
**CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT
RWANDA GENOCIDE PROSECUTION**

**MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR**

**ISSUE #2:
CAN AN OMISSION FULFILL THE *ACTUS REUS*
REQUIRMENT FOR COMPLICITY IN GENOCIDE, AND TO WHAT
DEGREE DOES ARTICLE 6(3) OF THE ICTR STATUTE IMPUTE
CRIMINAL LIABILITY FOR THE CRIME TO A SUPERIOR OFFICER?**

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I. Introduction and Summary of Conclusions

A.) Issues

This memorandum analyses whether the actus reus requirement for the crime of Complicity in Genocide may be committed by omission and to what extent Article 6(3) of the ICTR Statute applies to the crime of Complicity in Genocide.¹ Article 6(3) reads:

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

Therefore, this memorandum tries to determine whether one's failure to act will impute criminal liability to a superior officer for the crime of Complicity in Genocide. In analyzing this question, there are key issues which must be addressed:

- 1) How is Genocide defined by the ICTR?
- 2) Is Complicity in Genocide a direct offense?
- 3) What actions, or inactions, will support one being accused of Complicity in Genocide?
- 4) Under the doctrine of Command Responsibility, under what conditions are a superior responsible for the actions of his or her subordinates?
- 5) Therefore, under the doctrine of Command Responsibility can a superior officer be found criminally liable for the actions of his or her subordinates?

The issue can be thoroughly examined by analyzing each of the preceding questions. As a starting point, however, it must be emphasized that the crime of genocide is a specific

¹ Email from Andra Mobberley for the Office of the Prosecutor detailing research topics for War Crimes Prosecutions Lab.

“Research and analyse the actus reus requirement for Complicity in Genocide. Consider whether Complicity in Genocide can be committed by omission. Consider the extent to which Article 6(3) of the ICTR Statute applies to the crime of Complicity in Genocide. Assess and evaluate current ICTR and ICTY cases, holding, and dicta, addressing these issues.” [Reproduced in accompanying notebook at tab A1].

² Statute of the International Criminal Tribunal for Rwanda, annexed to S.C. Res. 955, U.N. Score, 49th Sess., 3453rd mtg., U.N. doc s/RES/955 (1994) [Reproduced in accompanying notebook at tab A2].

intent crime, meaning in order to be convicted for the crime a specific intent —or *dolus specialis* --, must be demonstrated.³ It is this intent requirement that makes it more difficult to obtain convictions for Genocide and also to prove that the acts related to the crime of Genocide (i.e. incitement, Complicity) took place. Problems arise in the prosecution of the crime of Genocide when it is demonstrated that not only did the alleged perpetrator not have the requisite intent to commit the acts, but they did not—in fact—commit any of the criminal offenses charged.⁴

Complicity in Genocide is a separate offense from Genocide, yet to be convicted of the crime of Complicity in Genocide it has to be proven that an act of Genocide has been committed. A way to understand the distinction between the two crimes is to see Genocide as requiring the *intent* to commit the crime and Complicity in Genocide as requiring the *knowledge* that an individual's actions (or inactions) would facilitate the activities of the principal perpetrators.⁵

Under the doctrine of command responsibility a superior can be held criminally liable for the actions of his or her subordinates if they knew or reasonably should have known the criminal activities were taking place and failed to take reasonable measures to correct or to alleviate the activities. Therefore, this memo will examine whether a superior's failure to act provides the necessary *actus reus* for the crime of Complicity in Genocide.

³ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998. [Reproduced in accompanying notebook at tab A5]

⁴ Prosecutor v. Jelisić, Case No. ICTY IT-95-10, Judgment 14 December 1999. [Reproduced in accompanying notebook at tab A6]

⁵ See generally Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, 2 September 1998 [Reproduced in accompanying notebook at tab A5]

B.) Summary of Conclusions

The *actus reus* requirement for the crime of complicity in genocide may be fulfilled by an individual's omission to act.⁶ Complicity in genocide may be committed in one of three ways: complicity by instigation, complicity by procurement, and complicity by aiding and abetting.⁷ In each instance the basic principle is whether the perpetrator knew that his/her complicitious behavior would in some way facilitate the completion of the crime of Genocide.⁸

