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## ***Mens Rea* and The International Criminal Tribunal for the Former Yugoslavia**

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*Mens Rea* is derived from a maxim of legal Latin used to refer to the mental (or moral or psychological) element of crime: *actus non facit reum nisi mens sit rea*. Literally, it is said to mean “guilty mind.” In one of the leading common law cases, Lord Goddard said that “the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.”<sup>1</sup> The requirement for a *mens rea* element of crimes is probably a general principle of law, as this term is understood in article 38 of the Statute of the International Court of Justice. Criminal law does not, as a general rule, address accidental behaviour, nor is it interested in vicarious forms of liability, matters that generally fall within regimes of civil liability or tort. Those who offend the criminal law are expected to intend the consequences of their acts. Most legal systems have treated the concept of *mens rea* as a presumption,<sup>2</sup> by which proof of guilty intent or knowledge is an element of any criminal offences, although like all presumptions it is subject to exceptions. Absent an indication to the contrary, law requires that a person who physically commits a crime do so intentionally. But “absolute liability” offences, where a person may be convicted of a serious offence absent any proof of intent or *mens rea*, are certainly far from unknown to national justice systems.

A common example of such an absolute liability offence is the crime that is often called statutory rape, namely, having sexual relations with a girl who is under some specified age, perhaps sixteen, or fourteen, or thirteen. Upon proof that the victim was below the age of consent, the crime is committed, irrespective of whether the accused believed she was older. Many legal systems simply refuse to entertain a defence of mistake

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1. *Brend v. Wood*, 175 L.T.R. 306, 307 (1946); *see also* *Harding v. Price*, 1 All E.R. 283, 284 (1948).

2. *See* *Sherras v. de Rutzen*, 72 L.T.R. 839 (1895); *see also*, JEAN PRADEL, DROIT PÉNAL COMPARÉ 251-53 (1995).

of fact in respect of such offences. Thus, an individual may commit what he believes to be the totally innocent act of having sexual relations with a consenting adult, but because of an honest mistake about her age he finds himself subject to punishment for a serious crime. Recently, the United Nations agreed to include such an “absolute liability” offence within the subject matter jurisdiction of its third *ad hoc* tribunal, the Special Court for Sierra Leone, which is supposedly designed to prosecute only “those who bear the greatest responsibility” for the atrocities committed during that country’s civil war.<sup>3</sup>

The focus of international human rights law in the area of criminal justice is on procedural rather than substantive issues. This does not mean that international human rights law has nothing to contribute with respect to the issue of *mens rea*. For example, article 6(2) of the International Covenant on Civil and Political Rights limits the use of capital punishment in States where it has not been abolished to the “most serious crimes.”<sup>4</sup> The “Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,” adopted by the Economic and Social Council in 1984 and subsequently endorsed by the General Assembly, declare that the ambit of the term most serious crimes “should not go beyond intentional crimes, with lethal or other extremely grave consequences.”<sup>5</sup> In a recent finding, the United Nations Human Rights Committee said that mandatory imposition of the death penalty for crimes of murder was arbitrary, because it failed to take into account the individual circumstances of the offender.<sup>6</sup>

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3. See Statute of the Special Court for Sierra Leone, art. 5(a). For information on the Special Court see generally, Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 EUR. J. INT’L L. 857 (2000); Robert Cryer, *A ‘Special Court’ for Sierra Leone?*, 50 INT’L & COMP. L. Q. 435 (2001); Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L. F. 185 (2001); Avril McDonald, *Sierra Leone’s Shoestring Special Court*, 84 INT’L REV. RED CROSS 121 (2002); Stewart Beresford & A.S. Muller, *The Special Court for Sierra Leone: An Initial Comment*, 14 LEIDEN J. INT’L L. 635 (2001); Melron C. Nicol-Wilson, *Accountability for Human Rights Abuses: The United Nations’ Special Court for Sierra Leone*, AUSTRALIAN INT’L L.J. 159 (2001); Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT’L L. 436 (2002); Abdul Tejan Cole, *Legal Basis of the Special Court for Sierra Leone*, 14 INTERIGHTS BULL. 37 (2002).

4. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, 174.

5. *Safeguards Guaranteeing Protection of the Rights of Those Facing The Death Penalty*, ESC Res. 1984/50, Annex, para. 1 (1984); *Human Rights in the Administration of Justice*, U.N. GAOR, 39th Sess., GA Res. 39/118 (1984).

6. See *Thompson v. St. Vincent and the Grenadines* (Communication No. 806/1998), U.N. Doc. CCPR/C/70/D/806/1998, para. 8.2 (2000). These views were endorsed by the East Caribbean Court of Appeal in *Spence v. The Queen*, *Hughes v. The Queen*, Criminal Appeal Nos. 20 of 1998 and 14 of 1997, Judgement of 2 April 2001, available at

But it is certainly difficult to claim, as the law now stands and as it is interpreted by courts and treaty bodies, that international human rights standards dictate that *mens rea* be an essential element of all criminal prosecutions. In fact, some may argue that too demanding a standard can even stymie the enforcement of other norms in international human rights law, such as the obligation upon States to:

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.<sup>7</sup>

#### SOURCES OF THE PRESUMPTION AT THE ICTY

The *Statute of the International Criminal Tribunal for the former Yugoslavia* does not address the issue of *mens rea* directly, and the other relevant normative instrument, the *Rules of Procedure and Evidence*, does nothing to complete the picture.<sup>8</sup> Perhaps a few hints can be gleaned from the Report of the Secretary-General which was prepared prior to the establishment of the Tribunal by the Security Council. For example, it rejects the concept of guilt by association, whereby a member of a criminal association or organisation, by the fact of mere membership, could be made subject to the jurisdiction of the Tribunal. “The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups,” said the Secretary General.<sup>9</sup>

The absence of any real guidance on the subject in the applicable law of the International Criminal Tribunal for the former Yugoslavia (ICTY) contrasts markedly with the law applicable to the International Criminal Court. The *Rome Statute of the International Criminal Court* declares, at article 30:

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<http://www.ecsupremecourts.org.lc> (last visited Apr. 9, 2003).

7. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 12, 1969, 660 U.N.T.S. 195, art. 4(a).

8. The Rules of Procedure and Evidence create their own offences to deal with contempt of court, obstruction of justice and perjury. The applicable texts require proof of *mens rea*, using words like “contumaciously” and “with the intention of.” Rule 77, U.N. Doc. IT/32/Rev.26. For application of the concept, see Prosecutor v. Aleksovski, Case No.: IT-95-14/1-AR77, Judgement on Appeal by Anto Nobile against Finding of Contempt, 30 May 2001.

9. *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, 22 Feb. 1993, U.N. Doc. S/25704, para. 56.

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Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.<sup>10</sup>

Nevertheless, from their very first decisions, the judges of the ICTY have simply assumed that *mens rea* is an essential element of the offences within their jurisdiction. The issue was central to the first conviction, that of Erdemovic, because the availability of the defence of duress had been raised. Erdemovic had confessed to killing a large number of defenceless prisoners at Srebrenica, but when asked to explain his actions he said he had been compelled to do so. This defence of duress amounts to a claim that the accused lacked a guilty mind, because the compulsion under which he acted amounted to something irresistible, leaving him no moral choice in the matter. When his guilty plea was accepted by the Trial Chamber, it examined the possible defence duress, noting that it “might go so far as to eliminate the *mens rea* of the offence and therefore the offence itself”.<sup>11</sup> All of the judges of the Appeals Chamber, in their 1997 ruling rejecting the admissibility of a defence of duress, approached the issue as one of the presence or absence of *mens rea*.<sup>12</sup>

However, the first guilty verdict by the Tribunal following a full-blown

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10. *Rome Statute of the International Criminal Court*, 17 July 1998, art. 30, U.N. Doc. A/CONF.183/9 (entered into force 1 July 2002). See Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 CRIM. L. F. 291 (2001); WILLIAM A. SCHABAS, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 85-87 (2001).

11. *Prosecutor v. Erdemovic*, Case No.: IT-96-22-T, Sentencing Judgement, 29 Nov. 1996, para. 14; 108 I.L.R. 180, 186.

12. See *Prosecutor v. Erdemovic*, Case No.: IT-96-22-A, Sentencing Appeal, 7 Oct. 1997, para. 71; 111 I.L.R. 298, 362 (Separate and Dissenting Opinion of Judge Stephen); see also *id.* para. 27; 111 I.L.R. at 442 (Separate and Dissenting Opinion of Judge Cassese).

trial hardly addressed the issue. Only one paragraph in the *Tadic* judgement refers to this question, and it summarily considers existing case law on whether or not the perpetrator of crimes against humanity must have knowledge of the context within which the acts are committed.<sup>13</sup> The *mens rea* of the offences was not considered, most likely because Dusko Tadic offered an alibi defence, which does not raise questions about intent, and simply denies that the accused was present or involved when the crime was committed.

*Mens rea* was given considerable attention in the *Celebici* judgement of November 1998. Because some of the accused were charged as accomplices and not as principals, the Trial Chamber was concerned with the mental element applicable to such secondary participation. In the case of a principal perpetrator, courts, including the ICTY, generally presume that absent evidence to the contrary a person is deemed to intend the consequences of his or her acts. But in the case of secondary offenders or accomplices, the acts of assistance are often quite ambiguous, and it is not as easy to simply presume the guilty mind from the physical act. According to the judgement of Trial Chamber II *quarter*,

[i]t is, accordingly, the view of the Trial Chamber that, in order for there to be individual criminal responsibility for degrees of involvement in a crime under the Tribunal's jurisdiction which do not constitute a direct performance of the acts which make up the offence, a showing must be made of both a physical and a mental element. The requisite *actus reus* for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have 'a direct and substantial effect on the commission of the illegal act.' The corresponding intent, or *mens rea*, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act. Thus, there must be 'awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime.'<sup>14</sup>

The issue of *mens rea* was explained in the *Tadic Appeal Decision* of July, 1999. According to the Appeals Chamber:

[t]he basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle

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13. See Prosecutor v. Tadic, Case No.: IT-94-1-T, Opinion and Judgement, 7 May 1997, para. 657; 112 I.L.R. 2, 222.

14. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 326 (reference omitted), available at <http://www.un.org/icty/celebici/trialc2/judgement/index.htm> (last visited Mar. 19, 2003).

of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).”<sup>15</sup>

In support, the Appeals Chamber referred to article 7(1) of the *Statute*, which recognises the principle of individual responsibility for criminal acts. Although perhaps only implied, it should be obvious that reference to “culpability” means that the crime must be committed by somebody with intent or knowledge, in other words, with *mens rea*.

#### MENS REA AND THE ELEMENTS OF THE CRIMES

Many of the crimes defined in Article 2 to 5 of the *Statute* include, either explicitly or implicitly, reference to specific mental elements. In other words, the judges are not merely applying a presumption in requiring proof of *mens rea* for a conviction, because *mens rea* is an integral component of the crime’s definition. For example, article 2 of the *Statute* gives the Tribunal subject-matter jurisdiction over an exhaustive list of “grave breaches of the Geneva Conventions.” According to the paragraphs in article 2, these include *wilful* killing, *wilfully* causing great suffering or serious injury to body or health and *wilfully* depriving a prisoner of war or a civilian of the rights of fair and regular trial, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and *wantonly*.

