

# THE CRIME OF COMPLICITY IN GENOCIDE: HOW THE INTERNATIONAL CRIMINAL TRIBUNALS FOR RWANDA AND YUGOSLAVIA GOT IT WRONG, AND WHY IT MATTERS

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*Jurists at the International Criminal Tribunals for Yugoslavia and Rwanda have erroneously determined that “complicity in genocide” is identical to “aiding and abetting” genocide. Accordingly, they theorize that complicity in genocide is not a crime itself, but merely a misplaced and superfluous liability provision for the crime of genocide. In reality, the two crimes are distinct and designed to capture very different perpetrators. One guilty of aiding and abetting genocide had as his very purpose the facilitation of the commission of genocide. A perpetrator of the crime of complicity in genocide, in contrast, may not have had genocide as his purpose. Instead, genocide may merely have been the foreseeable result of his actions. As such, one found guilty of aiding and abetting genocide must have the heightened, and difficult to establish, mens rea of the genocidaire—what I term the “specific intent specific motive nexus.” By comparison, one guilty of complicity in genocide need not have this heightened mens rea. Instead, a lesser mens rea such as malice or what I term the “specific intent without specific motive,” should suffice to attach guilt. Failure to appreciate this difference creates a gaping loophole in international criminal law, providing unwarranted sanctuary to those who enable genocide.*

## I. INTRODUCTION

The Convention on the Prevention and Punishment of the Crime of Genocide<sup>1</sup> (Genocide Convention) arose from the ashes of the Holocaust.

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<sup>1</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

Born of revulsion at the almost incomprehensible scale and success of the German campaign to exterminate European Jews and of collective guilt for the failure to prevent what was ultimately preventable, the Genocide Convention held great promise. Developed under the aegis of the United Nations, the Genocide Convention was a virtual codification of the “Never Again” ethos. Indeed, given the clear prohibitions and equally clear responsibilities contained within the Convention, one could have believed at the time that genocide was a thing of the past.

Unfortunately, the past sixty years have not been kind to the promise of the Genocide Convention. As evidenced by the campaigns of slaughter in Cambodia, the former Yugoslavia, Rwanda, and now Darfur, genocide, rather than being relegated to the history books, has become only more common in the years since the ratification of the Genocide Convention. The slogan “Never Again” seems quaint and idealistic; indeed, “Again and Again” might more accurately characterize the years that have passed since the Genocide Convention was adopted. The reasons for this failure are many, including naked political calculations, imperfect knowledge, deference to sovereignty, and isolationism.<sup>2</sup> However, political explanations do not tell the entire story. It is true that *ex ante* considerations have often left nations reluctant to intervene in order to prevent genocide from occurring. However, the *ex post* judicial responses once genocide has occurred have been perhaps equally fatal to the promise of the Genocide Convention.<sup>3</sup>

The Genocide Convention and the international criminal tribunals enacted to give force to its provisions, including the International Criminal Tribunal for the former Yugoslavia<sup>4</sup> (ICTY) and the International Criminal

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<sup>2</sup> See generally SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2002) (detailing the United States’ unwillingness to intervene to prevent genocide in the former Yugoslavia and Rwanda); WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* (2000) (exploring the application of international law to the prevention of genocide); Matthew Lippman, *The 1948 Convention on Genocide: 45 Years Later*, 8 TEMP. INT’L & COMP. L.J. 1 [hereinafter *1948 Convention*] (reviewing the successes and failures of the genocide convention on its forty-fifth anniversary); Matthew Lippman, *The Genocide Convention: Fifty Years Later*, 15 ARIZ. J. INT’L & COMP. L. 415 [hereinafter *Fifty Years Later*] (reviewing the successes and failures of the genocide convention on its fiftieth anniversary); David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION 229 (considering obstacles to successful genocide prosecutions).

<sup>3</sup> See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 70, ¶¶ 415, 424 (Feb. 26) (absolving Serbia of direct responsibility for genocide and complicity in genocide committed against Bosnian civilians during the 1995 Srebrenica massacre).

<sup>4</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the

Tribunal for Rwanda<sup>5</sup> (ICTR), have twin purposes: to prevent genocide and failing that, to punish genocide.<sup>6</sup> Because the international community has largely been unable to prevent genocide through *ex ante* measures, prevention may ultimately only be achieved through the deterrent force of punishment. During the past fourteen years, the ICTY and ICTR have carried out the first significant post-Genocide Convention attempts to punish the perpetrators of genocide. These ad hoc Tribunals have played a critical role in responding to the crime of genocide. For the first time since Nuremberg, perpetrators of genocide have been brought before the international community and held accountable for their crimes.<sup>7</sup> Moreover, the ad hoc Tribunals have developed a significant body of legal precedent with respect to the crime of genocide that is now available to future tribunals should the need arise.<sup>8</sup>

Unfortunately, the Tribunals have made a critical jurisprudential error that has deprived the Genocide Convention, and the Tribunals enacted to enforce it, of an extremely significant deterrent effect. Under the Genocide Convention and the Statutes of the ICTR and ICTY, complicity in genocide is a stand-alone crime, ripe for prosecution. However, recent decisions of the Tribunals have understandably, but erroneously, determined that complicity in genocide is merely a form of liability for the crime of genocide, and not a crime itself.<sup>9</sup> The ad hoc Tribunals appear to have

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Former Yugoslavia since 1991, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the International Criminal Tribunal for the Former Yugoslavia) [hereinafter ICTY Statute].

<sup>5</sup> Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955 (establishing the International Criminal Tribunal for Rwanda) [hereinafter ICTR Statute].

<sup>6</sup> This much is evident from the decision to incorporate the words “prevention” and “punishment” in the title of the Genocide Convention. Genocide Convention, *supra* note 1.

<sup>7</sup> See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998) (finding defendant guilty of, *inter alia*, genocide and direct and public incitement to commit genocide).

<sup>8</sup> The Nuremberg Trials were conducted before the Genocide Convention criminalized genocide and, thus, were limited jurisdictionally to considerations of crimes against humanity, war crimes, and crimes against the peace. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, annex art. VI (Aug. 8, 1945), 82 U.N.T.S. 279.

<sup>9</sup> See, e.g., Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, ¶ 7 (May 18, 2006) (“[J]urisprudence of both ad hoc Tribunals has determined that complicity is one of the forms of criminal responsibility that is applicable to the crime of genocide, and not a crime itself.”).

arrived at this decision through the mistaken conflation of two separate crimes. The first is the crime of complicity in genocide, as nominated for punishment in Article 2.3(e) of the ICTR Statute, a substantive crime provision. The second is the crime of aiding and abetting genocide, as created by the interplay of Article 2.3(a), also a substantive crime provision, and Article 6.1, the liability provision.<sup>10</sup> To arrive at this errant conclusion, the Tribunals appear to have inferred that complicity in genocide is a redundant artifact born of the verbatim inclusion of portions of the text of the Genocide Convention within the ICTY and ICTR Statutes.<sup>11</sup>

This error is understandable, but critical. The crime of complicity in genocide captures a class of perpetrators broader than those implicated by aiding and abetting the crime of genocide. This is a distinction seemingly recognized by the drafters of the Genocide Convention and of the ICTY and ICTR Statutes. One found guilty of aiding and abetting the crime of genocide must have the heightened mens rea of the *genocidaire*—what I term the “specific intent specific motive nexus;” by comparison, one who commits the crime of complicity in genocide need not have this heightened mens rea. Instead, a lesser mens rea, such as malice evidenced by reckless disregard, or what I term “specific intent *without* specific motive,” should suffice to attach guilt. Thus, the two provisions are designed to capture very different perpetrators. One guilty of aiding and abetting the crime of genocide had as his very purpose the facilitation of the commission of genocide. The perpetrator of the crime of complicity in genocide, in contrast, may not have had genocide as his purpose. Instead, genocide may merely have been the foreseeable result of his actions.

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<sup>10</sup> See, e.g., *id.*; Prosecutor v. Karemera, Case No. ICTR-98-44-T, Separate Opinion of Judge Short on Complicity in Genocide and Joint Criminal Enterprise Theory, ¶ 5 (May 23, 2006) [hereinafter Separate Opinion of Judge Short] (noting “the contention with respect to the status of complicity in genocide, mentioned in paragraph 3(e), arises as a result of an overlap between ‘complicity’ in Article 2(3)(e) of the Statute and forms of accomplice liability in Article 6(1) of the Statute”); Prosecutor v. Semanza, Case No. ICTR-97-20-A, Judgement, ¶ 316 (May 20, 2005); Prosecutor v. Ntakirutimana, Case No. ICTR-96-10-A, ICTR-96-17-A, Judgement, ¶ 500 (Dec. 13, 2004); Prosecutor v. Krstic, Case No. IT-98-33-A, Judgement, ¶ 139 (Apr. 19, 2004); Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, ¶ 640 (Aug. 2, 2001). Note that Article 6.1 of the ICTR Statute is identical to Article 7.1 of the ICTY Statute. ICTR Statute, *supra* note 5, art. 6.1; ICTY Statute, *supra* note 4, art. 7.1. Additionally, Article 2.3(e) of the ICTR Statute is identical to Article 4.3(e) of the ICTY Statute. ICTR Statute, *supra* note 5, art. 2.3(e); ICTY Statute, *supra* note 4, art. 4.3(e). For purposes of economy, all references to specific articles refer to the Statute of the ICTR.