Article 6(3) of the ICTR Statute imposes criminal liability on superior officers for their failure to act when they knew or should have known about the behavior of their subordinates and failed to take adequate remedial measures.⁹ An individual occupying a superior position is thought to be in the best position to deter criminal activity of their subordinate officers by exercising or emphasizing their authority. As such, superior officers should not be excused from being held criminally accountable when their omission to act and/or to intervene with the criminal activities of their subordinate officers results in Genocidal murder. While the superior officers may not have been the principle perpetrators of the crime of Genocide, they should be considered equally responsible for their failure to act thereby allowing their subordinate officers to commit genocide. Such behavior on the part of a superior officer should be considered

⁶ See Discussion *infra* at §III B

⁷ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, 2 September 1998 [Reproduced in accompanying notebook at tab A5]

⁸ See Discussion *Infra* at §III B

⁹ See Discussion *Infra* at §III C

complicitious in that they aided in the commission of Genocide by not properly sanctioning subordinate officers for committing the crime. In this way, the superior officer is shares in the guilt of their subordinates, and his or her omission to act should fulfill the *actus reus* requirement for Complicity in Genocide. Furthermore, this behavior should fall within the jurisdiction of Article 6(3) of the ICTR Statute regarding Command Responsibility and prosecution of these perpetrators should then be sought.

II. Factual Background

The International Criminal Tribunal for Rwanda was created by United Nations Security Council Resolution 955 on November 8, 1994.¹⁰ The Tribunal was established in an effort to contribute to the “process of national reconciliation and to the restoration and maintenance of peace in Rwanda.”¹¹ In April of 1994 President Nyaryamira of Uganda and President Juvenal Habyarimana of Rwanda were killed in a plane crash at Kigali airport.¹² The Presidents had been involved in communications to reach some type of civil and peaceful resolution to the war like revolutions taking place within the country. The Hutu subsequently placed blame for the crash on Tutsi political elitist. This incited a blood ridden war led by a Hutu lead interim government against the Rwandan Patriotic Front in which approximately 750,000 Tutsis were killed. The incessant fighting which ensued following the April 1994 plane crash of Ugandan President Cyprien Ntaryamira and Rwandan President Juvenal Habyarimana prompted the United

¹⁰ Virginia Morris & Michael P. Scharf, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998) [Reproduced in accompanying notebook at tab A15]

¹¹ Prosecutor v. Musema, Case No. ICTR-96-13-T, Case No. ICTR 96-13-T, Judgement 27 January 2000. [Reproduced in accompanying notebook at tab A7]

¹² See generally Virginia Morris & Michael P. Scharf, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998). [Reproduced in accompanying notebook at tab A15]

Nations to create the ICTR¹³. In November of 1994 the U.N. Security Council passed Resolution 955 which effectively created the ICTR.¹⁴

III. Legal Discussion

In order to determine whether Complicity in Genocide can be committed by commission there are key issues which must be addressed. First it must be determined which types of activities fulfill the *actus reus* portion of the crime of complicity in genocide. Next, a determination must be made as to whether or not complicity in genocide is a direct offense. Recognizing that Article 2 says that complicity in genocide is a chargeable offense, we must next determine what constitutes complicity in genocide. After looking at the several components of complicity in genocide we must then turn our discussion to Command Responsibility to determine the scope of the doctrine and its ramifications on a superior being held liable for the actions of his or her subordinates. Finally, we will look to whether a superior officer's omission, or failure to act will fulfill the *actus reus* requirement for complicity in genocide. After addressing these issues the reader will understand why under the provisions of Article 6(3) of the ICTR Statute a superior officer may be held criminally liable for the actions of his or her subordinates if they failed to take adequate measures to modify or alleviate the actions of their subordinates.