In the *Celibici case*, the Trial Chamber examined the scope of the term “wilful killing,” and its relationship to “murder,” which is the term used in many criminal justice systems to describe intentional homicide. If the term “killing” were to stand alone, without the adjective “wilful,” it might be argued that the crime might also include non-intentional forms of homicide. The ICTY Trial Chamber referred to the ordinary meaning of the term “wilful,” as defined in the Concise Oxford English Dictionary, which is “intentional, deliberate.”<sup>16</sup>

420. The first question which arises is whether there is a qualitative difference between ‘wilful killing’ and “murder” such as to render the elements constituting these offences materially different. The Trial Chamber notes that the term ‘wilful killing’ has been incorporated directly from the four Geneva Conventions, in particular articles 50, 51, 130 and 147 thereof, which set out those acts that constitute “grave breaches” of the Conventions. In the French text of the Conventions,

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15. Prosecutor v. Tadic, Case No.: IT-94-1-A, Judgement, 15 July 1999, para. 186, available at <http://www.un.org/icty/tadic/appeal/judgement/index.htm> (last visited Mar. 19, 2003).

16. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 433.

this terminology is translated as '*l'homicide intentionnel*.' On the other hand, "murder", prohibited by common article 3 of the Conventions, is translated literally in the French text of the Conventions as '*meurtre*.'

421. The Trial Chamber takes the view that it is the simple essence of these offences, derived from the ordinary meaning of their terms in the context of the Geneva Conventions, which must be outlined in the abstract before they are given concrete form and substance in relation to the facts alleged. With this in mind, there can be no line drawn between 'wilful killing' and 'murder' which affects their content.<sup>17</sup>

The Trial Chamber relied upon a teleological interpretation of the term "wilful," observing that the purpose of the grave breaches provision of the Geneva Conventions is proscribing "the *deliberate* taking of the lives of those defenceless and vulnerable persons who are the objects of the Conventions' protections."<sup>18</sup> The Trial Chamber said that the *mens rea* of the grave breach of wilful killing was "an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life."<sup>19</sup> Another of the grave breaches, the crime of wilfully causing great suffering, has been interpreted as "an intentional act or omission which causes serious mental or physical suffering or injury, provided the requisite level of suffering or injury can be proven."<sup>20</sup>

But what of those grave breaches which do not include, in their definition, the words "willful," "wilfully" or "wantonly?" The Tribunal has nevertheless held that these must also be committed with intent. Thus, the grave breach of inhuman treatment consists of "an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity."<sup>21</sup>

The *chapeau* of article 2 requires that the grave breaches be committed against "protected persons." But must the offender *know* that the victim is a "protected person," as this term is meant by the *Geneva Conventions*. "Protected persons" are defined in article 4(1) of the fourth Geneva Convention as those "in the hands of a Party to the conflict or Occupying

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17. *Id.*

18. *Id.* para. 431. *See also* Prosecutor v. Blaskic, Case No.: IT-95-14-A, Judgement, 3 Mar. 2000, para. 153; Prosecutor v. Kordic & Cerkez, Case No.: IT-95-14/2-T, Judgement, 26 Feb. 2001, para. 229.

19. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 439.

20. Prosecutor v. Kordic & Cerkez, Case No.: IT-95-14/2-T, Judgement, 26 Feb. 2001, at para. 245.

21. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 348.

Power of which they are not nationals.”<sup>22</sup> Wilful killing of a combatant during an armed conflict is not a crime, indeed it is the very essence of warfare. It is one of the “lawful acts of war” to which reference is made in article 15(2) of the *European Convention of Human Rights*.<sup>23</sup> If *mens rea* is taken to mean intent and knowledge, the combatant who kills a “protected person” in error, believing that person to be a combatant and a lawful target, ought to have a defence of mistake of fact.<sup>24</sup>

Article 3 of the ICTY *Statute* is the “umbrella rule”<sup>25</sup> encompassing a broad range of unenumerated serious violations of the “laws or customs of war” as recognised at customary international law, in addition to the brief list of punishable acts that actually appears in the text of the provision.<sup>26</sup> As is the case with grave breaches, some of the paragraphs in article 3 include words that indicate intent to be an element of the offense. Thus, it is a violation of the laws or customs of war to employ weapons “calculated to cause unnecessary suffering.” In addition, “wanton destruction of cities, towns or villages, or devastation not justified by military necessity” is proscribed.

In the case of those offences not specifically listed as violations of the laws or customs of war, the Tribunal has also imposed a *mens rea* requirement, even where this is not part of the text of the infraction as defined by customary international law. For example, in *Aleksovski* it considered the mental element of the crime of “outrages upon personal dignity,” which is drawn from common article 3 of the four *Geneva Conventions*. The Trial Chamber required, as an element of the offence, that the accused intend to humiliate the victim.<sup>27</sup>

In the case of genocide, the definition in article 4 of the *Statute* is drawn without significant change from article II of the 1948 *Genocide*

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22. Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War, (1950) 75 U.N.T.S. 135; *see also* Prosecutor v. Tadic, Case No.: IT-94-1-A, Judgement, 15 July 1999, para. s. 163-71; Prosecutor v. Aleksovski, Case No.: IT-95-14/1-A, Judgement, 24 Mar. 2000, para. 151.

23. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, E.T.S. 5 (entered into force 3 Sept. 1953).

24. *See* Clark, *supra* note 10, art. 32 (discussing a codification of the defence) Whether or not the perpetrator must know that the victim is a protected person is discussed by Roger Clark. *See id* at 330-31.

25. Prosecutor v. Furundzija, Case No.: IT-95-17/1-T, Judgement, 10 Dec. 1998, para. 133; Amended Statute of the International Tribunal, art. 3 [hereinafter ICTY Statute] available at <http://www.un.org/icty/legaldoc/index.htm> (last visited April 9, 2003).

26. Prosecutor v. Tadic, Case No.: IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 137.

27. Prosecutor v. Aleksovski, Case No.: IT-95-14/1-T, Judgement, 25 June 1999, para. 57. *But see* Prosecutor v. Kunarac et al., Case. No.: IT-96-23-T and IT-96-23/1-T, Judgement, 22 Feb. 2001, paras. 164-166.

