

The *Jelisić* Case and the *Mens Rea* of the Crime of Genocide

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Abstract. The December 1999 judgment of the ICTY in the *Jelisić* case is the first ruling on the merits from that court dealing with an indictment for genocide. The Trial Chamber concluded that the Prosecutor had failed to prove that genocide was committed and that consequently the accused could not be convicted as an accomplice to the crime. It went on to examine whether despite the absence of genocide on any widespread or systematic basis it was still possible for an individual, driven by genocidal intent, to commit one of the underlying crimes such as killing or causing serious bodily or mental harm. The Trial Chamber considered this a plausible hypothesis but ruled that this did not correspond to the facts of the case. Since the *Jelisić* ruling, the Preparatory Commission of the International Criminal Court has attempted to eliminate the lone *génocidaire* scenario in the Elements of Crimes. While the law remains unsettled, awaiting clarification from the Appeals Chamber, a wise prosecutorial policy would be to reserve international genocide prosecutions for serious cases involving organized and widespread crimes. Exaggerated attention to individual and isolated cases is a questionable use of valuable resources and risks diluting some of the terrible stigma now attached to the “crime of crimes.”

1. INTRODUCTION

The crime of genocide, as defined within the subject matter jurisdiction provisions of the statutes of both the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹ and the International Criminal Tribunal for Rwanda (ICTR),² is drawn, essentially unchanged, from Articles II and III of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide.³ In proceedings before the ICTR, virtually all of the indictments have involved charges of genocide. Indeed, in one case, when a judge refused to confirm the genocide portion of an indictment, the Prosecutor decided to withdraw the case.⁴ Before the Yugoslav Tribunal,

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1. Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827 (1993), Ann., Art. 4.
2. Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), Ann., Art. 2.
3. Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1951). On the Convention in general, *see also* W. Schabas, *Genocide in International Law* (2000).
4. Prosecutor v. Ntuyahaga, Decision on the Prosecutor’s Motion to Withdraw the Indictment, Case No. ICTR-98-40-T, 18 March 1999.

however, accusations of genocide have been rather sparse, accounting for fewer than ten of the public indictments.⁵ The only ICTY trial for genocide to be completed, that of Goran Jelisić, resulted in an acquittal,⁶ although the accused was found guilty of crimes against humanity and war crimes pursuant to his guilty plea to these charges and sentenced to the not insignificant term of forty years imprisonment.

There are now three important judgments interpreting the genocide provision: *Prosecutor v. Akayesu*, rendered by Trial Chamber I of the Rwanda Tribunal in September 1998,⁷ *Prosecutor v. Kayishema and Ruzindana*, rendered by Trial Chamber II of the ICTR in May 1999,⁸ and *Prosecutor v. Jelisić*, rendered by Trial Chamber I of the ICTY in December 1999.⁹ There have been a number of other convictions for genocide by the ICTR,¹⁰ including two cases based on guilty pleas,¹¹ but none of these adds significantly to the legal interpretation of the genocide provision beyond what is set out in the three judgments referred to above. As for the ICTY, prior to the *Jelisić* judgment it had made isolated comments on the issue of genocide in rulings issued under Rule 61 of the Rules of Procedure and Evidence.¹²

The three judgments, the first two of them convictions (*Akayesu* and *Rutaganda*), the third an acquittal (*Jelisić*), are currently under appeal. Each raises important questions of interpretation of the genocide provision in the Statute for which there is currently little or no case law, be it of domestic or international tribunals. Accordingly, the judgments that the Appeals Chamber is expected to render in 2001 will have very decisive effects on the developing law of genocide. This comment focuses on two questions raised primarily by the *Jelisić* appeal, namely, proof that the offender was animated by a *dolus specialis* or "special intent," and proof that genocide was committed as a result of a plan.

