaning, contradicting the principle of effective interpretation and fails to correct the Chamber's already moot argument because, again, the Convention protects both civilians and combatants.

Besides inappropriately characterizing the victims as civilians, the judgments erroneously dub them refugees. The 1951 Convention Relating to the Status of Refugees defines refugee, among other criteria, as someone who is "outside the country of his nationality."[196] Since the persecuted Rwandan Tutsi remained inside the country of their nationality or did "not cross an internationally recognized State border,"[197] they constituted internally displaced people. In eight of ten sub-paragraphs, the *Ntakirutimana* judgment used the term to describe the accused Gérard Ntakirutimana's genocidal acts in the Bisesero region.[198] For instance, "on or about 18 April 1994, Gérard Ntakirutimana was with Interahamwe at Murambi Hill pursuing and attacking Tutsi refugees."[199] That an international court would apply international law without regard to basic definitional categories implies a significance to "refugee." Perhaps, refugee expresses greater vulnerability.

Similarly, that court emphasizes vulnerability through descriptions of the victims'

[194] *Kayishema and Ruzindana*, Trial Judgment, par. 516.
[195] *Trbić*, First Instance Verdict, par. 795.
[196] 1951 Convention Relating to the Status of Refugees, (1951) 189 *UNTS* 137, Art. 1A(2).
[197] F. Deng, Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2 (1994).
[198] *Ntakirutimana,* Trial Judgment, par. 832(i)-(x).
[199] *Ibid*., par. 832(i).

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ultimately pointless search for refuge. The *Kayishema and Ruzindana* judgment establishes that "since the 1959 revolutions, whenever people felt insecure, they would go to the churches, parishes and would be protected and be 'respected in these places,'"[200] and "because the Tutsis were targets in their homes, they began to flee and seek refugee in traditional safety."[201] Unfortunately, the churches were only "perceived safe havens."[202] Catholic priest Athanase Seromba caused bodily and mental harm of a genocidal gravity because he refused to celebrate Mass for the Tutsi, prohibited their gathering food at the parish's banana plantation, and expelled these "very vulnerable […] Tutsi who sought refuge in Nyange church."[203] Thus Seromba perverted the church; no longer did it offer its traditional safety. Under this particularly subjective material offense—causing serious bodily or mental harm—the Tutsi's pre-existing vulnerability and the fact that a religious leader caused this harm in a house of worship may have contributed to the ultimate harm the victims endured. As the Chamber explains, these facts do not demonstrate genocidal intent; the Rwanda Tribunal convicted Seromba of aiding and abetting genocide, which requires only knowledge of the principle perpetrator's *dolus specialis*.[204]

In addition to the nature of the victims, the Tribunals emphasize the nature of the attack. Citing the *travaux préparatoires*, *Akayesu* held that "in the absence of [genocidal intent], whatever the degree to atrocity of an act and however similar it might be to the acts described in the convention, that act could still not be called genocide."[205] The Tribunals' jurisprudence, however, permit inference from "the massive scale of [acts'] destructive effect and from their specific nature, which aims at undermining what is considered to be the

[200] *Kayishema and Ruzindana*, Trial Judgment, par. 305.
[201] *Ibid.*, par. 302.
[202] *Ibid.*, par. 312.
[203] *Prosecutor v. Athanase Seromba*, Trial Judgment, Case No. ICTR-01-66-T, T.Ch.I., 13 December 2006, par. 326.
[204] *Ibid.*, par. 322, 329-331.
[205] *Akayesu*, Trial Judgment, par. 519.

foundation of the group[;][206] the scale of atrocities, their general nature, in a region or a county[; and][207] the weapons employed and the extent of bodily injury.[208] In other words, an individual attack does not constitute genocide but may evidence intent.

In this category of findings, *Musema* specified that "the assailants used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis."[209] Within thirty paragraphs of the trial judgment, the *Bagambiki* Chamber repeated that "soldiers also drove a nail into the foot of a detainee, removed the nail, and drove it into the foot of another detainee."[210] From these facts, the Tribunal may infer, but does not establish, *dolus specialis*. While the Convention's *travaux* and the Tribunals' jurisprudence require that this intent to destroy be biologically or physically, Judge Shahabuddeen's dissenting but persuasive opinion allows non-exterminatory acts. "From their nature, the listed (or initial) acts must indeed take a physical or biological form, but the accompanying intent, by those acts, to destroy the group in whole or in part need not always lead to a destruction of the same character."[211]

In addition to *Musema* and *Bagambiki*'s findings of physical suffering, the Tribunals emphasized victim vulnerability through longer-term discrimination. The *Kayishema and Ruzindana* Chamber observed that "perpetrators set fire to [Tutsi's] houses and looted and killed their herds of cattle."[212] *Stakić* found that "Bosnian Muslims were discriminated against in employment, e.g., by arbitrary dismissals, their houses were marked for destruction, and in many cases were destroyed along with mosques and Catholic