*Convention*, and has specific mental elements set out explicitly in the text. Genocide involves commission of one of five acts, “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Furthermore, several of the five punishable acts have their own mental elements. In the *Jeliscic* appeal, the Office of the Prosecutor argued that the concept of *dolus specialis*, which is a civil law term used to describe the *mens rea* of a crime, set too high a standard, and could not be equated with the common law concepts of “specific intent” or “special intent.”<sup>28</sup> The Appeals Chamber dealt with the matter rather laconically, saying simply that the Trial Chamber had used the term *dolus specialis* as if it meant “specific intent.”<sup>29</sup> The Appeals Chamber referred to “specific intent” to describe “the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such” or, in other words, the normative requirement set out in the *chapeau* of the definition of genocide.<sup>30</sup> The *Sikirica* Trial Chamber criticised the Prosecutor for introducing a debate about theories of intent for the crime of genocide, noting that the matter should be resolved with reference to the text of the provision:

The first rule of interpretation is to give words their ordinary meaning where the text is clear. Here, the meaning of intent is made plain in the *chapeau* to Article 4(2). Beyond saying that the very specific intent required must be established, particularly in the light of the potential for confusion between genocide and persecution, the Chamber does not consider it necessary to indulge in the exercise of choosing one of the three standards identified by the Prosecution. In the light, therefore, of the explanation that the provision itself gives as to the specific meaning of intent, it is unnecessary to have recourse to theories of intent.<sup>31</sup>

The text of article 5, crimes against humanity, has little to say on the subject of the mental element, with the exception of paragraph (h), which requires the existence of a discriminatory motive.<sup>32</sup> In *Kunarac*, the Trial Chamber held that the accused must have had the intent to commit the underlying offence or offences charged, and must have known “that there is

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28. Prosecutor v. Jeliscic, Case No.: IT-95-10-A, Prosecution’s Appeal Brief (Redacted Version), para. 4.22; *see also* Prosecutor v. Sikirica et al., Case No.: IT-95-8-I, Judgement on Defence Motions to Acquit, 3 Sept. 2001, para. 142.

29. Prosecutor v. Jeliscic, Case No.: IT-95-10-A, Judgement, 5 July 2001, para. 51.

30. *Id.* para. 45.

31. Prosecutor v. Sikirica et al., Case No.: IT-95-8-I, Judgement on Defence Motions to Acquit, 3 Sept. 2001, para. 60.

32. *See* Prosecutor v. Kordic & Cerkez, Case No.: IT-95-14/2-T, Judgement, 26 Feb. 2001, paras. 211-12; Prosecutor v. Kvocka et al., Case No.: IT-98-30/1-T, Judgement, 2 Nov. 2001, para. 195; Prosecutor v. Krnojelac, Case No.: IT-97-25-T, Judgement, 15 Mar. 2002, paras. 435-36; Prosecutor v. Vasiljevic, Case No.: IT-98-32-T, Judgement, 29 Nov. 2002, para. 228.

an attack on the civilian population and that his acts comprise part of that attack, or at least *that he took* the risk that his acts were part of the attack.”<sup>33</sup> But there is no requirement that the perpetrator have knowledge of the details of the attack.<sup>34</sup> In *Tadic*, the Appeals Chamber found that discriminatory intent is not, as a general rule, an element of crimes against humanity.<sup>35</sup> But as with the other three categories of crime, there has never been any doubt that intent or knowledge be a requirement for proof that an individual has committed crimes against humanity. With respect to the crime against humanity of rape, for example, it must be proven that the accused knew that the victim did not consent.<sup>36</sup>

There have been debates, of course, about the nature of the intent or knowledge that is required for specific offences. In *Krnjelac*, a Trial Chamber held that the *mens rea* of torture must aim at obtaining information or a confession or at punishing, intimidating or coercing the victim or third person or at discriminating on any ground against the victim or third person. It said that “although other purposes may come to be regarded as prohibited under the torture provision in due course, they have not as yet reached customary status.”<sup>37</sup> This contrasted with the broader view taken in earlier judgements, holding that torture can also be carried out with the intent to “humiliate” the victim. In particular, it noted that “the purpose to ‘humiliate’ the victim” mentioned in the *Furundzija*<sup>38</sup> and *Kvocka*<sup>39</sup> judgements “is not expressly mentioned in any of the principal

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33. Prosecutor v. Kunarac et al., Case No.: IT-96-23-T and IT-96-23/1-T, Judgement, 22 Feb. 2001, para. 434.

34. See *id.* para. 102.

35. Prosecutor v. Tadic, Case No.: IT-94-1-A, Judgement, 15 July 1999, para. 305. See also Prosecutor v. Kordic & Cerkez, (Case No.: IT-95-14/2-T), Judgement, 26 Feb. 2001, at para. 186.

36. See Prosecutor v. Kunarac et al., Case No.: IT-96-23-T, Judgement, 22 Feb. 2001, paras. 147, 460-64; see also Prosecutor v. Kunarac et al., Case No.: IT-96-23/1-A), Judgement, 12 June 2002, para. 127. Note, however, the very first version of Rule 96(ii) of the Rules of Procedure and Evidence, IT/32, which bluntly stated that consent was not a defence to rape. The judges quickly fixed this faux pas with an amendment. See William A. Schabas, *Le règlement de preuve et de procédure du Tribunal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991*, 10 REVUE QUÉBÉCOISE DU DROIT INTERNATIONAL 112 (1994).

37. Prosecutor v. Krnjelac, Case No.: IT-97-25-T, Judgement, 15 Mar. 2002, para. 186.

38. Prosecutor v. Furundzija, Case No.: IT-95-17/1-T, Judgement, 10 Dec. 1998, para. 162.

39. Prosecutor v. Kvocka et al., Case No.: IT-98-30/1-T, Judgement, 2 Nov. 2001, paras. 141, 152, 157.

international instruments prohibiting torture.”<sup>40</sup> The Trial Chamber also observed that “[n]or is there a clear jurisprudential disposition towards its recognition as an illegitimate purpose.”<sup>41</sup> It acknowledged that “[t]here may be a tendency, particularly in the field of human rights, towards the enlargement of the list of prohibited purposes” but reiterated that “the Trial Chamber must apply customary international humanitarian law as it finds it to have been *at the time when the crimes charged were alleged to have been committed*.”<sup>42</sup>

Thus, although not required within the text of the *ICTY Statute*, in contrast with the *Rome Statute*, the judges of the ICTY have treated *mens rea* as an element of all of the offences within the Tribunal’s subject matter jurisdiction. Indeed, there are more or less systematic efforts by the judges to identify the specific mental element of each crime. Incidentally, this would suggest that article 30 of the *Rome Statute* is not only confusing and ambiguous, it is also superfluous, and that judges of the International Criminal Court, like their colleagues at the ICTY, would easily have understood the mental element of crimes without them having to be told.

