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**NEW ENGLAND SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES PROJECT  
RWANDA GENOCIDE PROSECUTION**

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**MEMORANDUM FOR THE  
OFFICE OF THE PROSECUTOR**

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**ISSUE: GENOCIDE AND COMPLICITY IN  
GENOCIDE – CAN OR MUST THEY BE  
CHARGED IN THE ALTERNATIVE?**

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November 2001

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## I. Introduction and Summary of Conclusions.

### A. Issues.

This memorandum addresses whether Genocide and Complicity in Genocide can be charged alternatively on the same set of facts in a single case before the International Criminal Tribunal for Rwanda (the “ICTR”). This issue has arisen as a point of contention following the ICTR’s holding in the trial of Jean Paul Akayesu.<sup>1</sup> In that case, the Trial Chamber held that an accused cannot be convicted for Genocide and Complicity in Genocide for the same act, because an individual cannot be both the principal perpetrator of a particular act and an accomplice thereto.<sup>2</sup> The Prosecutor believes this to be “based on sound reasoning.”<sup>3</sup>

On behalf of the Office of the Prosecutor (the “OTP”), Melinda Pollard stated, in relevant part, that

[a]s a result of the Akayesu decision, the OTP began to charge Genocide and Complicity in Genocide in the alternative often based on the same facts. A simplified version of an argument I made to support charging the two crimes based on the same facts is this: the trier of facts would need to make a determination as to whether the special intent required for Genocide *dolus specialis* was proven beyond a reasonable doubt. If “yes,” and all other elements of Genocide had also been proven beyond a reasonable doubt, then there was no need to go further re: the charge of Complicity in Genocide.

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<sup>1</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998. [Reproduced in Tabs C 1-3].

<sup>2</sup> *Id.*

<sup>3</sup> Email from Melinda Pollard for the Office of the Prosecutor (hereinafter referred to as OTP’s email). *See infra* note 4. [Reproduced in Tab A1].

However, if the court found that the special intent required for Genocide had not been proven beyond a reasonable doubt, then the same facts could serve as a basis for a conviction of Complicity in Genocide.

At least one judge has dismissed, at the confirmation phase, the count of Complicity in Genocide where both counts were pleaded on the same facts. In one case, the Court stated “[that] simple recitation of a legal text of alternative mode of responsibility or of the legal elements of alternative crimes is insufficient. . . . Alternative charges are appropriate where conflicting evidence shows that a crime could have occurred in essentially different ways or where conflicting evidence demonstrates different modes of responsibility for the crime.”<sup>4</sup>

As a result, three sources of uncertainty arise. First, if this judge’s theory is accurate, the Prosecution would face the issue of how to determine the specific intent of the defendant, which is necessary for charging a defendant with Genocide as opposed to Complicity in Genocide, prior to determining the facts at trial.

The second source of uncertainty arises out of the failure to distinguish between charging, convicting and sentencing a defendant for multiple offenses in relation to the same set of facts. In order to determine how the Prosecution should charge a defendant and where the potential problems lie, this distinction must be made before the ICTR Trial Chamber is able to characterize the charges.<sup>5</sup> Once the Trial Chamber is able to characterize the charges, it can then determine under what circumstances alternative charging is permissible, thus eliminating the resulting problems.

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<sup>4</sup> OTP’s email. [Reproduced in Tab A1].

<sup>5</sup> See *infra* Point III.D.2.

A third source of confusion as to when and how to charge in the alternative based on the *Akayesu* decision arises from discrepancies in translation.<sup>6</sup>

**B. Summary of Conclusions.**

Charging Genocide with Complicity in Genocide in the alternative before the ICTR should not only be permissible, it is essential. First, charging in the alternative is necessary for determining the level of intent, which may only become apparent once all the facts are adduced at trial. Determining the level of intent prior to trial may be based on little more than speculation on the part of the Prosecution, and in order to ensure a fair and accurate finding, the Prosecution must be able to present all relevant options to the Trial Chamber.<sup>7</sup>

Second, disallowing charging in the alternative on the same set of facts does not resolve the problem purported. The rationale for barring charging Complicity in Genocide as an alternative to Genocide is in actuality a sentencing problem, not a charging problem. The ultimate objective is not to have a defendant serve time for one criminal act two times over. If an individual is able to be convicted for both Genocide and for Complicity in Genocide, he is assumed to be both the principal perpetrator of the crime as well as the accomplice. This is impossible because of the mutually exclusive relationship between these crimes.<sup>8</sup>

This is the scenario that the Trial Chamber must ultimately avoid, which is already addressed at the sentencing stage and the conviction stage. It need not—and for efficacy,

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<sup>6</sup> See *infra* notes 105-109 and accompanying text.

<sup>7</sup> See *infra* Point III.B. and Point III.C.

<sup>8</sup> See *infra* Point III.D.

must not—be addressed at the charging phase. Simply because a defendant may not be sentenced or convicted of both crimes does not mean that he cannot be charged with both; the appropriate way to do so is in the alternative.<sup>9</sup> An “all or nothing” approach would serve neither the interests of the defendant nor the interests of the ICTR.

Also, because Complicity in Genocide is not a lesser included offense of Genocide (the two are mutually exclusive), charging in the alternative is the only feasible way a conviction for either may be properly obtained.<sup>10</sup> Otherwise, charging cumulatively would likely result in the sentencing problems the Trial Chamber seeks to avoid.

## **II. Factual Background.**

The ICTR was established in November of 1994, in response to the slaughter of hundreds of thousands of Tutsi over the course of the previous months.<sup>11</sup> By Resolution

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<sup>9</sup> *See id.*

<sup>10</sup> *See infra* Point III.D.1.

<sup>11</sup> On 7 April 1994, the internal political turmoil of Rwanda culminated in a plane crash at Kigali Airport, in which all on board were killed. Among the deceased were President Cyprien Ntaryamira of Uganda and President Juvénal Habyarimana of Rwanda, who had been attempting to reach an accord to resolve by peaceful means the issues that had arisen in the country at that time. The plane was believed to have been shot down by political extremists, and the Hutu assigned the responsibility for the crash to the Tutsi elitists.

Immediately after the death of President Habyarimana, and as a result thereof, long raging civil hostilities amongst the Hutu and the Tutsi populations resumed. On 8 April 1994, a newly installed interim government launched a nationwide campaign to mobilize government armed forces and Hutu civilians alike to fight the Rwandan Patriotic Front, which was comprised predominantly of members of the Tutsi opposition. Under the guise of national defense, “ordinary citizens of Rwanda, mainly Hutu peasantry, were enlisted in a nationwide campaign of looting, pillaging, murder, rape, torture, and extermination of the Tutsi.” Factual background detailed in the Indictment of Sylvestre Gacumbitsi, § III, Count 2: Complicity in Genocide, ¶ 3 (internal citations omitted).