<sup>11</sup> See, e.g., *Krstic*, Case No. IT-98-33-A, ¶ 640:

By incorporating Article 4.3 in the Statute [of the ICTY], the drafters of the Statute ensured that the Tribunal has jurisdiction over all forms of participation in genocide prohibited under customary international law. The consequence of this approach, however, is that certain heads of individual criminal responsibility in Article 4.3 overlap with those in Article 7.1.

The failure by jurists to appreciate that complicity in genocide is a stand-alone crime whereas aiding and abetting is merely a form of liability for the crime of genocide creates a gaping loophole, providing unwarranted sanctuary to those who commit the crime of complicity in genocide. Moreover, it signals to would-be facilitators of genocide, whether military commanders, elected officials, arms dealers, or nations themselves, that genocidal conduct more often than not goes unpunished. The failure to hold these players accountable threatens to significantly weaken the Genocide Convention and the criminal tribunals enacted in its wake. Only by correcting this jurisprudential error can the “Never Again” ethos of the Genocide Convention be fully realized.

This Article proceeds in three parts. Part II introduces the jurisprudence of the ICTY and ICTR with respect to the crimes of complicity in genocide and of aiding and abetting genocide. Part III analyzes the Genocide Convention as well as the Statutes of the ad hoc Tribunals enacted to enforce it. This section describes how and why these instruments have been misinterpreted and proposes a corrected interpretation. Part IV reveals that this corrected interpretation might result in culpability for a broader class of players than current jurisprudence allows, including political leaders and arms dealers who have plausible deniability and nations, such as the United States, with interventionist foreign policies.<sup>12</sup>

## II. THE CRIME OF COMPLICITY IN GENOCIDE VERSUS AIDING AND ABETTING THE CRIME OF GENOCIDE IN THE JURISPRUDENCE OF THE ICTY AND ICTR

### A. COMPLICITY IN THEORY

Complicity as defined by the Tribunals refers to “all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion” of a crime within the jurisdiction of the Tribunal.<sup>13</sup> In international criminal law, the three essential elements of complicity are (1) the commission of a crime; (2) the accomplice’s—one

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<sup>12</sup> The International Court of Justice (ICJ), by virtue of Article 9 of the Genocide Convention, has jurisdiction to hear cases regarding state responsibility for genocide and its companion crimes. Genocide Convention, *supra* note 1, art. 9. The exemplar used below of the United States is not meant to suggest that U.S. government officials are any more deserving of prosecution than are the officials of many other nations against whom complicity in genocide might attach.

<sup>13</sup> Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, ¶ 6 (May 18, 2006).

who is complicit—material contribution to the commission of that crime; and (3) the accomplice’s intention that the crime be committed, or the accomplice’s reckless disregard for the potential of its commission.<sup>14</sup> The elements of this third requirement are referred to in this Article as the mens rea degrees of “specific intent” and “malice,” respectively.

International criminal law provides for the punishment of accomplices.<sup>15</sup> For instance, the Nuremberg Principles recognize that complicity in the commission of a crime against humanity or a war crime is a crime under international law.<sup>16</sup> Since the Nuremberg Trials, international criminal efforts have frequently focused as much on those in leadership positions, such as Hermann Goring or Julius Streicher<sup>17</sup> who are, technically speaking, just accomplices,<sup>18</sup> as on the physical perpetrators—those who perform the actual action that results in death or injury to the victim. As the ICTY Appeals Chamber suggested in reference to this distinction:

Although only some members of the group may physically perpetrate the criminal act . . . the . . . contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows then that the moral gravity of such participation is often no less—or indeed no different—from that of those actually carrying out the acts in question.<sup>19</sup>

Indeed, according to Professor Schabas:

Complicity is sometimes described as secondary participation, but when applied to genocide, there is nothing “secondary” about it. The “accomplice” is often the real villain, and the “principal offender” a small cog in the machine. Hitler did not, apparently, physically murder or brutalize anybody; technically, he was “only” an accomplice to the crime of genocide.<sup>20</sup>

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<sup>14</sup> See William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 842 INT’L REV. RED CROSS 439, 446 (2001).

<sup>15</sup> *Id.* at 442-46.

<sup>16</sup> *Id.* “Principle VII: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.” Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal: Report of the International Law Commission on the Work of its Second Session, princ. 7, U.N. GAOR, 5th Sess., Supp. No. 12, U.N. Doc. A/1316 (1950), 2 Y.B. INT’L L. COMM’N 374, 377 (1950), available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_1\\_1950.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf).

<sup>17</sup> Hermann Goring was a leading member of the Nazi Party and second in command to Adolph Hitler during World War II. Julius Streicher was the propaganda minister of the Nazi Party. He published *Der Stürmer*, a weekly Nazi newspaper responsible for the propagation of anti-Semitic propaganda.

<sup>18</sup> See Schabas, *supra* note 14, at 442-46.

<sup>19</sup> Prosecutor v. Tadic, Case No. IC-94-1-A, Judgment, ¶ 191 (July 15, 1999).

<sup>20</sup> See SCHABAS, *supra* note 2, at 286.

Nevertheless, Hitler was in every sense the person most responsible for the Holocaust. Therefore, the drafters of the Genocide Convention recognized that it was essential to include “a provision authorizing prosecution for complicity” in order to capture “those who organize, direct or otherwise encourage genocide but who never actually wield machine guns or machetes.”<sup>21</sup> In other instances, however, the accomplice to genocide may be a subsidiary villain and may lack the *genocidaire*’s specific genocidal intent. Instead, genocide may merely be a foreseeable result of his actions. That is, the complicity provisions of the Genocide Convention and the Statutes of the ad hoc Tribunals appear designed to capture two very different classes of criminals: those who planned genocide but did not kill, and those who lacked a genocidal plan, but knew that genocide was the foreseeable result of their actions.

Unfortunately, giving effect to this important policy at the ad hoc Tribunals has not been easy or without controversy.

#### B. COMPLICITY IN PRACTICE

The difficulty with respect to the ICTY and ICTR revolves around a seeming redundancy contained within the Statutes of the Tribunals. Article 2.3(e)—“Genocide” (a substantive crimes provision)—of the ICTR Statute nominates for punishment the crime of “complicity in genocide” whereas Article 6.1—“Individual Criminal Responsibility” (a liability provision)—of the ICTR Statute nominates for punishment those who “otherwise aided and abetted” the commission of a crime within the jurisdiction of the ICTR. Because the phrase *aided and abetted* is thought to be virtually indistinguishable from the concept of complicity,<sup>22</sup> the existence in the same instrument of provisions providing for the punishment both of one who aids and abets the crime of genocide and of one who commits the crime of complicity in genocide has confused some jurists at the Tribunals.<sup>23</sup> In response, they have erroneously inferred that the two are identical, the result of a careless drafting error.<sup>24</sup> Others have noted that each provision is distinct, designed to capture perpetrators with differing *mens rea*.<sup>25</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *See, e.g.*, William A. Schabas, *Commentary: Prosecutor v. Akayesu*, in 2 ANNOTATED LEADING CASES OF THE INTERNATIONAL CRIMINAL TRIBUNALS 546 (André Klip and Goran Sluiter eds., 2001).

<sup>23</sup> *See, e.g.*, Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, ¶ 640 (Apr. 19, 2004).

<sup>24</sup> *Id.*

<sup>25</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 485 (Sept. 2, 1998):

Almost a decade ago, the ICTR Trial Chamber attempted to settle this controversy when it delivered its landmark judgment in the case of *Prosecutor v. Akayesu*. There, the court distinguished between aiding and abetting genocide under Article 6.1 and complicity in genocide under Article 2.3(e).<sup>26</sup> The *Akayesu* court concluded that aiding and abetting genocide requires the heightened mens rea of the *genocidaire*, specific intent,<sup>27</sup> whereas complicity in genocide does not, but, instead, requires a lesser mens rea such as malice.<sup>28</sup> This ruling demonstrates an understanding that in order to give the widest possible effect to the deterrent purpose of the Genocide Convention, it is essential to hold liable criminals possessing these distinct mens rea.

Unfortunately, this approach has been abandoned, and the ICTR and ICTY appear to no longer distinguish between one who aids and abets the crime of genocide and one who commits the crime of complicity in genocide.<sup>29</sup> Instead, the ad hoc Tribunals now appear to insist that both one who aids and abets the crime of genocide and one who commits the crime of complicity in genocide must possess the heightened specific intent mens rea of the *genocidaire*.<sup>30</sup>

In the ongoing case of *Prosecutor v. Karemera*, a case which represents the latest analysis of this controversy with respect to the ICTR or the ICTY, the ICTR Trial Chamber announced that the “jurisprudence of both ad hoc Tribunals has determined that complicity [in genocide] is one of the forms of criminal responsibility that is applicable to the crime of

The Chamber is consequently of the opinion that when dealing with a person accused of having aided and abetted in the planning, preparation and execution of genocide, it must be proven that such a person did have the specific intent to commit genocide, namely that, he or she acted with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such; whereas . . . the same requirement is not needed for complicity in genocide.

<sup>26</sup> *Id.*

<sup>27</sup> The concept of specific genocidal intent is explored in depth in Part III, *infra*, and is referred to throughout as the specific intent specific motive nexus.

