

Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations *Ad Hoc* Tribunals

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Ne coupez pas ce que vous pouvez dénouer.
—Joseph Joubert

I. INTRODUCTION

The relationship between aiding and abetting genocide and complicity in genocide has generated debate in the jurisprudence of the United Nations' two *ad hoc* tribunals, the International Criminal Tribunals for the former Yugoslavia and Rwanda. Despite the exploration of this issue by various Chambers of the *ad hoc* tribunals, case law on the issue remains unsettled in the area of liability for complicity in genocide and aiding and abetting genocide. This issue is all the more significant when both modes of liability for genocide are included in an indictment. Although the *Krstić* Appeals Chamber hypothesized that complicity in genocide could encompass broader conduct than aiding and abetting,¹ aiding and abetting has been the only culpable conduct that the tribunals have considered in relation to complicity in genocide. It is perhaps for this reason, in part, that the distinction between complicity in genocide and aiding and abetting genocide is worthy of debate and clarification.

In order to assist in the comparison between aiding and abetting genocide and complicity in genocide, section II of this article briefly explores

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1. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 139 (Apr. 19, 2004) [hereinafter *Krstić* Appeal Judgment].

the crime of genocide, including the elements of the crime. In sections III(A) and (B), the jurisprudence on both aiding and abetting and complicity in genocide is discussed in order to familiarize the reader with principles of individual criminal responsibility that will be examined in the following section. Section III(C) then analyzes these two modes of liability in relation to one another, beginning with a review of the various theories presented in the case law of the tribunals considering the relationship between aiding and abetting and complicity in genocide. An analysis of the viability of these theories, as well as their application in subsequent case law, is then advanced in an attempt to identify possible avenues of reconciling the jurisprudence of the tribunals. Section IV offers some concluding remarks.

II. THE CRIME OF GENOCIDE

The term “genocide” was coined in 1944 in reference to the extermination of the Jews under the Nazis in World War II and is derived from the Greek noun “τό γένος,” meaning “race,” “clan,” or “tribe,” and the Latin verb “*caedere*,” meaning “to kill.”² Article 4(2) and (3) of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) Statute, and Article 2(2) and (3) of the International Criminal Tribunal for Rwanda (“ICTR”) Statute³ reproduce *verbatim* the definition of the crime of genocide set out in Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) adopted on December 9, 1948:

Article 4 Genocide

1. The International Tribunal 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;

2. BARNHART, CONCISE DICTIONARY OF ETYMOLOGY, THE ORIGINS OF AMERICAN ENGLISH WORDS 314 (Robert K. Barnhart ed., Harper Collins 1995); AN INTERMEDIATE GREEK-ENGLISH LEXICON FOUNDED UPON THE SEVENTH EDITION OF LIDDELL AND SCOTT'S GREEK-ENGLISH LEXICON 162 (Oxford University Press 1991); CHARLTON T. LEWIS, LIBER INTERPRES LINGUAE LATINAE ELEMENTORUM 100 (Oxford University Press 1992).

3. Article 4(2) and (3) of the ICTY Statute and Article 2(2) and (3) of the ICTR Statute are identical. For the purposes of this article, Articles of the ICTY Statute will be referenced where it is inconvenient to reference the Articles of both tribunals.

- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

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.⁴

Textual provisions on the crime of genocide have remained consistent from the Genocide Convention to the Rome Statute of the International Criminal Court, which was adopted fifty years later.⁵ The definition of genocide in the statutes of both the ICTY and ICTR follows the same pattern.⁶

In order for an individual to incur liability under Article 4, first, one of the underlying acts of the offense in subparagraph (2) must have been committed, which consists of both the *actus reus* enumerated in Article 4(2)(a) to (e) and the *mens rea* required for the commission of each. For example, the perpetrator must have caused, by act or omission, the death of the victims (*actus reus*) and intended his or her act or omission to cause the death of the victims (*mens rea*). Second, the individual must also possess the specific intent of the crime of genocide, which consists of the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.⁷ It is the inclusion of subparagraph (3) of the Article that gives rise to potential confusion. Pursuant to Article 4(3), the ICTY may punish genocide, conspiracy to commit genocide, direct and public incitement to commit

4. Updated Statute of the International Criminal Tribunal for the former Yugoslavia, art. 4, *available at* <http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb08-e.pdf> [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda (as amended), art. 2, *available at* <http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf> [hereinafter ICTR Statute]. *See also* Convention on the Prevention and Punishment of the Crime of Genocide, arts. 2–3, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951).

5. William A. Schabas, *Developments in the Law of Genocide*, 5 Y.B. INT'L HUMANITARIAN L. 131, 134 (2002).

6. William A. Schabas, *The Jelisić Case and the Mens Rea of the Crime of Genocide*, 14 LEIDEN J. INT'L L. 125, 125 (2001).

7. Concerning the elements, *see* Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶ 642 (Jan. 17, 2005) [hereinafter *Blagojević & Jokić* Trial Judgment]; Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 681 (Sept. 1, 2004) [hereinafter *Brđanin* Trial Judgment]; Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 542 (Aug. 2, 2001) [hereinafter *Krstić* Trial Judgment]; Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 62 (Dec. 14, 1999) [hereinafter *Jelisić* Trial Judgment]. In the *Krstić* Trial Judgment and the *Jelisić* Trial Judgment, it is not specifically provided that the *mens rea* required for each underlying act is part of the first element of genocide.

genocide, attempt to commit genocide, and complicity in genocide. It is the relationship between the punishable acts in subparagraph (3), the underlying offenses in subparagraph (2), and the specific genocidal intent that is the subject of this article.

A. Underlying Acts of Genocide

The underlying acts of genocide include: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.⁸

“Killing” under Article 4(2)(a) is understood as murder, i.e., intentional killing.⁹ Furthermore, the victims must consist of members of the targeted group.¹⁰ In the *Blagojević & Jokić* Trial Judgment, the Trial Chamber explained that the French version of the statute refers to “meurtre,” whereas the English version utilizes the term “killings,” which includes both intentional and non-intentional homicides. However, the Chamber then went on to state that, consistent with the general principle of interpretation *in dubio pro reo*, the ICTY had opted for the interpretation most favorable to the accused and found that the term “killings,” in the context of a genocide charge, must be interpreted as referring to the definition of murder or, in other words, intentional homicide.¹¹

Whether an act constitutes “serious bodily or mental harm” within the meaning of Article 4(2)(b) must be assessed on a case-by-case basis, with

8. The *travaux préparatoires* to the Genocide Convention provide support for the idea that the drafters “intended these provisions to include all persons who could be held responsible for genocidal acts under general principles of criminal law.” Prosecutor v. Rwamakuba, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, ¶ 27 (Oct. 22, 2004) (citing the *travaux préparatoires* to the Genocide Convention in drawing this conclusion) [hereinafter *Rwamakuba* Interlocutory Appeal Decision].

9. *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 640; *Brđanin* Trial Judgment, *supra* note 7, at ¶ 689; Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 515 (July 31, 2003) [hereinafter *Stakić* Trial Judgment]; *Krstić* Trial Judgment, *supra* note 7, at ¶ 543; *Jelisić* Trial Judgment, *supra* note 7, at ¶ 63.

10. *Brđanin* Trial Judgment, *supra* note 7, at ¶ 739 (“The elements of Article 4(2)(a) are identical to those required for willful killing under Article 5(b) of the Statute, except that the former requires that they be committed against members of the protected groups.”).

11. *Blagojević & Jokić* Trial Judgment, *supra* note 7, at 236, n. 2057 (citing Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A, Judgment, ¶ 151 (June 1, 2001) [hereinafter *Kayishema & Ruzindana* Appeal Judgment]). See also Claus Kress, *The Darfur Report and Genocidal Intent*, 3 J. INT'L CRIM. JUST. 562, 565 (2005) (stating that the Darfur Report imposed the requirement of not only *dolus specialis*, but also of criminal intent for the underlying offense). But see David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT'L L.J. 231, 270 (2002) (“A textual analysis of the Genocide Convention establishes a preference for crediting the word ‘killing’ with its plain meaning.”).

due regard to the particular circumstances of the case.¹² “Causing serious bodily or mental harm” is understood to include, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence (including rape), interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury.¹³

The seriousness of bodily harm has been inferred from the nature of the damaging act and the surrounding circumstances. For example, the *Brđanin* Trial Chamber relied upon, *inter alia*, evidence that beatings in the prison camp had been regular, that there had been no medical treatment of the damages inflicted, that some had lost consciousness or died as a result of the beatings, and that some still suffered from the injuries they had sustained.¹⁴ In the *Blagojević & Jokić* Trial Judgment, the Chamber concluded that the men who were executed at Srebrenica and who had survived had suffered serious bodily and mental harm. The Trial Chamber pointed to their fear of being captured, their fear for the security of friends and family, the fact that they had been taken to the execution sites and seen friends and relatives being killed, the trauma they had gone through waiting for their turn to be executed, and the fact that some of them had been injured.¹⁵

The harm need not be permanent or irremediable,¹⁶ but the *Krstić* Trial Judgment stated that “[i]t must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”¹⁷ Mental harm refers to more than minor or temporary impairment of mental faculties.¹⁸

The acts envisaged in Article 4(2)(c)—deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part—include, but are not limited to, methods of destruction apart from direct killings, such as subjecting the group to a subsistence diet, systematic expulsion from homes, and denial of the right to medical

12. *Krstić* Trial Judgment, *supra* note 7, at ¶ 513. See also *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 646.

13. *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 646; *Brđanin* Trial Judgment, *supra* note 7, at ¶ 690; *Stakić* Trial Judgment, *supra* note 9, at ¶ 516; *Krstić* Trial Judgment, *supra* note 7, at ¶ 513. In all the above-mentioned cases, reference was made to Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶¶ 108–110 (May 21, 1999) [hereinafter *Kayishema* Trial Judgment] and to Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 502–504 (Sept. 2, 1998) [hereinafter *Akayesu* Trial Judgment].

14. *Brđanin* Trial Judgment, *supra* note 7, at ¶¶ 741–903.

15. *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶¶ 647–649.

16. *Id.*

17. *Krstić* Trial Judgment, *supra* note 7, at ¶ 513 (citing *Akayesu* Trial Judgment, *supra* note 13, at ¶ 502). See also *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 645.

18. *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 645 (citing Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶¶ 321, 322 (May 15, 2003) [hereinafter *Semanza* Trial Judgment]; Prosecutor v. Ntagerura et al., Case No. ICTR-99-46-T, Judgment and Sentence, ¶ 664 (Feb. 25, 2004) [hereinafter *Ntagerura* Trial Judgment]).

services.¹⁹ The act does not require proof of the actual physical destruction in whole or in part of the group that is targeted;²⁰ and the creation of circumstances that would lead to a slow death is also included as such an act, such as lack of proper housing, clothing and hygiene, or excessive work or physical exertion.²¹

Chambers have also considered forcible transfer and deportation (collectively referred to as “forcible displacement”) as acts which may fall under Article 4(2)(b) or 4(2)(c), as will be seen below. The importance of this ruling lies in the fact that forcible displacement is a common means of effectuating genocide, and yet is not enumerated in the statutes as an underlying act by which a genocide can be committed. For example, in establishing that the forcible transfer of women, children, and elderly from Srebrenica caused them serious mental harm under Article 4(2)(b), the *Blagojević & Jokić* Trial Chamber relied upon the surrounding circumstances: they had been brutally separated from the men, had feared for the security of their male relatives and of themselves, had been forced to leave their homes and possessions, and had known that they would never be able to return. In addition, their economic and emotional situation at the time was taken into account.²²

It should be noted, however, that the *Stakić* Trial Judgment seems to have classified forcible displacement under Article 4(2)(c), commenting that “[i]t does not suffice to deport a group or a part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of a group.”²³ In *Brđanin*, the Trial Chamber articulated the test for whether the conditions imposed during deportation or forcible transfer constitute genocidal destruction as:

19. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 50 (Dec. 6, 1999) [hereinafter *Rutaganda* Trial Judgment]; *Brđanin* Trial Judgment, *supra* note 7, at ¶ 691; *Stakić* Trial Judgment, *supra* note 9, at ¶ 517 (citing *Akayesu* Trial Judgment, *supra* note 13, at ¶¶ 505–506).

20. *Stakić* Trial Judgment, *supra* note 9, at ¶ 517 (citing with approval the Trial Chamber’s holding in the *Akayesu* Trial Judgment, *supra* note 13, at ¶ 505: “The Chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.”).

21. *Kayishema* Trial Judgment, *supra* note 13, at ¶¶ 115–116; *Brđanin* Trial Judgment, *supra* note 7, at ¶ 691; *Stakić* Trial Judgment, *supra* note 10, at ¶ 517.

22. *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶¶ 646, 650–654; *Krstić* Trial Judgment, *supra* note 7, at ¶ 513; Prosecutor v. Karadžić & Mladić, Case Nos. IT-95-5-R61 & IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 93 (July 11, 1996) [hereinafter *Karadžić & Mladić* Rule 61 Review].

23. The Trial Chamber referred to the fact that a Syrian proposal to include “[i]mposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment” as a separate underlying act in Article II of the Genocide Convention was rejected by twenty-nine votes to five, with eight abstentions. *Stakić* Trial Judgment, *supra* note 9, at ¶¶ 516–519. The Trial Chamber’s findings were undisturbed by the Appeals Chamber in the Appeal Judgment. See Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶¶ 37–57 (Mar. 22, 2006) [hereinafter *Stakić* Appeal Judgment].

the objective probability of these conditions leading to the physical destruction of the group in part. In evaluating this objective probability, the Trial Chamber has focused on the actual nature of the “conditions of life” and on the length of time that members of the group were subjected to them. It has also been guided, when available, by factors such as the characteristics of the members of the group upon which they were inflicted.²⁴

In making its findings in that case, the Trial Chamber relied upon evidence that the prisoners of the various camps had been held in small spaces and had to sleep on the floor, that the hygienic circumstances had been bad, that they had received insufficient food and water, and that they had been forced to perform heavy physical work.²⁵ The *Brđanin* Trial Chamber seems to have classified acts committed amidst a forcible transfer under Article 4(2)(c). The status of forcible displacement as an underlying act under Article 4(2)(b) or (c) would therefore seem to be unsettled in the jurisprudence.