955,<sup>12</sup> the U.N. Security Council created the ICTR.<sup>13</sup> The Statute for the ICTR, among its various provisions, also adopted the provisions of the Genocide Convention verbatim.<sup>14</sup>

The objective of the ICTR is to investigate and prosecute the key precipitators of the acts of Genocide that occurred in Rwanda during the course of the interim government.<sup>15</sup> Complicity in Genocide is among the acts set forth in the ICTR Statute that the Tribunal is responsible for prosecuting.<sup>16</sup> As indicated by the *Akayesu* case, as well as other cases brought before this and previous tribunals, however, Complicity in Genocide is a crime for which Prosecutors have found it difficult to obtain convictions.<sup>17</sup> Frequently

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As a result, acts that the world proclaimed would happen “never again” began happening again for the third time in fifty years. “Never again” is the slogan attributed to the international community’s commitment to preserving the memory of the Holocaust and its survivors. If we vow never to forget the enormity of the atrocities that occurred during World War II, we mistakenly believe we can ensure that it will not happen again. *See, e.g.,* Francis A. Boyle, *The Bosnian People Charge Genocide* (Aletheia Press 1996); Leo Kuper, *Genocide* (1981). [Reproduced in Tab E19].

<sup>12</sup> U.N. SCOR, 3453d mtg., 8 Nov. 1994, U.N. Doc. S/Res/955 (1994). [Reproduced in Tab B1].

<sup>13</sup> *See generally* Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998). [Reproduced in Tab E23]. *See also* John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (1998).

<sup>14</sup> *See* 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 5 (1998). [Reproduced in Tab E23].

<sup>15</sup> *Id.*

<sup>16</sup> ICTR Statute, Report on the ICTR and National Trials, July 1997. Available at: <http://www.un.org/ictt>. [Reproduced in Tab B3].

<sup>17</sup> *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998. [Reproduced in Tabs C1-3].

the elements of Complicity in Genocide are overlooked or included in another offense, as it is often viewed as a secondary crime of Genocide.<sup>18</sup>

Accordingly, it is necessary to establish the precise parameters of each respective crime. This is accomplished by determining: (1) the distinctions between the elements of each crime; (2) how a conviction for each crime may be obtained; and (3) under what circumstances a defendant may be charged with each crime.

The primary distinctions between the elements which constitute Genocide and Complicity in Genocide and how a defendant may be convicted for each crime have in large part already been established.<sup>19</sup> The focus of this memorandum is on the final issue: determining if a defendant may be charged with Genocide and Complicity in Genocide in the alternative on the same set of facts.

### **III. Legal Discussion.**

In order to determine whether the Prosecution may charge Complicity in Genocide as an alternative to Genocide, several factors must be considered:

- (1) Complicity in Genocide must be defined with respect to Genocide: for what criminal acts are each charge assigned, and what distinguishes Genocide from Complicity in Genocide?

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<sup>18</sup> *Id.* [Reproduced in Tab C1-3].

<sup>19</sup> *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998; Prosecutor v. Tadić, Case No. IT-95-1-A, Judgment, 15 July 1999; *Principles of the Nuremberg Charter and Judgment Formulated by the International Law Commission*, GA Res. 177A(II); *Report on the International Law Commission Covering Its Second Session*, 5 June to 29 July 1950, UN Doc. A 1313, p.12, art. VII. *See also* Robert Sheets, *Memorandum For Office of the Prosecutor: Complicity in Genocide as an Alternative Count to Genocide* (May 1999). [Reproduced in Tabs C1-3; D1-4; E18].

- (2) What difficulties arise as a result of the different levels of intent required for each crime?
- (3) What is the most effective way to deal with these different levels of intent in the judicial forum?
- (4) What are the technical problems associated with alternative charging, and how might these be addressed?
- (5) Are there any alternatives to charging in the alternative?
- (6) What is the ICTR's ultimate objective?
- (7) Does precluding alternative charging for the same set of facts further that objective?

Following is a detailed discussion answering these questions and arriving at the ultimate conclusion that charging Genocide and Complicity in Genocide in the alternative based on the same set of facts is the proper way these crimes should be charged.<sup>20</sup>

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<sup>20</sup> After the horrors of World War II came to light, the United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (the "Genocide Convention"), which set forth a universal definition of genocide and declared it to be an international crime. GA Res. 96(I). *See also* Simpson, *The Law of War Crimes: National and International Approaches* (1997). "The international community also wanted to respond to the horrors of the Jewish Holocaust with a more permanent structure capable of dealing with any future occurrences of genocide[.]" The United Nations General Assembly "adopted a resolution characterizing genocide as an international crime;" it also "consider[ed] the question of enforcement of the convention." In response, the Security Council "recommended the creation of an international criminal court as a supplement to national courts for the trial of alleged violations of the Genocide Convention." *Id.* at 58. [Reproduced in Tab B2].

The Genocide Convention "was adopted by the General Assembly at its Fourth Session with a provision in Article VI that individuals charged with a violation of the convention could either be tried by a competent national tribunal 'or by such international penal tribunal as may have jurisdiction.'" *Id.* at 59 [Reproduced in Tab B2]. The parties to the Genocide Convention undertook to punish not only acts of genocide committed within

## **A. Defining Genocide and Complicity in Genocide.**

### **1. The ICTR's definition of Genocide.**

Article 1 of the ICTR Statute gives the ICTR the power to prosecute individuals for “serious violations of international humanitarian law committed in the territory of Rwanda.”<sup>21</sup> Article 2 of the ICTR Statute establishes that the ICTR has the power to prosecute for Genocide, and defines this crime as follows:

any of following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of that group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group; and

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their jurisdiction but also complicity in genocide and conspiracy, incitement and attempts to commit genocide. GA Res. 96(I). [Reproduced in Tab B2].

The Genocide Convention was also enacted into English domestic law by the Genocide Act of 1969, and was subsequently adopted in the domestic law of a variety of countries around the world in the years following. Official Report, Fifth Series, *Parliamentary Debates, Commons 1968-1969*, Vol. 777, 3-14 February 1969, pp. 480-509. See also William A. Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge University Press 2000). [Reproduced in Tab E22].

The Genocide Convention is generally thought to embody the principles of customary international law that bind all nations, including those that are not parties to it. Dictionary of Law, Oxford University Press (Market House Books Ltd. 1997).

<sup>21</sup> ICTR Statute, Art. I, Report on the ICTR and National Trials, July 1997. Available at: <http://www.un.org/ictcr>. [Reproduced in Tab B3].

- (e) Forcibly transferring children of the group to another group.<sup>22</sup>

Article 3 of the ICTR Statute further delineates which acts are punishable thereunder:

- (a) Genocide;
- (b) Conspiracy to commit Genocide;
- (c) Direct and public incitement to commit Genocide;
- (d) Attempt to commit Genocide; and
- (e) Complicity in Genocide.<sup>23</sup>

## **2. The ICTR's definition of Complicity in Genocide.**

Article 91 of the ICTR Statute, which is based on the Rwandan Penal Code,<sup>24</sup> defines Complicity through accomplice liability. According to the ICTR Statute, an accomplice, for purposes of a charge of Complicity, is defined as follows:

- (1) A person or persons who by means of gifts, promises, threats, abuse of authority or power, culpable machinations, or artifice, directly incite(s) to commit such action or order(s) that such action be committed.