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5. *Prosecutor v. Karadžić and Mladić*, Indictments, Case Nos. IT-95-5-I and IT-95-18-I, 25 July 1995 and 15 November 1995; *Prosecutor v. Jelisić*, Indictments, Case No. IT-95-10-I, 21 July 1995, 13 May 1998, and 19 October 1998; *Prosecutor v. Meakić*, Indictments, Case No. IT-95-4-I, 13 February 1995 and 3 June 1998; *Prosecutor v. Krstić*, Indictment, Case No. IT-98-33-I, 2 November 1998; *Prosecutor v. Kovacević and Drljaca*, Indictments, Case No. IT-97-24-I, 13 March 1997 and 23 June 1998; *Prosecutor v. Duško Sikirica et al.*, Indictment, Case No. IT-95-8-I, 21 July 1995.
 6. *Prosecutor v. Jelisić*, Judgment, Case No. IT-95-10-T, 14 December 1999.
 7. *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998.
 8. *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-T, 21 May 1999.
 9. *Supra* note 6.
 10. *Prosecutor v. Rutaganda*, Judgment, Case No. ICTR-96-3-T, 6 December 1999; *Prosecutor v. Musema*, Judgment, Case No. ICTR-ICTR-96-13-T, 27 January 2000.
 11. *Prosecutor v. Kambanda*, Judgment and Sentence, Case No. ICTR-97-23-S, 4 September 1998; *Kambanda v. Prosecutor*, Judgment, Case No. ICTR-97-23-A, 19 October 2000; *Prosecutor v. Serushago*, Sentence, Case No. ICTR-98-39-S, 2 February 1999; *Serushago v. Prosecutor*, Judgment, Case No. ICTR-98-39-A, 6 April 2000.
 12. *Prosecutor v. Nikolić*, Review of Indictment Pursuant to Rule 61, Case No. IT-95-2-R61, 20 October 1995; *Prosecutor v. Karadžić and Mladić*, Consideration of the Indictment within the framework of Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-5-R61, IT-95-18-R61, 11 July 1996.

Goran Jelisić was called the “Serbian Adolf,” a name he himself appears to have fancied. He was not a major player in the Bosnian atrocities, but rather a “low-level” thug driven by hatred of Muslims. He is personally alleged to be responsible for the murder of several dozen victims. After indictment and arrest, Jelisić agreed to plead guilty to counts of war crimes and crimes against humanity, but denied responsibility for the crime of genocide. The Prosecutor decided, nevertheless, that a trial should proceed in search of a conviction for genocide. After she announced that all of her evidence had been led, the Trial Chamber announced that it would enter an acquittal on the charge of genocide. A summary judgment was issued at that time, on 19 October 1999, followed two months later by more substantial reasons, on 14 December 1999.

The peremptory manner in which the Trial Chamber dismissed the genocide indictment infuriated the Prosecutor, who charged that judgment been rendered without her having a chance to be heard properly. This procedural issue is an element of the appeal, but does not concern us here because it is unrelated to the interpretation of the crime of genocide. In the preliminary judgment of October, the Trial Chamber indicated that Jelisić was acquitted because he lacked the requisite genocidal intent. In the complete reasons issued subsequently, two distinct issues were identified.

First, the Trial Chamber concluded that genocide as such had not been committed in Brčko during the operative period. This factual determination was fatal to the charge that Jelisić had been an accomplice in genocide; an accomplice cannot be liable for aiding and abetting a crime that others do not commit. This portion of the judgment is of considerable import because it obviously undermines other prosecutions and moreover augurs poorly for genocide litigation before the International Court of Justice.¹³ Some caution here is advisable, because the Trial Chamber was looking at a very limited geographic area within Bosnia. Still, the Office of the Prosecutor had led a great deal of quite general evidence about the context of the crimes committed by Jelisić. Thus, to the question “was genocide committed in Bosnia,” and subject to the above *caveat*, the answer of the Trial Chamber is “no.”

13. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Requests for the Indication of Provisional Measures of 8 April 1993, 1993 ICJ Rep., at 16; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Further requests for the Indication of Provisional Measures of 13 September 1993, 1993 ICJ Rep., at 32; Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Preliminary Objections, 1996 ICJ Rep., at 595; Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Order of 17 December 1997, 1997 ICJ Rep., at 243; Legality of Use of Force (Yugoslavia v. Belgium *et al.*), Request for the Indication of Provisional Measures, Order of 2 June 1999; Application by the Republic of Croatia Instituting Proceedings Against the Federal Republic of Yugoslavia, 2 July 1999.

Second, the Trial Chamber examined a hypothesis of considerably less political and historical interest, namely, whether Jelisić acting individually and despite the absence of genocide perpetrated by others might himself be guilty of the crime. The suggestion may seem paradoxical: the Trial Chamber concludes that genocide was not committed in Brčko, but then proceeds to examine whether Jelisić committed genocide in Brčko. In any event, absent the factual underpinning, its analysis here focuses essentially on Jelisić's intent. It is within this context that the Trial Chamber makes certain findings with respect to the mental element of the crime of genocide, points that are now hotly contested by the Prosecutor in the appeal case. The Office of the Prosecutor of the two *ad hoc* tribunals has taken the position that the mental element of genocide is established by proof of one of three alternatives:

1. the accused consciously desired the acts to result in the destruction, in whole or in part, of the group, as such;
2. the accused knew his acts were destroying, in whole or in part, the group, as such; and
3. the accused knew that the likely consequence of his acts would be to destroy, in whole or in part, the group, as such.¹⁴

2. *DOLUS SPECIALIS*, SPECIAL INTENT, AND SPECIFIC INTENT

One of the intriguing issues of interpretation involved in genocide prosecutions is the concept of intent. It has become quite common to use the term *dolus specialis* to describe the level of *mens rea* required to establish guilt for genocide. *Dolus specialis*, a term used in certain Romano-Germanic systems but one unknown in the common law, is the expression employed by Trial Chamber I of the ICTR in its first genocide judgment on the merits of a case, in *Prosecutor v. Akeyesu*.¹⁵ The Trial Chamber refers, in the English version of the judgment, to "special intent," as if this were a translation of *dolus specialis*,¹⁶ although more frequently it describes the mental element of genocide as one of "specific intent."¹⁷ In *Kambanda*, the same Trial Chamber observes: "[t]he crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent 'to destroy in whole

14. *Prosecutor v. Jelisić*, Prosecution's Pre-Trial Brief, Case No. IT-95-10-A, para. 3.1; *Prosecutor v. Jelisić*, Prosecution's Appeal Brief (Redacted Version), Case No. IT-95-10-A, para. 4.9; *Prosecutor v. Sikirica et al.*, Prosecutor's Second Revised Pre-Trial Brief, Case No. IT-95-8-T, para. 141.

15. *Prosecutor v. Akayesu*, *supra* note 7, paras. 121, 226–227, 245, and 268.

16. *Id.*, paras. 226, 227, 238, 245, 246, 272, and 296.

17. *Id.*, paras. 121, 213, 225–226, 251, 252, 268, 272–273, 288, 300, 453, 456, 458, and 461.

or in part, a national, ethnic, racial, or religious group as such.’”¹⁸ In *Jelisić*, the Trial Chamber uses the expression only once, in what is essentially a concluding paragraph of the judgment of 14 December 1999: “[t]he Trial Chamber therefore concludes that it has not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide.”¹⁹ In explanation, the Trial Chamber said “he killed arbitrarily rather than with the clear intention to destroy a group.”²⁰

The terms *dolus specialis*, “special intent,” and “specific intent” seem to be used interchangeably by the tribunals. This may be the source of some confusion, because the *dolus specialis* concept “is particular to a few civil law systems and cannot sweepingly be equated with the notions of ‘special’ or ‘specific intent’ in common law systems.”²¹ Of course, the same might equally be said of the concept of “specific intent,” a notion used in the common law almost exclusively within the context of the defence of voluntary intoxication.²² It would probably be preferable to eschew importation of enigmatic concepts like *dolus specialis* or “specific intent” from national systems of criminal law. They seem valuable only to the extent that they recall what can in any case be gleaned from the plain words of the definition of the international crime of genocide. This definition requires that the accused commit one of five punishable acts, of which “killing” sits at the top of the list and is arguably the most serious. Obviously the accused must have the intent to commit the act of killing. In the common law system, “killing” *simpliciter* is a crime of “specific intent,” in that the accused may rebut a charge with evidence that he or she lacked the “specific” intent to murder, for example because of voluntary intoxication.²³ The result is acquittal of the crime of murder, but conviction for the lesser and included crime of manslaughter or involuntary homicide, itself a crime of “general intent.” But for “killing” to constitute the crime of genocide, it must be accompanied by the “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such.” This presumably is all that is meant by the *dolus specialis*, or the special intent, or the specific intent of the crime of genocide.

According to the Trial Chamber of the International Criminal Tribunal for Rwanda, in the *Akayesu* case:

Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act

18. Prosecutor v. Kambanda, Case No. ICTR 97-23-S, *supra* note 11, para. 16. *See also*, Prosecutor v. Kayishema and Ruzindana, *supra* note 8, para. 91; Prosecutor v. Rutaganda, *supra* note 10, 6 December 1999.

19. Prosecutor v. Jelisić, *supra* note 6, para. 108.

20. *Id.*

21. Prosecutor v. Jelisić Prosecution’s Appeal Brief (Redacted Version), Case No. IT-95-10-A, para. 4.22. *See also* Prosecutor v. Sikirica *et al.*, *supra* note 14, para. 142.