The ICTY has not yet considered the acts enumerated under Articles 4(2)(d) and (e): imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group. In ICTR jurisprudence, the *Akayesu* Trial Chamber found that the definition of preventing births “should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages . . . a woman of the said group [being] deliberately impregnated by a man of another group [in patriarchal societies],” as well as any mentally coercive measures which aim to prevent births.²⁶ The Chamber also found that the definition of forcibly transferring children of the group to another group would sanction any “direct act of forcible physical transfer,” as well as “threats or trauma which would lead to the forcible transfer of children from one group to another.”²⁷ These findings have been followed by subsequent Chambers.²⁸

Having briefly dealt with the *actus reus* of the crime of genocide, in order to situate the reader, the *mens rea* constituting the crime of genocide will now be discussed.

24. *Brđanin* Trial Judgment, *supra* note 7, at ¶ 906. The Trial Chamber’s findings were undisturbed by the Appeals Chamber in the Appeal Judgment. See generally Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgment (Apr. 3, 2007) [hereinafter *Brđanin* Appeal Judgment].

25. *Brđanin* Trial Judgment, *supra* note 7, at ¶¶ 904–962.

26. *Akayesu* Trial Judgment, *supra* note 13, at ¶¶ 507–508.

27. *Id.*

28. See Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, ¶¶ 158–159 (Jan. 27, 2001) [hereinafter *Musema* Trial Judgment]; *Rutaganda* Trial Judgment, *supra* note 19, at ¶¶ 53–54; *Kayishema* Trial Judgment, *supra* note 13, at ¶¶ 117–118.

B. Specific Intent for Genocide

Pursuant to Article 4(2), in order to constitute the crime of genocide, an underlying act must be committed with the *specific intent* to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such. Differing terminology has been used to discuss the intent required to commit genocide.

Leading up to the adoption of the Genocide Convention, the United Nations General Assembly, in a resolution, defined genocide as “a denial of the right of existence of entire human groups.”²⁹ Following this, the Secretary-General prepared a draft Convention stating that “the word ‘genocide’ means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part, or of preventing its preservation or development,”³⁰ but pointed out that excluded from his definition of genocide were acts that, although resulting in the total or partial destruction of a group, were committed without an actual intent to destroy that group.³¹

The terms “specific intent”, “special intent”, “*dolus specialis*”, or “genocidal intent” can be used interchangeably, although there has been some debate as to how appropriate application of the terminology “*dolus specialis*” is to the mens rea requirement for genocide. Johan D. van der Vyver stated that *dolus specialis* can actually take on three different forms: *dolus directus*, *dolus indirectus*, and *dolus eventualis*, and that *dolus directus* is the form of special intent required for genocide.³² The Appeals Chamber in *Jelisić* clarified that *dolus specialis* as applied by the Trial Chamber was used synonymously with specific intent, i.e., the intent as defined in the statute, and not as it might be used in domestic law.³³ However, William Schabas argued that importation of terms such as “specific intent” and “*dolus specialis*” is unnecessary and confusing, where the strict definition of genocide suffices.³⁴ The jurisprudence of the ICTY predominantly contains the term “specific intent,”³⁵ and this is the terminology that will be used in this article.

29. U.N. GAOR, 96th Sess., 55th plen. mtg., at 188–89, U.N. Doc. A/96/PV.1 (Dec. 11, 1946).

30. U.N. GAOR, 447th Sess., at 20, U.N. Doc. E/447 (June 26, 1947).

31. U.N. GAOR, 96th Sess., 55th plen. mtg., at 188–89, U.N. Doc. A/96/PV.1 (Dec. 11, 1946).

32. Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 *FORDHAM INT'L L.J.* 286, 306–08 (1999); see also William A. Schabas, *Mens Rea and the International Criminal Tribunal for the former Yugoslavia*, 37 *NEW ENG. L. REV.* 1015, 1023 (2003).

33. Prosecutor v. Jelisić, No. IT-95-10-A, Judgment, ¶ 51 (July 5, 2001) [hereinafter *Jelisić* Appeal Judgment]; but see generally Alexander K.A. Greenawalt, Note, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 *COLUM. L. REV.* 2259 (1999) (arguing that *dolus indirectus* should satisfy intent for genocide).

34. See William A. Schabas, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the former Yugoslavia*, 25 *FORDHAM INT'L L.J.* 23, 47–51 (2001).

35. See, e.g., *Krstić* Appeal Judgment, *supra* note 1, at ¶ 20; *Brđanin* Trial Judgment, *supra* note 7, at ¶ 696; Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, (June 16, 2004) [hereinafter *Milošević* Acquittal Decision]; *Stakić* Trial Judgment, *supra* note

It is not sufficient that the perpetrator knew that the underlying crime would inevitably or likely result in the destruction of the targeted group;³⁶ rather, destruction of the protected group must be the goal of the principal perpetrator³⁷ when committing the act. The *Krstić* Trial Chamber inferred the accused's intent by his participation in the genocide and his awareness that a genocide was taking place, and thus held *Krstić* guilty of genocide via the mode of liability of joint criminal enterprise under Article 7(1).³⁸ However, the Appeals Chamber rejected this reasoning, stating that:

9, at ¶ 521; *Jelišić* Appeal Judgment, *supra* note 33, at ¶ 45, *et seq.*; *Jelišić* Trial Judgment, *supra* note 7, at ¶¶ 45–46.

36. *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 656.

37. See *Brdanin* Appeal Judgment, *supra* note 24, at ¶ 362 (“The parties and the Trial Chamber have used various expressions to identify the people ‘on the ground’ who ‘pulled the trigger’ or otherwise committed the *actus reus* of the crimes identified in the indictment. These expressions include ‘material perpetrators’, ‘physical perpetrators’, or ‘Relevant Physical Perpetrators’ . . . when referring to members of the army and Serb paramilitary forces. However, at times, crimes might have been committed by omission, without any ‘physical’ or ‘material’ acts. Moreover, the *actus reus* carried out by these individuals might have not been accompanied by the requisite *mens rea*. Thus, the Appeals Chamber refers to these individuals, in the discussions that follow, as persons who carry out the *actus reus* of the crime(s) or, more simply, as ‘principal perpetrators.’”) (footnote omitted). The same terminology is followed in this article.

38. *Krstić* Trial Judgment, *supra* note 7, at ¶¶ 571, 601–605, 619–636, 645, 653. The doctrine of joint criminal enterprise is a legal universe unto itself and has inspired a prodigious amount of jurisprudential and scholarly debate since its recognition by the ICTY Appeals Chamber. See generally, Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L CRIM. JUST. 159 (2007) (comparing the doctrine of joint criminal enterprise to the doctrine of command responsibility); Katrina Gustafson, *The Requirement of an ‘Express Agreement’ for Joint Criminal Enterprise Liability, A Critique of Brđanin*, 5 J. INT'L CRIM. JUST. 134 (2007) (exploring development of joint criminal enterprise in ICTY jurisprudence and critiquing the “express agreement requirement” articulated in the *Brđanin* Trial Judgment). Although the relationship between the doctrine of joint criminal enterprise and genocide is not the subject of this article, a few words bear mention here. The mode of individual criminal responsibility commonly referred to as “joint criminal enterprise” or “JCE,” first recognized by the *Tadić* Appeals Chamber, is a form of responsibility not explicitly enumerated in the *ad hoc* tribunal statutes, but rather derived from customary international law. JCE is a form of liability through which accused can be held responsible for crimes in the statutes. *Tadić* Appeal Judgment, *supra* note 41, at ¶¶ 190–191. ICTY jurisprudence has recognized three categories of JCE; and, in general, the three requirements for a JCE are (1) “a plurality of persons;” (2) “existence of a common purpose (or plan) which amounts to or involves the commission of a crime provided for in the Statute;” and (3) “participation of the accused in this common purpose.” The mental elements for JCE differ according to each category. See *Brđanin* Appeal Judgment, *supra* note 25, at ¶¶ 363–365. The Appeals Chamber has clearly held, based upon ICTY jurisprudence, post World War II cases, and the text and drafting history of the Genocide Convention of 1948, that customary international law criminalized intentional participation in a common plan to commit genocide prior to 1992. *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, ¶¶ 13–14 (Oct. 22, 2004). See also *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶ 2 (Mar. 19, 2004) (holding that the Trial Chamber—in dismissing a count of the indictment on the ground that the specific intent required for a conviction of genocide was incompatible with the lower mental element standard of a third category joint criminal enterprise—had erred in conflating the *mens rea* requirement of the crime of genocide with the mental element requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused and therefore reversing the Trial Chamber's decision to acquit the accused of that charge). See also *Brđanin* Appeal Judgment, *supra* note 25, at ¶ 132, n. 891 (“The jurisprudence of the Tribunal traditionally equates a conviction for JCE with the mode of liability of ‘committing’ under Article 7(1). The Appeals Chamber declines at this time to address whether this equating is still appropriate where the accused is convicted

[a]s has been demonstrated, all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent.³⁹

The Appeals Chamber therefore set aside the Trial Chamber's conclusion that the accused had shared the intent to commit genocide and held that a genocide had been committed and that the accused had aided and abetted that genocide.⁴⁰

Thus, as can be seen, this requirement of specific intent⁴¹ is often the defining factor as to whether or not certain acts constitute genocide.⁴² It is also the element of genocidal intent that often distinguishes the crime of genocide from that of aiding and abetting genocide in the jurisprudence of the *ad hoc* tribunals. Stated in a different way, one can be held liable for aiding and abetting genocide, even if one does not share the specific genocidal intent of the principal perpetrator.

The Rome Statute contains a provision about criminal responsibility that is not found in either of the U.N. *ad hoc* tribunal statutes or the Genocide Convention but which further illuminates the mens rea of genocide. Under Article 30 of the Rome Statute, "knowledge" and "intent" are the two components of mens rea. A person has "intent" when the person "means to engage in the conduct" and "means to cause that consequence or is aware that it will occur in the ordinary course of events." "Knowledge" requires that the person had "awareness that a circumstance exists or a consequence will occur in the ordinary course of events." As defined in Article 30, recklessness or *dolus eventualis* and negligence are insufficient to establish criminal responsibility.⁴³

via JCE for crimes committed by a principal perpetrator who was not part of the JCE, but was used by a member of the JCE.").

39. *Krstić* Appeal Judgment, *supra* note 1, at ¶¶ 134, 143.

40. *Id.*

41. It should be noted that the *Jelisić* Appeal Judgment clarified that personal motive must be distinguished from genocidal intent. However, the Appeals Chamber clarified that the existence of personal motive, such as to obtain personal economic benefits, political advantages, or some form of power, "does not preclude the perpetrator from also having the specific intent to commit genocide." *Jelisić* Appeal Judgment, *supra* note 33, ¶ 49 (referring to *Prosecutor v. Tadić*, Case No. IT-95-1-A, Judgment, ¶ 269 (July 15, 1999) [hereinafter *Tadić* Appeal Judgment] (stressing the irrelevance and "inscrutability of motives in criminal law")).

42. See Cecile Tournaye, *Genocidal Intent Before the ICTY*, 52 INT'L & COMP. L. Q. 447, 449 (2003).

43. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, Art. 30. See also WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 207, 214 (2000) (discussing additional requirements from Article 30 for genocide given the reference to intent in the Rome Statute); *id.* at 227 (omission to take action that results in an act of genocide can occur either with or without the required genocidal intent).

With the Rome Statute's treatment of intent in mind, it is useful to examine decisions of the ICTY Appeals Chamber holding that proof of genocidal intent, in the absence of direct evidence (such as witness statements),⁴⁴ can be inferred from the factual circumstances of the case. Examples of situations from which intent can be inferred include, "the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts."⁴⁵ Some chambers have inferred intent to physically or biologically destroy the targeted group when such destruction followed from the nature of the underlying acts.⁴⁶ Conversely, if the perpetrator's acts are not completely consistent with the aim to destroy the group, it does not necessarily disprove specific intent.

For example, in the *Blagojević & Jokić* Trial Judgment, the forcible transfer of women, children, and elderly from Srebrenica, although it may not seem an act of murder or extinction per se, was regarded an act that could destroy the Bosnian Muslims of Srebrenica and that could display the Serb forces' intention to destroy the Bosnian Muslims of Srebrenica.⁴⁷ However, the Trial Chamber in the *Brđanin* Trial Judgment found that the fact that the great majority had been forcibly transferred, and not killed, supported the conclusion that the Bosnian Serb forces did not have the intention to destroy the targeted group. As a further factor contradicting genocidal in-

44. Statements of the accused have been taken into account in determining whether he personally possessed specific intent. In the *Jelisić* Appeal Judgment, the Appeals Chamber found that the statements of the accused—e.g., statements that he wanted to rid the world of Muslims, that he was the "Adolf the second", and about how many Muslims he had killed—against the backdrop of it having been established that a genocide had been committed in Brèko and that the accused had killed Muslims with a discriminatory intent, were sufficient to conclude that he had possessed the specific intent. *Jelisić* Appeal Judgment, *supra* note 33, at ¶¶ 66–68; see also *Jelisić* Trial Judgment, *supra* note 7, at ¶¶ 73, 75, 102 (holding that the accused did not have specific intent). *But see Stakić* Trial Judgment, *supra* note 9, at ¶ 554 (the accused had made statements revealing an intent to alter the ethnic composition of Prijedor, but the Trial Chamber held that, because the accused had not advocated killings, intent to destroy the Bosnian Muslims could not be inferred).