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<sup>22</sup> ICTR Statute, Art. II, Report on the ICTR and National Trials, July 1997. Available at: <http://www.un.org/ictor>. [Reproduced in Tab B3].

<sup>23</sup> ICTR Statute, Art. III, Report on the ICTR and National Trials, July 1997. Available at: <http://www.un.org/ictor>. [Reproduced in Tab B3].

<sup>24</sup> The Rwandan Penal Code was adopted in 1977, but is patterned after the nineteenth-century codes of France and Belgium. See William A. Schabas and Martin Imbleau, *Introduction to Rwandan Law* (Cowansville, Quebec: Edition Yvon Blais, 1998). See also *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998 at ¶ 90. [Reproduced in Tabs C1-3].

- (2) A person or persons who procure(s) weapons, instruments or any other means which are used in committing such action with the knowledge that they would be so used.
- (3) A person or persons who knowingly aid(s) or abet(s) the perpetrator or perpetrators of such action in the acts carried out in preparing or planning such action or in effectively committing it.<sup>25</sup>

Complicity is generally defined as a “partnership in a crime or wrongdoing.”<sup>26</sup> A finding of Complicity in Genocide results in holding an accused liable as an accomplice for participating in or contributing to the commission of Genocide.<sup>27</sup> In its similarity to the primary offense, Complicity is often overlooked as being a portion of the larger offense, when in fact it is independently punishable.<sup>28</sup> Every criminal system in the world recognizes Complicity as a separate crime;<sup>29</sup> as such, it should not be incorporated into another crime.

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<sup>25</sup> ICTR Statute, Art. 91, Report on the ICTR and National Trials, July 1997. Available at: <http://www.un.org/ictt>. [Reproduced in Tab B3].

<sup>26</sup> *See, e.g.*, The Oxford English Reference Dictionary (Oxford University Press 1996). [Reproduced in Tab E24].

<sup>27</sup> *See* 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 233 n.889 (1998). “The possible range of persons who may be held guilty of war crimes or crimes against humanity is not limited to those who physically performed the illegal deed. Many others have been held to be sufficiently connected with an offense to be criminally liable[.]” United National War Crimes Commission, XV Law Report of Trials of War Criminals 49 (1949) (citations omitted). [Reproduced in Tab E23].

<sup>28</sup> *Id.* at 338.

<sup>29</sup> United Kingdom v. Schoenfeld et al., (1948) 11 LRTWC 64, 69-70 (British Military Court); United Kingdom v. Golkel et al., (1948) 5 LRTWC 45, 53 (British Military Court). *See also* William A. Schabas, *Genocide in International Law: The Crimes of Crimes* 285 (Cambridge University Press 2000). [Reproduced in Tab E22].

### 3. Various international perspectives relating to Genocide and Complicity in Genocide.

All criminal systems view Complicity as a form of criminal participation.<sup>30</sup> Indeed, “participation by Complicity in the most serious violations of international humanitarian law was considered a crime as early as Nuremberg.”<sup>31</sup> The Nuremberg Tribunal defined Complicity as having an awareness while participating in the following acts: planning, instigating, ordering, committing or otherwise aiding and abetting in the commission of a crime.<sup>32</sup>

The International Criminal Tribunal for Yugoslavia (the “ICTY”) defined Complicity as aiding and abetting or otherwise assisting, providing the means, or lending encouragement or support by words or acts, as long as it is done knowingly.<sup>33</sup>

Most civil law systems’ definitions of Complicity are essentially similar to the above mentioned definitions, with a few minor discrepancies. For example, France holds

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<sup>30</sup> *See generally* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998. [Reproduced in Tabs C1-3].

<sup>31</sup> *Id.* at ¶ 88. *See also* Steven R. Rutner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* 118 (1997).

<sup>32</sup> Prosecutor v. Tadić, Case No. IT-95-1-A, Judgment, 15 July 1999 at ¶ 141. [Reproduced in Tabs D1-4].

<sup>33</sup> *Id.* *See also id.* at ¶ 134 (citing other international law; for example, Article 4 (1) of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment “uses the phrase ‘Complicity or participation in torture,’” and Article III of the International Convention on the Suppression and Punishment of the Crime of Apartheid “cites as criminally culpable those who ‘participate in, directly incite, [] conspire in, or . . . directly abet, encourage or cooperate in the commission of the crime.’”). [Reproduced in Tab B5].

an accomplice liable if he knowingly instigated, supplied arms or tools, gave orders, or aided and assisted in the crime.<sup>34</sup>

Common law systems generally consider an individual to be criminally culpable if he assists, encourages, or fails to perform a legal duty to prevent the crime, or if he has the intent to promote or facilitate the commission of a crime.<sup>35</sup> In Australia, presence alone may be a form of encouragement or support sufficient to render an individual guilty of Complicity.<sup>36</sup> The United States has determined that an individual is guilty of Complicity if he aids, counsels, hires or otherwise procures the crime.<sup>37</sup> Under American jurisprudence, Complicity is most closely linked with the concept of accomplice liability; in fact, Complicity and accomplice liability are often referred to interchangeably.<sup>38</sup> The doctrine of Complicity defines the circumstances “in which one person becomes liable for the crime of another.”<sup>39</sup> The liability of such an individual “must rest on the violation of

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<sup>34</sup> Prosecutor v. Tadić, Case No. IT-95-1-A, Judgment, 15 July 1999 at ¶ 135 (referring to the Trial of Wagner and Six Others from the War Crimes trials after the Second World War). [Reproduced in Tab D1-4].

<sup>35</sup> See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998). [Reproduced in Tab E23].

<sup>36</sup> Prosecutor v. Tadić, Case No. IT-95-1-A, Judgment, 15 July 1999 at ¶ 135 (citing Australian Common Law, stating “the most marginal act of assistance or encouragement can amount to an act of Complicity . . . [including] presence.”). [Reproduced in Tabs D1-4].

<sup>37</sup> Commonwealth v. Perry, 357 Mass. 149, 256 N.E. 2d 745 (1970). [Reproduced in Tab E7].

<sup>38</sup> Joshua Dressler, *Cases and Materials on Criminal Law* (2d ed.) 111 (West 1999). [Reproduced in Tab E20].

law by the principal, the legal consequences of which he incurs because of his own actions.”<sup>40</sup>

**B. *Actus Reus and Mens Rea Are Aspects of Genocide and Complicity in Genocide.***

Genocide and Complicity in Genocide, like many other crimes in both the common law and civil law systems, are comprised of two components.<sup>41</sup> These two components, the *actus reus* and the *mens rea* of the crime, are the measurable aspects by which a legal system may determine an individual’s criminal culpability for a particular act or omission within a set of circumstances.<sup>42</sup>

**1. *Actus reus is the observable aspect of a crime.***

The *actus reus* is defined as “the physical or external part of the crime.”<sup>43</sup> More clearly stated, the *actus reus* is the objectively observable voluntary act or omission that the individual did to render him criminally liable.

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<sup>39</sup> Stanford H. Kadish, *Complicity, Cause and Blame: A study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 336-337 (1985). [Reproduced in Tab E16].