22. D.P.P. v. Beard, [1920] A.C. 479 (H.L.)

23. *Id.*

charged. Thus, the special intent in the crime of genocide lies in “the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.” Thus, for a crime of genocide to have been committed, it is necessary that one of the acts listed under Article 2(2) of the Statute [or article II of the Convention] be committed, that the particular act be committed against a specifically targeted group, it being a national, ethnical, racial, or religious group.²⁴

The Tribunal continues:

Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator.²⁵

In its commentary on the 1996 *Code of Crimes against the Peace and Security of Mankind*, the International Law Commission qualifies genocide’s specific intent as “the distinguishing characteristic of this particular crime under international law.”²⁶

The prohibited acts enumerated in subparagraphs (a) to (c) are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. These are not the type of acts that would normally occur by accident or even as a result of mere negligence. However, a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act.²⁷

The significance of this very demanding intent requirement is that a mere participant in genocide – the “footsoldier” – who commits killing or one of the other four acts listed in the definition, should not be convicted if he or she does not additionally have the “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such.” While this may seem obvious, it is apparently a source of great frustration to prosecutors as well as to sincere human rights activists desirous of ensuring that even minor players in heinous crimes do not escape accountability.

24. Prosecutor v. Akayesu, *supra* note 7, at para. 497.

25. *Id.*, at para. 516.

26. Report of the International Law Commission on the work of its forty-eighth session. *See* UN Doc. A/51/10 (1996), at 87. *See also* Report of the International Law Commission on the work of its forty-seventh session, 2 May–21 July 1995. UN Doc. A/50/10 (1995), at 43, para. 79.

27. Report of the International Law Commission on the work of its forty-eighth session (1996), *ibid.*, at 87.

This can be seen not only in attempts to dilute the intent requirement²⁸ – despite the principle of strict construction of criminal law²⁹ – but also in efforts to reduce the available defences, excuses, and justifications available to an accused. For example, along these lines Trial Chamber I of the ICTR has contrived a theory whereby principal perpetrators of genocide require the specific intent but accomplices do not. It seems to derive from a technical anomaly in the Statute, which contemplates accomplice liability for genocide in two distinct provisions. Article 2(3)(e) (Article 4(3)(e) of the ICTY Statute) deals specifically with complicity in genocide, while Article 6(1) (Article 7(1) of the ICTY Statute) covers complicity in all of the crimes over which the Tribunal has jurisdiction *ratione materiae*. According to the *Akayesu* Trial Chamber,

[t]herefore, the Chamber is of the opinion that an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such. Thus, if for example, an accused knowingly aided or abetted another in the commission of a murder, while being unaware that the principal was committing such a murder, with the intent to destroy, in whole or in part, the group to which the murdered victim belonged, the accused could be prosecuted for complicity in murder, and certainly not for complicity in genocide. However, if the accused knowingly aided and abetted in the commission of such a murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer's intent to destroy the group [...]. In conclusion, the Chamber is of the opinion that an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.³⁰

But the accomplice who knows of the principal offender's intent and who assists or encourages must necessarily share the genocidal intent. To say that the goal of the accomplice is to earn money by selling the weapon rather than to destroy a group in whole or in part is to confuse concepts of intent and motive. In support of its position, the Trial Chamber cites Lord Devlin, in an English case, stating that

an indifference to the resulting of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he

28. See, e.g., M. Bassiouni, *Commentary on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind*, 11 *Nouvelles études pénales* 233 (1993).

29. *Prosecutor v. Tadić*, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, Case No. IT-94-1-A, 15 October 1998, para. 73; *Prosecutor v. Delalić et al.*, Judgment, Case No. IT-96-21-T, 16 November 1998, paras. 408–413; *Prosecutor v. Kayishema and Ruzindana*, *supra* note 8, para. 103; *Prosecutor v. Akayesu*, *supra* note 7, paras. 309, 501

30. *Prosecutor v. Akayesu*, *supra* note 7, para. 544.

may be indifferent about whether the third lives or dies and interested only the cash profit to be made out of the sale, but he can still be an aider and abettor.³¹

Here, the Rwanda Tribunal's reference to English authority is incorrect, because the *National Coal Board* case, as well as subsequent judgments, actually confirm that the motive of the accomplice is irrelevant as long as knowledge and intent are present.³²