45. *Jelisić* Appeal Judgment, *supra* note 33, at ¶ 47. See also *Krstić* Appeal Judgment, *supra* note 1, at ¶ 34; *Stakić* Trial Judgment, *supra* note 9, at ¶ 526; *Krstić* Trial Judgment, *supra* note 7, at ¶ 568. In the *Brđanin* Trial Judgment, the caveat was added that "[w]here an inference needs to be drawn, it has to be the only reasonable inference available on the evidence." *Brđanin* Trial Judgment, *supra* note 7, at ¶ 970 (emphasis in original).

46. *Krstić* Appeal Judgment, *supra* note 1, at ¶¶ 28–33; *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶¶ 666, 674–677; *Krstić* Trial Judgment, *supra* note 7, at ¶¶ 594–596.

47. *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 675. See also *Jelisić* Appeal Judgment, *supra* note 33, at ¶ 71 ("A reasonable trier of fact could have discounted the few incidents where he showed mercy as aberrations in an otherwise relentless campaign against the protected group."); *Krstić* Trial Judgment, *supra* note 7, at ¶¶ 572–573, 595–596 (holding that killing was limited to military aged men—women, children, and elderly were forcibly transferred from the area—the Chamber concluded that the Bosnian Serb forces had the intent to destroy the entire Bosnian Muslim population of Srebrenica, the relevant part of the protected group, because they "knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.").

tent, the Trial Chamber pointed to the fact that the Bosnian Serb forces controlled the Autonomous Region of Krajina (“ARK”)⁴⁸ at the relevant time and had the logistical resources to destroy, instead of forcibly transfer, the population, had they so desired. The victims of the underlying acts were predominantly military men, which the Trial Chamber stated supported the conclusion that the Bosnian Serbs’ intent was to eliminate a perceived threat, not to commit genocide.⁴⁹

The extent of the actual destruction caused by the underlying acts, both in terms of geographic scope and number of victims, is an important factor in determining intent. The *Brđanin* Trial Chamber found that the fact that the underlying acts were limited to thirteen municipalities and targeted only a small percentage of the respective parts of the two protected groups, did not allow an inference that the underlying acts were motivated by genocidal intent. The Trial Chamber considered that other factors could have shown such intent, but that no such factors were present in the instant case.⁵⁰

The *Milošević* Trial Chamber, in its decision upon the accused’s motion for Judgment of acquittal, decided that it would assess whether there was evidence of genocide in a specified number of municipalities, on a municipality by municipality basis.⁵¹ The inference that the underlying acts were motivated by genocidal intent may be drawn even though the individuals to whom the intent is attributed are not precisely identified.⁵²

Finally, the existence of a plan or policy is not an element of the crime, nor is it tantamount to specific intent per se. However, it has high probative value in proving specific intent.⁵³ The ICTY Appeals Chamber has relied upon the fact that the accused was acting according to a plan in establishing his intent.⁵⁴

1. *Defining Protected “National, Ethnical, Racial or Religious Group”*

The case law of the ICTY and the ICTR supports the conclusion of the *Brđanin* Trial Chamber that “[t]he correct determination of the relevant

48. The *Brđanin* Trial Chamber determined that the Serbian Democratic Party established the Autonomous Region of Krajina (“ARK”) “as an intermediate level of government to co-ordinate the implementation by the municipalities” of a Strategic Plan to “link Serb-populated areas in [Bosnia and Herzegovina] together, to gain control over these areas and to create a separate Bosnian Serb state, from which most non-Serbs would be permanently removed.” The *Brđanin* Trial Chamber further found that “[t]he implementation of the Strategic Plan led to the widespread commission of crimes against non-Serbs in the Bosnian Krajina.” *Brđanin* Trial Judgment, *supra* note 7 at ¶¶ 163–66, 180, 230, 305.

49. *Id.* at ¶¶ 976, 978–979.

50. *Brđanin* Trial Judgment, *supra* note 7, at ¶¶ 973–974.

51. *Milošević* Acquittal Decision, *supra* note 35, at ¶ 125.

52. *Krstić* Appeal Judgment, *supra* note 1, at ¶¶ 34–35 (following the decision in the *Krstić* Trial Judgment, *supra* note 7, at ¶¶ 591–599). See also *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 677; *Krstić* Trial Judgment, *supra* note 7, at ¶¶ 594–599. In both cases reference is to the intent of “Bosnian Serb forces.”

53. *Brđanin* Trial Judgment, *supra* note 7, at ¶ 980.

54. *Jelišić* Appeal Judgment, *supra* note 33, ¶¶ 66–68.

protected group has to be made on a case-by-case basis, consulting both objective and subjective criteria.”⁵⁵ Subjective criteria have been seen as more helpful however, and the use of “scientifically objective criteria” has been explicitly rejected.⁵⁶ An objective criterion relates to an actual aspect of the victim, e.g., the victim is a member of a religious group; whereas, a subjective criterion relates to an aspect, either true in fact or not, that the perpetrator ascribes to the victim, e.g., the perpetrator thinks that the victim is a member of a religious group, but whether the victim in fact is such a member may or may not be the case.

However, the *Brđanin* Trial Judgment stated that “subjective criteria alone may not be sufficient to determine the group targeted for destruction and protected by the Genocide Convention, for the reason that the acts identified in subparagraphs (a) to (e) of Article 4(2) must be in fact directed against ‘members of the group.’”⁵⁷ When a victim’s actual membership in a defined protected group is unclear, the ICTR has consistently held that the subjective perception of the perpetrator that the victim is the member of the group is decisive.⁵⁸ The subjective criterion can therefore be determinative and can analytically be reduced further to a “positive” or “negative” approach, as is discussed below.

Concerning subjective criteria, the *Jelisić* Trial Chamber held that “[i]t is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.”⁵⁹ The Trial Chamber further stated:

[a] group may be stigmatised in this manner by way of positive or negative criteria. A “positive approach” would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A “negative approach” would consist of

55. *Brđanin* Trial Judgment, *supra* note 7, at ¶ 684 (citing *Semanza* Trial Judgment, *supra* note 18, at ¶ 317). See *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 811 (December 1, 2003) [hereinafter *Kajelijeli* Trial Judgment]. See also *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 667.

56. *Krstić* Trial Judgment, *supra* note 7, at ¶ 556. In ICTR jurisprudence, although *Akayesu* explored potential definitions of a “national, ethnical, racial, or religious group,” it is commonly accepted that “no generally or internationally accepted definition” exists, and that each concept “must be assessed in the light of a particular political, social, historical, and cultural context. Although membership of the targeted group must be an objective feature of the society in question, there is also a subjective dimension.” *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgment, ¶ 65 (June 7, 2001) [hereinafter *Bagilishema* Trial Judgment]; *Akayesu* Trial Judgment, *supra* note 13, at ¶¶ 510–516. See also, e.g., *Prosecutor v. Ndindabahizi*, Case No. ICTR-2001-71-1, Judgment and Sentence, ¶ 468 (July 15, 2004) [hereinafter *Ndindabahizi* Trial Judgment].

57. *Brđanin* Trial Judgment, *supra* note 7, at ¶ 684.

58. *Ndindabahizi* Trial Judgment, *supra* note 56, at ¶ 468; *Bagilishema* Trial Judgment, *supra* note 56, at ¶ 65; *Musema* Trial Judgment, *supra* note 28, at ¶ 161.

59. *Jelisić* Trial Judgment, *supra* note 7, ¶ 70 (referring to *Kayishema & Ruzindana* Trial Judgment, *supra* note 13, ¶ 98).

identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group.⁶⁰

Later case law followed the “positive approach,”⁶¹ whereas no case has used the “negative approach,” which was explicitly rejected in the *Brđanin* and *Stakić* Trial Judgments.⁶² Recently, the Appeals Chamber, in addressing this issue, examined the plain text of Article 4 of the Genocide Convention, its drafting history, and commentaries, after which the Chamber concluded that, regardless of whether the group is established by objective or subjective criteria (or a combination thereof), a group targeted for genocide could not be defined negatively, but rather had to be defined positively in order for it to be a group protected by the Genocide Convention.⁶³

Finally, the victims of the crime must be targeted because of their membership in the protected group,⁶⁴ although not necessarily solely because of such membership.⁶⁵ It is also interesting to note that, whereas a principal perpetrator of persecution as a crime against humanity selects his or her victim because of membership in a specific group or community, the perpetrator does not necessarily seek to destroy that group as such, as is the case with genocide.⁶⁶ This difference between the mens rea for genocide and persecution assists (and highlights) in defining the specific intent required for genocide.

2. Intent to Destroy Group “in Whole or in Part . . . As Such”

The term “in whole” has not been specifically considered by the ICTY or the ICTR; however, with respect to the term “in part,” the *Krstić* Appeal Judgment held the requirement to be that “the alleged perpetrator intended to destroy at least a *substantial* part of the protected group.”⁶⁷ The Appeals Chamber held that “the substantiality requirement both captures genocide’s defining character as a crime of massive proportions and reflects the Convention’s concern with the impact the destruction of the targeted

60. *Id.* at ¶ 71.

61. *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 667; *Krstić* Trial Judgment, *supra* note 7, at ¶ 557.

62. *Brđanin* Trial Judgment, *supra* note 7, at ¶ 685; *Stakić* Trial Judgment, *supra* note 9, at ¶ 512.

63. *Stakić* Appeal Judgment, *supra* note 23, at ¶¶ 25–26 (citations omitted).

64. *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 669; *Krstić* Trial Judgment, *supra* note 7, at ¶ 561; *Jelisić* Trial Judgment, *supra* note 8, ¶ 67.

65. *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 669.

66. *Krstić* Trial Judgment, *supra* note 7, at ¶ 553; *Jelisić* Trial Judgment, *supra* note 7, at ¶ 79 (citing *Akayesu* Trial Judgment, *supra* note 13, at ¶ 522).

67. *Krstić* Appeal Judgment, *supra* note 1, at ¶ 12 (emphasis added). See also *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 668; Prosecutor v. Sikirica et al., Case No. IT-95-8-T, Judgment on Defense Motions to Acquit, ¶¶ 65–86 (September 3, 2001) [hereinafter *Sikirica* Rule 98 *bis* Decision]; *Jelisić* Trial Judgment, *supra* note 7, at ¶ 82.

part will have on the overall survival of the group.”⁶⁸ The Appeals Chamber explained that the numerical size of the targeted part of the group, both in absolute numbers and in relation to the overall size of the entire group, is the starting point of an inquiry into whether a substantial part of a group was destroyed.⁶⁹

The prominence of the targeted part within the group is an important additional factor in determining the substantiality of its destruction. The *Krstić* Appeal Judgment considered that, if a specific part of the group is “emblematic of the overall group” or is “essential to its survival,” this “part” of the group may qualify as substantial within the meaning of Article 4.⁷⁰

The requirement of intent to destroy a part of the group can be fulfilled when the exterminatory intent is restricted to a part of the group within a limited geographical zone, such as a region or a municipality.⁷¹ This conclusion is reinforced by the ICTY’s case law holding that the specific intent to destroy a part of a group means seeking to destroy a *distinct* part of the group, as opposed to an accumulation of isolated individuals within the group.⁷² However, the perpetrator must intend to destroy the group “as such.” The term “as such” encapsulates the requirement that the perpetrator must intend to destroy the targeted group, or the targeted part thereof, as a separate and distinct entity.⁷³ A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such. Conversely, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims,

68. *Krstić* Appeal Judgment, *supra* note 1, at ¶ 8. See also *Sikirica* Rule 98 *bis* Decision, *supra* note 67, at ¶ 77; *Krstić* Trial Judgment, *supra* note 7, at ¶ 590; *Jelisić* Trial Judgment, *supra* note 7, at ¶ 82.

69. *Krstić* Appeal Judgment, *supra* note 1, at ¶ 12. See also *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 668.

70. *Krstić* Appeal Judgment, *supra* note 1, at ¶ 12. In the *Sikirica* Rule 98 *bis* Decision, a group’s leadership was pointed out as “a significant section of the group.” *Sikirica* Rule 98 *bis* Decision, *supra* note 67, at ¶¶ 65, 76–85. See also *Stakić* Trial Judgment, *supra* note 9, at ¶ 525; *Krstić* Trial Judgment, *supra* note 7, at ¶ 587; *Jelisić* Trial Judgment, *supra* note 7, at ¶ 82. But see *Krstić* Appeal Judgment, *supra* note 1, at 4 n.22 (rejecting the positions of the *Jelisić* Trial Judgment and the *Sikirica* Rule 98 *bis* Decision, that the targeted part’s prominence is something that, in and of itself, is sufficient to satisfy the requirement of substantiality); *Sikirica* Rule 98 *bis* Decision, *supra* note 67, at ¶ 65; *Jelisić* Trial Judgment, *supra* note 7, at ¶ 82.

71. *Stakić* Trial Judgment, *supra* note 9, at ¶ 523; *Sikirica* Rule 98 *bis* Decision, *supra* note 67, at ¶ 68; *Krstić* Trial Judgment, *supra* note 7, at ¶¶ 589–590; *Jelisić* Trial Judgment, *supra* note 7, at ¶ 83. See also *Akayesu* Trial Judgment, *supra* note 13, at ¶¶ 704, 733. It has been pointed out that this approach must be applied with caution because it risks distorting the definition of genocide. *Stakić* Trial Judgment, *supra* note 9, at ¶ 523.

72. *Krstić* Trial Judgment, *supra* note 7, at ¶ 590. See also *Brđanin* Trial Judgment, *supra* note 7, at ¶ 700; *Stakić* Trial Judgment, *supra* note 9, at ¶ 524.