A.) Definition of Genocide

¹³ *Id.*

¹⁴ Statute for the International Tribunal for Rwanda, annexed to S.C. Res. 955, U.N. SCOR, 3453 mtg., 8 Nov. 1994, U.N. Doc. S/Res/955 (1994). [Reproduced in accompanying notebook at A2]

The aftermath of World War II necessitated the need to introduce a system of accountability for the atrocities which had taken place in Europe. Article 1 of the Genocide Convention established genocide as a “discrete and justiciable crime” under international law.¹⁵ Further, the legacy of Nuremberg characterized and cemented into a general legal understanding that certain crimes—such as Genocide—were both inexcusable and international.¹⁶ In fact, Robert H. Jackson is quoted as having said,

“The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.”¹⁷

History shows us, however, that these atrocities have been repeated. It is the repetition of these horrendous crimes that makes it all the more important that the crime of Genocide and its related crimes are punished and their perpetrators are held accountable for their actions.

In order to be convicted with the crime of Complicity in Genocide it has to be proven that an individual was, in fact, an *accomplice* to the crime of Genocide. Article 2 of the ICTR Statute defines Genocide “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

- (a) Killing members of the 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 physical destruction in whole or in part;

¹⁵ See generally William Schabas, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (2000). [Reproduced in accompanying notebook at A17]

¹⁶ *Id.*

¹⁷ See Michael P. Scharf BALKAN JUSTICE THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG (Carolina Academic Press, 1997). [Reproduced in accompanying notebook at tab A16]

- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”¹⁸

This definition of Genocide is the same definition adopted in the Genocide Convention, and it has been retained by many other international criminal tribunals such as the ICTY and the ICC.”¹⁹

Some view Genocide as the most horrific of all crimes.²⁰ The ICTR has used this expression in sentencing decisions.²¹ Genocide is a special crime in that it requires a special intent or *dolus specialis*.²² Therefore, in order to prove that the crime of Genocide has occurred it has to be proven both that one of the enumerated acts under Article 2(2) of the ICTR have been committed against one of the listed groups *and* the presence of the special intent element.²³ The crime of Genocide may be understood as being comprised of three primary elements: “1)the commission of at least one of the acts enumerated in Article 2; 2)the direction of that act at one of the enumerated types of groups; and 3) the

¹⁸ See Article 2 of the ICTR Statute [Reproduced in accompanying notebook at tab A2]

¹⁹ The definition of “Genocide” the Genocide Convention maintains was subsequently adopted not only by the ICTR, but also by the International Criminal Tribunal for the Former Yugoslavia and the ICC Statute. *See also the Rome Statute of the International Criminal Court* [Reproduced in accompanying notebook at A4]

²⁰ *See generally* William Schabas *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* (Cambridge University Press 2000). [Reproduced in accompanying notebook at tab A17]

²¹ *See* Prosecutor v. Kambanda, Judgment and Sentence, Case No. ICTR-97-23-S, 16; The ICTR notes “The Chamber is of the opinion that genocide constitutes the crime of crimes.” *See also* Prosecutor v. Akayesu, Sentence, Case No. ICTR-95-1-T; *See also* Kayishema & Ruzindana Sentence, Case No. ICTR-95-1-T, [Reproduced in accompanying notebook at tab A8]

²² *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998 ¶558; the ICTR held that “Special 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.” [Reproduced in accompanying notebook at tab A5]

²³ *See* ICTR Statute, Report on the ICTR and National Trials, July 1997. Available at: <http://www.un.org/ictt>. [Reproduced in accompanying notebook at tab A2]

intent to destroy the group in whole or in part.”²⁴ To be successful in convicting a defendant of Genocide, the preceding elements must be proven.

1. Actus Reus Must be Inhumane in Nature and character, causing great suffering, or serious injury to body or to mental or physical health

The *actus reus* requirement regarding the crime of Genocide can be understood as containing four essential elements.²⁵ They are:

- “(a.) the *actus reus* must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health.
- (b) the *actus reus* must be committed as part of a widespread or systematic attack.
- (c) the *actus reus* must be committed against members of the civilian population
- (d) the *actus reus* must be committed on one or more discriminatory grounds, namely national, political, ethnic, racial, or religious grounds.”

The first requirement is that the *actus reus* be inhumane in nature and character, causing great suffering, or serious injury to body or mental or physical health. In its most basic sense, mass killings are inhumane in nature. Genocide not only affects its victims, but it also has a detrimental effect on society as a whole. For the crime of genocide to have occurred, the acts must have been of such a serious nature as to shock the conscious and be adverse to the acceptable standard of society.