<sup>40</sup> *Id.* See generally Prosecutor v. Tadić, Case No. IT-95-1-A, Judgment, 15 July 1999, regarding individual criminal responsibility for aiding and abetting, directly inciting, cooperating and providing means. “The Nuremberg Tribunal defined acts of instigating, ordering, aiding and abetting.” See also Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998 at ¶ 89. See, e.g., Article 46 of the Senegalese Penal Code and Article 121-7 of the New French Penal Code. See also Commonwealth v. Perry, 357 Mass. 149, 256 N.E.2d 745 (1970), which held an accomplice is one who aids, counsels, hires, or otherwise procures the crime. [Reproduced in Tab C1-3; D1-4; E7].

<sup>41</sup> Joshua Dressler, *Cases and Materials on Criminal Law* (2d ed.) 111 (West 1999). [Reproduced in Tab E20].

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

According to the definition of Genocide, an individual may be guilty of that crime if that person destroys any national, racial, ethnical, or religious group, or any part thereof.<sup>44</sup> Any act falling within this definition may constitute the *actus reus* necessary to be criminally culpable for Genocide.<sup>45</sup>

As the definition indicates, that which rendered the defendant culpable need not have been an affirmative act, but could also have been a failure on the part of the defendant to act when he was legally obligated to do so.<sup>46</sup> If the defendant had a duty to act that he breached by failing to act, he may be held accountable in the same manner as if he had done something that the law prohibited him from doing.<sup>47</sup>

Genocide may also be committed by omission.<sup>48</sup> An individual may be found guilty of Genocide if he was in a position to terminate acts over which he had authority that would constitute Genocide, but did not do so.<sup>49</sup> Similarly, Complicity in Genocide may be accomplished by omission in the same manner.<sup>50</sup>

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<sup>44</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951 GA Res. 96(I) (1951). [Reproduced in Tab B2].

<sup>45</sup> Joshua Dressler, *Cases and Materials on Criminal Law* (2d ed.) 111 (West 1999). [Reproduced in Tab E20].

<sup>46</sup> *Id.* (citing the ALI Model Penal Code which defines “omission” as a “failure to act”).

<sup>47</sup> *See* People v. Beardsley, 150 Mich. 206, 113 N.W. 1128 (1907). *But see* Barber v. Superior Ct., 147 Cal.App.3d 1006, 195 Cal.Rptr. 484, 486 (1983), which states that there is “no criminal liability for failure to act where there is not a duty to do so.” [Reproduced in Tabs E4; E8].

<sup>48</sup> *See* John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (1998).

Genocide and Complicity in Genocide share many overlapping aspects, although each remains a distinct crime, which presents a problem for the Prosecution in determining how to distinguish between them for the purposes of charging an individual.

**2. The primary distinction between Genocide and Complicity in Genocide is the *mens rea* necessary for each.**

*Mens rea* is defined as the “mental or internal ingredient” of a crime.<sup>51</sup> It is the subjective component for a finding of criminal liability; because it is subjective in nature, it is unlike *actus reus* in that it is not objectively ascertainable. *Mens rea* may be defined as the intent or the driving motivational force of an individual either to perform an act that renders him criminally culpable or to omit to act when legally obligated to do so.<sup>52</sup>

Most criminal systems provide for different levels of intent for the various acts or omissions that are categorized as crimes.<sup>53</sup> The extent to which an individual harbors intent often will determine the crime for which he is liable.

According to the Model Penal Code (the “MPC”) promulgated by the American Law Institute, the model upon which the criminal laws of a majority of American

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<sup>49</sup> *Id.* at 131.

<sup>50</sup> *Id.*

<sup>51</sup> Joshua Dressler, *Cases and Materials on Criminal Law* (2d ed.) 111 (West 1999). [Reproduced in Tab E20].

<sup>52</sup> *Id.*

<sup>53</sup> See John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* 118 (1998).

jurisdictions are based, the four levels of intent that are considered in determining criminal culpability are: (i) intentional; (ii) knowledge; (iii) recklessness; and (iv) negligence.<sup>54</sup>

The MPC provides that an individual acts intentionally with respect to the material element of a crime when:

- (1) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (2) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes they exist.<sup>55</sup>

The MPC further provides that an individual acts knowingly with respect to a material element of an offense when:

- (1) if the element involves the nature of his conduct or the attendant circumstances,<sup>56</sup> he is aware that his conduct is of that nature or such that circumstances exist; and
- (2) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.<sup>57</sup>

Because Genocide and Complicity in Genocide are mutually exclusive and a defendant may not be convicted of both under the same set of facts, the primary difference between being able to convict a defendant of Genocide and of Complicity in Genocide lies in the *mens rea* element of each crime.

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<sup>54</sup> Recklessness and negligence are inapplicable for the purposes of this discussion.

<sup>55</sup> American Law Institute, Model Penal Code and Commentaries, Comment to § 2.06 at 311 (1985). [Reproduced in Tab E2-3].

<sup>56</sup> *Id.*

**3. Genocide requires specific intent, or *dolus specialis*, whereas Complicity in Genocide requires only knowledge.**

In *Akayesu*, the ICTR held that Genocide is distinct from other crimes precisely because it requires a special intent or *dolus specialis*.<sup>58</sup> The ICTR stated that “[s]pecial intent of a crime is the specific intention, required as the constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged.”<sup>59</sup> The special intent of Genocide is therefore manifested in “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group[.]”<sup>60</sup>

For a crime of Genocide to have been committed, one of the acts listed under Article 2(2) of the ICTR Statute must necessarily have been committed against one of the specified groups.<sup>61</sup> At trial, the Prosecutor has the burden of proving special intent.

In order to convict a defendant of Complicity in Genocide, the Prosecution must prove that one of the acts in Article 2(2) of the Statute was committed.<sup>62</sup> Although the Prosecution need not prove who committed the crime, it must be determined that Genocide

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<sup>57</sup> *See id.*

<sup>58</sup> *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998. [Reproduced in Tabs C1-3].

<sup>59</sup> *Id.* at ¶ 558.

<sup>60</sup> ICTR Statute, Report on the ICTR and National Trials, July 1997. Available at: <http://www.un.org/ictor>. [Reproduced in Tab B3].

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

has occurred in order to charge a defendant with Complicity in Genocide.<sup>63</sup> Beyond proving that Genocide occurred, the Prosecution must prove that a defendant acted with the knowledge that his actions would result in facilitating or furthering the objectives of those engaged in Genocide.<sup>64</sup>

The difficulty arises in ascertaining prior to trial whether the defendant acted with the intention to further or facilitate the objectives of those engaged in Genocide, or whether he was acting only with the knowledge that his actions would have the effect of facilitating or furthering the objectives of the principal perpetrators.

Drawing on what it deemed to be a logical inference that an individual cannot be both the principal perpetrator of a particular act and the accomplice thereto, the ICTR held in *Akayesu* that an accused cannot be convicted of both Genocide and Complicity in Genocide for the same act.<sup>65</sup> In light of this holding, if the Prosecution is unable to convict the defendant of both crimes for the same set of facts, is the Prosecution able to *charge* the defendant with both crimes prior to adducing facts at trial?