<sup>28</sup> *Akayesu*, Case No. ICTR-96-4-T, ¶ 485; see also Larissa Van Den Herik & Elies Van Sliedregt, *Ten Years Later, the Rwanda Tribunal Still Faces Legal Complexities: Some Comments on the Vagueness of the Indictment, Complicity in Genocide, and the Nexus Requirement for War Crimes*, 17 LEIDEN J. INT’L L. 537, 545 (2004) (explaining that the *Akayesu* Trial Chamber concluded that a perpetrator can be convicted of “complicity in genocide” merely if he knew or had reason to know that the principal was acting with genocidal intent, whereas a conviction for “aiding and abetting” the crime of genocide requires proof of specific genocidal intent (that is, the specific intent specific motive nexus introduced below)).

<sup>29</sup> See, e.g., *Prosecutor v. Karemera*, Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, Case No. ICTR-98-44-T, ¶ 7 (May 18, 2006).

<sup>30</sup> *Id.*



genocide, and not a crime itself.”<sup>31</sup> This decision incorrectly exports the heightened mens rea of one who aids and abets the crime of genocide onto one who commits the crime of complicity in genocide. Because the burden of proof to convict someone of genocide (or of aiding and abetting genocide) is extraordinarily high,<sup>32</sup> it may preclude the conviction of these particular defendants for *any* genocidal crime. This decision is tragic for, like Julius Streicher and Hermann Goring, Karemera and his co-defendants bear significant responsibility for the genocide perpetrated against the Tutsis even though they may not have personally murdered anyone.<sup>33</sup> Yet this decision has a much wider import. Not only does it mean that those who planned genocide but did not kill are unlikely to be convicted of a

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<sup>31</sup> *Id.* However, Judge Short, in his dissent in this case, interpreted the provisions correctly:

It is clear that the so-called “acts” referred to in Articles 2(3)(a) and (b)—genocide and conspiracy to commit genocide—are individual crimes. So are “attempt to commit genocide” and “direct and public incitement to commit genocide[.]” . . .

The decision of 18 May 2006 found that “complicity is one of the forms of criminal responsibility applicable to the crime of genocide, and not a crime itself[.]” . . .

In my view, complicity in genocide has the indicia of a criminal offence . . . . It is often charged as an alternative count to the count of genocide. . . and can result in a finding of guilt for “complicity in genocide”. . . . In the case of *Semanza*, for example, the Accused, who was charged with counts of genocide and complicity in genocide the alternative, was found not guilty of genocide and convicted of complicity in genocide. It certainly can not be said that the accused in that case was convicted of a mode of liability. I am therefore of the view that the term “complicity in genocide” referred to under Article 2(3)(e) is a crime.

Prosecutor v. Karemera, Case No. ICTR-98-44-T, Separate Opinion of Judge Short, ¶¶ 5-6, 8 (May 23, 2006).

<sup>32</sup> *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 70 (Feb. 26). The court explained that:

[Genocide] requires the establishment of the ‘intent to destroy, in whole or in part, . . . [the protected] group, as such.’ It is not enough to establish . . . that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*. . . . It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts . . . must be done with intent to destroy the group as such in whole or in part. The words ‘as such’ emphasize that intent to destroy the protected group . . . . The specific intent is also to be distinguished from other reasons or motives the perpetrator may have. Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.

*Id.* ¶ 187.

<sup>33</sup> Edouard Karemera, Mathieu Ndirumpatse, and Joseph Nzirorera, founding members of the MRND—the political wing of the Hutu Power regime responsible for the genocide—began meeting over a year before the genocide to plan and prepare for the destruction of the Tutsi population. *See generally* Prosecutor v. Karemera, Case No. ICTR-98-44-T, Amended Indictment, ¶ 24 (Feb. 23, 2005) (detailing the co-defendants’ preparation).

genocidal crime, it also means that those who lacked a genocidal plan, but knew that genocide was the foreseeable result of their actions, are unlikely to be convicted of a genocidal crime. This loophole provides undeserved sanctuary for these genocidal criminals<sup>34</sup> and threatens to defeat the deterrent force of the Genocide Convention. In order to correct this misinterpretation, it is necessary to examine first the text of the Genocide Convention, and then that of the Statutes developed to enforce its provisions.

### III. THE GENOCIDE CONVENTION AND THE STATUTES OF THE AD HOC TRIBUNALS

#### A. COMPLICITY IN GENOCIDE AND GENOCIDE ARE SEPARATE CRIMES UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

Because the ICTY and ICTR exist only within the confines of a statutorily created judicial universe, in some sense all questions of law begin and end with the Statutes of the ad hoc Tribunals. However, because, with respect to the crime of genocide, the Statutes are derived in large part from the Genocide Convention, one cannot faithfully interpret the later Statutes without considering the earlier instrument. The Genocide Convention reads in relevant part as follows:

Article I: The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II: In the present Convention, 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;

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<sup>34</sup> Punishing Karemera and his cohorts for crimes against humanity or war crimes would severely understate the degree of their criminality. Genocide has been aptly referred to as the “Crime of Crimes,” and by referring to genocidal conduct as anything but genocide—for instance, as a crime against humanity as it was known at Nuremberg—we diminish the gravity of the crime. See SCHABAS, *supra* note 2. As the ICTY Appeals Chamber explained in *Prosecutor v. Krstic*, IT-98-33-A, Judgement, ¶ 37 (Apr. 19, 2004):

The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements . . . guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name.

- (c) Deliberated 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.

Article III: The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article IV: Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.<sup>35</sup>

As a first step toward determining whether complicity in genocide is a stand-alone crime, The Vienna Convention on the Law of Treaties<sup>36</sup> (Vienna Convention) instructs us to search the Genocide Convention for “its object and purpose” and then to search for the “ordinary meaning to be given to the terms of the treaty” in order to achieve this object and purpose. Regarding the first step, Article I leaves no doubt that the object and purpose of the Genocide Convention is to “prevent and to punish” the crime of genocide.<sup>37</sup> Stated another way, the Genocide Convention is designed to deter genocide by putting would-be perpetrators on notice that participation in genocide will result in punishment.

With respect to the second step, it is essential to interpret the relevant terms of the Genocide Convention in a manner that will give effect to its object and purpose. Four terms are critical to this examination: acts, crimes, intent, and as such.

#### *i. Acts versus Crimes*

The term *acts* is unfortunately used to convey two distinctly different meanings within the one document. The first meaning appears in Article II, the definitional provision that defines both the *actus reus* and the *mens rea* that constitute the crime of genocide: “[G]enocide means any of the

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<sup>35</sup> Genocide Convention, *supra* note 1, arts. 1-4.

<sup>36</sup> The Vienna Convention on the Law of Treaties art. 31.1, May 23, 1969, 1155 U.N.T.S. 331, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf). The Vienna Convention reads in relevant part: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” *Id.*

<sup>37</sup> Genocide Convention, *supra* note 1, art. 1.

following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>38</sup> Within this provision, the term *acts* refers to the actus reus attendant to the crime of genocide. These acts—killing members of the group, causing serious bodily or mental harm to members of the group, etc.—comprise the *sine qua non* of genocide because one must, at a minimum, participate in one of these proscribed acts to be found guilty of the crime of genocide.

The second meaning of the term *acts* occurs in Article III<sup>39</sup> and then throughout the remainder of the Genocide Convention as part of the phrase “genocide or any of the other acts enumerated in article III.”<sup>40</sup> In these instances, the word *acts* refers to the substantive crimes nominated for punishment by Article III of the Genocide Convention. Substitution of the word *crimes* for the word *acts* would convey the meaning of Article III appropriately.

In order to understand why *acts* must mean *crimes* in this second instance, consider the following: First, if *acts* has the same meaning in both Article II and Article III, there would be no reason for these Articles to exist separately of one another. If *acts* means only physical actions, that is, actus reus, and never crimes, then Article III, now referring to physical actions rather than substantive crimes, could be subsumed into Article II, the actus reus provision. Similarly, if *acts* means only crimes and never physical actions, then there would be no reason to use *acts* in Article II. Further proof is provided by the fact that the drafters of the Genocide Convention listed genocide in Article III as a punishable act and considered it a crime, a point emphasized by the decision to refer to the instrument as the “Convention on the Prevention and Punishment of the *Crime* of Genocide” (emphasis added). Thus, *acts* must mean crimes within Article III. It follows then that the phrase “genocide or any of the other acts enumerated in Article III” must mean that these other acts, including complicity in genocide, are crimes rather than liability provisions.<sup>41</sup> This is strong semantic evidence that the drafters of the Genocide Convention considered complicity in genocide a stand-alone crime rather than a mere liability

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<sup>38</sup> Genocide Convention, *supra* note 1, art. 2.

<sup>39</sup> *Id.* art. III.

<sup>40</sup> *See, e.g., id.* art. IV (“Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”).

<sup>41</sup> For more support, recall Judge Short’s statement from his separate opinion, *supra* note 31, the relevant text of which provides: “It is clear that the so-called ‘acts’ referred to in Article 2.3 . . . are individual crimes.” Prosecutor v. Karemera, Case No. ICTR 98-44-T, Separate Opinion of Judge Short, ¶ 5 (May 23, 2006).

provision for the crime of genocide. Further evidence is provided by a consideration of mens rea.