73. *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 670; *Brđanin* Trial Judgment, *supra* note 7, at ¶ 698; *Stakić* Trial Judgment, *supra* note 9, at ¶ 521; *Krstić* Trial Judgment, *supra* note 7, at ¶ 552; *Jelisić* Trial Judgment, *supra* note 7, at ¶ 79.

would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area.⁷⁴

Therefore the destruction or intent to destroy an entire group is not necessary, but rather a smaller part of the group may be targeted; and, when this is the case, this smaller part of the group must be targeted as a distinctive entity. The intent to destroy the targeted group as such, i.e., as a distinct and separate entity, has been inferred when it has been concluded that: (1) the underlying acts targeted a specific part of the group; and (2) the acts could have had, or had, the effect of destroying that part of the group.⁷⁵

III. RECONCILING AIDING AND ABETTING GENOCIDE AND COMPLICITY IN GENOCIDE

The crimes included within the subject matter jurisdiction of the *ad hoc* tribunals are genocide,⁷⁶ crimes against humanity,⁷⁷ violations of the laws or customs of war (“war crimes”),⁷⁸ grave breaches of the Geneva Conventions of 1949,⁷⁹ and Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.⁸⁰ These crimes are drawn from many different sources in international law, and it is the statutes of the tribunals themselves that enable the ICTY and the ICTR to hold individuals criminally responsible for violations of these international law principles.

Article 1 of the ICTY Statute, entitled “Competence of the International Tribunal,” provides as follows: “The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.”⁸¹ In other words, one could not be convicted of breaching, for example, the Genocide Convention without the juridical vehicle of the statutes, which are creatures of a United Nations Security Council Resolution adopted under Article VII of the United Nations Charter.⁸² The statutes themselves situate the tribunals’ jurisdiction for the enforcement of these principles in an international

74. *Krstić* Trial Judgment, *supra* note 7, at ¶ 590.

75. *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶¶ 666, 674–677; *Krstić* Appeal Judgment, *supra* note 1, at ¶¶ 28–33; *Krstić* Trial Judgment, *supra* note 7, at ¶¶ 594–596.

76. ICTY Statute, *supra* note 4, art. 4; ICTR Statute, *supra* note 4, art. 2.

77. ICTY Statute, *supra* note 4, art. 5; ICTR Statute, *supra* note 4, art. 3.

78. ICTY Statute, *supra* note 4, art. 3.

79. ICTY Statute, *supra* note 4, art. 2.

80. ICTR Statute, *supra* note 4, art. 4.

81. ICTY Statute, *supra* note 4, art. 1; *see also* ICTR Statute, *supra* note 4, art. 1, entitled “Competence of the International Tribunal for Rwanda,” which provides as follows:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

82. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

criminal law context. This includes personal jurisdiction over individuals,⁸³ temporal and geographic jurisdiction,⁸⁴ and subject matter jurisdiction over the crimes mentioned above.⁸⁵ In order for an individual to be convicted of one of the statutory crimes, the Prosecution must prove three “levels” of elements beyond a reasonable doubt, namely the actus reus and mens rea of the underlying offense, the general requirements of the statutory crimes, and the physical and mental elements of the mode of liability.

The elements of an underlying offense and the elements of a mode of liability are often assigned the same terminology of “mens rea” and “actus reus.” However, this can lead to confusion when the elements of an underlying offense must be analyzed separately from the elements of a mode of liability, for example, when an accused on trial is separate and distinct from the principal perpetrator of a crime. For this reason, this article will use “mens rea” and “actus reus” for the elements of an underlying offense and “mental element” and “physical element” for the elements of a mode of liability.

This terminology is important when the principal perpetrator is far-removed from the accused and separate findings need to be made regarding the mens rea and actus reus of the underlying offenses (committed by the principal perpetrator) and the mental and physical elements of the modes of liability (through which the accused is held responsible for the underlying offenses). Aiding and abetting genocide and complicity in genocide—as modes of liability—are discussed below, prior to a comparison of the two.

A. *Aiding and Abetting Genocide*

Aiding and abetting, in relation to genocide, is the first mode of liability to be examined. Aiding and abetting is a form of individual criminal liability set forth in Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute.⁸⁶ Article 7(1) of the ICTY Statute is set forth below in full:

Article 7

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 5 of the present Statute, shall be individually responsible for the crime.

83. ICTY Statute, *supra* note 4, art. 6; ICTR Statute, *supra* note 4, art. 5.

84. ICTY Statute, *supra* note 4, art. 8; ICTR Statute, *supra* note 4, art. 7.

85. ICTY Statute, *supra* note 4, arts. 1–5; ICTR Statute, *supra* note 4, arts. 1–4.

86. Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute are almost identical. The differences between the two consist of disparate references to previous Articles in the Statutes. This is due to dissimilarities among some of the substantive crimes each tribunal has the jurisdiction to prosecute. Other minute differences include varied reference to gender and specific references to each particular tribunal. For the purposes of this memorandum, Article 7(1) of the ICTY Statute will be referenced where it is inconvenient to reference both Articles.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such 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.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.⁸⁷

Therefore, Article 7(1) provides that 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 5 of the present Statute, shall be individually responsible for the crime.”⁸⁸ Aiding and abetting is not a form of liability that is specific to genocide alone, and it has been frequently applied to different crimes in varying factual scenarios throughout the jurisprudence of the tribunals.⁸⁹

Perhaps because of its frequent and potentially broad application, the jurisprudence regarding aiding and abetting is fairly well-settled; there is little contention as to the basic elements of aiding and abetting, which are widely recognized as being the following:⁹⁰

87. ICTY Statute, *supra* note 4, art. 7.

88. ICTY Statute, *supra* note 4, art. 7(1) (emphasis added).

89. *Bagilishema* Trial Judgment, *supra* note 56; *Akayesu* Trial Judgment, *supra* note 13; Prosecutor v. Orić, Case No. IT-03-68-T, Judgment (June 30, 2006) [hereinafter *Orić* Trial Judgment]; *Blagojević & Jokić* Trial Judgment, *supra* note 7; *Brđanin* Trial Judgment, *supra* note 7; Prosecutor v. Galić, Case No. IT-98-29-T, Judgment and Opinion (December 5, 2003) [hereinafter *Galić* Trial Judgment]; Prosecutor v. Simić, Case No. IT-95-9-T, Judgment (Oct. 17, 2003) [hereinafter *Simić* Trial Judgment]; Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment (Nov. 29, 2002) [hereinafter *Vasiljević* Trial Judgment]; Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, (Mar. 15, 2002) [hereinafter *Krnojelac* Trial Judgment]; Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, (March 3, 2000) [hereinafter *Blaškić* Trial Judgment]; Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgment (June 25, 1999) [hereinafter *Aleksovski* Trial Judgment]; Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998) [hereinafter *Furundžija* Trial Judgment].

90. The recent Judgment by the Trial Chamber sought to clarify and expand the elements of aiding and abetting. The *Orić* Trial Chamber stated that aiding and abetting may be constituted by any contribution to the planning, preparation or execution of a finally completed crime, provided that, on the one hand, the contribution falls short of one's own co-perpetration in or instigation or ordering of the crime, and, on the other hand, they are substantial and efficient enough to make the performance of the crime possible or at least easier. *Orić* Trial Judgment, *supra* note 89, at ¶ 281.

- The accused lent practical assistance, encouragement, or moral support to the principal offender in committing an offense.⁹¹
- The act or omission had a substantial effect on the commission of the crime.⁹²
- The accused acted intentionally, or refrained from acting, with knowledge or awareness that his act or omission would lend assistance, encouragement, or moral support to the principal offender.⁹³

The Trial Chamber specified that the act or omission can be spatially or physically removed from the actual crime, and could occur before, during or after the crime. Confirming that aiding and abetting can occur through omission, the Trial Chamber clarified that such an omission would have to be accompanied by an obligation to prevent the crime. The *Orić* Trial Chamber also felt that the mental requirements for aiding and abetting needed clarification, finding that aiding and abetting must be intentional; the aider and abettor must have ‘double intent,’ in that he intends the furthering effect of his own contribution and the completion of the crime by the principal perpetrator; the intention must contain a cognitive element of knowledge and a volitional element of acceptance; and the aider and abettor must, at a minimum, be aware of the essential elements of the crime committed. Whether the changes and adjustments proposed by the *Orić* Trial Chamber will be implemented in future decisions and judgments of the tribunals remains to be seen. See *Orić* Trial Judgment, *supra* note 89, at ¶¶ 280–288.

91. Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Judgment and Sentence, ¶ 597 (Jan. 22, 2003) [hereinafter *Kamuhanda* Trial Judgment]; *Kajelijeli* Trial Judgment, *supra* note 55, at ¶ 766; *Musema* Trial Judgment, *supra* note 28, at ¶¶ 126, 175 (“physical or moral support”); *Rutaganda* Trial Judgment, *supra* note 19, at ¶ 43 (“physical or moral support”); *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 726; Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 349, (Jan. 31, 2005) [hereinafter *Strugar* Trial Judgment]; *Brđanin* Trial Judgment, *supra* note 7, at ¶ 271; Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 45 (July 29, 2004) [hereinafter *Blaškić* Appeal Judgment]; Prosecutor v. Vasiljević, Case No. IT-98-32-A, ¶ 102, (Feb. 25, 2004) [hereinafter *Vasiljević* Appeal Judgment]; *Simić* Trial Judgment, *supra* note 89, at ¶ 162; Prosecutor v. Naletilić, Case No. IT-98-34-T, Judgment, ¶ 63 (Mar. 31, 2003) [hereinafter *Naletilić* Trial Judgment]; *Vasiljević* Trial Judgment, *supra* note 89, at ¶ 70; Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶ 399 (Feb. 26, 2001) [hereinafter *Kordić* Trial Judgment]; Prosecutor v. Kunarac, Case No. IT-96-23-T, IT-96-23/1-T, Judgment, ¶ 391 (Feb. 22, 2001) [hereinafter *Kunarac* Trial Judgment]; *Blaškić* Trial Judgment, *supra* note 89, at ¶ 283; *Tadić* Appeal Judgment, *supra* note 41, at ¶ 229; *Furundžija* Trial Judgment, *supra* note 89, at ¶¶ 235, 249; Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 689, (May 7, 1997) [hereinafter *Tadić* Trial Judgment].

92. *Furundžija* Trial Judgment, *supra* note 89, at ¶¶ 235, 249. See also *Kajelijeli* Trial Judgment, *supra* note 55, at ¶ 766; *Strugar* Trial Judgment, *supra* note 91, at ¶ 349; *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 726; *Brđanin* Trial Judgment, *supra* note 7, at ¶ 271; *Blaškić* Appeal Judgment, *supra* note 91, at ¶ 46; *Vasiljević* Appeal Judgment, *supra* note 91, at ¶ 102; *Tadić* Appeal Judgment, *supra* note 41, at ¶ 229; *Vasiljević* Trial Judgment, *supra* note 91, at ¶ 70; *Kordić* Trial Judgment, *supra* note 91, at ¶ 399; *Kunarac* Trial Judgment, *supra* note 91, at ¶ 391; *Blaškić* Trial Judgment, *supra* note 89, at ¶ 283; *Aleksovski* Trial Judgment, *supra* note 89, at ¶ 61; *Tadić* Trial Judgment, *supra* note 91, at ¶ 692.

93. *Kajelijeli* Trial Judgment, *supra* note 55, at ¶ 768; *Strugar* Trial Judgment, *supra* note 91, at ¶ 350; *Brđanin* Trial Judgment, *supra* note 7, at ¶ 272; *Blaškić* Appeal Judgment, *supra* note 91, at ¶ 49; *Vasiljević* Appeal Judgment, *supra* note 91, at ¶ 102; *Simić* Trial Judgment, *supra* note 89, at ¶ 163; *Naletilić* Trial Judgment, *supra* note 91, at ¶ 63; *Kayishema* Appeal Judgment, *supra* note 11, at ¶ 186; Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 162 (Mar. 24, 2000) [hereinafter *Aleksovski* Appeal Judgment]; *Vasiljević* Trial Judgment, *supra* note 89, at ¶ 71; *Krnjelac* Trial Judgment, *supra* note 89, at ¶ 90; Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 255 (Nov. 2, 2001) [hereinafter *Kvočka* Trial Judgment]; *Blaškić* Trial Judgment, *supra* note 89, at ¶ 283; *Furundžija* Trial Judgment *supra* note 89, at ¶¶ 245, 249; *Tadić* Appeal Judgment, *supra* note 41, at ¶ 229.

- The accused must have been aware of the essential elements of the principal offender's crime, including the principal's mental state.⁹⁴

Each of these elements must be satisfied for individual criminal responsibility to attach to the accused.

The *Tadić* Trial Chamber first discussed the elements of aiding and abetting in its 1997 Judgment.⁹⁵ The *Furundžija* Trial Judgment clarified and expanded upon the findings made in *Tadić*.⁹⁶ The *Aleksovski* Appeals Chamber articulated the elements of aiding and abetting almost exactly as *Furundžija* had set forth,⁹⁷ and there has since been little variation to these often-cited basic elements of aiding and abetting as a form of criminal responsibility. Both the *Tadić* and *Furundžija* Trial Chambers based their findings upon an examination of customary international law.⁹⁸ *Tadić* identified the Nürnberg war crimes trials concerning complicitous conduct as the most relevant source for its inquiry into the elements of the forms of liability contained in Article 7(1).⁹⁹ *Tadić* therefore applied customary international law on complicity as a basis for establishing the elements of aiding and abetting. This usage indicates that, from the earliest cases in the jurisprudence of the ICTY, aiding and abetting and the other forms of liability contained in Article 7(1) have been regarded as forms of complicity.¹⁰⁰

Akayesu was the first ICTR case to consider the elements of aiding and abetting. Although *Akayesu* accepted the elements of aiding and abetting¹⁰¹ articulated in *Tadić*,¹⁰² the Trial Chamber introduced an additional mental requirement, finding that an aider and abettor of the crime of genocide must possess the specific intent to commit genocide.¹⁰³ The *Furundžija* Trial Chamber, in expanding upon the elements in *Tadić*, found that an aider and abettor need not share and identify “with the principal’s criminal

94. *Strugar* Trial Judgment, *supra* note 91, at ¶ 349; *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 727; *Brđanin* Trial Judgment, *supra* note 7, at ¶ 273; *Simić* Trial Judgment, *supra* note 89, at ¶ 163; *Naletilić* Trial Judgment, *supra* note 91, at ¶ 63; *Vasiljević* Trial Judgment, *supra* note 91, at ¶ 71; *Krnojelac* Trial Judgment, *supra* note 89, at ¶ 90; *Kvočka* Trial Judgment, *supra* note 93, at ¶ 255; *Kumarac* Trial Judgment, *supra* note 90, at ¶ 392; *Aleksovski* Appeal Judgment *supra* note 93, at ¶162.