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<sup>63</sup> *Id.*

<sup>64</sup> *See generally* ICTR Statute, Art. 91, Report on the ICTR and National Trials, July 1997. Available at: <http://www.un.org/ictt>. [Reproduced in Tab B3].

<sup>65</sup> *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998. [Reproduced in Tabs C1-3].

Another pertinent question arises, however, in regard to this consideration: how does the ICTR determine whether there was knowledge or intent without first finding the facts?<sup>66</sup>

**C. Because of the Different Levels of Intent Required For Genocide and Complicity in Genocide, Alternative Charging Is Essential.**

Although it is true that one cannot be both the principal perpetrator of an act and an accomplice thereto, in almost every case, Genocide is not a single incident crime. It could be extremely difficult to determine where one set of facts ends and the next begins. Moreover, in many instances, an act that is complicitous in nature may also constitute Genocide if specific intent lies therein.

The *dolus specialis* is the only additional element that must be present for an act to be considered Genocide. For example, providing minimal assistance can rise to the level of Genocide if done with specific intent.<sup>67</sup>

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<sup>66</sup> Additionally, the method with which different countries deal with the concept of alternative charging in a vacuum does not prove to be particularly illustrative as to how the ICTR should charge defendants with Genocide and Complicity in Genocide in the alternative. It appears that in civil law and common law countries which employ variations of alternative charging, alternative charging serves the purpose of being the catch-all method of charging. There appears to be very few standards to which alternative charges are held, as it appears to be the final stop on the map, when other forms of charging are impermissible. No compelling evidence seems to exist in support of not charging in the alternative in cases where there is a prima facie case for both charges, and it is unclear as to which role the defendant served in the commission of a particular crime.

<sup>67</sup> One author notes that when

the United Kingdom incorporated the Genocide Convention in its domestic law, it did not include a provision dealing with Complicity. Parliamentary Secretary Elystan Morgan, in explaining the legislation to Parliament, noted that ‘Complicity in Genocide has not been included in Clause 2(1) [because] we take the view that the sub-heading in Article III

If the Prosecution has a prima facie case for proving Genocide, which entails enough evidence to support a finding of specific intent, yet is unable to prove beyond a reasonable doubt that the defendant had a specific intent to commit Genocide, it should be able to charge the defendant with either Genocide, Complicity in Genocide or both, in order to avoid an unjust result.

If the Prosecution is able to charge a defendant simultaneously with Genocide and Complicity in Genocide, it must first determine the relationship of the two charges and how each should be weighted. Complicity in Genocide, as it relates to Genocide, is often considered to be somewhat analogous to the notion of accomplice liability, as previously discussed.<sup>68</sup> Because the actions of the accomplice have a tendency to be non-criminal in nature, the notion of accomplice liability derives its criminality from “borrowing” the criminal liability from the principal perpetrator of the crime.<sup>69</sup> The definition of accomplice liability necessarily precludes an accomplice<sup>70</sup> from being convicted as both the principal perpetrator of the criminal activity and an accomplice thereto.

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is subsumed in the act of Genocide . . . [and it] is a situation in which a person so charged could be charged as a principal in relation to the offense itself.’

William A. Schabas, *Genocide in International Law: The Crimes of Crimes* 287 (Cambridge University Press 2000). [Reproduced in Tab E22].

<sup>68</sup> See *supra* notes 37-39 and accompanying text.

<sup>69</sup> American Law Institute, Model Penal Code and Commentaries, Complicity § 2.06 (3)(a)(ii)(3), which states that a “person is an accomplice of another person in the commission of an offense if: with the purpose of promotion or facilitating the commission of the offense, he . . . aids or agrees or attempts to aid such other person in planning or committing it.” [Reproduced in Tab E2-3].

This was the rationale of the ICTR in the *Akayesu* case, in which Jean-Paul Akayesu was charged with having committed both Genocide and Complicity in Genocide on the same set of facts.<sup>71</sup> Because Akayesu was eventually convicted of Genocide, the Trial Chamber was unable to convict him of Complicity in Genocide as well.<sup>72</sup> The case is important for a number of reasons: it determined how the ICTR was going to prosecute Genocide in future cases, it defined both Genocide and Complicity in Genocide for purposes of factual applications, and it determined the mutual exclusivity of Genocide and Complicity in Genocide.<sup>73</sup>

Accordingly, because one cannot be both a perpetrator of a crime and an accomplice thereto, and because the Trial Chamber is unable to convict a defendant of both crimes, the Prosecutor should be able to charge the defendant with both crimes in regard to the same fact pattern.

In a recent case, a judge of the Trial Chamber reasoned that charging alternatively is only appropriate where “conflicting evidence shows that a crime could have occurred in essentially different ways or where conflicting evidence demonstrates different modes of responsibility for the crime.”<sup>74</sup> If, however, an individual is guilty of Complicity in

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<sup>70</sup> In some jurisdictions, also the “aider and abettor.”

<sup>71</sup> See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998. [Reproduced in Tabs C1-3].

<sup>72</sup> *Id.* at ¶ 334; see *supra* note 4.

<sup>73</sup> *Id.*

<sup>74</sup> See OTP’s email [Reproduced in Tab A1].

Genocide, as opposed to Genocide, then the crime must have been able to have been committed in essentially different ways. If the Prosecutor is able to show a prima facie case for both, then this necessarily must be true. Therefore, Genocide must be defined with respect to Complicity in Genocide in order to determine how each may be appropriately charged in reference to the same set of facts. One potential categorization of the relationship between the crimes is the possibility that Complicity in Genocide may be subsumed by Genocide as a lesser included offense.

**D. Alternatives to Alternative Charging.**

**1. Lesser included offenses.**

**a. Is Complicity in Genocide a lesser included offense of Genocide?**

It is unclear as to whether Complicity in Genocide is, in fact, a lesser included offense of Genocide. The treatment of Complicity in Genocide thus far in the international forum indicates that it is not.<sup>75</sup> While Complicity in Genocide shares many elements with Genocide, Complicity in Genocide is not, in all cases, subsumed in totality when the elements of Genocide are met.<sup>76</sup> Also, an individual may not necessarily be guilty of Complicity in Genocide before he is able to commit Genocide. A more appropriate means of charging a defendant with both crimes would be by charging in the alternative.

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<sup>75</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998 at ¶ 469. [Reproduced in Tabs C1-3 ]. See *infra* Point III.D.1.a.

<sup>76</sup> ICTR Statute, Art. I-II, Report on the ICTR and National Trials, July 1997. Available at: <http://www.un.org/ictt>. [Reproduced in Tab B3 ].

Although it is unlikely that Complicity in Genocide may in complete accuracy be categorized as only a lesser included offense of Genocide, the holding in *Akayesu*<sup>77</sup> indicates that the crimes should be addressed similarly to the method in which lesser included offenses are addressed.<sup>78</sup> If the Trial Chamber rejects an alternative charge of Complicity in Genocide based on the same set of facts supporting a charge of Genocide, it may be because it views Complicity in Genocide as a lesser included offense of Genocide. As such, the Trial Chamber may view the alternative charge as redundant, because if the Prosecution is unable to prove Genocide, the defendant may nevertheless be convicted of Complicity in Genocide as opposed to being acquitted altogether. Even so, “a lesser included offense of a single count must still be charged in the alternative,” and it is for the trier of fact to determine for which crime the defendant should be convicted.<sup>79</sup> Otherwise, a defendant may not be aware of all the charges he faces, which could constitute a violation of his right to due process.<sup>80</sup>

**b. United States case law may illustrate the effect different levels of culpability have upon the issue of lesser included offenses.**

In criminal trials in the United States, the lesser included offense doctrine is invoked “when the defendant could not have committed a particular crime without

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<sup>77</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998. [Reproduced in Tabs C1-3].