[206] *Karadzic and Mladić*, Decision of Trial Chamber I, par. 94-5.
[207] *Akayesu*, Trial Judgment par. 523.
[208] *Kayishema and Ruzindana*, Trial Judgment, par. 93.
[209] *Musema*, Trial Judgment, par. 907.
[210] *Prosecutor v. Emmanuel Bagambiki, et al.*, Trial Judgment, Case No. ICTR-99-46-T, T.Ch.III., 25 February 2004, par. 656 & 686.
[211] *Krstić*, Appeal Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, par. 48.
[212] *Ibid.,* par. 293.

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churches."[213] The judgments of the Court of Bosnia Herzegovina repeat

> The fact that 15,000 men, most of whom were unarmed, were willing to attempt an escape on foot through enemy territory and mine fields and uncompromising terrains for over 60 kilometers attest to a deeply held belief, which turned out to be true: they would be killed if they surrendered or remained in Srebrenica, or went with their wives and families to Potočari.[214]

Not a "Conventionally" prohibited act, this destruction affected the property and not the members of a group. Yet, the Chambers referenced these targeted attacks to prove at least the accused's discriminatory intent and the attacks' destructive nature. The inclusion of the attacks reflects Lemkin's broad and contextual understanding of genocide's objective—"disintegration of the political and social institutions, of culture, language, national feelings, religion, and the *economic existence* of national groups."[215]

[213] *Stakić*, Trial Judgment. par. 544.
[214] *Mitrović*, Trial Judgment, pg. 99.
[215] Lemkin, 79 [emphasis added].

CHAPTER FIVE: "WITH THE INTENT TO DESTROY"

Again, the Tribunals allow inferences from "certain presumptions of fact" because of the difficulty of proving genocidal intent absent a confession from the accused. The "intent to commit a crime, even genocide, may not always be difficult or impossible to discern from the circumstances of the crime."[216] While I acknowledge the challenge, I disagree with the excuse and the Chambers' reliance on the context of the crime as opposed to the person of the accused. The International Criminal Tribunals for the former Yugoslavia and Rwanda and the War Crimes Section of the Court of Bosnia Herzegovina rely on the jurisdictional elements of crimes against humanity to establish genocide's commission and thereby reduce the special status of the crime.

5.1 *Dolus Specialis* in the Jurisprudence

As discussed in the preceding chapters, the planned and systematic nature of attacks involving many numbers of perpetrators and injuring many numbers of civilians or otherwise vulnerable individuals, "lead the Chamber to the irresistible conclusion that the massacres, in which the accused participated were intended to destroy the Tutsi group,"[217] in the case of Mikaeli Muhimana specifically but in most judgments more generally. And from participation, the Chambers deduce intention; the Tribunals and the Court of Bosnia Herzegovina impose the chapeau elements of crimes against humanity to infer genocidal intent. Although the Convention purposely excluded and the Chambers explicitly rejected a requirement of a genocidal plan, the courts included planning as evidence. This hedging facilitates the Chambers' ultimate reliance on systematic perpetration, especially given the emphasis on the number of perpetrators. Thus the Yugoslavia and Rwanda Tribunals prefer

[216] *Prosecutor v. Jean de Dieu Kamuhanda*, Trial Judgment, Case No. ICTR- 99-54A-T, T.Ch.II., 22 January 2003, par. 624.
[217] *Prosecutor v. Mikaeli Muhimana*, Trial Judgment, Case No. ICTR-95-1B, T.Ch.III., 28 February 2005, par. 516.

theories of the evil collective as opposed to ideologically motivated or psychologically disturbed genocidaires. Besides system criminality, the Tribunals insist on widespread attacks. Even though the Genocide Convention, according to the text and early, authoritative interpretations, permits a geographic and a qualitative measurement of destruction, the Chambers occasionally ignore contextual interpretations and emphasize quantitatively substantial or widespread destruction. Unlike crimes against humanity, genocide need not occur against a backdrop of widespread or systematic attacks.

Similarly, neither does the crime of genocide necessarily destroy a civilian population. The crime protects national, ethnical, racial, or religious groups as such. In other words, individual victims are attacked because of their group membership. Nevertheless the Tribunals' judgments underscore individuals' suffering and not often as factual evidence of genocidal intent but instead as innocent victims of the perpetrator's cruelty. In this way, the Tribunals refer to the victim groups' non-combatant status but not national, ethnical, racial, or religious composition. Again, whereas the Genocide Convention prevents and punishes the annihilation of national, ethnical, racial, or religious groups, war crimes and crimes against humanity, as codified in the Statutes of the Tribunals and the Criminal Code of Bosnia Herzegovina, protect civilians.