95. *Tadić* Trial Judgment, *supra* note 91, at ¶¶ 670–692.

96. *Furundžija* Trial Judgment, *supra* note 89, at ¶ 249.

97. See *Aleksovski* Appeal Judgment, *supra* note 89, at ¶¶ 162–64.

98. *Furundžija* Trial Judgment, *supra* note 89, at ¶¶190–249; *Tadić* Trial Judgment, *supra* note 91, at ¶¶ 670–692.

99. *Tadić* Trial Judgment, *supra* note 91, at ¶ 674.

100. *Id.* at ¶ 674.

101. It is worth noting that the *Akayesu* Trial Chamber considered aiding and abetting to be both a crime itself (particularly, in the ICTR Statute), as well as a form of the crime of complicity as defined in civil law systems (or the crime of conspiracy in common law systems). The Chamber therefore discussed the elements of aiding and abetting in two different contexts and concluded that aiding and abetting and complicity were not the same in the ICTR Statute. See *Akayesu* Trial Judgment, *supra* note 13, at ¶¶ 478–485, 533–548.

102. *Akayesu* Trial Judgment, *supra* note 13, at ¶¶ 478–479.

103. *Id.* at ¶ 485.

will and purpose, provided that his own conduct was with knowledge.”¹⁰⁴ *Furundžija*'s finding on this element was not exactly in line with that of *Akayesu*.¹⁰⁵

The ICTY and the ICTR were thus split on this mental element requirement until the *Ntakirutimana* Appeal Judgment definitively brought the elements of aiding and abetting in ICTR jurisprudence into harmony with that of the ICTY.¹⁰⁶ In December 2004, the *Ntakirutimana* Appeals Chamber overturned the *Ntakirutimana* Trial Chamber's endorsement of the *Akayesu* specific intent requirement for aiding and abetting.¹⁰⁷ The *Ntakirutimana* Appeals Chamber's view currently prevails in the jurisprudence of the *ad hoc* tribunals. Thus both the ICTR and the ICTY now recognize identical elements for aiding and abetting as a form of liability under their respective statutes.

William Schabas rejected the proposition that an accomplice who either knew or had reason to know that the principal had genocidal intent satisfies the mental element for aiding and abetting genocide unless the accomplice also shares the intent to destroy the group. Under Schabas' theory, the accomplice's knowledge of the principal's genocidal intent could be used to prove that the accomplice also had the intent to destroy. As noted, however, this position has been consistently rejected in the jurisprudence of the *ad hoc* tribunals since *Akayesu*.¹⁰⁸

It should also be mentioned that the recent *Brđanin* Appeal Judgment has made some significant holdings in relation to aiding and abetting by omission. In that case, the Appeals Chamber held:

104. *Akayesu* Trial Judgment, *supra* note 13, at ¶ 485; see *Furundžija* Trial Judgment, *supra* note 89, at ¶ 243.

105. In fact the mental element requirement in *Furundžija* was identical to that of the *Tadić* case. Both Chambers found that an aider and abettor must act “knowingly.” The *Furundžija* Trial Chamber simply went further in describing what this requirement did and did not entail. See *Furundžija* Trial Judgment, *supra* note 89, at ¶¶ 236–249; *Tadić* Trial Judgment, *supra* note 91, at ¶¶ 675–677.

106. Note that the *Ntakirutimana* Appeal Judgment was not the first ICTR case to go against the *Akayesu* position on aiding and abetting. However, the *Ntakirutimana* Trial Judgment was the last Judgment to follow *Akayesu* on aiding and abetting, which the *Ntakirutimana* Appeal Judgment directly overturned. See *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-A, Judgment, ¶ 501 (Dec. 13, 2004) [hereinafter *Ntakirutimana* Appeal Judgment].

107. *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10, ICTR-96-17-T, Judgment and Sentence, ¶ 787 (Feb. 21, 2003) [hereinafter *Ntakirutimana* Trial Judgment]; *Ntakirutimana* Appeal Judgment, *supra* note 106, at ¶ 501.

108. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 221, 301 (2000); see also Schabas, *supra* note 6, at 130–31. It should be noted that the Appeals Chamber in the *Rwamakuba* Interlocutory Appeal Decision considered that “depending upon the circumstances, to hold [co-perpetrators] liable only as aiders and abettors might understate the degree of their criminal responsibility.” *Rwamakuba* Interlocutory Appeal Decision, *supra* note 8, at ¶ 29. In this particular case, this observation was made in the context of considering whether joint criminal enterprise could be a form of liability of genocide, especially where co-perpetrators intentionally participated in a common plan of committing genocide. The existence of a common plan suggests that such co-perpetrators may share the specific intent of the principal perpetrators, and perhaps for this reason in part, liability for only aiding and abetting would not sufficiently represent the gravity of their crimes. See *Rwamakuba* Interlocutory Appeal Decision, *supra* note 8, at ¶¶ 28–29.

An accused can be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime. This form of aiding and abetting is not, strictly speaking, criminal responsibility for omission. In the cases where this category was applied, the accused held a position of authority, he was physically present on the scene of the crime, and his non-intervention was seen as tacit approval and encouragement. . . . In such cases the combination of a position of authority and physical presence on the crime scene allowed the inference that non-interference by the accused actually amounted to tacit approval and encouragement.¹⁰⁹

The Appeals Chamber then went on to address what it termed “the theory of aiding and abetting by omission proper,” observing that it had recently affirmed that omission proper may lead to individual criminal responsibility under Article 7(1) of the statute where there is a legal duty to act.¹¹⁰ Therefore, the Appeals Chamber itself noted that it has never set out “in detail” the requirements for a conviction for omission, stating (in a footnote) that the most comprehensive statement of these requirements can be found in the *Ntagerura, et al.* Trial Judgment¹¹¹ as follows:

[I]n order to hold an accused criminally responsible for an omission as a principal perpetrator, the following elements must be established: (a) the accused must have had a duty to act mandated by a rule of criminal law; (b) the accused must have had the ability to act; (c) the accused failed to act intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and (d) the failure to act resulted in the commission of the crime.¹¹²

The Appeals Chamber then left open the possibility that an omission may constitute the physical element of aiding and abetting in the circumstances of a given case.¹¹³ The Chamber ultimately found that it was inappropriate to analyze the accused’s liability under the second “omission

109. *Brdanin* Appeal Judgment, *supra* note 24, at ¶ 273 (citations omitted).

110. *Brdanin* Appeal Judgment, *supra* note 24, at ¶ 274, n. 556 (citing *Prosecutor v. Ntagerura, et al.*, Case No. ICTR-99-46-A, Judgment, ¶ 334 (July 7, 2006) [hereinafter *Ntagerura, et al.* Appeal Judgment]; *Prosecutor v. Galić*, Case No. IT-98-29, Judgment, ¶ 175 (Nov. 30, 2006) [hereinafter *Galić* Appeal Judgment]; *Blaškić* Appeal Judgment, *supra* note 91, ¶ 663.

111. *Ntagerura, et al.* Trial Judgment, *supra* note 19, at ¶ 659; *Ntagerura, et al.* Appeal Judgment, *supra* note 110, at ¶ 333.

112. *Brdanin* Appeal Judgment, *supra* note 7, at ¶ 274, n. 557.

113. *Id.* at n. 558 (citing *Blaškić* Appeal Judgment, *supra* note 91, at ¶ 47, and *Prosecutor v. Simić*, Case No. IT-95-9, Judgment, at ¶¶ 82 n. 254, 85 n. 259 (Nov. 28, 2006) [hereinafter *Simić* Appeal Judgment]).

proper” theory and decided the ground of appeal on the basis of the accused’s “tacit approval and encouragement of the crime.”¹¹⁴

The law with respect to the definition and legal elements of the mode of liability of aiding and abetting by omission are therefore not definitively set forth in the jurisprudence of the *ad hoc* tribunals and will have to wait for another day in order to be revealed. Moreover, the Appeals Chamber’s comment—that “it has so far declined to analyze whether omission proper may lead to individual criminal responsibility for aiding and abetting”¹¹⁵—may even be construed as leaving open the possibility that one can aid and abet through omission. However, individuals have been placed upon notice that they may be held criminally responsible for aiding and abetting not only through their “tacit approval and encouragement” of a crime, but also—perhaps—by their failure to act. In light of this possibility, the elements of the mode of responsibility of aiding and abetting have been set forth above to reflect this remonstrance.

B. *Complicity in Genocide*

Complicity in genocide is enumerated in Article 4(3) of the ICTY Statute,¹¹⁶ which is identical to Article 3 of the 1948 Genocide Convention. Article 3 is the only part of the Genocide Convention that provides modes of responsibility through which liability can attach. Article 7(1) serves the function that Article 3 serves in the Genocide Convention, providing modes of responsibility for the various crimes enumerated in the statutes. The purpose of Article 4(3) in the statute is therefore not a settled matter. It is not immediately apparent from a plain reading of the statute whether the drafters intended to provide a form of liability in addition to, or instead of, Article 7(1) that would be applicable to genocide alone, or if complicity in genocide was intended to be a substantive crime, as is the crime of genocide itself.

The case law regarding complicity in genocide is more obscure than that of aiding and abetting. One possible cause of this may be, as mentioned earlier, that Chambers have not considered complicity in genocide without a concurrent discussion of aiding and abetting as either a form of complicity or as an alternative to complicity. Additionally, the application of complicity in genocide is not as common in the cases before the tribunals as is aiding and abetting. Often, the Prosecutor has included complicity in genocide in the indictment as an alternative charge to genocide. Because Chambers cannot convict an accused of both genocide and complicity in

114. *Brđanin* Appeal Judgment, *supra* note 24, at ¶¶ 274–277.

115. *Brđanin* Appeal Judgment, *supra* note 24, at ¶¶ 274.

116. Article 2(3) of the ICTR Statute is identical to Article 4(3) of the ICTY Statute.

genocide,¹¹⁷ they often dismiss charges of complicity in genocide without further discussion when an accused is found guilty of genocide.¹¹⁸

The jurisprudence of the tribunals has provided no clear elements for complicity in genocide per se. This, again, may be due to the fact that Chambers have generally only made concrete observations about complicity in genocide in relation to aiding and abetting. One could thus argue that there are clear elements for complicity in genocide *through aiding and abetting*, which are identical to those for aiding and abetting genocide itself. However, the *Krstić* Appeals Chamber observed that other forms of complicity in genocide may exist and that the elements of those forms may be different than those which apply to aiding and abetting as a form of complicity.¹¹⁹

Akayesu, as an exception, discussed the elements of complicity in genocide separately from those of aiding and abetting, setting forth separate elements for both aiding and abetting and for complicity in genocide.¹²⁰ As noted previously, *Akayesu* found that aiding and abetting genocide required that the individual also possess genocidal intent,¹²¹ whereas complicity in genocide only required knowledge that one's actions would assist the commission of the principal offense.¹²² As the *Ntakirutimana* Appeals Chamber has since rejected *Akayesu's* analysis, the mental element required for aiding and abetting is now identical to that which *Akayesu* prescribed to complicity in genocide.¹²³

Akayesu also differentiated the physical element required for complicity in genocide from the physical element of aiding and abetting. In that case, the Chamber found that, where aiding and abetting can be perpetrated by

117. See *Semanza* Trial Judgment, *supra* note 18, at ¶ 397; *Bagilishema* Trial Judgment, *supra* note 56; *Musema* Trial Judgment, *supra* note 28, at ¶ 175; *Akayesu* Trial Judgment, *supra* note 13, at ¶ 532.

118. Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment and Sentence, ¶ 520 (Apr. 28, 2005) [hereinafter *Muhimana* Trial Judgment]; Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, ¶ 295 (June 17, 2004) [hereinafter *Gacumbitsi* Trial Judgment]; Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Judgment and Sentence, ¶ 695 (Feb. 25, 2004) [hereinafter *Ntagerura* Trial Judgment]; Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 1056 (Dec. 3, 2003) [hereinafter *Nahimana* Trial Judgment]; *Kajelijeli* Trial Judgment, *supra* note 55, at ¶ 847; Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, Judgment and Sentence, ¶ 421 (May 16, 2003) [hereinafter *Niyitegeka* Trial Judgment]; *Ntakirutimana* Trial Judgment, *supra* note 107, at ¶¶ 769, 837; *Kamubanda* Trial Judgment, *supra* note 91, at ¶ 654; *Krstić* Trial Judgment, *supra* note 7, at ¶¶ 645, 653, 727.

119. This discussion, presented in the *Krstić* Appeal Judgment, will be discussed further below. See *Krstić* Appeal Judgment, *supra* note 1, at ¶¶ 139, 142.

120. *Akayesu* Trial Judgment, *supra* note 13, at ¶¶ 485–548.

121. *Id.* at ¶ 485.

122. *Id.* at ¶ 538; see also Steven Powles, *Joint Criminal Enterprise: Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT'L CRIM. JUST. 606, 614 (2004) ("The mens rea requirement is that the accomplice knew of the purposes of complicity in genocide. . . . [A]n accomplice need not possess the specific intent to destroy the group in whole or in part.")