Another plausible scenario where the issue of some level of diminished intent will eventually arise is in attempting to reconcile the specific intent requirement of genocide with the negligence *mens rea* requirement of command responsibility. The case law of the ICTR has, at least to date, taken detours rather than dare to steer through this *Scylla* and *Charybdis*. The *ad hoc* statutes are quite clear, as is the *Rome Statute*, that an accused may be liable for genocide as a superior if he or she "should have known" about the conduct of subordinates.³³ But the commander who simply "should have known" cannot possibly have the specific intent to destroy an ethnic group. The *Rome Statute* attempts to compensate for this in Article 30, the *mens rea* provision, which begins with the words "[u]nless otherwise provided [...]." This does the trick for war crimes and perhaps crimes against humanity, where the texts of the offences do not literally establish a specific intent of the crime. A solution for this problem with respect to genocide might be for judges to stiffen the mental element of command responsibility, in effect eliminating its application to cases of mere negligence. This is the theory advanced by the ICTR in *Akayesu*.³⁴ But once we dispose of "negligent" command responsibility, and in effect require that the superior have knowledge of the criminal conduct of his or her subordinates, we ratchet up command responsibility into a form of criminality by omission, and then we no longer need the command responsibility concept at all. The commander whose troops commit genocide, and who knows of this but does not intervene, is himself or herself possessed with the specific intent to destroy the group and can be prosecuted as a party to the offence, either principal or accomplice.

The drafters of the Elements of Crimes of the *Rome Statute* seem to have been aware of the problem of "negligent" genocide. They too attempted to broaden the scope of genocide, not by formally amending the definition, an idea rejected at Rome, but by the subterfuge of the Elements. The Coordinator's discussion paper, submitted at the conclusion of the February 1999 session of the Working Group on Elements of Crimes,

31. *Prosecutor v. Akayesu*, *supra* note 7, para. 536, citing *National Coal Board v. Gamble* [1959] 1 Q.B. 11, [1958] 3 All E.R. 203.

32. *D.P.P. for Northern Ireland v. Lynch* [1975] A.C. 653, [1975] 1 All E.R. 913 (H.L.). See also J. Smith & B. Hogan, *Criminal Law*, at 133–135 (1992).

33. Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 2, Art. 7(3); Statute of the International Criminal Tribunal for Rwanda, *supra* note 3, Art. 6(3); Rome Statute of the International Criminal Court, UN. Doc. A/CONF.183/9, Art. 28.

34. *Prosecutor v. Akayesu*, *supra* note 7, paras. 216–218.

contained the following: “[t]he accused knew or should have known that the conduct would destroy, in whole or in part, such group or that the conduct was part of similar conduct directed against that group.”³⁵ The suggestion remained in the rolling text until the penultimate stage of drafting. But the attempt to introduce “should have known” or negligence language into the Elements of genocide was ultimately dropped from the final version.³⁶

3. DOES GENOCIDE NEED A PLAN?

At the heart of issues relating to the mental element for genocide is the question of whether or not genocide requires a “plan.” In examining the issue of *mens rea* for genocide, two distinct scenarios seem to be of concern. The first, the “footsoldier hypothesis,” involves the participant in genocide who commits a punishable act but denies the intent to destroy the group, generally because he or she lacked knowledge that the act was part of such destruction. Some of the problems of the “footsoldier” are addressed in the previous section of this comment, dealing with specific intent. The second scenario, which might be called the “serial killer hypothesis,” involves a lone *génocidaire*, who allegedly intends to destroy the group but does so in isolation or, more likely, within the context of a campaign of racial hatred and persecution that, taken generally, falls short of full-blown genocide. In the first scenario, the accused will argue that there may have been a plan but that he or she was ignorant of it; an “act” of genocide was committed, but there was no “knowledge.” In the second, the accused will contend that the intent to destroy was the perverse obsession of an individual but that given the lack of a more collective plan, there was no physical act of genocide: an “intent” to commit genocide was present, but there was no “act.” Accordingly, the “plan” issue arises in two separate contexts. It may be a requirement of the *actus reus*, in which case the lone *génocidaire* hypothesis falls, and it may be a requirement of the *mens rea*, in which case lack of knowledge of the plan by the low-level participant affords a full defence to an accusation of genocide. In both cases, the accused will likely be convicted of some lesser crime although not necessarily one within the jurisdiction of an international tribunal or one subject to universal jurisdiction.