The historical development of genocide from persecution and the continuing likeness between the two offenses explain this confusion. Yet, the judicial interpretation of genocidal intent from crimes against humanity's jurisdictional elements devalues genocide within international criminal law. David Nersessian, a lecturer at Boston University School of Law, rejects an equivalence between genocide and its criminal antecedent. "Not only does genocide have a more stringent actus reus and mens rea, but the injury it aims to redress is

more severe than the harm at issue in persecution."[218] As the District Court of Jerusalem found,

> What is it that endows this crime with its special character in the criminal law of a State which adopts in its domestic legislation the definition of the crime of genocide? One would say, the all-embracing total form which this crime is liable to take. This form is already indicated by the definition of the criminal intention necessary in this crime, which is general and total: the extermination of members of a group as such; i.e., a whole people or part of a people.[219]

Thus the judgment clearly distinguishes between the scale of destruction—"all-embracing total form"—and the intent of destruction—"general and total […] extermination of members of a group as such." In fact, the judgment makes clear that this intention encompasses the possibility of this scale. The *Brđanin* Trial Chamber, repeating the *Krstić* Appeal Chamber, echoes this distinction. "The demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part […] guard against a danger that convictions for this crime will be imposed lightly." [220]

Yet, the Chambers have imposed convictions without regard for these requirements. They dismiss manifestations, whether actions, omissions, or speech, of *dolus specialis*. Ignoring the retroactive warning of the *Bagilishema* Chamber—"the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the accused."[221]—Trial Chamber I of the Yugoslavia Tribunal acquitted Jelisić despite his explicit purpose. At the initial appearance before the Trial Chamber, he presented himself as the Serbian Adolf.[222] His "disturbed personality," as reflected in his "opportunistic and inconsistent behavior" did not conform to the judges' conception of either genocidaires or genocide. From the perspective of the principle of effective interpretation, this Trial Chamber's insistence, and the similar insistence of other Chambers, on collectively and

[218] Nersessian, 'Comparative Approaches to Punishing Hate', 246 & 225.
[219] Schabas, 214.
[220] *Krstić*, Appeal Judgment, par. 87, quoted in *Brđanin*, Trial Judgment, par. 990.
[221] *Prosecutor v. Ignace Bagilishema*, Trial Judgment, Case No. ICTR-95-1A-T, T.Ch.I., 7 June 2001, par. 63.
[222] *Jelisić*, Trial Judgment, par. 102.

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systematically perpetrated genocide is flawed. Yet, the Appeal Chamber's reasoning that "the borderline unbalanced personality […] is more likely to be drawn to extreme racial and ethnical hatred than the more balanced modulated individual without personality defects"[223] also fails. James Waller, Hannah Arendt, Tim Cole, and Christopher Browning, among others affirm that ordinary individuals commit extraordinary evil. In fact, Waller discusses the inconclusive studies on a Mad Nazi or otherwise authoritarian personality. Unfortunately, when the judges discuss intent, they reject the "ordinary men" thesis. The *Krstić* appeal judgment, acquitting the General, found "he 'appeared as a reserved and serious career officer who is unlikely to have ever instigated a plan such as the one devised for the mass execution of Bosnian Muslim men.'"[224]

5.2 "The Crime of Crimes"

Though the early judgments espoused this idea, the crime of genocide does not carry greater moral opprobrium. The 1998 *Kambanda* and 1999 *Serushago* judgments defined genocide as the "crime of crimes."[225] According to the *Krstić* appeal judgment, "among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium."[226] Highlighting this alleged hierarchy as the subtitle of his 2000 *Genocide in International Law*, William Schabas explained that "genocide stands to crimes against humanity as premeditated murder stands to intentional homicide."[227] By 2005, the International Commission of Inquiry on Darfur affirmed that no such hierarchy exists within international criminal law. "One should not be blind to the fact that some categories of crimes against humanity may be similarly heinous and carry a similarly grave stigma."[228]

[223] *Jelisić*, Appeal Judgment, par. 70.
[224] *Krstić*, Appeal Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, par. 131.
[225] *Prosecutor v. Jean Kambanda*, Trial Judgment, Case No. ICTR-97-23-S, T.Ch.I., 4 September 1998, par. 16. See also *Prosecutor v. Omar Serushago*, Trial Judgment, Case No. ICTR-98-39-S, T.Ch.I., 5 February 1999, par. 15.
[226] *Krstić*, Appeal Judgment, par. 36.
[227] Schabas, 12.
[228] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, par. 506.