<sup>78</sup> *Id.*

<sup>79</sup> See John A. Alesandro, *Comment: Physician-Assisted Suicide and New York Law*, 57 Alb. L. Rev. 819 (1994). [Reproduced in Tab E14].

<sup>80</sup> U.S. Constitution Amends. V, XIV.

concomitantly committing another offense of a lesser degree.”<sup>81</sup> Federal courts in the United States charge defendants with lesser included offenses in accordance with Rule 31(c) of the Federal Rules of Criminal Procedure, which states that “[t]he defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.”<sup>82</sup>

The role of the trier of fact in the American criminal justice system is to determine guilt or innocence based on findings of fact, thereby indicating whether the Prosecution has proven all of the elements of the offense charged beyond a reasonable doubt.<sup>83</sup> If the trier of fact is able to find that the key elements of the lesser included offense exist, but is

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<sup>81</sup> Laura Anne Cooper, *Comment: Should Juries Be Able To Agree To Disagree? People v. Boettcher and the “Unanimous Acquittal First” Instruction*, 54 Brooklyn L. Rev. 1027 (1988). [Reproduced in Tab E15].

<sup>82</sup> Fed. R. Crim. P. 31(c). In *Sansone v. United States*, 380 U.S. 343 (1965), the Supreme Court stated that Rule 31(c) and due process require at a minimum that

the lesser offense must be included within but not on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.

*Id.* at 350. [Reproduced in Tabs E1; E12].

<sup>83</sup> Comment, *State v. Wussler: An Unfortunate Change in Arizona’s Lesser-Included Offense Jury Instruction*, 27 Ariz. L. Rev. 515 (1985).

unable to determine beyond a reasonable doubt all elements which would necessitate a finding of the primary offense, a conviction of the lesser included offense is appropriate.<sup>84</sup>

The lesser included offense doctrine has evolved as a means of enabling the trier of fact to avoid the acquittal of a defendant “whom the Prosecution had proven beyond a reasonable doubt was guilty of some offense albeit not the greater offense charged.”<sup>85</sup>

In cases where the specific intent element of an offense cannot be proven, there must still be sufficient evidence of knowledge of the commission of the offense in order to obtain a conviction for Complicity.

In one New York case,<sup>86</sup> a defendant was convicted with regard to the same offense (homicide) of both second degree murder and manslaughter (as a lesser included offense of depraved mind murder).<sup>87</sup> The judge sentenced the defendant to concurrent terms of fifteen years to life on the murder count and four to twelve years on the manslaughter

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<sup>84</sup> Laura Anne Cooper, *Comment: Should Juries Be Able To Agree To Disagree? People v. Boettcher and the “Unanimous Acquittal First” Instruction*, 54 Brooklyn L. Rev. 1027 (1988). [Reproduced in Tab E15].

<sup>85</sup> *People v. Boettcher*, 69 N.Y.2d 174, 182, 505 N.E.2d 594, 597, 513 N.Y.S.2d 83, 86 (1987). [Reproduced in Tab --]. *See also* *United States v. Tsanas*, 572 F.2d 340, 345 (2d Cir.), *cert. denied*, 435 U.S. 995 (1978) (“[A] defendant guilty of a lesser included charge of which the indictment has given him sufficient notice should not go free because the Government has failed to convince every member of a jury of some element of the greater crime beyond a reasonable doubt.”). [Reproduced in Tabs E9; E13].

<sup>86</sup> *People v. Gallagher*, 501 N.Y.S.2d 355, 362 (App. Div. 1986) (Bracken, J., concurring in part and dissenting in part), *rev’d*, 508 N.E.2d 909 (N.Y. 1987). [Reproduced in Tabs E10-11]. *See also* John A. Alesandro, *Comment: Physician-Assisted Suicide and New York Law*, 57 Alb. L. Rev. 819 (1994).

<sup>87</sup> *People v. Gallagher*, 501 N.Y.S.2d 355, 362 (App. Div. 1986) (Bracken, J., concurring in part and dissenting in part), *rev’d*, 508 N.E.2d 909 (N.Y. 1987). [Reproduced in Tabs E10-11].

count.<sup>88</sup> Much like the judge in the case discussed by the OTP, the trial judge refused to allow charges for the counts in the alternative, and the judge's refusal was upheld by the intermediate appellate court.<sup>89</sup> The state's highest court disagreed, and held that the failure to submit the intentional murder and depraved mind murder counts of the indictment to the jury in the alternative was in error. Specifically, the court stated that

[o]ne who acts intentionally in shooting a person to death—that is, with the conscious objective of bringing about that result—cannot at the same time act recklessly - that is, with conscious disregard of a substantial and unjustifiable risk that such a result will occur. The act is either intended or not intended; it cannot simultaneously be both. Thus, where the shooting (the act) and the death (the result) are the same, a defendant cannot be convicted twice for the murder, once for acting “intentionally” and once for acting “recklessly.”<sup>90</sup>

The court determined that there was no rational basis by which the jury could have found the defendant guilty of both crimes.<sup>91</sup> It also held that if “a court elects to charge two inconsistent counts, it *must* do so in the alternative since the jury is not permitted to find the defendant guilty of both.”<sup>92</sup>

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<sup>88</sup> *Id.* at 910.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *People v. Gallagher*, 501 N.Y.S.2d 355, 362 (App. Div. 1986) (Bracken, J., concurring in part and dissenting in part), *rev'd*, 508 N.E.2d 909 (N.Y. 1987). [Reproduced in Tabs E10-11].

<sup>92</sup> *Id.* (emphasis added)

In the New York case,<sup>93</sup> at both the trial and intermediate appellate levels, the defendant was found guilty of both intentional murder and reckless manslaughter, which are inconsistent counts.<sup>94</sup> Implicit in this result was a finding by the jury that the defendant's mental state was both intentional and unintentional, which is a practical impossibility. In this manner, the jury elected to absolve itself of its "responsibility of deciding which (if either) mental state [the] defendant possessed at the time of the shooting."<sup>95</sup>

By definition, the accused cannot be found to have had more than one mental state, and it is the responsibility of the trier of fact to determine which one is applicable.<sup>96</sup> Although it is unclear as to whether Complicity in Genocide is a lesser included offense of Genocide, and although the International Tribunals thus far have treated it as if Complicity in Genocide is not entirely a lesser included offense of Genocide, they have been treated in a similar manner, and in both cases, alternative charging is appropriate.