To be sure, the text of the definition of genocide makes no direct reference to an organized plan to commit the crime. During drafting of the Convention in 1948, proposals to include an explicit requirement that

35. Discussion paper proposed by the Co-ordinator, Article 6: The crime of genocide, UN Doc. PCNICC/1999/WGEC/RT.1.

36. Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized draft text of the Elements of Crimes, UN Doc. PCNICC/2000/INF/3/Add.2.

genocide be planned by government were rejected.³⁷ And yet while exceptions cannot be ruled out, it is virtually impossible to imagine genocide that is not planned and organized either by the state itself or by some clique associated with it. Raphael Lemkin, the scholar who first proposed the concept of “genocide,” spoke regularly of a plan as if this was a *sine qua non* for the crime of genocide.³⁸ In its ruling on the sufficiency of evidence in the case of Karadžić and Mladic, who were charged with genocide, the ICTY refers to a “project” or “plan.”³⁹ Trial Chamber I of the ICTR, in *Akayesu*, does not insist upon proof of a plan with respect to the indictment for genocide, but this may have been because the issue was self-evident. At one point in the judgment, it speaks of the “massive and/or systematic nature” of the crime of genocide.⁴⁰ In any event, in order to convict Akayesu of crimes against humanity, the Tribunal concludes that the crimes had been widespread and systematic,⁴¹ defining “systematic” as involving “some kind of preconceived plan or policy.”⁴² In *Kayishema and Ruzindana*, the Rwanda Tribunal writes: “although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without a plan or organization.”⁴³ Furthermore, it says “the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide.”⁴⁴

The plan or circumstances of genocide must be known to the offender. The Israeli court found that Eichmann knew of the “secret of the plan for extermination” only since June 1941, and acquitted him of genocide prior to that date.⁴⁵ This issue was considered in the commentary of the International Law Commission on its draft Code of Crimes Against the Peace and Security of Mankind:

The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure. This does not mean that a subordinate who actually carries out the plan or policy cannot be held responsible for the crime of genocide simply because he did not possess the same degree

37. UN Doc. E/AC.25/SR.4, at 3–6. *See also* *Kadic v. Karadžić*, 70 F.3d 232 (2nd Cir. 1995), cert. denied, 64 U.S.L.W. 3832 (18 June 1996).

38. R. Lemkin, *Axis Rule in Occupied Europe*, Laws of Occupation, Analysis of Government, Proposals for Redress, at 79 (1944).

39. *Prosecutor v. Karadžić and Mladić*, *supra* note 12, para. 94. “Project” may be an overly literal translation of the French word *projet*, which means “plan,” and possibly reflects the role of French judge Claude Jorda in the drafting of the decision.

40. *Prosecutor v. Akayesu*, *supra* note 7, para. 477.

41. *Id.*, para. 651.

42. *Id.*, para. 579. The Tribunal cited the Report of the International Law Commission on the work of its forty-eighth session, 6 May–26 July 1996, *supra* note 26, at 94.

43. *Prosecutor v. Kayishema and Ruzindana*, *supra* note 8, para. 94.

44. *Id.*, para. 276.

45. *A.-G. Israel v. Eichmann* (1968) 36 I.L.R. 18 (District Court, Jerusalem), para. 195. On the plan, *see also* paras. 193–194.

of information concerning the overall plan or policy as his superiors. The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide.⁴⁶

Individual offenders need not participate in devising the plan. If they commit acts of genocide with knowledge of the plan, then the requirements of the Convention are met.⁴⁷

The draft “Elements of Crimes” adopted by the Preparatory Commission of the International Criminal Court in June 2000 includes the following as an element of the crime of genocide: “[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”⁴⁸ This is what the “Elements” consider to be “contextual circumstances,”⁴⁹ to distinguish such facts from the classic criminal law concept of material element or *actus reus*. The term “circumstance” is familiar, because it appears in Article 30 of the Rome Statute, requiring as a component of the *mens rea* of crimes that an accused have “awareness that a circumstance exists.”⁵⁰ Three additional provisions appear in the Elements that complete but also complicate the construction of this somewhat puzzling text about genocidal conduct. The term “in the context of” is to include the initial acts in an emerging pattern, the term “manifest” is deemed an objective qualification, and “[n]otwithstanding the normal requirement for a mental element provided for in Article 30 [of the Rome Statute], and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.”⁵¹

The contextual “element” of genocide was initially proposed at the Rome Conference in 1998 by the United States in its draft “definitional elements” on the crime of genocide. The original draft required a “plan to destroy such group in whole or in part.”⁵² During subsequent debate in

46. Report of the International Law Commission on the work of its forty-eighth session, 6 May–26 July 1996, *supra* note 26, at 90.

47. *See, e.g.*, Proposal by Algeria, Bahrain, Comoros, Djibouti, Egypt, Jordan, Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, Tunisia, United Arab Emirates, and Yemen, comments on the proposal submitted by the United States of America concerning terminology and the crime of genocide, UN Doc. PCNICC/1999/WGEC/DP.4, at 4.

48. Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized draft text of the Elements of Crimes, *supra* note 36.

49. *Id.*, at 5.

50. Rome Statute of the International Criminal Court, *supra* note 33, Art. 30(3).

51. Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized draft text of the Elements of Crimes, *supra* note 36, at 6.