The Report cited the *ad hoc* courts' reversals of the *obiter dictum* that genocide is the crime of crimes, namely a 2001 appeal decision of the Rwanda Tribunal. "There is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are 'serious violations of international humanitarian law', capable of attracting the same sentence."[229]

Rather, it is as an inchoate offense that genocide has the power to prevent as well as punish the intent to destroy, in whole or in part, a group as such. The Convention is, after all, the Convention on the *Prevention* and Punishment of the Crime of Genocide. On this ground, Nersessian distinguishes genocide and persecution; whereas the former is inchoate, the latter is results-based. "The crime of genocide is completed as soon as prohibited acts are committed against group members with the requisite intent aimed at the group, whether or not those acts actually result in the group's destruction."[230] Insistence on planning may assist prevention, if broadly defined. Yet, the court's restrictive definition—planning as synonymous with or, at least, part of a systematic attack—effectively removes the preventive aspect.

Equally ineffective in this respect is the courts' understanding of genocide as involving multiple individuals, more specifically multiple perpetrators. At Yale University's 2002 Storrs Lecture, George Fletcher defined international crimes as collective crimes. "Aggression, crimes of war, crimes against humanity, and genocide are deeds that by their very nature are committed by groups and typically against individuals as members of groups."[231] The second interpretation—committed against individuals as members of groups—conforms to the Convention's "as such" element. Yet, that first interpretation influences the Tribunals, too. For instance, the *Ndindabahizi* judgment noted, "a gathering of thousands of Tutsi refugees encircled by an even larger number of primarily civilian

[229] *Kayishema and Ruzindana*, Appeal Judgment, par. 367.
[230] Nersessian, 'Comparative Approaches to Punishing Hate', 246.
[231] Fletcher, 1514.

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attackers."[232] Though Fletcher dismisses the "lone genocidaire" as a superficial interpretation,[233] I believe that individual criminal responsibility, established through specific intent, is necessary not only from a human rights perspective but also as a Convention requirement.

To prove the individual intention by reference to the crime's commission erases the line between genocide and crimes against humanity. For instance, the fact that the Third Reich instituted the state machinery to exterminate Jews, Gypsies, Slavs, and other "undesirables" does not imply that everyone operating within the genocidal machine intended the destructive result. Nor does it exclude or excuse that anyone did possess *dolus specialis*. Again, according to the *Kayishema and Ruzindana* Chamber, "a finding that genocide took place in Rwanda is not dispositive of the question of the accused's innocence or guilt."[234] Jelisić could harbor destructive intent as much as Stevanović did not. The Court of Bosnia Herzegovina acquitted Mr. Miladin Stevanović of genocide because of his refusal to participate,[235] but the Yugoslavia Tribunal acquitted Mr. Goran Jelisić in spite of his active participation.

Like Kai Ambos fittingly characterizes genocide's *dolus* as surplus,[236] genocide's special status is not the crime's hierarchical or moral importance. International criminal law has denied this hierarchy. Therefore genocide is not special in the sense of superior but surplus in the sense of additional. Unfortunately, the International Criminal Tribunals and the Court of Bosnia Herzegovina interpret genocide as special or surplus in terms of redundant. The principles of statutory and treaty interpretation disapprove of redundancy. As the International Court of Justice opinioned in the *Corfu Channel* case,

[232] *Ndindabahizi*, Trial Judgment, par. 458.
[233] Fletcher, 1523.
[234] *Kayishema and Ruzindana*, Trial Judgment, par. 273.
[235] *Prosecutor's Office of Bosnia Herzegovina v. Miladin Stevanović*, First Instance Verdict, Case No. X-KR-05/24-2, 29 July 2008, p. 86-90.
[236] Ambos, 834.

> it would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect […] 'in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects.'[237]

As opposed to doing violence to the terms, effective interpretation of the Genocide Convention's mental element would maintain the Convention's object and purpose.

Given that "ordinary men"—neither psychologically predisposed individuals nor morally robbed collectives— perpetrate mass crimes, the judicial interpretation of genocidal intent should concentrate on the individual, unlike the majority of the International Criminal Tribunals' judgments which focus on systematic, meaning planned and collective, as well as widespread commission against a civilian population. Resolving this conflict, essentially overturning the case law, will undoubtedly increase the difficulty of demonstrating intent. As demonstrated in the preceding chapters, the Yugoslavia and Rwanda Tribunals have not only identified sources from which to infer *dolus specialis* but also have privileged those sources which resemble the jurisdictional elements of crimes against humanity. In the face of perhaps the impossibility of proving intent, another alternative is to eliminate the crime of genocide. Examining these alternatives is beyond the scope of this project. Instead, I conclude with the reminder about prevention and understanding.

Because ordinary people commit extraordinary evil, any effective preventive strategy must include understanding these perpetrators. Crimes against humanity provide a framework for the recognition and so prevention of collective crimes; genocide should thus frame preventive strategies for individually-lead group destruction.

[237] *Corfu Channel*, p.24.

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