#### SOME EXCEPTIONS TO THE PRINCIPLE IN THE CASE LAW OF THE TRIBUNALS

Although the Tribunal has presumed *mens rea* to be an element of the offences over which it has jurisdiction, it has also made exceptions to this principle. There are two types of situation in which a person may be convicted of a crime for which the offender lacked full knowledge or intent. The first is established in the *Statute* itself. Article 7(3) sets out the principle of superior responsibility, by which someone may be convicted of a crime committed by a subordinate when that person “knew or had reason to know that the subordinate was about to commit such acts.”<sup>43</sup> The second has been devised by the judges, and in effect adds a form of criminal participation or complicity to the list that appears in article 7(1) that has been baptised “joint criminal enterprise.”<sup>44</sup>

Command or superior responsibility is a form of criminal participation by which a person in a hierarchically responsible position may be held liable for the acts of subordinates. It differs from ordinary complicity, which exists upon proof that the commander ordered the act or otherwise aided and abetted its performance. A commander who actually knows that

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40. Prosecutor v. Krnojelac, Case No.: IT-97-25-T, Judgement, 15 Mar. 2002, para. 186.

41. *Id.*

42. *Id.*

43. ICTY Statute, art. 7(3).

44. *Id.* art. 7(1)

troops under his or her command are about to commit an atrocity or are in the course of committing one, and who fails to intervene, can be prosecuted as an ordinary accomplice. But as the *Celibici* Trial Chamber explained, in the citation reproduced earlier in this article, to be an accomplice there must be some proof that the accused had knowledge of what the principal was doing.<sup>45</sup> Command responsibility takes this a significant step further, implicating the commander as an accomplice in the acts perpetrated by subordinates but in the absence of proof of such knowledge. Under command responsibility, it is only required that the commander had “reason to know” of the crimes, not that he or she actually knew of them.<sup>46</sup> The Secretary-General of the United Nations, in the report submitted prior to adoption of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* by the Security Council, described superior responsibility as “imputed responsibility or criminal negligence.”<sup>47</sup>

Superior or command responsibility developed in a military context and was applied, at least historically, to war crimes committed in international armed conflict.<sup>48</sup> It was later codified with respect to grave breaches of the Geneva Conventions in *Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts*.<sup>49</sup> Command responsibility in the case of war crimes is closely related to issues of military discipline, and the fact that a commander had specific duties that he or she had failed to fulfil. In the leading post-Second World War case, a United States Military Commission

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45. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 326 (reference omitted), available at <http://www.un.org/icty/celebici/trialc2/judgement/index.htm> (last visited Mar. 19, 2003).

46. ICTY Statute, art. 7(3); ICTR Statute, art. 6(3).

47. Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, para. 56 (1993); see also M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 345-74 (1996); EDWARD M. WISE, *GENERAL PRINCIPLES OF CRIMINAL LAW*, Part 3, 13ter *Nouvelles études pénales* 39, 46-47 (1998).

48. See L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 *TRANSNAT'L L. & CONTEMP. PROBS.* 319, 320-27 (1995) (discussing early foundations of the principle of command responsibility); L.C. Green, *Superior Orders and Command Responsibility*, 27 *CAN. YRBOOK INT'L L.* 167 (1989); Hays Parks, *Command Responsibility for War Crimes*, 62 *MIL. L. REV.* 1 (1973).

49. Art. 86(2), 1125 U.N.T.S. 3 (entered into force Dec. 7, 1979):

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

*Id.*

noted that General Yamashita “was an officer of long years of experience, broad in its scope, who has had extensive command and staff duty.”<sup>50</sup> Although acknowledging it would be absurd to condemn a commander merely because one of his or her soldiers committed a crime, the Commission held that “where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops. . . .”<sup>51</sup> When Yamashita’s *habeas corpus* petition was heard by the United States Supreme Court, dissenting Justice Rutledge voted to quash the conviction, believing it was impossible to determine whether the crime was a “wilful, informed and intentional omission to restrain and control troops *known* by petitioner to be committing crimes or was only a negligent failure on his part *to discover* this and take whatever measures he then could to stop the conduct.”<sup>52</sup> But the conviction stood and Yamashita was executed.

The *Statute* of the Tribunals allows conviction of a commander or superior who “had reason to know” of crimes being committed by subordinates, and these words clearly indicate the possibility that a commander can be found guilty who did not, as a matter of fact, have such knowledge.<sup>53</sup> This is not to say that the commander’s behaviour would be

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50. The Trial of General Tomoyuki Yamashita, IV L.R.T.W.C. 1, 36-37, U.S. Mil. Tribunal (Oct. 8, 1945 – Dec. 7, 1945); *In re Yamashita*, 327 U.S. 1 (1945). On the Yamashita case, see A. FRANK REEL, CASE OF GENERAL YAMASHITA (1949), RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY (1982); LAWRENCE TAYLOR, A TRIAL OF GENERALS: HOMMA, YAMASHITA, AND MACARTHUR (1981); Ann-Marie Prévost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 289 (1992); Major Bruce D. Landrum, *The Yamashita War Crime Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995). The other major post-Second World War command responsibility case is *Canada v. Meyer*, 4 L.R.T.W.C. 98, Canadian Mil. Court 98 (1948). On the Meyer case, see PATRICK BRODE, CASUAL SLAUGHTERS AND ACCIDENTAL JUDGMENTS: CANADIAN WAR CRIMES PROSECUTION, 1944-1948 (1997); HOWARD MARGOLIAN, CONDUCT UNBECOMING: THE STORY OF THE MURDER OF CANADIAN PRISONERS OF WAR IN NORMANDY (2000).