2. Actus reus Must be Committed as Part of a Systematic or Widespread Attack

In order for Genocide to have been committed, the *actus reus* has to have been done as part of a systematic or widespread attack; a “random inhumane act” is insufficient to

²⁴ See generally Steven R. Ratner & Jason S. Abrams ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW BEYOND THE NUREMBERG LEGACY (Clarendon Press 1997). [Reproduced in accompanying notebook at A23]

²⁵ See Prosecutor v. Rutaganda, Case No ICTR-96-3, Judgement , 6 December 1996 [Reproduced in accompanying notebook at tab A9]

obtain a conviction for Genocide.²⁶ Customary international law requires that the act be either a widespread attack or a systematic attack, but it is not required that the attack be both widespread *and* systematic.²⁷ In the *Akeyesu* judgment “widespread” was defined as “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”²⁸ Systematic was defined as “thoroughly organized action, following a regular pattern on the basis of a common policy and involving substantial public or private resources.”²⁹ After proving that genocidal acts were done in either a systematic or widespread manner, one may be faced with criminal charges for the crime of genocide.

3. Actus Reus has to be Directed against the Civilian Population

The *actus reus* for any of the enumerated acts in Article 3 of the ICTR Statute must be directed against the civilian population.³⁰ The *Akeyesu* and *Rutaganda* Judgments define civilian population as “people who were not taking any active part in the hostilities.”³¹ It may be argued that there is little difference between the mass killings described as “Genocide” and the numerous amount of murders which are committed during armed warfare. This argument lacks muster, because it is generally understood

²⁶ See Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgement, 6 December 1999. [Reproduced in accompanying notebook at tab A9]

²⁷ *Id.* at ¶68

²⁸ See Prosecutor v. Akeyesu Case No. ICTR 96-4-T, Judgment, 2 September 1998 [Reproduced in accompanying notebook at tab A5]

²⁹ *Id.*

³⁰ *Id.* at ¶207.

³¹ See Prosecutor v. Akeyesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998. [Reproduced in accompanying notebook at tab A5]

that war is different, and as such a different set of rules apply. Civilians are (at least theoretically) less likely to take up arms against other military officials, and all attacks on civilians are unwarranted, and it is such attacks are generally unacceptable in the international criminal law sphere.

4. Actus Reus Must be Based on Discriminatory Grounds

The *actus reus* must be directed at a “national, political, ethnic, racial, or religious” group.³² Inhuman acts which are committed against people who do not fall within any of these categories may be considered a crime against humanity if “the perpetrator’s intention in committing these acts is to further his attack on the group discriminated against.”³³

B. Definition of Complicity in Genocide

Complicity in genocide requires that a perpetrator acted as an accomplice by participating in or contributing to the commission of genocide.³⁴ Complicity as a form of criminal participation in nearly every criminal justice system in the world.³⁵

“Participation by Complicity in the most serious violations of international humanitarian

³² See Prosecutor v. Musema, Case No. ICTR-96-13-T Judgment at ¶208. [Reproduced in accompanying notebook at tab A7]

³³ *Id.*

³⁴ See Virginia Morris & Michael P. Scharf, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 233, n 889 (1998). The authors note, “The possible range of personas 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 held criminally liable....” [Reproduced in accompanying notebook at tab A15]

³⁵ See generally Prosecutor v. Akeyesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998. [Reproduced in accompanying notebook at tab A5]

law was considered a crime as early as Nuremberg,” thus the Nuremberg Tribunal took the initiative to identify acts which constitute Complicity.³⁶

The ICTR defines Complicity in Genocide in terms of accomplice liability³⁷. The ICTR defines an accomplice as:

- 1) A person or persons who by means of gifts, promises, threats, abuse of authority of power, culpable machinations, or artifice, directly incites(s) to commit such action or order(s) that such action be committed.
- 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.³⁸

The Rwandan Penal Code sets forth three forms of criminal participation which help to define the elements of Complicity in Genocide which nearly mirror the ICTR’s definition of Complicity and which provide:

- (a) Complicity by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose;
- (b) Complicity by knowingly aiding or abetting a perpetrator of a genocide in the planning acts thereof
- (c) Complicity by instigation, for which a person is liable who, though not directly participating in the crime of genocide, gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power,