*ii. Genocidal Mens Rea: Specific Intent versus the Specific Intent Specific Motive Nexus Under the Genocide Convention*

The second and third critical terms for interpretation—the word *intent* and the seemingly casual phrase *as such*—are also found within Article II, the definitional article.<sup>42</sup> These provisions within Article II correspond to the requisite intent and motive of the crime of genocide and, together define its mens rea. The term *intent* corresponds to the phrase “the purpose to destroy, in whole or in part, a national, ethnical, racial or religious group,” and the phrase *as such* corresponds to the phrase “because it is a national, ethnical, racial or religious group.” These two distinct elements—(1) the purpose to destroy, in whole or in part, a national, ethnical, racial, or religious group (2) because it is a national, ethnical, racial, or religious group—together constitute the special mens rea requirement of the crime of genocide.<sup>43</sup> For genocidal guilt to attach, the accused must perform the actus reus of genocide with the intent to destroy, in whole or in part, a national, ethnical,<sup>44</sup> racial, or religious group because it is a national, ethnical, racial, or religious group. In other words, the *genocidaire* seeks to destroy a protected group as an end in itself. The destruction, in whole or in part, of a protected group that is merely a foreseeable consequence of another purpose—territorial acquisition or financial gain—does not

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<sup>42</sup> Genocide Convention, *supra* note 1, art. 2.

<sup>43</sup> Some international criminal law scholars address the intent and motive requirements differently by subsuming both under differing standards of intent. The first standard of intent is *dolus directus*, in which the wrongful consequences of the act were both foreseen and desired by the perpetrator. The second standard of intent is *dolus indirectus*, in which certain secondary consequences, in addition to those desired by the perpetrator of the act, were foreseen by the perpetrator as a certainty. Although the perpetrator did not desire those collateral consequences, he nevertheless committed the act, and those consequences did follow. The third standard of intent is *dolus eventualis*, in which the perpetrator foresaw that consequences other than those desired were possible, and nevertheless went ahead with the act. Johan D. Van Der Vyver, *Genocide, War Crimes and Crimes Against Humanity: Prosecution and Punishment of the Crime of Genocide*, 23 *FORDHAM INT'L L.J.* 286, 307 (1999).

The concept of *dolus directus* is substantially similar to the concept of the specific intent specific motive nexus introduced later in this Article, whereas the concepts of *dolus indirectus* and *dolus eventualis* would apply to one who has specific intent but lacks specific motive. As such, only *dolus directus* will satisfy the mens rea requirement of the crime of genocide proper, whereas *dolus indirectus* and *dolus eventualis* will allow guilt to attach for committing the crime of complicity in genocide but not for aiding and abetting the crime of genocide.

<sup>44</sup> This Article uses the term *ethnical* rather than the more familiar term *ethnic* following the example of the Genocide Convention.

constitute genocide, but, instead, is complicity in genocide, or a crime against humanity, or an act of mass murder.

This mens rea requirement is critical because it distinguishes genocide (and, as explained below, aiding and abetting genocide) from complicity in genocide, mass murder, or crimes against humanity.<sup>45</sup> The international law refers to the mens rea that results from the union of intent and motive in the crime of genocide as the *dolus specialis* requirement. In the context of genocide, the corresponding English phrase, specific intent, can be somewhat misleading as it does not alert the reader to the fact that the phrase refers to the motive component as well. Therefore, this Article uses the phrase specific intent specific motive nexus to refer to the special mens rea requirement of the crime of genocide (and aiding and abetting the crime of genocide).

Is there a practical difference between specific intent and “specific motive?” There is, and it is critical to our analysis. A pair of examples illustrates the quite different meanings of the two terms within the jurisprudence of the ICTR:

(A) Specific Intent with Specific Motive: When in 1994 members of the Hutu majority in Rwanda killed approximately 800,000 members of the Tutsi minority because the Tutsi were members of a particular national, ethnical, racial, or religious group, the perpetrators had both specific intent and specific motive. In other words, their purpose was to eradicate the Tutsi (intent) because they were Tutsi (motive). In doing so, they satisfied the specific intent specific motive nexus requirement of the Genocide Convention (and the Statute of the ICTR) and thereby committed genocide.

(B) Specific Intent without Specific Motive: Had the Hutu majority instead killed thousands of Tutsi because the Tutsi lived in a fertile region of Rwanda and the Hutu desired their agricultural resources, they would have either the mens rea of specific intent *without* specific motive or the mens rea of malice. Here, their purpose would be to kill the Tutsi (intent) not because they were members of a national, ethnical, racial, or religious group, but because they desired agricultural resources (motive) and, in this sense, were indifferent to whether their victims were Tutsi or Hutu or even North Americans.<sup>46</sup> In this scenario, specific intent exists, but specific

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<sup>45</sup> Indeed, the commentary to the International Law Commission’s 1996 Draft Code of Crimes against the Peace and Security of Mankind describes the specific intent requirement of genocide (what I refer to as the specific intent specific motive nexus) as the “distinguishing characteristic of this particular crime under international law.” U.N. GAOR, 48th Sess., 6th plen. mtg., U.N. Doc. A/51/10 at 44 (July 26, 1996).

<sup>46</sup> Indeed, the Hutu claimed just this in their plea for mitigation:

[T]he Commission of Experts on Rwanda discussed the fact that Hutu activists denied that their actions had been racially motivated. Instead they said that they had been motivated by

motive is lacking, as the Hutu are agnostic to the fate of the Tutsi group as a whole. Thus, in keeping with current ICTR and ICTY jurisprudence, the perpetrators could be prosecuted for mass murder or crimes against humanity, but not for committing the crimes of complicity in genocide or genocide or any genocidal crime. Because genocide has a uniquely terrible stigma and heightened penalty, the inability to convict the participants imagined in this scenario for any genocidal crime deprives the Genocide Convention of a significant deterrent force.

To reiterate, under current ICTR and ICTY jurisprudence, the perpetrator in example (A), who has specific intent and specific motive can be prosecuted for genocide, aiding and abetting genocide, and complicity in genocide. The perpetrator in example (B), who has specific intent without specific motive, can be successfully prosecuted for crimes against humanity or mass murder, but not for aiding and abetting genocide, complicity in genocide, or any other genocidal crime. It is the failure in example (B), above, to allow successful prosecution of the perpetrators for a genocidal crime that animates this Article. Scholars have discussed precisely this weakness in the current jurisprudence of the ICTR.<sup>47</sup> It is critical to note that if the interpretation suggested below is adopted, the perpetrator in example (B) can be successfully prosecuted for committing the crime of complicity in genocide, but cannot be prosecuted for aiding and abetting the crime of genocide.

*iii. Complicity in Genocide is a Stand-Alone Crime Under the Genocide Convention*

Keeping the above examples in mind, the analysis in this section considers whether, under the Genocide Convention, complicity in genocide is a stand-alone crime or merely a mode of liability for the crime of genocide. If the latter is true, then the crime of complicity in genocide must have a mens rea requirement identical to that of the crime of genocide. If the former is true, then the crime of complicity in genocide and the crime of genocide must have different mens rea requirements.

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desire to abort the political aspiration of the rival Tutsi tribe. The Commission of Experts noted the difficulty in determining whether the violence in Rwanda was motivated by political or racial animus.

Lippman, *Fifty Years Later*, *supra* note 2, at 491. This evidence suggests that a distinction must be made between the crime of complicity in genocide and the crime of aiding and abetting genocide in order to facilitate genocide prosecutions.

<sup>47</sup> See, e.g., Van Den Herik & Van Sliedregt, *supra* note 28, at 549 (explaining that current “complicity doctrine, with its singular distinction between principals and accomplices, does not allow for [guilt to attach to] an *auctor intellectualist* with a perpetrator-like status . . . [whereas] [c]orrect complicity doctrine circumvents the requirement of proof of specific intent”).

In order to proceed with this inquiry, it is essential to return once more to the text of the Genocide Convention. Article II reads in relevant part: “[G]enocide means any of the following acts committed with *intent . . . as such*.”<sup>48</sup> Article III reads in relevant part, “The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in Genocide.”<sup>49</sup>

The critical point here is that the specific intent specific motive nexus requirement applies only to the crime of genocide itself and not to the other crimes listed in Article III.<sup>50</sup> This is because Article II does not read, “genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide means any of the following acts committed with intent . . . as such.” Instead, it reads “[*g*]enocide means any of the following acts committed with intent . . . as such.”<sup>51</sup>

Further, one need only consider the exhaustive list of prohibited acts, including killing members of the group and causing serious bodily or mental harm to members of the group, without the commission of which genocide cannot occur, to clarify this point. “Attempt to commit genocide” is an inchoate crime. Yet to attach liability to the crime of genocide, one of the discrete actions listed in Article II must be completed. The completion of any one of the acts will suffice to fulfill the *actus reus* of genocide. If Article II is read as applying to all of Article III, attempt to commit

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<sup>48</sup> Genocide Convention, *supra* note 1, art. 2 (emphasis added).