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *People v. Gallagher*, 501 N.Y.S.2d 355, 362 (App. Div. 1986) (Bracken, J., concurring in part and dissenting in part), *rev'd*, 508 N.E.2d 909 (N.Y. 1987). [Reproduced in Tab E10-11]. Concurring in the judgment reversing the conviction and ordering a new trial, one judge concluded that the guilt of an intentional offense does not "necessarily negate" the guilt of a reckless offense. "There may be circumstances, where in the split second it takes to form and hold a culpable mental state, that a person can intend an act and simultaneously be 'aware of and consciously disregard' a risk. Intent and conscious disregard may be compatible rather than inconsistent in the workings of the human mind and under the statute." *Id.* at 913 (Bellacosa, J., concurring).

## 2. Multiple charging and sentencing.

According to the ICTY's decision in *Tadic*,<sup>97</sup> it is acceptable to charge a defendant with more than one offense in relation to the same set of facts.<sup>98</sup> In jurisdictions where multiple convictions with regard to one criminal transaction are not permitted, or when one crime is a lesser included offense of the other, it may, but need not, be done in the alternative.<sup>99</sup>

If an accused is not charged in the alternative, it is nevertheless open to a tribunal to convict that accused of one offense and not another.<sup>100</sup> Whether an accused should be convicted of two such crimes, as indicated above, gives rise to many potentially problematic issues. Another of these such issues is multiple sentencing.<sup>101</sup>

If the Trial Chamber does not permit Genocide and Complicity in Genocide to be charged in the alternative on the same set of facts, a defendant may be subject to the inequities associated with multiple sentencing. The Trial Chamber in *Tadic* deferred the

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<sup>97</sup> Prosecutor v. Tadić, Case No. IT-95-1-A, Judgment, 15 July 1999. [Reproduced in Tabs D1-4].

<sup>98</sup> *Id.*

<sup>99</sup> Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 Duke J. Comp. & Int'l L. 307, 345 n.165 (2000). [Reproduced in Tab E17].

<sup>100</sup> Because the Trial Chamber reserves this discretionary function at the conviction phase, it is not necessary for the Prosecution to make the determination of which crime to convict a defendant (Genocide or Complicity in Genocide) at the charging phase. *See also id.*

<sup>101</sup> Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 Duke J. Comp. & Int'l L. 307, 345 n.165 (2000). [Reproduced in Tab E17].

issue of multiple sentencing, stating that it could be best addressed “if and when matters of penalty fall for consideration.”<sup>102</sup> It is unclear whether the ICTY Trial Chamber intended to hold that convictions for multiple offenses were permissible under the Statute of the ICTY.<sup>103</sup> Nevertheless, the *Tadic* decision has been interpreted as an indication that the issue of multiple criminal offenses with regard to the same set of facts is relevant only at the sentencing stage, and by implication, *not* at the charging stage.<sup>104</sup> This implies no rationale for discouraging alternative charging where appropriate, even in regard to the same set of facts.

**a. When is multiple sentencing permissible?**

The ICTR Trial Chamber held in *Akayesu*<sup>105</sup> that it is acceptable to convict an accused of two offenses in relation to the same set of facts in three circumstances:

- (1) the offenses have different elements;
- (2) the provisions creating the offenses protect different interests; or
- (3) it is necessary to record a conviction for both offenses in order fully to describe what the accused did.<sup>106</sup>

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<sup>102</sup> Decision on the Defence Motion on the Form of the Indictment, Prosecutor v. Tadić, Case No. IT-95-1-A, 15 July 1999. [Reproduced in Tabs D1-4].

<sup>103</sup> Statute of the International Tribunal, Art. 4, May 25, 1993. Available at: <http://www.un.org/icty>. [Reproduced in Tab E4].

<sup>104</sup> Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, 20 February 2001. [Reproduced in Tabs D5-8].

<sup>105</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998 at ¶ 469. [Reproduced in Tab C1-3].

<sup>106</sup> *Id.*

Cases in which the Trial Chamber held that it is not justifiable to convict an accused of two offenses in relation to the same set of facts is when:

- (1) one offense is a lesser included offense of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or
- (2) one offense charges accomplice liability and the other offense charges liability as a principal (for example, Genocide and Complicity in Genocide).<sup>107</sup>

**b. The difficulties with multiple charging.**

The Trial Chamber held in *Akayesu* that it was permissible to convict Akayesu of crimes against humanity with respect to both murder and extermination on the one hand, and Genocide on the other, in relation to the same set of facts.<sup>108</sup> The basis on which this finding was made, however, requires some clarification, as discrepancies in translation have resulted in two possible interpretations of the judgment. The English translation of the *Akayesu* decision concludes that the offenses of Genocide, crimes against humanity and other such crimes “have different purposes and are, therefore, never co-extensive.”

This conclusion is not in the French translation of the *Akayesu* text. As a result, there are two possible interpretations of the judgment. The view that is based on the English version is that charges of Genocide, crimes against humanity and other such crimes are “never co-extensive.” Because these crimes are designed to protect different interests, and are not subject to being subsumed within a single offense, such charges will

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

always comply with the test in *Akayesu*. It is, therefore, always possible to charge and convict a defendant of more than one of these offenses, regardless of the overlapping aspects of each crime.

The French translation of *Akayesu* permits charging a defendant with multiple offenses when the offenses have different components or protect different interests. In determining whether multiple convictions for Genocide, crimes against humanity and other such crimes, it will be necessary to analyze whether the offenses as proven have different elements and protect different interests. This interpretation is relied upon by the majority in *Kayishema*.<sup>109</sup>

### **3. Cumulative charging.**

The difficulty with characterizing Genocide with respect to Complicity in Genocide is partially a result of the fact neither of these interpretations is completely applicable in determining how each should be charged with respect to one another. While Complicity in Genocide may not be entirely subsumed in Genocide, they remain mutually exclusive, and a conviction for both for the same set of facts would still amount to multiple sentencing. A rule of law remains to be purported that would account for a relationship of two crimes that cannot be accurately categorized as either one offense that is wholly a component of the other, or one offense that is completely unrelated to the other.

The fact that they are mutually exclusive may preclude the defendant from having committed one crime if he is convicted of another. It should not, however, preclude the Prosecution from charging the defendant with both crimes; such is the nature of cumulative

charging.<sup>110</sup> Cumulative charging is essentially a civil law concept without a direct common law alternative, which largely accounts for the inconsistent interpretations and results. Cumulative charging, an indirect translation of the French phrase *concoure d'infractions* is more precisely translated as “multiple offenses in relation to the same set of facts.” This, however, fails to identify explicitly if it is in regard to the charging, convicting or sentencing stage.

With regard to cumulative charging, the Trial Chamber in the ICTY *Celebici* case held that

[c]umulative charging *is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven.* The Trial Chamber is better poised, after the parties’ presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. *In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.*<sup>111</sup>

The ICTR Trial Chamber thus far has not disputed the notion of cumulative charging, nor has it overtly permitted it as an alternative to charging Complicity in Genocide in the alternative to Genocide.

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<sup>109</sup> Prosecutor v. Kayeshima, Case No. ICTR-95-1-T, Judgment, 21 May 1999. [Reproduced in Tab C4].