52. Annex on Definitional Elements for Part Two Crimes, UN Doc. A/CONF.183/C.1/L.10, at 1. The draft also specified that “when the accused committed such act, there existed a plan to destroy such group in whole or in part.”

the Preparatory Commission for the International Criminal Court, the United States modified the “plan” requirement, this time borrowing from crimes against humanity the concept of “a widespread or systematic policy or practice.”⁵³ The wording was widely criticized as an unnecessary addition to a well-accepted definition, with no basis in case law or in the *travaux* of the Convention.⁵⁴ Israel however made the quite compelling point that it was hard to conceive of a case of genocide that was not conducted as a “widespread and systematic policy or practice.” As the debate evolved, a consensus appeared to develop recognizing the “plan” element, although in a more cautious formulation.⁵⁵

The final version of the “Elements” adopted in June 2000 then eschews the word “plan” in favour of the expression a “manifest pattern of similar conduct,” but any difference between the two expressions would appear to be entirely semantic. Alternatively, the context may be “conduct that could itself effect such destruction.” These criteria should be enough to eliminate the two cases discussed above. The “footsoldier” is innocent of genocide because he or she is ignorant of the “manifest plan.” The “serial killer” is innocent of genocide because he or she is incapable of effecting destruction of the group.

The “Elements of Crimes” are to assist “in the interpretation and application” of the substantive provisions defining crimes within the jurisdiction of the Court.⁵⁶ They are to be “consistent” with the Statute, implying that where they are not the Court may disregard them. The *ad hoc* Tribunals have found provisions of the Rome Statute to be of persuasive authority in the application of international criminal law,⁵⁷ and there is no reason why the same rationale ought not to apply to the draft “Elements.”

The Office of the Prosecutor of the *ad hoc* tribunals addresses this issue as follows: “proof of the objective context in which genocidal acts are committed with requisite intent is an integral part of the proof of a genocide case.”⁵⁸ But the Prosecutor would quarrel vigorously with any suggestion that the existence of a plan is an “element” of the crime. It is not an “element” but it is in “integral part” of proof of a case. Perhaps the Office of the Prosecutor prefers to reserve the term “element” for the *actus reus* and *mens reus*, but to admit a requirement that proof also be

53. The draft proposal specified that genocide was carried out “in conscious furtherance of a widespread or systematic policy or practice aimed at destroying the group”; see Draft elements of crimes, UN Doc. PCNICC/1999/DP.4, at 7.

54. Comments by Canada, Norway, New Zealand, and Italy, 17 February 1999, on file with the author.

55. Discussion paper proposed by the Co-ordinator, Article 6: The crime of genocide, UN Doc. PCNICC/1999/WGEC/RT.1: “The accused knew [...] that the conduct was part of a similar conduct directed against that group.”

56. Rome Statute of the International Criminal Court, *supra* note 33, Art. 9(1).

57. Prosecutor v. Furundžija, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para. 227.

58. Prosecutor v. Jelisić, Prosecution’s Appeal Brief (Redacted Version), Case No. IT-95-10-A, at 64. See also, Prosecutor v. Sikirica *et al.*, *supra* note 14, at 66–67.

made of “context” as an “integral part”. This distinction may not always be easy to understand. The Office of the Prosecutor contends that the “objective context” – or what the draft “Elements of Crimes” call the “manifest pattern of similar conduct” – may be one limited to “persecution” as it is contemplated by the crimes against humanity provisions. This is a refinement on the “serial killer” hypothesis, because the lone *génocidaire* no longer operates in isolation, but rather within a context of widespread or systematic persecution that nevertheless falls short of genocide. This profile corresponds neatly, of course, to Goran Jelisić, a genocidal hoodlum with homicidal inclinations caught up in a campaign – the case law is already clear on this point – of crimes against humanity.

Thus, there seems to be little argument with the notion that context is an implied element in the definition of genocide. The debate is apparently about the scale of such “context,” with the Office of the Prosecutor and no doubt some interpreters of the draft “Elements” contending that the plan or pattern need only be one of widespread or systematic persecution on racial or ethnic grounds (a “crimes against humanity policy”)⁵⁹ rather than one of intentional destruction of a racial or ethnic group (a “genocidal policy”). That the accused must, at the very least, have knowledge of the context of persecution is a point that has already been decided: “[...] there must be an element of subjective knowledge on the part of the accused of the factual conditions which render the actions a crime against humanity. The mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity.”⁶⁰ Although whether or not genocide should be deemed a particularly heinous category of crimes against humanity remains subject to debate,⁶¹ to set a lower threshold of knowledge for genocide than for crimes against humanity would be an absurd proposition. Therefore, conceding that a person accused of genocide must have knowledge of the context of persecution is merely to accept what is, at least for the *ad hoc* tribunals, already a binding precedent. But why this knowledge should be limited to the context of crimes against humanity is puzzling and borders on the incoherent. If there must be a plan, policy, context or pattern for genocide, surely it should be a genocidal plan, policy, context, or pattern. If the plan is for