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., Chile Eboe-Osuji, *Complicity in Genocide Versus Aiding and Abetting Genocide—Construing the Difference in the ICTR and ICTY Statutes*, 3 J. INT’L CRIM. JUST. 56, 63-64 (2005):

The *dolus specialis*—i.e. the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” stated in Article 2(2)—is indicated only against “genocide.” Article 2(2), which prescribes the *dolus specialis*, does not say that it pertains to “genocide” as well as to the other crimes listed in Article 2(3) including “complicity in genocide.” Nor does Article 2(3), which contains the list of crimes, say so. Without needing to invoke the *expressio unius exclusio alterius* doctrine, it may suffice simply to ask this: What is the legal basis to read this special intent into the provision of Article 2(3)(e) providing for “complicity in genocide,” if there is no language in the Statute that says so? Surely, this cannot be based on a conception of the *dolus specialis* as part of what is known as the “general part” of the law, for the general part in a criminal statute, such as the Tribunals’ Statutes, must contain words to the effect that the provisions made there are of general application to every other provision or offence in the statute. There is no such statutory language in either Article 2 of the ICTR Statute or in the Genocide Convention (1948) on which Article 2 of the Statute is modeled. In the absence of clear statutory language requiring this special *mens rea* for Article 2(3)(e), we must then hark back to the general principles of law of accessorial responsibility and the required *mens rea* for it.

<sup>51</sup> Genocide Convention, *supra* note 1, art. 2 (emphasis added).



genocide, an inchoate crime, is a crime that cannot actually be committed. In other words, one would actually have to commit one of the five prohibited elements of the actus reus of genocide—thereby committing genocide—to be found guilty of the inchoate crime of attempt to commit genocide. Thus, there would be no reason to list the inchoate crime of attempt to commit genocide within Article III. This illogical result cannot have been the intention of the framers of the Genocide Convention. Thus, it is apparent that Article II applies only to the crime of genocide and not to the crimes of “conspiracy to commit genocide,” complicity in genocide, etc.

This difference is critical. According to the terms of the Genocide Convention, genocide cannot be committed absent the specific intent specific motive nexus, but the companion crimes of genocide can. One can be found guilty of the crime of complicity in genocide without having held the desire to destroy, in whole or in part, a national, ethnical, racial, or religious group because it is a national, ethnical, racial, or religious group. As a practical matter, the specific intent specific motive nexus will generally be present in the crimes of conspiracy to commit genocide, “direct and public incitement to commit genocide,” and attempt to commit genocide. But the specific intent specific motive nexus need not be present to secure a conviction for any of the companion crimes of genocide. The absence of this specific intent specific motive nexus requirement within the crime of complicity in genocide is almost certainly the reason for its existence. Complicity in genocide ensures that those who commit genocidal crimes with without specific motive are prosecutable.<sup>52</sup>

Surely this must be the correct interpretation of the Genocide Convention, the object and purpose of which is to “prevent and to punish” the crime of genocide.<sup>53</sup> Indeed, in adapting the Statutes of the ad hoc Tribunals from the Genocide Convention, the framers of the newer documents clarified precisely this point.

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<sup>52</sup> Alexander Greenawalt proposes a substantially similar dual track analysis for analyzing the specific intent requirement. Alexander Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COL. L. REV. 2259, 2259 (1999). Greenawalt argues that although “genocide is generally interpreted as a crime of special intent . . . principal culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions.” *Id.* While this Article shares his view of the problem, it proposes a different solution. Rather than remove the specific intent specific motive nexus requirement, which would invite charges of judicial legislation, this Article suggests that the crime of complicity in genocide suffices to capture those perpetrators who satisfy the specific intent requirement although they do not satisfy the specific intent specific motive nexus requirement. In those instances in which the specific intent specific motive nexus requirement is satisfied, aiding and abetting genocide would be the appropriate charge.

<sup>53</sup> Genocide Convention, *supra* note 1, art. 1.

B. COMPLICITY IN GENOCIDE AND GENOCIDE ARE SEPARATE CRIMES  
UNDER THE STATUTES OF THE AD HOC TRIBUNALS

In 1993, the drafters of the ICTY Statute<sup>54</sup> picked up where the framers of the Genocide Convention had left off some forty-five years before. The ICTY and ICTR Statutes are based in large part on the Genocide Convention. Articles II and III of the Genocide Convention are reproduced verbatim within the later documents. This is no surprise given that the Statutes of the ad hoc Tribunals were designed, like the Genocide Convention before them, to punish and deter genocide. There is, however, a critical addition to the text of the Genocide Convention within the later instruments. This addition, Article 6, serves to emphasize that complicity in genocide is a stand-alone crime. The ICTR Statute reads in relevant part as follows:

Article 2: Genocide

1: The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this article.

2: 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) Deliberated 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.

3: The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article 6: Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually criminally responsible for the crime.

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<sup>54</sup> The ICTY and ICTR Statutes are identical in all relevant aspects save numbering.

3. The fact that any of the acts referred to in Article 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>55</sup>

Although the ICTR and the ICTY Statutes lack preambles, the texts leave little doubt that the object and purpose of the Statutes is to deter the crime of genocide and to punish those guilty of its commission. Thus, in fidelity to the Vienna Convention, the text of the Statutes of the ad hoc Tribunals must be interpreted in a manner that allows punishment to a degree sufficient to deter the crimes listed within the Statutes. Once again, the critical terms for interpretation are *acts*, *intent*, and *as such*.

#### *i. Acts Versus Crimes*

As in the Genocide Convention, the term *acts* is used within the ICTR Statute in two distinct manners. In Article 2.1 of the Statute, *acts* is used as a substitute for the word *crimes*. This is the predominant meaning of the term *acts* throughout the ICTR Statute. The logic behind the determination that *acts* in these instances means crimes is identical to the logic underlying the same determination in the Genocide Convention. However, because the drafters of the ICTR Statute employed the word *acts* as a substitute for the word *crimes* in several additional Articles beyond those contained in the Genocide Convention, we briefly consider one of these instances here.

Article 6.1 reads in relevant part: “A person who . . . committed . . . a crime referred to in Articles 2 to 4, shall be individually responsible for the crime.”<sup>56</sup> Article 6.3 reads in relevant part: “The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility . . . .”<sup>57</sup> In terms of purpose, the sole relevant difference between Articles 6.1 and 6.3, both of which are liability provisions, is that the former refers to non-command-responsibility liability while the latter refers to command-responsibility liability. Given that each liability provision is structured similarly, is contained within the same Article, and is subservient to the same Articles (Articles 2-4), the word *acts* in Article 6.3

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<sup>55</sup> ICTR Statute, *supra* note 5, art. 2.1-2.3, 6.1, 6.3. It should be noted that the “ICTR defines aiding as ‘giving assistance to someone’ and abetting as ‘facilitating the commission of a crime by being sympathetic thereto.’” Katharine Orlovsky, *International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms Brokers*, 29 HASTINGS INT’L & COMP. L. REV. 343, 359 (2006) (citing Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 484 (Sept. 2, 1998)).

<sup>56</sup> ICTR Statute, *supra* note 5, art. 6.1.

<sup>57</sup> *Id.* art. 6.3.

must share its meaning with the word *crime* in Article 6.1. Because criminal liability accrues to perpetrators of crimes, not ordinary actions, and because Article 6 is by its very title a liability provision, both terms should be read as meaning crimes, rather than acts.

Thus, as in the Genocide Convention, the term *acts* is, with only the single exception of the actus reus provision, used here as a substitute for the word *crimes*. It follows then that when Article 2.3 lists both genocide and complicity in genocide as punishable acts, they are intended as distinct punishable crimes. This is further evidence that complicity in genocide is a crime in itself, not a liability provision for the separate crime of genocide.

*ii. Genocidal Mens Rea: Specific Intent versus the Specific Intent Specific Motive Nexus Under the Statutes of the Ad Hoc Tribunals*

As in the Genocide Convention, the second and third critical terms for interpretation within the ICTR Statute are the word *intent* and the phrase *as such*.<sup>58</sup> Both are found in Article 2.2, the definitional paragraph. Once again, this paragraph serves to establish both the actus reus and the mens rea that are the foundational requirements of the crime of genocide. With respect to mens rea, the point to be gleaned from this provision is identical to that of the implicated provision in the Genocide Convention. Genocide cannot be committed absent the specific intent specific motive nexus, but those crimes such as complicity in genocide and conspiracy to commit genocide require only specific intent without specific motive or malice (as evidenced by reckless disregard) for successful prosecution. The differing mens rea requirements for the crimes of genocide and complicity in genocide serve to ensure that liability is broad enough to attach to those who bear responsibility for a genocidal crime even though they may lack the specific intent specific motive nexus that is a pre-requisite for successful prosecution of genocide (or, as explained below, for aiding and abetting genocide). At the same time, by still requiring specific intent without specific motive or malice to successfully prosecute the crime of complicity in genocide, the liability threshold is set sufficiently high that those without appropriate culpability are not subject to punishment.

*iii. Complicity in Genocide is a Stand-Alone Crime Under the Statutes of the Ad Hoc Tribunals*

The process of determining that genocide and complicity in genocide have distinct mens rea under the Statutes of the ad hoc Tribunals is identical to the process employed above to make the same determination with respect to the Genocide Convention. Having established that complicity in

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<sup>58</sup> *Id.* art. 2.2.

genocide and genocide are distinct crimes under both the Statutes of the ad hoc Tribunals and the Genocide Convention, it is now possible to consider whether there is a meaningful difference between the crime of complicity in genocide and the crime of aiding and abetting genocide.