51. The Trial of General Tomoyaki Yamashita, IV L.R.T.W.C. 1, 35, U.S. Mil. Tribunal (Oct. 8, 1945 – Dec. 7, 1945).

52. *Id.*; see also the comments on the case, *In re Yamashita*, 327 U.S. 1, 52 (1946).

53. On superior or command responsibility as applied by the Tribunal, see Daryl Mundis, *Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute*, in CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (Gideon Boas & William A. Schabas eds.) (forthcoming 2003); Sonja Boelaert-Suominen, *Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War*, 41 VA. J. INT’L L. 747 (2001); Kirsten M.F. Keith, *The Mens Rea of Superior Responsibility as Developed by ICTY Jurisprudence*, 14 LEIDEN J. INT’L L. 617 (2001).

entirely innocent. The whole concept of superior responsibility is built upon the premise that those who assume command positions must conduct themselves diligently and with proper respect for the dangerous weapons and life-threatened individuals over which they have control. Nevertheless, the culpable act of a commander under such a scenario may only amount to one of negligent or irresponsible command. But negligent or irresponsible command is not a crime within the jurisdiction of the Tribunal.

The Appeals Chamber examined the *mens rea* of command responsibility in the *Celebici* case. The judges dismissed an argument by the Prosecutor aimed at expanding the concept, noting that:

a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates. This is consistent with the customary law standard of *mens rea* as existing at the time of the offences charged in the Indictment.<sup>54</sup>

Thus, although a literal reading of article 7(3) suggests the possibility of a superior being convicted who had no knowledge of the crimes, the Appeals Chamber has required that there be evidence that the superior have some amount of actual knowledge. This knowledge cannot simply be presumed because of the commander's position. Obviously sensitive to the charges of abuse that could result from an overly large construction of article 7(3) of the *Statute*, the Appeals Chamber said it "would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability."<sup>55</sup> Several of the judgements testify to this judicial discomfort with respect to the outer limits of superior responsibility, and reveal concerns among the judges that a liberal interpretation may offend the *nullum crimen sine lege* principle.<sup>56</sup>

According to the Appeals Chamber, the information available to the superior:

does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having

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54. Prosecutor v. Delalic, Case No.: IT-96-21-A), Judgement, 20 Feb. 2001, para. 241 (reference omitted); see also Prosecutor v. Galic, Case No.: IT-98-29-AR73.2, Appeals Judgement, 7 June 2002.

55. Prosecutor v. Delalic, Case No.: IT-96-21-A, Judgement, 20 Feb. 2001, para. 239.

56. See, for example, the opinion of Judge Bennouna, in Prosecutor v. Krajisnik, Case No.: IT-00-39, Separate Opinion of Judge Bennouna, 22 Sept. 2000. For a recent discussion of this point: Prosecutor v. Hadžihasanović et al., Case No.: IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 Nov. 2002.

the required knowledge.<sup>57</sup>

This certainly falls short of the concept of “wilful blindness”, by which an offender in effect wishes to remain ignorant of the facts. In *Celibici*, Trial Chamber II said that it took as its starting point in an analysis of superior responsibility:

the principle that a superior is not permitted to remain wilfully blind to the acts of his subordinates. There can be no doubt that a superior who simply ignores information within his actual possession compelling the conclusion that criminal offences are being committed, or are about to be committed, by his subordinates commits a most serious dereliction of duty for which he may be held criminally responsible under the doctrine of superior responsibility.<sup>58</sup>

In a contempt prosecution, the Appeals Chamber said:

[p]roof of knowledge of the existence of the relevant fact is accepted in such cases where it is established that the defendant suspected that the fact existed (or was aware that its existence was highly probable) but refrained from finding out whether it did exist because he wanted to be able to deny knowledge of it (or he just did not want to find out that it did exist).<sup>59</sup>

In the view of the Appeals Chamber, wilful blindness is “equally culpable” as actual knowledge.<sup>60</sup>

But even “wilful blindness” should be treated with caution, as the great English criminal law specialist Glanville Williams has observed:

The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable

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57. Prosecutor v. Delalic, Case No.: IT-96-21-A, Judgement, 20 Feb. 2001, para. 238.

58. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 387.

59. Prosecutor v. Aleksovski (Case No.: IT-95-14/1-AR77), Judgement on Appeal by Anto Nobile against Finding of Contempt, 30 May 2001, para 43.

60. *Id.*

from the civil doctrine of negligence in not obtaining knowledge.<sup>61</sup>

There is the very real possibility of a conflict between the superior responsibility provisions in article 7(3) and the subject matter jurisdiction provisions in articles 2 to 5. To the extent that certain definitions of crimes include specific reference to intent, it is impossible to reconcile this with the lower threshold established for superior responsibility in the *Statute* as interpreted by the Appeals Chamber in *Delalic*.<sup>62</sup> For example, the reference to subordinates with “a violent or unstable character” recalls the notorious behaviour of Goran Jelusic, a racist concentration camp official who went by the sobriquet “the Serbian Adolf.” Describing him as “violent or unstable” is to understate the extent of his dysfunctional personality. The Appeals Chamber considered that it was, at least in theory, possible for Jelusic to have committed genocide acting alone and with no larger plan or policy or the involvement of others.<sup>63</sup> But is it conceivable that Jelusic’s superior could be convicted of a crime specifically requiring an “intent to destroy” an ethnic group if, in reality, the superior simply underestimated the perversity of a fanatic over whom he exercised command and control?<sup>64</sup>

Superior responsibility is believed by many to offer the most effective way of convicting leaders when evidence is lacking that they have actually ordered the commission of atrocities. Recent judgements suggest that it may not be the panacea many had hoped, and that in its place is an even more effective mechanism that does not appear in the *Statute* at all, and that has been devised by judges. This is “joint criminal enterprise” complicity, a way of imputing guilt to a person who participates in a form of collective criminal activity. The accused can be convicted not only for the crimes that he or she actually committed, with intent, but for those committed by others that he or she did not specifically intend but that were a natural and foreseeable consequence of executing the crime that formed part of the

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61. GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 159 (2nd ed. 1961).