123. The German Supreme Court also adopted the interpretation that accomplices need not possess genocidal intent, so long as they have knowledge of the principal's specific intent. See Ruth Rissing-van Saan, *The German Federal Supreme Court and the Prosecution of International Crimes Committed in the former Yugoslavia*, 3 J. INT'L CRIM. JUST. 381, 393 (2005).

act or omission, only a positive act could cause liability to attach for complicity in genocide.¹²⁴ No Chamber has since discussed this particular finding in *Akayesu*, likely due to the fact that no Chamber has yet been confronted with an omission that is alleged to amount to genocide or complicity thereof. Regardless, as Chile Eboe-Osuji suggested, the key to reconciling the relationship between complicity in genocide and aiding and abetting likely does not lie in such a small qualitative difference between their elements.¹²⁵ Aiding and abetting genocide by omission is a rare case, and it is unlikely that the drafters of the statutes of the tribunals would have created such a complicated statutory scheme in order to set apart such an obscure element. Additionally, the creation of complicity in genocide for this reason would in fact serve no practical purpose; any act falling under complicity in genocide regardless could have fallen into the category of aiding and abetting genocide.

The most recent decision concerning complicity in genocide is the *Karemera* case, in which the Trial Chamber considered the question of whether complicity in genocide was intended to be a substantive crime, as is the crime of genocide itself, rather than a mode of liability. In that case, the majority of the Trial Chamber found that complicity in genocide is a form of criminal responsibility applicable to genocide, and not a crime itself.¹²⁶ Therefore, both joint criminal enterprise and complicity in genocide are modes of liability. As such, the Trial Chamber reasoned, one cannot commit complicity in genocide through a joint criminal enterprise.¹²⁷ That is to say, one cannot commit a mode of liability through another mode of liability. As stated by the Appeals Chamber in *Prosecutor v. Rwamakuba*, “joint criminal enterprise does not create a separate crime of participating through the means identified in that doctrine,” but rather “is only concerned with the mode of liability of committing crimes within the jurisdiction of the Tribunal.”¹²⁸

Judge Short, although agreeing with the ultimate decision that *in that particular case* complicity in genocide could not have been committed under an extended form of joint criminal enterprise,¹²⁹ filed a separate opinion in

124. See *Akayesu* Trial Judgment, *supra* note 13, at ¶ 548.

125. See Chile Eboe-Osuji, ‘Complicity in Genocide’ versus ‘Aiding and Abetting’: *Construing the Difference in the ICTR and ICTY Statutes*, 3 J. INT’L CRIM. JUST. 56, 58, 61–63.

126. *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).

127. *Id.* at ¶¶ 3–9.

128. *Rwamakuba* Interlocutory Appeal Decision, *supra* note 8, at ¶ 30.

129. It should be noted that this finding directly conflicts with Steven Powles’ interpretation of the *Krstić* Trial Judgment, namely that “depending on the role played by a member of a joint genocidal enterprise, he could be described as either a co-perpetrator or an accomplice.” Powles, *supra* note 122, at 614; see also *Krstić* Trial Judgment, *supra* note 7, at ¶¶ 642–643.

order to express his disagreement regarding the nature of complicity in genocide.¹³⁰

In his separate opinion, Judge Short opined that “complicity in genocide has the indicia of a criminal offense, whilst encompassing a particular mode of liability.”¹³¹ He reasoned that complicity in genocide is often charged as an alternative count to genocide, and has resulted in convictions for complicity in genocide, as in *Semanza*.¹³² Judge Short pointed out that Semanza could not have been convicted of a mode of liability alone.¹³³ He acknowledged that the Trial Chamber in the *Blagojević & Jokić* case classified complicity in genocide as a form of liability rather than a crime. However in so acknowledging, he criticized *Blagojević & Jokić* for relying on a passage in the *Krstić* Appeal Judgment that did not, in his opinion, support that conclusion.¹³⁴

Judge Short’s analysis may lend support to the view that complicity in genocide is in fact a hybrid of (1) a substantive crime and (2) a mode of liability. This may be a logical explanation to reconcile the fact that an individual could be convicted of complicity in genocide with the fact that complicity itself refers to a certain form of participation in the crime. Judge Short also did not foreclose the possibility that in other cases complicity in genocide could be committed through a joint criminal enterprise, as he limited his rejection of complicity in genocide through joint criminal enterprise to the facts of that case, and in particular only analyzed the extended form of joint criminal enterprise.¹³⁵

Judge Short’s rejection of a strict categorization of complicity in genocide provides a means of reconciling conflicting jurisprudence and scholarship on the matter. However, it does not provide an explanation for the inclusion of complicity in genocide under Article 4(3), rather than simply leaving Article 7(1) to define modes of liability. Indeed none of the other crimes enumerated in Articles 2, 3, and 5 of the ICTY Statute or Articles 3 and 4 of the ICTR Statute mentions modes of liability. Why then was a purported mode of liability, or a hybrid thereof, interjected into the Articles criminalizing genocide?

C. Examination of Case Law and Way Forward

Several chambers of the tribunals have addressed the relationship between aiding and abetting genocide and complicity in genocide. They have

130. See *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Separate Opinion of Judge Short on Complicity in Genocide and Joint Criminal Enterprise Theory (May 23, 2006) [hereinafter *Karemera* Separate Opinion].

131. *Id.* at ¶ 8.

132. *Id.* at ¶ 8, n. 8 (citing *Semanza* Trial Judgment, *supra* note 18, at ¶¶ 433, 553).

133. *Id.*

134. *Id.* at ¶ 7, n. 7 (citing *Krstić* Appeal Judgment, *supra* note 1, at ¶ 640, citing *Blagojević & Jokić* Trial Judgment, *supra* note 7, at ¶ 684).

135. See *id.* at ¶¶ 1, 9–14.

almost uniformly recognized that there is an apparent overlap between complicity in genocide contained in Article 4(3)(e) and aiding and abetting contained in Article 7(1). The purpose for this construction of the statutes has become a conundrum that has produced various explanations in the jurisprudence of the tribunals, and a uniform approach has yet to be developed.

1. *Treatment of Aiding and Abetting Genocide and Complicity in Genocide in Cases Before the Tribunals*

The case law of the *ad hoc* tribunals is instructive on the relationship between aiding and abetting genocide and complicity in genocide. The *Akayesu* Trial Chamber set forth the first theory of the relationship between aiding and abetting genocide and complicity in genocide, attempting to distinguish the two as separate forms of liability with different mental and physical elements.¹³⁶ This distinction was subsequently rejected by other Trial Chambers of the ICTR that held that the mental element for aiding and abetting genocide is the same as the mental element for complicity in genocide.¹³⁷ The only remaining distinction is the purported difference between the physical element requirements, namely that one can aid and abet through an omission, whereas complicity in genocide can only be accomplished by means of a positive act.¹³⁸ One could argue that the *Semanza* Trial Chamber contradicted this finding when it found that there was no material distinction between the two.¹³⁹ However, even if this distinction were to remain, it would seem to be a relatively minor basis upon which to distinguish two different modes of liability.

The *Semanza* Trial Judgment set forth the next approach to reconciling the similarities between aiding and abetting and complicity in genocide. The Chamber addressed both aiding and abetting and complicity in genocide as forms of liability, holding that there was no material distinction between the two.¹⁴⁰ The Chamber concluded that the overlap amounted to no more than a redundancy, which could be explained by the verbatim incorporation of Article 3 of the Genocide Convention in the ICTY Statute.¹⁴¹ Payam Akhavan also concluded that the overlap was no more than a “normative redundancy” resulting from the “strict fidelity of the Statute’s drafters to the construction of Articles II and III of the [Genocide] Convention.”¹⁴²

136. *Akayesu* Trial Judgment, *supra* note 13, at ¶¶ 485, 548.

137. See *Semanza* Trial Judgment, *supra* note 18, at ¶ 388, n. 648; *Ntakirutimana* Trial Judgment, *supra* note 107, at ¶ 677.

138. *Akayesu* Trial Judgment, *supra* note 13, at ¶ 548.

139. *Semanza* Trial Judgment, *supra* note 18, at ¶ 394.

140. *Id.*

141. *Semanza* Trial Judgment, *supra* note 18, at ¶ 391.

142. Payam Akhavan, *The Crime of Genocide in the ICTR Jurisprudence*, 3 J. INT’L CRIM. JUST. 989, 994 (2005).

Although such a logical and practical resolution of this legal conundrum is at first seductive, it conflicts with the principle of effective construction, which does not permit a Chamber to find that the overlap between the statutes “is a result of an inadvertence on the part of the legislator where another explanation, consonant with the language used by the Statute, is possible.”¹⁴³ Assuming that such an alternative explanation exists, *Semanza*’s position is potentially problematic, as the *Krstić* Appeals Chamber and the *Stakić* Trial Chamber seemed to recognize in subsequent decisions.

Although the *Semanza* Trial Chamber concluded that the relationship between aiding and abetting genocide and complicity in genocide resulted in no more than a “normative redundancy,” it applied a *lex specialis*-type approach that was later articulated in the *Stakić* Rule 98 *bis* Decision.¹⁴⁴ The *Stakić* Trial Chamber considered that it was of utmost importance to avoid the danger of “enlarging and diluting” the crime of genocide, which it felt *Kambanda* had properly described as “the crime of all crimes.”¹⁴⁵ The Chamber therefore attempted to interpret Article 4 as restrictively as possible.¹⁴⁶

The *Stakić* Trial Chamber accepted the *Semanza* Trial Chamber’s assertion that there was “no material distinction between complicity in genocide and ‘the broad definition accorded to aiding and abetting.’”¹⁴⁷ However, the Chamber did not consider that the lack of a material distinction between the definitions was irreconcilable with a concrete reason for including both aiding and abetting genocide and complicity in genocide in the ICTY Statute, nor did it exclude nuances in practical application.¹⁴⁸

The *Stakić* Chamber set forth two potential approaches to deal with the overlap between the two in its Rule 98 *bis* Decision. First, Article 4(3) is the *lex specialis* in relation to Article 7(1)—the “*lex specialis* approach.” This terminology, no doubt, was derived from the legal doctrine of “*lex specialis derogat legi generali*,” whereby a pre-existing law regulating a specific subject matter (*lex specialis*) is not superseded by a later promulgated law dealing with a general subject matter (*lex generalis*).

Second, the modes of participation enumerated in Article 7(1) are read into Article 4(3)—the “heads of responsibility approach”—where an accused would be charged with the crime of “complicity in genocide” via a

143. *Krstić* Appeal Judgment, *supra* note 1, at ¶ 139; see also Prosecutor v. *Stakić*, Case No. IT-97-24-T, Decision on Rule 98 *bis* Motion for Judgment of Acquittal, ¶ 47 (Oct. 31, 2002) (emphasizing the importance of the “most favourable interpretation” rule) [hereinafter *Stakić* Acquittal Decision]; Eboe-Osuji, *supra* note 125, at 59–60.

144. This approach will be discussed in further detail *infra*. See *Semanza* Trial Judgment, *supra* note 18, at ¶¶ 397–398; *Stakić* Acquittal Decision, *supra* note 143, at ¶ 48.

145. *Stakić* Acquittal Decision, *supra* note 143, at ¶ 22 (citing Prosecutor v. *Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence, ¶ 16 (Sept. 4, 1998) [hereinafter *Kambanda* Trial Judgment]).

146. *Id.*

147. *Id.* at ¶ 531 (citing *Semanza* Trial Judgment, *supra* note 18, at ¶ 394).

148. See *Stakić* Trial Judgment, *supra* note 9, at ¶ 531.

mode of liability in Article 7(1).¹⁴⁹ The Chamber concluded that both theories would lead to the same practical result, namely that complicity in genocide would be the proper characterization of the crime should both forms of liability be alleged. The Chamber observed that these approaches respect the interpretation that “Article 4(3) delimits the modes of participation in genocide, and maintains the requirement of special intent. Only this interpretation honours the exclusivity of the crime of genocide . . . and upholds the limitations set by the 1948 Genocide Convention.”¹⁵⁰

In the *Stakić* Trial Judgment, the Chamber cited its earlier findings of law on complicity and its relationship to aiding and abetting in the Rule 98 *bis* Decision.¹⁵¹ It did not mention the exclusivity theory, but again recognized genocide as the “crime of all crimes.”¹⁵² It found that a separate discussion of aiding and abetting was unnecessary in that case.¹⁵³ The Trial Chamber acquitted Stakić of complicity in genocide.¹⁵⁴ The *Stakić* Appeals Chamber affirmed the Trial Chamber’s acquittal for complicity in genocide, but did not discuss the relationship between complicity and aiding and abetting genocide.¹⁵⁵

The *Krstić* Appeals Chamber, recognizing the importance of effective construction, took a different approach than *Stakić* and presented the theory that the two provisions could be reconciled because “complicity” could encompass broader conduct than that of aiding and abetting.¹⁵⁶ The Appeals Chamber, having so acknowledged, limited its inquiry to the application of Article 4(3) in conjunction with aiding and abetting as a form of liability only, since that was the case at hand.¹⁵⁷ The Chamber decided, however, that its theory merited re-examination of whether knowledge of the principal’s genocidal intent is sufficient to establish liability as an aider or abettor, or whether an individual must share the specific intent of genocide.¹⁵⁸

After considering the possibility that other forms of complicity may require specific intent, the Chamber again limited its finding to the mental requirement for aiding and abetting as a form of complicity.¹⁵⁹ The Chamber’s inquiry into customary international law produced the same result as that of earlier Chambers—specific intent is not a required mental element for aiding and abetting.¹⁶⁰ Ultimately, the Chamber did not take any definite position on the mental element for complicity in genocide, finding

149. *Stakić* Acquittal Decision, *supra* note 143, at ¶ 48.

150. *Id.*

151. *Stakić* Trial Judgment, *supra* note 9, at ¶ 531.

152. *Id.* at ¶ 502 (internal quotes omitted).

153. *Id.* at ¶ 446.

154. *Id.* at ¶ 534.