### C. COMPLICITY IN GENOCIDE IS DISTINCT FROM AIDING AND ABETTING GENOCIDE

Article IV of the Genocide Convention reads as follows: “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”<sup>59</sup> This is the liability provision, and within the Genocide Convention, liability only attaches to those who commit the crimes of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, or complicity in genocide. The drafters of the ICTR chose quite different terminology for the basic liability provision, perhaps fearing that successful prosecutions of those who perpetrate the crimes listed within the ICTR Statute might be dependent on ambiguities in the definition of the word *committing* or on whether a perpetrator’s participation rose to the level of committing. Under Article 6.1 of the ICTR Statute, liability attaches to those who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute.”<sup>60</sup> Consequently, liability attaches to those whose behavior arguably may not rise to the definitional standard of committing. This allows for broader culpability than is provided by the Genocide Convention.

It is this very liability provision, through its inclusion of the phrase “aiding and abetting,” that has led to interpretive difficulties for the ad hoc Tribunals. These difficulties have led some jurists to argue that a redundancy exists between the liability provision of aiding and abetting genocide, as nominated by the interplay of Articles 6.1 and 2.3(a), and the crime of complicity in genocide, as nominated by Article 2.3(e).<sup>61</sup> The explanation offered is that this seeming redundancy is merely the result of a drafting oversight and of the careless verbatim inclusion of several Articles of the Genocide Convention.<sup>62</sup>

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<sup>59</sup> Genocide Convention, *supra* note 1, art. 4.

<sup>60</sup> ICTR Statute, *supra* note 5, art 6.1.

<sup>61</sup> *See, e.g.*, Prosecutor v. Karemera, Case No. ICTR 98-44-T, Separate Opinion of Judge Short, ¶ 5 (May 23, 2006).

<sup>62</sup> *See, e.g.*, Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, ¶ 640 (Apr. 19, 2004).

This argument is difficult to accept. The supposed redundancy is apparent to any careful reader of the entire ICTR Statute. Thus, the interpreter is faced with three possibilities, two of which merit rejection. The first possibility is that the drafters of the ICTR Statute were so careless that in including Article III of the Genocide Convention verbatim, they failed to notice that complicity in genocide was a listed crime. The near universal familiarity with the Genocide Convention along with the fact that the framers proposed multiple drafts of the ICTY Statute before it was even appropriated for use as the ICTR Statute make this suggestion untenable.<sup>63</sup> The second possibility is that in choosing to construct a liability provision in a manner different from that provided in the Genocide Convention, the drafters failed to recognize that *aiding and abetting* has a meaning identical to *complicity*. There are two problems with this suggestion. First, given the ubiquity of the two concepts, it is unlikely that the drafters were unaware of the similarity of meaning.<sup>64</sup> Second, in importing verbatim both Articles II and III from the Genocide Convention, but replacing Article IV of the Genocide Convention with Article 6.1 of the ICTR Statute, the drafters of the latter instrument signaled that they were satisfied with the crimes nominated by the Genocide Convention, including complicity in genocide, but dissatisfied with the attendant liability provisions. Were this not the case, the drafters simply would have imported Article IV verbatim in keeping with the practice adopted for Articles II and III, or they would have rewritten Article III without including the crime of complicity in genocide.

The third proposition, that Article III was purposefully transported verbatim from the Genocide Convention to the ICTR Statute and that Article IV of the Genocide Convention was reformulated as Article 6.1 of the ICTR Statute in order to address the perceived shortcomings of the

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<sup>63</sup> This proposition becomes even more unlikely when one considers that, according to the legislative history of the ICTY Statute, there was a “general agreement that . . . [the] definition [of genocide] should conform to the text in the Genocide Convention.” This was because “the part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable . . . as embodied in” the Genocide Convention. SCHABAS, *supra* note 2, at 98-99 (quoting *The Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 (1993)).

<sup>64</sup> Indeed, Professor Schabas, in referring to this supposed redundancy, states that:

These are cognate if not totally identical concepts . . . aiding and abetting . . . is a classic common law formulation of complicity. . . . [The Trial Chamber in Akayesu] asserts a distinction between aiding and abetting in 6.1 and complicity in genocide in 2.3(e). This is hard to understand because in comparative criminal law, the two mean essentially the same thing.

Schabas, *supra* note 22, at 539-40.

Convention, is the only logical explanation for the alleged redundancy.<sup>65</sup> As an initial matter, this interpretation adheres to the seminal rule of international legal statutory construction that implores jurists to give reasonable meaning to the text of a statute rather than reading the text in such a way that leads to redundancy between provisions. Far more significantly, there actually is no redundancy to be accounted for because the two crimes at issue are distinct. ICTR Article 2.3(e) nominates a crime known as complicity in genocide for which liability attaches through, *inter alia*, committing. By contrast, ICTR Article 2.3(a) nominates a crime called genocide for which liability attaches, through, *inter alia*, aiding and abetting. Consequently, under the ICTR Statute an individual can be prosecuted for committing the crime of complicity in genocide and for aiding and abetting the crime of genocide.

The difference between the two is vast. To successfully prosecute an alleged perpetrator for aiding and abetting the crime of genocide under Articles 6.1 and 2.3(a) of the ICTR Statute, the alleged perpetrator must possess the specific intent specific motive nexus that is the *sine qua non* of the crime of genocide. However, to be found guilty of committing the crime of complicity in genocide under Articles 6.1 and 2.3(e) of the ICTR Statute, the alleged perpetrator need only possess a lesser mens rea such as specific intent without specific motive or malice. In other words, an individual found guilty of committing the crime of complicity in genocide has knowledge, or has recklessly disregarded knowledge, that his actions will assist in the destruction, in whole or in part, of a national, ethnical, racial, or religious group. The perpetrator pursues his actions, not because

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<sup>65</sup> The 1978 Report of the Special Rapporteur on Genocide concluded that the “[Genocide] Convention failed to adopt effective international measures to prevent and punish genocide.” Lippman, *1948 Convention*, *supra* note 2, at 73-74. In Lippman’s 1998 study, he explains:

The 1985 report [of the Special Rapporteur on Genocide] reached a similar conclusion determining that[:]

[A]ll too much evidence continues to accumulate that acts of genocide are still being committed in various parts of the world . . . . In its present form, the Convention . . . [m]ust be judged to be inadequate. Further evolution of international measures against genocide are necessary and indeed overdue.

This report recommends that additional measures should be incorporated into a supplementary convention or protocol.

*Id.* at 463-64. Indeed, Lippman explains that critics complain that the specific intent specific motive nexus requirement permits those who commit genocide to claim that they lacked the required mens rea to exterminate the group, which allows them to escape punishment. *Id.* at 464. Lippman’s proposal to address this situation is for a secondary form of liability that encompasses the “negligent” destruction of a group. *Id.* This Article suggests that such a provision already exists within the Statutes of the ad hoc Tribunals and the Genocide Convention, namely, the crime of complicity in genocide.

of the victims' status, but because this action may result in economic profit or territorial or political gain or for any other non-specific motive. In contrast, the perpetrator found guilty of aiding and abetting the crime of genocide assists in the destruction, in whole or in part, of a national, ethnical, racial, or religious group because the victims are members of the particular group. These differing mens rea are in keeping with the object and purpose of the ICTR Statute to spread liability broadly enough to deter the commission of the crimes listed within the Statute without capturing those who are not deserving of punishment.<sup>66</sup>

Was there any need to include the aiding and abetting provision within Article 6.1? That is, can it be said that the aiding and abetting liability provision is redundant? After all, would not one who satisfies the mens rea requirement of aiding and abetting the crime of genocide exceed the mens rea requirement of the crime of complicity in genocide, thereby permitting guilt to attach for that crime as well? Although the answer is yes, two notes are important. First, as discussed above, one with specific intent who lacks specific motive can be prosecuted for committing the crime of complicity in genocide, but not for aiding and abetting genocide. Second, Article 6.1 applies to each and every crime within the jurisdiction of the ICTR Statute. Thus, in addition to serving as a liability provision for the crime of genocide, Article 6.1 is a liability provision for Article 3 (Crimes against Humanity) and Article 4 (Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II). In contrast to Article 2, neither Article 3 nor Article 4 standing alone provide for accomplice liability. Thus, without Article 6.1, those who merely planned, instigated, or otherwise aided and abetted in the planning, preparation, or execution of a crime referred to in Articles 3 or 4—that is, those whose participation did not rise to the level of committing or ordering to be committed—could not be successfully prosecuted. Article 2, in contrast, explicitly provides for the punishment of those who commit crimes of arguably attenuated liability

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<sup>66</sup> Indeed, the ICTY Appeals Chamber has supported this very proposition by explaining that:

An interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to *all* those 'responsible for serious violations of international humanitarian law' committed in the former Yugoslavia (Article 1). As is apparent from the wording of both Article 7(1) and the provisions setting forth the crimes over which the International Tribunal has jurisdiction (Articles 2 to 5), such responsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the *actus reus* of the enumerated crimes but appears to extend also to other offenders (see in particular Article 2, which refers to committing or *ordering* to be committed grave breaches of the Geneva Conventions and Article 4 which sets forth various types of offences in relation to genocide, including *conspiracy*, *incitement*, *attempt* and *complicity*).

Prosecutor v. Tadic, Case No. ICTY 94-1-A, Judgement, ¶ 189 (July 15, 1999).



such as conspiracy to commit genocide and complicity in genocide, and thus directly provides for punishment without reliance on Article 6.1.

#### IV. AN IMPORTANT APPLICATION FOR THE CRIME OF COMPLICITY IN GENOCIDE: EXPANDED LIABILITY FOR POLITICAL LEADERS, ARMS TRAFFICKERS, AND STATES

Having now established that complicity in genocide is a stand-alone crime, distinct from aiding and abetting genocide and with a reduced mens rea, it is now possible to consider to what use this corrected interpretation might be put.