62. See *Prosecutor v. Delalic et al.*, Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 389.

63. See *id.*

64. Although there have now been several convictions by the International Criminal Tribunal for Rwanda for genocide committed on the basis of superior responsibility, none of them really confronts this difficulty. In each case, the Trial Chamber accepted evidence that the superior had actual knowledge of the behaviour of the subordinate rather than mere “reason to know.” Although the convictions rely upon the superior responsibility provision, in reality the crime looks more like one of complicity by omission. See *Prosecutor v. Serushago*, Case No.: ICTR-98-39-S, Sentence, 2 Feb. 1999; *Prosecutor v. Kayishema & Ruzindana*, Case No.: ICTR-95-1-T, Judgement, 21 May 1999, para. 473 (Kayishema only); *Prosecutor v. Musema* Case No.: ICTR-96-13-T, Judgement, 27 Jan. 2000, paras. 894, 899, 905, 914, 924.

collective or common purpose or enterprise.<sup>65</sup>

The Appeals Chamber first developed the theory in *Tadic*, building upon a discussion of complicity in the *Furundzija Trial Judgement*.<sup>66</sup> The Appeals Chamber conceded that “common purpose” or “joint criminal enterprise” liability is not included within the enumeration of forms of participation in article 7(1), but said that a purposive approach to the *Statute* indicates that “it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution.”<sup>67</sup> It considered the case where perpetrators share a common design to pursue a criminal course of conduct, but where one of them commits an act that was outside the common design yet “a natural and foreseeable consequence of the effecting of that common purpose.” According to the Appeals Chamber:

[a]n example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect “ethnic cleansing”) with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. Another example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; if some of the participants in the plan, in carrying out this plan, kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing if these deaths were predictable.<sup>68</sup>

The Appeals Chamber found support for this type of accomplice liability in some of the post-Second World War jurisprudence of British, United States and Italian courts and military tribunals. It concluded with respect to

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65. Prosecutor v. *Tadic*, Case No.: IT-94-1-A, Judgement, 15 July 1999; *see also* Prosecutor v. Krnojelac, Case No.: IT-97-25-PT, Decision on Form of Second Amended Indictment, 11 May 2000; Prosecutor v. Brdjanin & Talic, Case No.: IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001; Prosecutor v. Krnojelac, Case No.: IT-97-25-T, Judgement, 15 Mar. 2002.

66. Prosecutor v. *Furundzija*, Case No.: IT-95-17/1-T, Judgement, 10 Dec. 1998, paras. 199-226.

67. Prosecutor v. *Tadic*, Case No.: IT-94-1-A, Judgement, 15 July 1999, para. 190.

68. *Id.* para. 204.

such cases:

[I]t is appropriate to apply the notion of “common purpose” only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called “advertent recklessness” in some national legal systems).<sup>69</sup>

The Appeals Chamber referred to national practice as well, conceding, but only obliquely and in a footnote, that common purpose or joint criminal enterprise liability has in some countries been declared unconstitutional in the case of serious offences such as murder because conviction of a person for an offence that was not truly intended offends principles of fundamental justice.<sup>70</sup> Thus, as with superior responsibility, in the case of joint criminal enterprise the Tribunal recognises a form of liability or responsibility for acts where, as the Appeals Chamber says, “he did not intend to bring about” the result.

Since the theory of “joint criminal enterprise” was first mooted by the Tribunal, in *Tadic* in July 1999, it has become the magic bullet of the Office of the Prosecutor. For example, the May 1999 indictment of Slobodan Milosevic for crimes against humanity and war crimes committed in Kosovo was amended in 2001 so as to allege his participation in a joint criminal enterprise with Bosnian Serb military and civilian leaders.<sup>71</sup> In August 2001, Bosnian Serb leader General Radovan Krstic was convicted

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69. *Id.* para. 220; see also *id.* para 228.

70. *Id.* para. 224, fn. 288 (citing *R. v. Logan*, [1990] 2 S.C.R. 731, 735 and *R. v. Rodney*, [1990] 2 S.C.R. 687 .

71. *Compare* Prosecutor v. Milosevic et al., Case No.: IT-99-37-I, Indictment, 24 May 1999 *with* Prosecutor v. Milosevic et al., Case No.: IT-99-37-I, Amended Indictment, 29 June 2001 *and* Prosecutor v. Milosevic et al., Case No.: IT-99-37-PT, Second Amended Indictment, 29 Oct. 2001.

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as part of a “joint criminal enterprise” to commit genocide with respect to the Srebrenica massacre of July 1995. The Trial Chamber was not prepared to conclude that there was an operational genocidal plan until the days immediately preceding the killings, when it said that “ethnic cleansing” become transformed into a full-blown plan to destroy physically the Bosnian Serbs in Srebrenica. It found that “General Krstic could only *surmise* that the original objective of ethnic cleansing by forcible transfer had turned into a lethal plan to destroy the male population of Srebrenica once and for all.”<sup>72</sup>

Both of these forms of criminal participation, superior responsibility and joint criminal enterprise, involve a presumption that the offenders behave as “reasonable” people. They establish an objective rather than a subjective standard for the assessment of *mens rea*. The Tribunal can remain uncertain about what the offender actually believed, intended and knew, as long as it is satisfied with how a reasonable person in the same circumstances would have judged the situation and reacted.