155. *Stakić* Appeal Judgment, *supra* note 23, at 141 (Disposition).

156. *Krstić* Appeal Judgment, *supra* note 1, at ¶ 139.

157. *Id.* at n. 234.

158. *Id.* at ¶ 140.

159. *Id.* at ¶142, n. 247.

160. *See id.* at ¶¶ 140–141.

instead that the accused should be convicted of aiding and abetting genocide pursuant to Article 7(1) alone.¹⁶¹

The *Krstić* Appeals Chamber provided an alternative explanation for the overlap between complicity in genocide and aiding and abetting, as discussed above. However, several issues result from this approach, warranting further examination.¹⁶² The Appeals Chamber posited that the statutes' drafters' intent in including complicity in genocide was to encompass accomplice liability broader than that of aiding and abetting; and yet, aiding and abetting itself is already a broad form of liability that applies to a wide range of factual scenarios and actors. It is difficult to imagine a form of liability that would extend beyond aiding and abetting, which itself seems to encompass residual forms of accomplice liability not otherwise enumerated in Article 7(1).¹⁶³

In essence, *Krstić* proposes that there is a specialized form of accomplice liability unique to genocide which was not reasonably encompassed by aiding and abetting in the statute. This form of liability would also need to extend beyond all other forms of liability encompassed in Article 7(1) in order to provide a reasonable explanation for its inclusion in Article 4(3). Finally, the drafters must have intended that this form of liability be applicable to genocide alone, and not to other crimes enumerated in the statute. Therefore, this form of liability would also have to extend beyond joint criminal enterprise, since that is also applicable to all crimes enumerated in the ICTY Statute.¹⁶⁴

Several of the ICTR Chambers have referred to Article 91 of the Rwandan Penal Code to define complicity in genocide, finding that it could encompass any of the following three activities:

- complicity by *procuring means*, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose;
- complicity by knowingly *aiding or abetting* a perpetrator of a genocide in the planning or enabling acts thereof;

161. *See id.* at ¶ 143.

162. Eboe-Osuji, *supra* note 125, at 62–63.

163. The wording of the statute supports this notion as it reads “or otherwise aided and abetted,” which is listed at the end of the forms of liability. *See* ICTY Statute, *supra* note 4, at Art.7(1); ICTR Statute, *supra* note 4, at Art. 6(1) (emphasis added). The mode of liability known as “joint criminal enterprise” is herein not considered in this regard. *See Britanin* Appeal Judgment, *supra* note 25, at ¶¶ 429–430 (setting forth elements of joint criminal enterprise); *see also id.* at ¶ 2 (Separate Opinion of Judge Meron) (“Whatever the merits of the overall doctrine of JCE, it is now firmly embedded in our jurisprudence.”).

164. *See* Prosecutor v. Rwamakuba, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, ¶¶ 13–14 (Oct. 22, 2004) (holding, based upon ICTY jurisprudence, post World War II cases, and the text and drafting history of the Genocide Convention of 1948, that customary international law criminalized intentional participation in common plan to commit genocide prior to 1992).

- complicity by *instigation*, for which a person is liable who, although not directly participating in the crime of genocide [sic], gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or who directly incited to commit genocide.¹⁶⁵

Procuring means and instigation appear as potential candidates for additional forms of complicity in genocide beyond aiding and abetting, as per *Krstić's* theory. The fact that they come from Rwandan domestic law makes it unlikely that *Krstić*, or the drafters of the ICTY Statute for that matter, would have considered their implementation for the purposes of the ICTY. Even *Semanza*, an ICTR case, rejected the application of the Rwandan statute to complicity in genocide in ICTR case law.¹⁶⁶ Even if other Chambers did wish to apply these definitions to the jurisprudence of the tribunals, "procuring means" would likely not provide a scope of criminal activity beyond that which is already encompassed by aiding and abetting in the jurisprudence. Instigation is another form of liability under Article 7(1), and so the inclusion of instigation as a form of complicity also would not provide a reason for the inclusion of complicity in genocide under Article 4(3) in addition to Article 7(1).

Chile Eboe-Osuji advanced a similar argument to that found in *Krstić*, suggesting that "complicity in genocide" has the limited purpose of capturing the "accessories after the fact of genocide, as well as the residue of culpable genocide-related conducts that do not rise to the level of individual responsibility described in Article 6(1). . ." of the ICTR Statute.¹⁶⁷ He did not provide any specific examples of what such residual conducts might be, except for accessory after the fact.¹⁶⁸ Eboe-Osuji cited the *Tadić* Trial Judgment, which suggested that an accessory after the fact could not have substantially affected the commission of the offense, as is required for aiding and abetting.¹⁶⁹ The *Tadić* Trial Chamber's reasoning stands the test only in circumstances where the perpetrator of genocide did not know that he would receive assistance from the accessory after the crime.¹⁷⁰ Therefore the category of cases that are left for this residual category appears to be quite small, and necessarily excludes acts that had a substantial impact upon the crime.

165. *Akayesu* Trial Judgment, *supra* note 13, at ¶ 537 (emphasis in original). See also *Semanza* Trial Judgment, *supra* note 18, at ¶ 393; *Bagilishema* Trial Judgment, *supra* note 56, at ¶ 69; *Musema* Trial Judgment, *supra* note 28, at ¶ 179; see also Powles, *supra* note 123, at 614 (citing *Akayesu* Trial Judgment, *supra* note 13, at ¶ 537, and recognizing procuring means, aiding and abetting, and instigation as different forms of complicity in genocide).

166. *Semanza* Trial Judgment, *supra* note 18, at n. 654; see also Eboe-Osuji, *supra* note 125, at 62 (noting that the *Akayesu* Trial Chamber's direct reliance on Rwandan law to define complicity in genocide limits its jurisprudential value in international law).

167. Eboe-Osuji, *supra* note 125, at 79.

168. See *id.*

169. *Id.* at n. 79 (citing *Tadić* Trial Judgment, *supra* note 91, at ¶ 692).

170. See *id.*; see also *Tadić* Trial Judgment, *supra* note 91, at ¶ 692.

Both the approaches in *Krstić* and by Eboe-Osuji seem to depend upon a certain carelessness on the part of the statute's drafters. First, if the drafters intended to include a form of accomplice liability exclusive to genocide, as a catch-all for lesser forms of liability, they could have formulated the provision by cross-referencing Article 7(1) or by otherwise clarifying their relationship. Second, accessory after the fact is the only concrete example yet advanced of a form of liability that may not be encompassed by aiding and abetting.¹⁷¹ As *Tadić's* explanation indicates, this would have to be an act that did not have a substantial effect upon the crime in order to fall outside the rubric of aiding and abetting.¹⁷²

Any other forms of liability that the drafters may have intended to include under complicity in genocide that do not fall under Article 7(1) would be quite recondite and likely far down on the chain of responsibility. The *Rwamakuba* Appeals Chamber read the *travaux préparatoires* to the Genocide Convention to indicate that the drafters "intended these provisions to include all persons who could be held responsible for genocidal acts under general principles of criminal law."¹⁷³ This may support the idea that the Genocide Convention itself intended to encompass even these residual forms of liability. However, the stated purpose of the *ad hoc* tribunals, unlike the Genocide Convention, is to prosecute those bearing the greatest responsibility for serious breaches of humanitarian law.¹⁷⁴ Thus, why would the drafters have gone out of their way to ensure that the tribunals could prosecute an individual for an act that did not have a substantial impact on the crime itself? Such a conclusion would, a fortiori, cast doubt upon the fact that an accused's contribution to a joint criminal enterprise need only be "significant."

It is useful to examine now *Krstić's* application of the approach taken in *Stakić*. The Chamber made its determination in the *Krstić* case by considering two approaches that had already been presented before the tribunal.¹⁷⁵ Both of the possibilities, which were presented as conflicting alternative

171. See Eboe-Osuji, *supra* note 125 at 79.

172. *Tadić* Trial Judgment, *supra* note 91, at ¶ 692.

173. *Rwamakuba* Interlocutory Appeal Decision, *supra* note 8, at ¶¶ 27–29.

174. See ICTY Statute; ICTR Statute; Statement by the President of the Security Council, U.N. Doc. S/PRST/2002/21 (July 23, 2002) ("The Council recognizes, as it has done on other occasions . . . that the ICTY should concentrate its work on the prosecution and trial of the civilian, military and paramilitary leaders suspected of being responsible for serious violations of international humanitarian law . . . rather than on minor actors."); S.C. Res. 1329, Preamble, U.N. Doc. S/RES/1329 (Dec. 5, 2000) ("Taking note of the position expressed by the International Tribunals that civilian, military and paramilitary leaders should be tried before them in preference to minor actors."); S.C. Res. 1503, Preamble, U.N. Doc. S/RES/1503 (Aug. 28, 2003) (recalling and reaffirming Statement of the President of the Security Council (S/PRST/2002/21), "which endorsed . . . concentrating on the prosecution and trial of the most senior leaders . . ."); S.C. Res. 1534, Preamble and ¶ 5, U.N. Doc. S/RES/1534 (Mar. 26, 2004) (recalling and reaffirming Statement of the President of the Security Council (S/PRST/2002/21) in the "strongest terms," and calling on the *ad hoc* Tribunals to ensure that new indictments "concentrate on the most senior leaders . . .").

175. *Krstić* Appeal Judgment, *supra* note 1, at ¶ 138.

approaches, were proposed by the *Stakić* Trial Chamber.¹⁷⁶ After presenting both approaches, the *Krstić* Appeals Chamber discarded the *lex specialis* approach and endorsed the heads of responsibility approach.¹⁷⁷ The *Krstić* Appeals Chamber further found that following the heads of responsibility approach meant that the proper characterization for the criminal liability in that case was aiding and abetting genocide.¹⁷⁸ The *Krstić* Appeals Chamber did not seem to acknowledge *Stakić's* theory about the exclusivity of the crime of genocide, or take this into consideration when determining the proper application of one of these approaches.

The *Krstić* Appeals Chamber's finding, with respect to the heads of responsibility approach and its implications, raises several issues. *Stakić* presented both the *lex specialis* approach and the heads of responsibility approach.¹⁷⁹ Although the *Krstić* Appeals Chamber chose the heads of responsibility approach, its reasoning does not seem to exclude the possibility that the *lex specialis* approach is also correct, stating that "the two provisions can be reconciled, because the terms 'complicity' and 'accomplice' may encompass conduct broader than that of aiding and abetting."¹⁸⁰ This finding, along with the subsequent explanation, therefore leaves in doubt not only *why* one approach was taken over the other, but also raises further issues over the relationship between complicity in genocide and aiding and abetting genocide.¹⁸¹

The *Stakić* Trial Chamber itself did not express any preference for either approach.¹⁸² In fact, the *Krstić* Appeals Chamber implicitly acknowledged that there was slightly more weight in the jurisprudence to support the *lex specialis* approach when it included a *Semanza* citation in a footnote. *Semanza* seemed to endorse a *lex specialis* type approach to the overlap of complicity in genocide and aiding and abetting genocide—although not for the same reasons presented in *Stakić*.¹⁸³ The *Krstić* Appeals Chamber seemed to have based its decision upon the fact that the tribunal's statute directs that the modes of liability in Article 7(1) be read into Article 4(3). However, its discussion of this point is less of a legal holding and more of an open discussion of the different approaches to the issue.¹⁸⁴

176. See *id.*; *Stakić* Acquittal Decision, *supra* note 143, at ¶ 48.

177. *Krstić* Appeal Judgment, *supra* note 1, at ¶ 138.

178. *Id.*

179. *Stakić* Acquittal Decision, *supra* note 143, at ¶ 48.

180. *Krstić* Appeal Judgment, *supra* note 1, at ¶ 139.

181. *Id.* at ¶ 138.

182. See *Stakić* Acquittal Decision, *supra* note 9, at ¶ 48.

183. It should be noted that the *Krstić* Appeal Judgment cites paragraphs 394 and 395 of the *Semanza* Trial Judgment in reference to the *lex specialis* approach. The *Semanza* Trial Judgment did not articulate that it was in fact applying a "*lex specialis*" approach, but most support for the assertion that it did apply this approach seems to be found in paragraph 397 of the *Semanza* Trial Judgment. See *Krstić* Appeal Judgment, *supra* note 1, at ¶ 138, n. 231 (citing *Semanza* Trial Judgment, ¶¶ 394, 395); *Semanza* Trial Judgment, *supra* note 18, at ¶¶ 394–398.

184. See *Krstić* Appeal Judgment, *supra* note 1, at ¶ 138.

Moreover, the Appeals Chamber decided not to take a position upon the mental element requirement for a conviction for complicity in genocide under Article 4(3) of the statute, “where this offence strikes broader than the prohibition of aiding and abetting.”¹⁸⁵ Although the Appeals Chamber was at liberty to take such a course of action, due to the fact that it deemed this not to be an issue in that case, such a legal holding—or even informed and well-reasoned *obiter dicta*—may have assisted in discerning the relationship between the juridical concepts dealt with in this article.

The *Stakić* Trial Chamber had pointed out that the application of both approaches would lead to the same result—that *complicity in genocide* would be the proper characterization of the crime.¹⁸⁶ It is therefore less than clear how the *Krstić* Appeals Chamber came to the conclusion that the heads of responsibility approach led to aiding and abetting genocide as the proper characterization for responsibility in that case,¹⁸⁷ a conclusion that is at odds with the approach in *Stakić*.

2. *Post-Krstić Treatment of Aiding and Abetting Genocide and Complicity in Genocide*

Coming off of the *Krstić* Appeals Chamber’s holding that the aiding and abetting approach was “the correct one *in this case*,”¹⁸⁸ the *Milošević* Trial Chamber, in its decision on Slobodan Milošević’s Motion for a Judgment of Acquittal, found that the *Krstić* “Appeals Chamber’s conclusion that the proper characterization of Krstić’s liability is aiding and abetting genocide is confined to the facts of the case.”¹⁸⁹ The *Milošević* Chamber thereby opened the door for departure from the *Krstić* finding in different evidentiary scenarios.