It was suggested above that a correct interpretation of complicity in genocide might result in liability for political leaders who plan or facilitate the commission of genocide, but for whom hard proof of the requisite specific intent specific motive nexus is lacking. For instance, Edouard Karemera and his co-defendants Mathieu Ndirumapatse and Joseph Nzirorera, founding members of the MRND, the political wing of the Hutu Power regime, were almost certainly instrumental in facilitating the Rwandan genocide.<sup>67</sup> Following the assassination of President Habyarimana, the defendants allegedly assumed power and employed the apparatus of the Hutu Power state they established to execute their meticulously planned destruction of the Tutsis. Karemera, as Minister of the Interior, allegedly distributed weapons to the Interahamwe, the genocidal youth militia founded in 1992 by Ndirumapatse. Ndirumapatse allegedly founded a hate radio station, RTLM, employed to disseminate Hutu Power ideology and exhort the Interahamwe and other adherents of the Hutu Power regime to exterminate the Tutsi. Nzirorera allegedly collaborated with the other two defendants to institute a program of “civilian self defense” encouraging Hutu civilians to cooperate with the Hutu military in the eradication of Tutsi civilians.

Like their Nazi predecessors, Karemera, Ndirumapatse, and Nzirorera almost certainly bear significant responsibility for genocide though they did not, as far as we know, actually kill anyone. However, because the defendants carefully concealed their genocidal intent under a guise of plausible deniability provided by Hutu pride, military objective, and civilian self-defense, the prosecution may be unable to establish the existence of the specific intent specific motive nexus required to find them guilty of genocide.<sup>68</sup> Karemera, Ndirumapatse, and Nzirorera seem ripe for

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<sup>67</sup> The following factual discussion is drawn from the ICTR’s indictment of Karemera. Amended Indictment ¶¶ 1-80, Prosecutor v. Karemera, Case No. ICTR-98-44-I (Feb. 23, 2005).

<sup>68</sup> *Id.*

prosecution for committing the crime of complicity in genocide, where the specific intent specific motive nexus need not be established. As explained above, specific intent without specific motive or, alternatively, malice as evidenced by reckless disregard is sufficient to establish culpability. Yet, unless the jurisprudential error of the ad hoc Tribunals is corrected, these defendants, who may bear some of the greatest culpability for the devastating Rwandan genocide, may not be convicted of any genocidal crime.<sup>69</sup>

Correcting the jurisprudential error could provide for the conviction of Karemera, Ngirumpatse, and Nzirorera. In international criminal law, the three basic requirements for establishing complicity are (1) a crime must have been committed; (2) the accomplice—one who is complicit—must have contributed in a material way to the commission of that crime; and (3) the accomplice must have intended that the crime be committed or have been reckless as to its commission.<sup>70</sup> Here, there is little question that the crime was committed and there is little doubt that the accomplices contributed in a material way to its commission. The issue of culpability, therefore, revolves around the third step, whether the accomplices had the requisite mens rea. While it is likely that Karemera, Ngirumpatse, and Nzirorera intended the genocidal result of their actions, it is by no means certain that the prosecution could establish this. There is, however, little doubt that Karemera, Ngirumpatse, and Nzirorera at the very least recklessly disregarded the fact that genocide might result from their activities. Assuming that complicity in genocide requires only the mens rea of specific intent without specific motive or that of malice as evidenced by reckless knowledge, Karemera, Ngirumpatse, and Nzirorera could be convicted of the crime of complicity in genocide, whereas they might not be successfully prosecuted for genocide or aiding and abetting genocide.

A second application for a corrected interpretation of the crime of complicity in genocide revolves around the culpability of international arms traders who are often the very lifeblood of genocide.<sup>71</sup> Take, for instance, the fictional example of an apolitical Zairean (now Congolese) arms broker with one Tutsi parent and one Hutu parent who, in violation of the U.N. arms embargo forbidding arms sales to Rwanda during 1994, supplied two million machetes to Rwandan militia forces during the second month of the

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<sup>69</sup> Punishing Karemera and his cohorts for crimes against humanity or war crimes would severely understate the degree of their criminality and would serve to weaken the deterrent effect of the Genocide Convention. *See supra* note 34.

<sup>70</sup> *See* Schabas, *supra* note 14, at 446.

<sup>71</sup> *See e.g.*, Katharine Orlovsky, *International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms Brokers*, 29 HASTINGS INT'L & COMP. L. REV. 343, 350-52 (2006) (discussing black market arms in the context of the Rwandan genocide).

genocide. Within days of the assassination of President Habyarimana, international news reports, running around the clock, described in gruesome detail how members of the Hutu majority were using machetes to dismember members of the Tutsi minority.<sup>72</sup> Given the widespread knowledge of the genocide, it must be assumed that the arms broker had knew of the tragedy unfolding in neighboring Rwanda, yet went ahead with the sale of the machetes to the Hutu Power regime hoping to make a handsome profit.<sup>73</sup> Thus, the arms dealer had the specific intent to commit genocide in that he knew or recklessly disregarded the fact that his sale would facilitate the deaths of thousands of Tutsis.

However, such a perpetrator cannot be successfully prosecuted for aiding and abetting genocide because he lacked the specific motive to destroy the Tutsis because they were members of a national, religious, ethnical, or religious group. In this case, his motive was merely to make a profit, and indeed, being half-Tutsi himself, the fictional arms broker probably would prefer his machetes to be used for agricultural purposes. He cannot be prosecuted for conspiracy to commit genocide because an arms broker simply looking to make a profit probably would not go through the trouble of planning a massive international crime merely to accomplish that goal. He cannot be prosecuted for attempt to commit genocide because attempt is an inchoate crime. Nor can he be prosecuted for direct and public incitement to commit genocide, as those in the business of illegal arms trading in violation of an international embargo generally do not broadcast their involvement. Thus, without the crime of complicity in genocide, this man, who significantly facilitated the commission of genocide in Rwanda, whether intentionally or with criminal recklessness, is

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<sup>72</sup> See, e.g., The United Human Rights Council, Genocide in Rwanda, [http://www.unitedhumanrights.org/Genocide/genocide\\_in\\_rwanda.htm](http://www.unitedhumanrights.org/Genocide/genocide_in_rwanda.htm) (last visited Aug. 1, 2008).

<sup>73</sup> Cf. Schabas, *supra* note 14, at 450-51. Professor Schabas explains:

In domestic criminal law, the knowledge requirement is usually the linchpin of the case. This is because accomplices provide assistance that is ostensibly ambiguous in nature, and because if the criminal is acting on an individual and generally isolated basis it may seem unlikely that the accomplice is aware of his or her intentions. For example, there will often be considerable doubt as to whether the gun merchant actually knows the firearm being sold will be used to effect a bank robbery . . . However with regard to violations of international humanitarian law, establishing knowledge of the end use should generally be less difficult because . . . given the intense publicity about war crimes and other atrocities . . . made known not only . . . by the United Nations and non-governmental-organizations, but also by the popular media, a court ought to have little difficulty in concluding that diamond traders, airline pilots and executives, small arms suppliers, and so on, have knowledge of their contribution to the conflict and to the offences being committed.

*Id.*

unavailable for prosecution under the Genocide Convention or the Statutes of the ad hoc Tribunals.

This hypothetical is hardly far-fetched: Victor Anatolyevich Bout (a.k.a. “The Merchant of Death”), one of the world’s most prolific arms dealers, was arrested in March of 2008 by U.S. and Thai authorities.<sup>74</sup> Bout is accused of supplying arms on a massive scale to such genocide-torn regions as Sudan.<sup>75</sup> If the jurisprudential error identified by this Article is corrected, Bout’s deadly profiteering might render him culpable for the crime of complicity in genocide.

An equally powerful application for the corrected interpretation advocated here is in assigning State responsibility for the commission of genocide. A case in point is the potential responsibility of the United States for complicity in genocide with respect to Iraq.<sup>76</sup>

Since the March 2003 invasion of Iraq and the concomitant removal of Saddam Hussein from power, dramatic sectarian violence has wreaked havoc in Iraq.<sup>77</sup> While estimates of the civilian death toll since March 2003 range from 100,000 to 1,000,000,<sup>78</sup> the most commonly accepted figure as of August 2008 appears to be approximately 90,000 deaths.<sup>79</sup> It appears that the vast majority of these civilian deaths are attributable to sectarian violence rather than to traditional military operations.<sup>80</sup>

In response, a variety of American political, military, and human rights leaders have cautioned against a precipitous withdrawal from Iraq lest genocide result.<sup>81</sup> Others have suggested that genocide may already be

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<sup>74</sup> See Victor Bout News, N. Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/b/victor\\_bout/index.html](http://topics.nytimes.com/top/reference/timestopics/people/b/victor_bout/index.html) (last visited Aug. 15, 2008).

<sup>75</sup> *Id.*

<sup>76</sup> The International Court of Justice has jurisdiction to hear cases regarding genocide and its companion crimes. Genocide Convention, *supra* note 1, art. 9.

<sup>77</sup> See generally JAMES A. BAKER, III ET AL., THE IRAQ STUDY GROUP REPORT: THE WAY FORWARD—A NEW APPROACH (2006) [hereinafter IRAQ STUDY GROUP REPORT] (assessing the state of the war in Iraq per Congressional mandate).