³⁶ See *Id.* at ¶ 88 [Reproduced in tab A5]. The Nuremberg Tribunal explained Complicity as having knowledge or awareness while participating in the following acts: planning, instigating, ordering, committing or otherwise aiding and abetting in the commission of a crime. See *Prosecutor v. Tadic*, Case No. IT-95-1-A, Judgment, 15 July 1999 at ¶ 141. [Reproduced in accompanying notebook at tab A10]

³⁷ See ICTR Statute, art. 91, Report on the ICTR and National Trials, July 1997. available at: <http://www.un.org.ictor>. [Reproduced in accompanying notebook at]

³⁸ *Id.*

machinations or culpable artifice, or who directly incited the commission of genocide.³⁹

Complicity is generally regarded as being a separate form of criminal activity, and in fact several national and international criminal justice systems view Complicity as a separate crime.⁴⁰ For example, in the United States Complicity is described along the lines of accomplice liability.⁴¹ Australia uses a ‘presence’ standard in determining whether an individual may be held criminally liable for Complicity.⁴² Finally, under French law an individual may be held liable if he knowingly instigated a crime, supplied ammunition for the crime, gave orders for the crime to be committed, or aided in the commission of the crime.⁴³ The ICTR’s interpretation of accomplice liability is the prevalent view in both customary international law and criminal and civil law systems.⁴⁴ Thus, if it can be proven that an individual acted to facilitate the crime of genocide, whether by instigation, procurement, or incitement, the individual may be charged as an accomplice and therefore held criminally liable for the crime of complicity in genocide.

1. The Actus Reus Requirement for Complicity in Genocide

³⁹ Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment at ¶179 [Reproduced in accompanying notebook at tab A7]

⁴⁰ William A. Schabas, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 285 (Cambridge University Press 2000). [Reproduced in accompanying notebook at A17]

⁴¹ Joshua Dressler, CASES AND MATERIALS ON CRIMINAL LAW (2d ed.) 111 (West 1999). [Reproduced in accompanying notebook at tab A18]

⁴² Prosecutor v. Tadic, Case No. IT-95-1-A, Judgment, 15 July 1999 at ¶135; (citing the Australian Common Law the Chamber states, “the most marginal act of assistance or encouragement can amount to an act of Complicity...[which includes] presence.”) [Reproduced in accompanying notebook at tab 10]

⁴³ Prosecutor v. Tadic, Case No. IT-95-1-A, Judgment, 15 July 1999 at ¶ 135. [Reproduced in accompanying notebook at tab A10]

⁴⁴ Prosecutor v. Akeyesu, Case No. ICTR-96-4-T [Reproduced in accompanying notebook at tab A5]

It is well established that in the criminal context two elements are necessary to prove a crime has occurred: the *mens rea* and the *actus reus*. The *mens rea* can be understood as the mindset an individual has at the time a crime is committed—the intent element or guilty mind. The *actus reus* is the act itself—the observable portion of a crime.⁴⁵ Additionally, the *actus reus* is the observable voluntary act or omission which establishes criminal liability.⁴⁶

Under article 2(3) of the Statute for the Tribunal makes the following acts punishable: Genocide, Conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.

Each of the aforementioned crimes involves a certain degree of both fault and knowledge which should “bring the proscription of genocide to bear on a great variety of specific conduct that would almost inevitably come within the reach of the broad confines of the *actus reus*.”⁴⁷ In this manner, criminal liability can more easily be demonstrated and the perpetrators of genocidal acts could be convicted for their crimes.

For the crime of Complicity, the *actus reus* requirement is fulfilled in terms of the individual acting as an accomplice to the crime of Genocide.⁴⁸ The Trial Chamber of the ICTY has held that acts of encouragement such as incitement may reach the necessary

⁴⁵ The *actus reus* can be viewed in four different ways. The first is the Identity thesis which holds that “the acts required for criminal liability are partially identical to events of a certain kind, namely bodily movements.” See Michael S. Moore ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW (1993). [Reproduced in accompanying notebook at tab A21]

⁴⁶ Joshua Dressler, CASES AND MATERIALS ON CRIMINAL LAW (2d ed.) 111 (West 1999). [Reproduced in accompanying notebook at tab A18]