<sup>110</sup> Prosecutor v. Delalic, et al., Case No. IT-96-21-T, Judgment 16 November 1998, ¶ 321. [Reproduced in Tab D5-8].

<sup>111</sup> *Id.* (emphasis added).

**a. If the ICTR finds that cumulative charging is permissible but that charging in the alternative is not, should the Prosecution revert to the practice of cumulative charging?**

The decision in *Akayesu* offers no rationale for not doing so. Yet this method does not seem to be the most effective method to achieve justice. To address this issue, the ICTR may look to established U.S. law on multiplicitous charging, which is how American jurisprudence refers to cumulative charging.

With respect to multiplicitous charging, however, despite that American jurisprudence may be the best example of how a legal system effectively deals with the issue, the topic nevertheless remains somewhat opaque. The guiding principle in U.S. law is essentially that “one transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person.”<sup>112</sup> The goal is to prevent an accused from being punished twice for “what amounted to the same offense, rather than preventing multiple convictions.”<sup>113</sup> This is not inconsistent with the rationale of the ICTR. The general conclusion is that the improper multiplication of charges affected only the sentence, and not the legality of the findings.<sup>114</sup>

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<sup>112</sup> See *United States Manual For Courts Martial* § 26(b) (1951).

<sup>113</sup> *Id.*

<sup>114</sup> *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L.Ed.2d 187 (1987) [Reproduced in Tab E6]; *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932). [Reproduced in Tab E5].

The precedent set forth by the Supreme Court in *Blockburger* that is reflected in the 1951 Manual For Courts Martial has been subsequently reversed; however, since its reversal, there has been a trend to revert back to this test for multiplicitous charging.

**b. Alternative charging is necessary because neither multiple charging nor cumulative charging is sufficient.**

The ICTY Trial Chamber noted another significant point in *Celebici*. In that case, it stated that prior to trial, the facts may be insufficient to establish which charge is appropriate under the circumstances; therefore, this remains an issue for the finder of fact.<sup>115</sup> As such, it would be impossible for the Prosecution to determine whether the defendant should be charged with Genocide or Complicity in Genocide without the benefit of the facts later adduced at trial.

The Prosecution, however, must still meet the requirements for charging Genocide initially. Before a defendant can be charged with Genocide, the Prosecution must have a *prima facie* case.<sup>116</sup> That is, the Prosecution must have enough evidence for the trier of fact to find that the defendant is guilty beyond a reasonable doubt.<sup>117</sup> The trier of fact may still find otherwise, but a finding of guilt must be at least possible based on the evidence before the Prosecution may charge a defendant with Genocide.<sup>118</sup> The gap that is created between the *possibility* of a defendant being convicted on these grounds and the defendant *actually* being convicted on these grounds is precisely the reason why an alternative charge for Complicity in Genocide is necessary.

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<sup>115</sup> *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L.Ed.2d 187 (1987) [Reproduced in Tab E6]; *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932). [Reproduced in Tab E5].

<sup>116</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998 at ¶ 331. [Reproduced in Tabs C1-3].

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

Also, since the Prosecution can prove Complicity in Genocide even without the principal perpetrator, one set of facts may have the same legal consequences as two different sets of facts at bar. The judge who stated that an alternate charge of Complicity in Genocide is only appropriate in instances where the Prosecution is asserting two different legal theories based on different sets of facts did not take into account that one set of legal facts may be effectively equivalent to having two sets of facts depending on the legal theory asserted.<sup>119</sup>

For example, one set of facts may appear to lead to two well-founded sets of legal conclusions. Facts may indicate that the defendant was present while an act that constituted Genocide was taking place, but it may be unclear given the facts adduced prior to trial as to what role the defendant assumed. He may have been the principal perpetrator, with the special intent of committing Genocide, or he may only be guilty of facilitating the crime, with the knowledge that he was doing so but without any particular intent to destroy the targeted group.<sup>120</sup> If it is proven that Genocide was committed, the trier of fact may find the defendant guilty of either offense, depending on the weight of the evidence and the credibility of the witnesses.

The trier of fact may, perhaps, find the defendant guilty of neither crime. It should not, however, be limited by impractical restrictions that may result in justice not being served, which is possible if the Prosecution is prohibited from charging the defendant in

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<sup>119</sup> See OTP's email [Reproduced in Tab A1].

<sup>120</sup> See ICTR Statute, Report on the ICTR and National Trials, July 1997. Available at: <http://www.un.org/ictt>. [Reproduced in Tab B3].

the alternative. Disallowing charging in the alternative with regard to Complicity in Genocide may result in a legal loophole that serves the interests of those involved in the horrific crimes that the ICTR considers rather than those of the international community.

For instance, if a Prosecutor has a *prima facie* case for charging a defendant with Genocide but is unable to prove beyond a reasonable doubt that he had the *dolus specialis*, the defendant would be able to go free in the absence of alternative charging. The defendant would be acquitted, despite the fact that the trier of fact would have been able to find that he had the knowledge necessary for a conviction of Complicity in Genocide, even though it may not have been able to convict on the basis of the specific intent required for Genocide. Essentially, if the Prosecution cannot prove specific intent, the trier of fact cannot convict the defendant, and Complicity in Genocide may become obsolete with respect to many cases.

Not allowing Prosecutors to charge in the alternative may force them to tailor their charges against defendants with more precise scrutiny; the fact that the Prosecution would need a greater degree of certainty before charging a defendant with Genocide may protect the defendant's right to due process.

The fact that the nature of the crime is so abhorrent to the collective human conscious may incline the trier of fact towards bias against a defendant on trial for Genocide before the trial even begins. It would be difficult to ensure that a defendant accused of Genocide could ever get a truly fair trial; accordingly, it may be necessary to compensate for this bias. One way to do this would be to enact a very stringent test for the

Prosecution before it could bring the charge, such as only allowing the Prosecution to charge for either Genocide or Complicity in Genocide, but not both.

These concerns, however, do not outweigh the fact that if the Prosecution believes it has a prima facie Genocide case, but is unable to convince the trier of fact of the defendant's special intent, that possibly would entitle a defendant who may nevertheless be guilty of Complicity in Genocide to an acquittal.

Finally, it may have the effect of discouraging Prosecutors from charging for Genocide, even in cases where obtaining a conviction of genocide is practically certain, because they may feel that they cannot run the risk of not being able to meet the special intent requirement.

#### **IV. Conclusion.**

Based on the foregoing, charging Genocide and Complicity in Genocide in the alternative for the same set of facts, is not only appropriate, it is essential. First, charging in the alternative is necessary for determining the level of intent, which may only become apparent once all the facts are adduced at trial. Second, because Complicity in Genocide is not a lesser included offense of Genocide (the two are mutually exclusive), charging in the alternative is the only feasible way a conviction for either may be properly obtained. Disallowing charging in the alternative on the same set of facts does not resolve the problems which may arise out of charging cumulatively and multiple sentencing. Otherwise, charging cumulatively would likely result in the sentencing problems the Trial Chamber seeks to avoid. The only manner in which the interests of the defendants, the

ICTR, and the international community may be served is to allow for charging Complicity in Genocide in the alternative to Genocide based on the same set of facts.

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