<sup>78</sup> See G. Burnham et al., *Mortality After the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey*, 368 THE LANCET 9545, 1421-28 (2004); Lawrence K. Altman & Richard A. Opiel, *W.H.O. Says Iraq Civilian Death Toll Higher Than Cited*, N.Y. TIMES, Jan. 10, 2008, at A14; Jonathan Steele & Suzanne Goldenberg, *What is the Real Death Toll in Iraq?* GUARDIAN (U.K.), Mar. 19, 2008, at 6.

<sup>79</sup> See, e.g., Iraq Body Count, <http://www.iraqbodycount.org> (last visited Aug. 15, 2008).

<sup>80</sup> See IRAQ STUDY GROUP REPORT, *supra* note 77, at 4.

<sup>81</sup> Independent Senator Joe Lieberman has predicted that there will be “ethnic cleansing on an enormous scale” if American forces withdraw from Iraq. See David Scheffer, *The Responsibility To Protect in Iraq: Re-Deploying To Save Lives*, THE JURIST, Jan. 30, 2007, <http://jurist.law.pitt.edu/forumy/2007/01/responsibility-to-protect-in-iraq-re.php>.

Additionally, Professor Gregory Stanton “sees in Iraq the same troubling signs of preparation and execution of genocidal aims that he saw in the 1990s in Rwanda when he

taking place in Iraq, provoked in part by the U.S. military occupation, and that withdrawal is the solution.<sup>82</sup> No matter which view is correct, the question is twofold. First, are the conditions in Iraq currently, or will they become following withdrawal, such that it can be said that genocide is or will be occurring in Iraq? Second, if the answer to the first question is in the affirmative, does the United States bear responsibility for this genocide, and if so, to what degree?

In order for liability to attach for complicity in genocide, the crime of genocide itself must be committed. Given the requirements of genocide outlined above, namely, that an element of the actus reus of the crime of genocide needs to have been committed with the specific intent specific motive nexus, it is likely that any sectarian slaughter would qualify as genocide. This is so because the actus reus would be satisfied by the killing of members of a protected group, the Sunni Iraqis. The mens rea would be satisfied because the Shia would be targeting the Sunni because they were Sunni rather than because they were an impediment to economic growth or because of any other non-specific motive.

Indeed, the situation in Iraq parallels to a striking degree the situation that existed in Rwanda prior to the 1994 genocide. The members of a long-oppressed majority have assumed power at the expense of a formerly powerful minority and have undertaken a campaign of reprisal killings. The only significant distinctions are, first, that the tensions in Iraq are motivated by religious differences rather than tribal differences and, second, that the recently empowered group in Iraq is backed by the United States to

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worked at the State Department . . . and his organization, Genocide Watch, is preparing to declare the country a genocide emergency.” Massimo Calabresi, *Is Iraq Headed for Genocide?*, TIME MAGAZINE, Nov. 29, 2006, available at <http://www.time.com/time/world/article/0,8599,1564270,00.html>.

As Calabresi explains, Professor Samantha Power has concluded that:

[T]he necessary specific intent is already in evidence in Iraq and that preparations for genocide are underway: “When you drive up to a checkpoint and you’re stopped and somebody pulls out your ID and determines whether you’re a Sunni or a Shiite and takes you away and kills you because of that, there is a genocidal mentality afoot.”

*Id.*

<sup>82</sup> For instance, the Iraq Study Group Report warns that: “in some parts of Iraq—notably in Baghdad—sectarian cleansing is taking place.” IRAQ STUDY GROUP REPORT, *supra* note 77, at 10. Professor Scheffer has concluded that the Bush Administration’s rationale for staying in Iraq is fallacious because “the civilian death count from violence now rates Iraq as an atrocity zone.” See Scheffer, *supra* note 81. Indeed, journalist Nicholas Kristof “doubt[s] President Bush’s premise that a buildup is necessarily the best way to avoid a cataclysm . . . . [I]f our aim is to avoid catastrophic bloodshed in Iraq, it may well be that we’re more likely to accomplish that by leaving rather than staying.” Nicholas D. Kristof, *Iraqis Show Us the Door*, N.Y. TIMES, Feb. 13, 2007, at A23.

a far greater extent than the Hutu in Rwanda were backed by any foreign power.

If genocide is either occurring or is likely to occur in Iraq, could the United States could be found liable for the crime of complicity in genocide? Once again, the familiar accomplice matrix is implicated. In this example, if the Shiite majority were to commit genocide, the first element, the commission of a crime, would be satisfied. The United States' invasion of Iraq and failure to sufficiently protect the newly disempowered Sunni majority would constitute a material contribution to the crime by the accomplice, thereby satisfying the second element.<sup>83</sup> The only question remaining would be whether the United States possessed the specific intent without specific motive or malice as evidenced by reckless knowledge necessary to satisfy the mens rea requirement of the crime of complicity in genocide.

The answer, unfortunately, may be in the affirmative. Of course, there is no suggestion that the United States possesses the specific intent specific motive nexus in the sense that the government desires the destruction of the Sunni minority. The opposite is certainly true. But specific intent is not the requisite mens rea with respect to the crime of complicity in genocide. Instead, a lesser mens rea such as specific intent without specific motive or malice is sufficient to attach liability for the crime of complicity in genocide. Given the constant media coverage of the sectarian killings in Iraq and the repeated acknowledgements of such by prominent U.S. politicians, including President George W. Bush,<sup>84</sup> a strong case can be made that the United States knows of the genocidal intent of those it aids or, at the very least, recklessly disregards knowledge of their genocidal intent. The crime of complicity in genocide, in keeping with the object and purpose of the Genocide Convention and the Statutes of the ad hoc Tribunals, allows prosecutions of those who commit or facilitate genocidal crimes with specific intent even though they may lack specific motive. The drafters of the Genocide Convention and the Statutes of the ad hoc Tribunals intended to ensure that those without the specific intent specific motive nexus could still be prosecuted for committing the crime of complicity in genocide as long as the perpetrators have the requisite specific intent without specific motive or malice. As such, it is quite possible that

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<sup>83</sup> In fact, the ICJ recently held in the case of *Bosnia v. Serbia* that failure to prevent genocide is itself a separate ground for imputing State liability under the Genocide Convention: "In particular, the Contracting Parties have a direct obligation to prevent genocide." Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J. 70, ¶ 165 (Feb. 26).

<sup>84</sup> See, e.g., *Bush Acknowledges Setbacks in Iraq*, CNN.COM, Oct. 25, 2006 <http://www.cnn.com/2006/POLITICS/10/25/stay.course/index.html>.

the United States would be found guilty of committing the crime of complicity in genocide were it to be prosecuted at the ICJ under Article IX of the Genocide Convention. The United States has established the conditions that make the genocide possible, provided the requisite material support to the would-be *genocidaires*, and has knowledge of, or recklessly disregards knowledge of, their genocidal intent.

The intention of this Article is not to advocate such a prosecution. It is instead to increase awareness that the possibility of such a prosecution exists in the hope that this knowledge might be sufficient to deter state conduct that facilitates the commission of genocide. In the case of Iraq, the United States may need to take positive steps immediately to protect Iraqi citizens from genocide and to protect itself from prosecution for complicity in genocide. A variety of proposals to do so already exist. For example, Professor Scheffer makes a strong argument for immediate redeployment of U.S. forces to “on-the-horizon” and “over-the-horizon” positions in Iraq.<sup>85</sup> According to Scheffer, this would allow United States forces to disengage from provocative urban combat that may contribute to conditions enabling genocide and instead stand ready to intervene to prevent genocidal atrocities if they do occur.<sup>86</sup> Senator Biden has suggested that the United States immediately carve Iraq into three semi-autonomous provinces (Shiite, Sunni, and Kurdish), each capable of self-defense, in order to avoid the possibility of genocide.<sup>87</sup> Undoubtedly, other solutions exist. But the purpose of this Article is not to recommend a course of action to take in Iraq. Instead, it is merely to explain that action must be taken immediately lest the world watch as yet another genocide occurs—this time a genocide that might have dire legal consequences for the United States and its officials for the crime of complicity in genocide.

## V. CONCLUSION

The crime of complicity in genocide exists to punish those who contribute in a material way to the commission of genocide, but who, because they lack the specific intent specific motive nexus, cannot be successfully prosecuted for aiding and abetting the crime of genocide. Although it may be possible to convict one who would otherwise be guilty of complicity in genocide for aiding and abetting a crime against humanity under the Statutes of the ad hoc Tribunals, this conviction understates the perpetrator’s degree of guilt and undermines the unique condemnation

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<sup>85</sup> See Scheffer, *supra* note 81.

<sup>86</sup> *Id.*

<sup>87</sup> See, e.g., Joseph R. Biden & Leslie H. Gelb, *Unity Through Autonomy in Iraq*, N.Y. TIMES, May 1, 2006, at A19.

society has reserved for the *genocidaire*. As a result, an important deterrence mechanism is lost. In order to punish and deter the crime of genocide in fidelity to the object and purpose of the Genocide Convention and the Statutes of the ad hoc Tribunals, complicity in genocide must be recognized as a stand-alone crime. Only by extending liability to the political actors, arms brokers, and States that facilitate genocide can the promises of the Genocide Convention be fulfilled.