The *Milošević* Trial Chamber stated that there was no authoritative decision within the ICTY as to the mental element for aiding and abetting genocide as compared to that for complicity in genocide.¹⁹⁰ The *Milošević* Chamber also endorsed the *lex specialis* approach, and stated that complicity in genocide might be the proper characterization of the accused in that case.¹⁹¹ However, the Trial Chamber declined to make this finding during that stage of the case—the half-way point—thus leaving its final decision for the final Judgment.¹⁹²

After this decision in *Milošević*, the *Krstić* Appeals Chamber’s approach to complicity in genocide was endorsed in certain aspects by the *Ntakirutimana* Appeals Chamber and by the *Semanza* Appeals Chamber. *Ntakiru-*

185. See *Krstić* Appeal Judgment, *supra* note 1, at 50, n. 247.

186. *Stakić* Acquittal Decision, *supra* note 143, at ¶ 48.

187. See *Krstić* Appeal Judgment, *supra* note 1, at ¶ 139.

188. See *id.*

189. *Milošević* Acquittal Decision, *supra* note 35, at ¶ 295.

190. *Id.* at ¶ 296.

191. *Id.* at ¶ 297.

192. *Id.*

timana referred to the *Krstić* Appeal Judgment as having found that “aiding and abetting constitutes a form of complicity, suggesting that complicity under . . . [the] Statute would also encompass aiding and abetting, based on the same mental element, while other forms of complicity may require proof of specific intent.”¹⁹³ The Appeals Chamber found that *Ntakirutimana* was guilty of aiding and abetting genocide.¹⁹⁴ The *Semanza* Appeals Chamber similarly cited *Krstić*, as well as *Ntakirutimana*.¹⁹⁵ However, after seemingly endorsing *Krstić*, the *Semanza* Appeals Chamber found that *Semanza* was guilty of complicity in genocide, and not of aiding and abetting genocide as was the case in *Krstić* and *Ntakirutimana*.¹⁹⁶

It is therefore uncertain what precisely *Ntakirutimana* and *Semanza* were endorsing in the *Krstić* Appeal Judgment. *Ntakirutimana*’s paraphrasing of *Krstić* suggests that the Chamber was applying the heads of responsibility approach, where complicity would encompass aiding and abetting. Additional portions of the *Krstić* Appeal Judgment cited in the two cases suggest that the Chambers were endorsing the theory in *Krstić* that complicity could encompass various modes of liability, some of which might require specific intent. However, because none of these cases actually made a finding based upon that theory, it is not binding precedent.¹⁹⁷ No Chamber of the tribunal has yet been presented with such a case; and, as discussed earlier, it seems unlikely that a case with accomplice liability not encompassed by Article 7(1) or by joint criminal enterprise could arise.

Blagojević & Jokić is the only case in the jurisprudence of the ICTY that has convicted an individual of “complicity in genocide.”¹⁹⁸ This Judgment was rendered on January 17, 2005, after *Ntakirutimana* but before *Semanza*.¹⁹⁹ Although the Trial Chamber endorsed the heads of responsibility approach, as did the *Krstić* Appeals Chamber, the Chamber came to the conclusion that proper characterization of the crime was *complicity in genocide through aiding and abetting*, rather than aiding and abetting genocide.²⁰⁰ The characterization of criminal responsibility in *Blagojević & Jokić* is consistent with the outcome that *Stakić* had first prescribed as the result of this approach. Therefore, the outcome in *Blagojević & Jokić* can properly be reconciled with the heads of responsibility approach first proposed in *Stakić*, and with its reasoning. However, the outcome of *Blagojević & Jokić* then conflicts with the finding in *Krstić*, which it purported to follow, because of its finding for complicity in genocide rather than for aiding and abetting genocide.

193. *Ntakirutimana* Appeal Judgment, *supra* note 106, at ¶ 500.

194. *Id.* at ¶ 509.

195. Prosecutor v. *Semanza*, Case No. ICTR-97-20-A, Judgment, ¶ 316 (May 20, 2005) [hereinafter *Semanza* Appeal Judgment].

196. *See id.*, n. 682, 125 (Disposition).

197. *See Milošević* Acquittal Decision, *supra* note 35, at ¶ 295(2) (noting that the comments of the *Krstić* Appeals Chamber concerning this theory are *obiter dicta*).

198. *See Blagojević & Jokić* Trial Judgment, *supra* note 7.

199. *Id.*

200. *Id.* at ¶¶ 679, 787

The Appeals Chamber overturned Blagojević's conviction for complicity in genocide in its Judgment of May 9, 2007.²⁰¹ The reversal was based upon the finding that Blagojević did not have sufficient knowledge of the specific intent of the principal perpetrators of genocide.²⁰² The Chamber did not revisit the Trial Chamber's discussion of the relationship between complicity and aiding and abetting genocide and only recalled Blagojević's conviction as one for "complicity in genocide as an aider and abettor," without discussing the construction of that charge.²⁰³

If indeed the Chambers in *Blagojević & Jokić*, *Ntakirutimana*, and *Semanza* meant to apply the heads of responsibility approach, they have not uniformly made decisions as to whether a conviction based upon both Articles would correctly fall under complicity in genocide or aiding and abetting genocide. If the tribunals continue to apply both Articles in such a manner, without determining under what circumstances it is appropriate to apply one rather than the other, an ultimate resolution to the relationship between these two concepts of individual criminal responsibility may remain for other international courts—such as the International Criminal Court—to settle in the future. The efforts of the *ad hoc* tribunals, no doubt, will have nevertheless advanced the issue and perhaps ripened it for final determination.

It should be noted that, despite the doctrinal differences in the two approaches to liability for genocide, there does not seem to be a material difference in the evidence required for a conviction under either complicity in genocide or aiding and abetting genocide. The fact that the elements for both seem to be identical suggests there truly is no practical difference between both these provisions, and that any theories which might seem to properly explain their co-existence would not make any substantial veridical difference in application. If complicity in genocide and aiding and abetting genocide are reciprocative, it is more likely that their coexistence is a mere, inadvertent redundancy. Although one could simply accept that the purpose behind the inclusion of complicity in genocide under Article 4 was strictly theoretical, the jurisprudential legacy to date resulting from this provision seems to deserve another explanation, if doctrinal harmony is to be achieved.

3. *Heads of Responsibility Approach as Tool to Reconcile Aiding and Abetting Genocide and Complicity in Genocide*

Consideration of what the heads of responsibility approach actually entails provides an answer to the question of whether the difference between complicity in genocide and aiding and abetting genocide is solely theoretic-

201. Prosecutor v. Blagojević & Jokić, Case No. ICTY-97-20-A, Judgment, ¶ 124 (May 9, 2007) [hereinafter *Blagojević & Jokić* Appeal Judgment].

202. See *id.* at ¶¶ 119–124.

203. *Id.* at ¶ 119.

cal in nature or whether there is a practical difference in their application. *Krstić's* position—that complicity in genocide could include other forms of liability—does not fully exhaust the issue of why the drafters included Article 4(3)(e) in the statute along with Article 7(1). However, it did point out the logical conclusion that, if the heads of responsibility in Article 7(1) are read into Article 4—and consequently into Article 4(3)(e)—complicity in genocide could indeed “take on” forms of liability other than that of aiding and abetting. That is to say, the other forms of accomplice liability listed in Article 7(1) could also be properly alleged as forms of liability of complicity in genocide.

The *Blagojević & Jokić* Trial Chamber seemed to allow for this possibility when it found the accused responsible for complicity in genocide through aiding and abetting.²⁰⁴ The Trial Chamber further noted that “since complicity in genocide has been interpreted to include various forms of participation listed under Article 7(1) of the Statute, the charge should be pled in such a way that the accused is on notice of the exact nature of his alleged responsibility.”²⁰⁵

Therefore, it may be possible that complicity in genocide could be committed through other forms of liability in Article 7(1) beyond that of aiding and abetting, and possibly even may be committed via a joint criminal enterprise. If other forms of liability attach to complicity in genocide, aiding and abetting is only one way of being held individually criminally responsible for complicity in genocide. As this situation is speculative, it is difficult to predict how it would effect the treatment of complicity in genocide. At the moment, the elements that have been identified with complicity in genocide appear to be practically identical to those of aiding and abetting. Although it is unclear what elements would apply to complicity in genocide if it were committed through another form of liability rather than aiding and abetting, it is possible that the elements of complicity in genocide would conform to the mode of liability through which it is committed, as appears to be the case with aiding and abetting under Article 7(1) of the statute.

IV. CONCLUSION

The issue still remains of why complicity in genocide was included in the statute, along with Article 7(1), which enumerates modes of liability for genocide in any case. The report of the United Nations Secretary-General accompanying submission of the statute to the United Nations Security

204. *Id.* at ¶ 787 (emphasis added).

205. *Id.* at ¶ 778.

Council is silent upon the issue.²⁰⁶ The jurisprudence of the *ad hoc* tribunals indicates seemingly transposable application of aiding and abetting genocide and complicity in genocide, which appear in the case law almost as reciprocal modes of liability, resulting in no more than a potential statutory redundancy.

However, closer examination reveals that, although they may often overlap in application, they serve separate theoretical and practical functions. Aiding and abetting is a form of liability under Article 7(1) that can be applied to any of the substantive crimes set forth in the statute. Complicity in genocide is a hybrid of a substantive crime with a form of liability explicitly attached. As such, the forms of liability under Article 7(1) can attach to complicity in genocide, as they can to genocide and the other substantive crimes in the statute. Despite the fact that the elements of aiding and abetting are often equated with and commingled with complicity in genocide, it would seem that this would only be the case when complicity in genocide is committed through aiding and abetting. Should any of the other forms of liability under Article 7(1) attach to complicity in genocide, the substantive elements would likely change accordingly. Therefore, there is no one set of substantive elements applicable to complicity in genocide in all cases. *Stakić* explained this construction of the statute as an attempt to honor “the exclusivity of the crime of genocide . . . and [uphold] the limitations set by the 1948 Genocide Convention.”²⁰⁷

The heads of responsibility approach from *Stakić* presents an attractive solution to this doctrinal debate. The Chamber’s explanation for the co-existence of complicity in genocide and aiding and abetting genocide in setting forth this approach, namely the exclusivity of the crime of genocide, does not seem to have drawn any criticism in the case law; on the other hand, the exclusivity theory from *Stakić* is neither specifically cited nor explicitly accepted thus far. Nevertheless, *Stakić*’s reasoning is sound. *Akayesu*’s attempt to differentiate aiding and abetting and complicity in genocide by their elements is difficult to accept as a matter of law in the jurisprudence of the tribunals. *Krstić*’s explanation lacks a corresponding form of complicity beyond Article 7(1) and joint criminal enterprise. Indeed, if the heads of responsibility listed in Article 7(1) are properly read into Article 4, all of the forms of accomplice liability provided for under Article 7(1) would still be applicable to genocide without the inclusion of Article 4(3)(e), complicity in genocide.

Therefore, *Stakić*’s exclusivity theory provides the best explanation for the co-existence of Article 7(1) and Article 4(3)(e) in the statutes of the tribunals. Article 4(3)(e) creates a hybrid between a substantive crime and a

206. See The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 presented to the Security Council*, U.N. Doc. S/25704 (May 3, 1993), available at <http://www.un.org/icty/legaldoc-e/index.htm> (last visited Apr. 22, 2007).

207. *Stakić* Acquittal Decision, *supra* note 143, at ¶ 48.

mode of liability, which is complicity in genocide. The purpose of creating a separate category for complicity in genocide, which stands apart from complicitous conduct in other crimes within the purview of the tribunals, is to preserve the exclusivity of genocide as the crime of all crimes. Explicitly including complicity in genocide as a hybrid form of a substantive crime highlights the egregious nature of complicity in this particular crime and places complicity in genocide on more of the same level as perpetration of the crime itself. This approach would also be consonant with H.L.A. Hart's "rule of recognition" whereby he postulated:

Laws require interpretation if they are to be applied to concrete cases Neither in interpreting statutes nor precedents are judges confined to the alternatives of blind, arbitrary choice, or "mechanical" deduction from rules with predetermined meaning. Very often their choice is guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work injustice or offend settled moral principles No doubt because a plurality of such principles is always possible it cannot be *demonstrated* that a decision is uniquely correct: but it may be made acceptable as the reasoned product of informed impartial choice. In all this we have the "weighing" and "balancing" characteristic of the effort to do justice between competing interests.²⁰⁸

The exclusivity theory would assign—with precision—the liability of a person who aids and abets complicity in genocide or who aids and abets another who is complicit in genocide, while at the same time avoiding the over or understatement of the aider and abettor's level of responsibility.²⁰⁹ It is therefore submitted that the commission of complicity in genocide *through* a form of liability under Article 7(1) would be the correct formulation of a charge for the crime of complicity in genocide.²¹⁰

Acceptance of the exclusivity theory in *Stakić*, as well as either of its approaches, does not necessarily reconcile the inconsistent application of the two Articles in conjunction with one another throughout the jurisprudence. One avenue for future Chambers would be to follow the suggestion of the *Milošević* Chamber, which would entail limiting the *Krstić* finding—and inevitably the *Ntakirutimana* finding as well—for aiding and abetting genocide to the facts of those cases. Such an approach would ensure the availability of the heads of responsibility approach, set forth in *Stakić*, and perhaps foster uniformity in future case law.

208. H.L.A. HART, *CONCEPT OF LAW* 204–205 (1997) (emphasis in original). See also *id.* at 263–269 (proffering defense for rule of recognition).

209. See *Tadić* Appeal Judgment, *supra* note 41, at ¶ 192.

210. For the definition of the term "charge," see *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, ¶¶ 25–35 (Dec. 17, 2004).