59. According to the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia, “a policy must exist to commit [crimes against humanity, although] it need not be the policy of a State.” See *Prosecutor v. Tadić*, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 655.

60. *R. v. Finta*, [1994] 1 S.C.R. 701, 819 (per Cory J.), cited with approval in *Prosecutor v. Tadić* Judgment, Case No. IT-94-1-A, 15 July 1999, para. 266. See also *Prosecutor v. Tadić*, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 657.

61. *Prosecutor v. Akayesu*, *supra* note 7, para. 469; *Prosecutor v. Rutaganda*, *supra* note 10, paras. 109–119 and *Prosecutor v. Musema*, *supra* note 10, paras. 289–299; *Prosecutor v. Kayishema and Rutaganda*, *supra* note 8, para. 626; *Prosecutor v. Serushago*, *supra* note 11, paras. 13–14.

the “lesser” crime of persecution *qua* crimes against humanity, then the accused ought to be convicted of crimes against humanity. Alternatively, it can be argued – although most of the authorities disagree – that there is no requirement whatsoever of any plan, policy, context, or pattern. But once it is admitted that there should be a plan, policy, context, or pattern, then why it should be the “half-way house” of persecution is hard to understand.

On this issue, judges are confronted with what is essentially a policy determination, as the words of the Convention definition of genocide can evidently bear either approach. In *Jelisić*, Trial Chamber I of the ICTY seriously considers the “serial killer” scenario as a basis for a genocide conviction, only to conclude that the Prosecutor had failed to prove genocidal intent beyond a reasonable doubt on the facts of the specific case before it. It might also have dismissed the “serial killer” scenario as being incompatible with the object and purpose of the Convention provision, to the extent that it requires proof of a genocidal plan, something that will be evidenced by a “manifest pattern.” The former approach promises easier convictions for genocide in Bosnia. This, it may be argued, is helpful to the Tribunal’s image. On the other hand, the second approach ensures a more appropriate stigmatisation of the crime of genocide. The Tribunal’s role is to contribute to peace, accountability and ultimately reconciliation within a context of collective atrocity. Directing its fire at what are really no more than isolated social deviants can only distort the historical record in an unnecessarily provocative fashion. If Serb militias did not, in a collective sense, commit genocide during the Bosnian war, such genocide convictions may not assist the Tribunal in its restorative function and may ultimately prove to be counterproductive.

But even assuming that there is no requirement of proof of genocidal context, a responsible international prosecutor, conscious of the need to focus precious resources on genuinely significant cases, ought to discourage prosecution of individual maniacs who seem to possess a genocidal plan – preposterous and unrealistic – that is not shared by others. Where a prosecutor does not exercise such discretion, judges may well manifest their frustration. This may explain at least partially the impatience of the Trial Chamber in *Jelisić*, where the accused had already pleaded guilty to crimes against humanity but where the Office of the Prosecutor somewhat greedily insisted on a trial in order to add a conviction for genocide. Once the judges concluded that there was no proof of a plan, but that the Prosecutor was stubbornly clinging to a lone *génocidaire* hypothesis, they provoked an abrupt termination to the proceedings. Under the Rome Statute, the judicial power to intervene in such cases is explicit. The International Criminal Court will be empowered to declare inadmissible any case that “is not of sufficient gravity to justify further action by the Court.”⁶²

62. Rome Statute of the International Criminal Court, *supra* note 33, Art. 17(1)(d).

4. CONCLUSION

At the present time, the best that can be said on the *mens rea* of genocide is that the case law is uncertain. Jurists – and human rights activists – disagree on the merits of a broad prosecution-friendly approach to the definition of genocide, for reasons that are essentially driven by policy rather than law. A liberal approach will facilitate convictions and ensure, to the satisfaction of some victims and to the eternal disgrace of the Serbs, that the Bosnian war is tarred with the stigma of the “crime of crimes,” genocide. A narrow approach will focus on the very particular and fortunately rare odium of the crime, reserving it for the organized schemes of Hitler, Eichmann, Bagosora, and Nahimana.