Command responsibility requires that the offender “had reason to know,” while joint criminal enterprise allows a conviction where acts are “natural and foreseeable.” The use of objective criteria to measure knowledge and intent is well-accepted in criminal justice systems in the case of negligence-based offences. A negligent person is someone who does not act in the manner of a “reasonable” one, and who does not appreciate what is “natural and foreseeable.” But negligence-type offences are not treated as the most serious crimes, and they do not attract the most serious penalties. It is a form of anti-social behaviour judged by a different yardstick than those who commit crimes with malice and premeditation.

Yet in the case of the International Criminal Tribunal for the former Yugoslavia, an offender may be convicted of the most serious crimes, and sentenced to lengthy terms in prison, on the basis of what can amount to a negligence-like standard of guilt. General Krstic was convicted of genocide, not manslaughter, and he was sentenced, as a man in his early fifties, to a term of forty-six years in prison, all on the basis of the joint criminal enterprise theory of criminal liability. The Trial Chamber never really concluded that he actually intended to commit genocide – a requirement of the chapeau to article 4(2) of the *Statute* – but only that genocide was a “natural and foreseeable” consequence of a criminal plan to ethnically cleanse Srebrenica, and that a reasonable person would have “surmised” such a development.

Dilution of the *mens rea* standard in the case of prosecutions that rely upon superior responsibility or joint criminal enterprise raises issues of a

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72. Prosecutor v. Krstic, Case No.: IT-98-33-T, Judgement, 2 Aug. 2001, para. 622 (emphasis added).

policy nature. Granted, these two techniques facilitate the conviction of individual villains who have apparently participated in serious violations of human rights. But they result in discounted convictions that inevitably diminish the didactic significance of the Tribunal's judgements and that compromise its historical legacy.

At present, a conviction that relies upon either superior responsibility or joint criminal enterprise appears to be a likely result of the trial of Slobodan Milosevic.<sup>73</sup> The three indictments as amended, dealing with crimes in Kosovo, Croatia and Bosnia and Herzegovina, all place reliance on these techniques. However, if it cannot be established that the man who ruled Yugoslavia throughout its decade of war did not actually intend to commit war crimes, crimes against humanity and genocide, but only that he failed to supervise his subordinates or joined with accomplices when a reasonable person would have foreseen the types of atrocities they might commit, we may well ask whether the Tribunal will have fulfilled its historic mission. It is just a bit like the famous prosecution of gangster Al Capone, who was sent to Alcatraz for tax evasion, with a wink and a nod, because federal prosecutors couldn't make proof of murder.

If it cannot be established that leaders such as Milosevic actually intended the atrocities with which they are charged, the door is left ajar for future generations to deny the truth. As special Rapporteur Louis Joinet has written,

The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember" on the part of the State: to be forearmed against the perversions of history that go under the names of revisionism or negationism, for the history of its oppression is part of a people's national heritage and as such must be preserved.<sup>74</sup>

Holocaust denier David Irving has made a career out of claiming that Hitler never actually intended to destroy the Jews of Europe. He generally concedes the involvement of Hitler's associates in racist atrocities, but attempts to rehabilitate the *fuhrer*, to the acclaim of neo-Nazis around the world.<sup>75</sup> But can it be a serious and credible answer to Irving's revisionism

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73. See MICHAEL P. SCHARF & WILLIAM A. SCHABAS, SLOBODAN MILOSEVIC ON TRIAL: A COMPANION 122-26 (2002) (discussing forms of criminal responsibility).

74. *The Administration of Justice and Human Rights of Detainees*, U.N. Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 49th Sess., Agenda Item 9, at 4, U.N. Doc. E/CN.4/Sub.2/1997/20 (1997) (proposed by Mr. Joinet pursuant to Sub-Commission decision 1996/119).

75. Irving's revisionist views that centre around a denial that Hitler knew of the planned extermination of the Jews are well-documented, and well-demolished. See RICHARD J. EVANS, LYING ABOUT HITLER: HISTORY, HOLOCAUST, AND THE DAVID IRVING TRIAL 71-

to claim that even if Hitler did not really intend the Holocaust, he should be held accountable for the actions that he had “reason to know” his subordinates, like Heydrich and Eichmann, were committing, or that their acts were “natural and foreseeable” consequences of his plan to make Europe *judenfrei*? Is history served if we say, in effect, that we may not be able to prove that Hitler was personally involved in the final solution or even had knowledge of it, but that this doesn’t matter because he ought to have known about it, and he was derelict in his duty as a superior or commander?

In this respect it may be worth recalling a warning from Trial Chamber III (Judges May, Bennouna and Robinson), in the *Kordic* judgement of 26 February 2001:

The expansion of *mens rea* is an easy but dangerous approach. The Trial Chamber must keep in mind that the jurisdiction of this International Tribunal extends only to ‘natural persons’ and only the crimes of those individuals may be prosecuted. Stretching notions of individual *mens rea* too thin may lead to the imposition of criminal liability on individuals for what is actually guilt by association, a result that is at odds with the driving principles behind the creation of this International Tribunal.<sup>76</sup>

In its first Annual Report, the Tribunal warned of the dangers of “guilt by association,” observing that suggestions of collective responsibility could frustrate its objectives.

Far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring true peace. If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. In other words, “collective responsibility” - a primitive and archaic concept - will gain the upper hand; eventually whole groups will be held guilty of massacres, torture, rape, ethnic cleansing, the wanton destruction of cities and villages. The history of the region clearly shows that clinging to feelings of “collective responsibility” easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes.<sup>77</sup>

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103 (2001). See generally D.D. GUTTENPLAN, *THE HOLOCAUST ON TRIAL* (2001).

76. Prosecutor v. Kordic & Cerkez, Case No.: IT-95-14/2-T, Judgement, 26 Feb. 2001, para. 219 (reference omitted).

77. *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. GAOR/SCOR, 49th Sess., UN Doc. A/49/342 - S/1994/1007, para. 16 (1994).

Ultimately, it is for this reason that the concept of *mens rea* is so central to all of the prosecutions of the International Criminal Tribunal for the former Yugoslavia. Deviation from adherence to strict principles may augment the chances of conviction but it can also threaten the Tribunal's ability to fulfil its solemn goals.