⁴⁷ Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide* 23 FORDHAM INT’L L.J. 286, 298 (1999) [Reproduced in accompanying notebook at tab A25]

⁴⁸ Prosecutor v. Akeyesu, Case No. ICTR 96-4-T at [Reproduced in accompanying notebook at tab A5]

level of accomplice liability in order to establish the *actus reus* requirement for Complicity.⁴⁹ Viewing Complicity in terms of accomplice liability allows criminal justice systems to hold individuals accountable for offenses which are not directly committed by an individual. It is important to view Complicity as a separate crime in order to provide society with some sense of retribution for criminal acts.⁵⁰ In this way, an individual who claims to have not committed the criminal act itself cannot be relieved of criminal responsibility for his complicitous behavior.⁵¹ In *Prosecutor v. Akeyesu*, the ICTR held that Genocide and Complicity in Genocide were not mutually exclusive crimes, and an individual could be charged with one crime without being convicted of the other.⁵² The ICTR distinguished between an accessory or accomplice and a concurrent wrongdoer.⁵³ In making this distinction, the ICTR found that while an accomplice did

⁴⁹ See *Prosecutor v. Tadic*, Case No. IT-94-1 at ¶ [Reproduced in accompanying notebook at tab A10]

⁵⁰ See Jordan J. Paust, et. al. *International Criminal Law Cases and Materials* (Carolina Academic Press 2000) 39 “there can be a crime of complicity, but complicity does not include the actions of all those contributing to the crime ‘in the normal exercise of their duties.’” Complicity involves more than a contribution, it involves a necessary guilty intent. We should not forget, however that society can act to remove from the armed forces those individuals who though lacking any subjective mental guilt or moral wrong-doing have nevertheless demonstrated a dangerous quality which society can ill afford to be exercised.” [Reproduced in accompanying notebook at tab

⁵¹ *Id.* at 40. Paust discusses a U.S. standard of responsibility for complicitous crimes as he refers to the Trial of Lt. General Kurt Maelzer. Maelzer was found guilty of “exposing prisoners in his custody to acts of violence, insults and public curiosity by ordering American and British prisoners of war to be paraded in the streets of Rome in 1944.” This activity was found to be accomplice like, and thus he was guilty of complicity. Likewise, Paust describes a similar result being reached in the *Borkum Island* case. In this case, both the commander who had ordered the parading of the troops and other officers were found criminally liable for standing by and allowing civilians to inflict injury and death on U.S. fliers. These cases offer examples of how complicity can at times serve as harmful a purpose as inflicting the actual injury. [Reproduced in accompanying notebook at tab]

⁵² See *Prosecutor v. Akeyesu*, Case No. ICTR-96-4-T Judgment, 2 September 1998 at ¶. The Tribunal maintained that one’s conviction on charges of Complicity in Genocide does imply the existence of the crime of genocide, however it does not mean that an individual charged with complicity in genocide can only be convicted if they are the principal perpetrator of the crime of genocide. [Reproduced in accompanying notebook at tab A5]

⁵³ See Johan van der Vyver *Prosecution and Punishment for the Crime of Genocide* 23 FORDHAM INT’L L.J. 313. [Reproduced in accompanying notebook at A25]

need to have knowledge of the intent of the principal actor, they did not have to share the “desire to destroy.”⁵⁴ An aider and abettor, on the other hand, needs to act with the “specific genocidal intent,” and according to the Tribunal the actus reus (“planning, preparing, or execution of the crime of genocide”) *could* be an omission.⁵⁵ Thus the emphasis in this situation is placed on the knowledge of the action rather than the intent to commit the action or on the action itself.

In the same manner, the ICTY held in *Prosecutor v. Tadic* that:

[A]ssisting and abetting includes all acts of assistance by words or acts that lends encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it.⁵⁶

The crime of Genocide is so serious that its related crimes should also be punished.

Complicity in Genocide can be committed in one of three ways. These include complicity through instigation, complicity by procuring means, and complicity by aiding and abetting.

a. Complicity by Instigation

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Johan D. van der Vyver *Prosecution and Punishment of the Crime of Genocide* 23 *FORDHAM INT’L L.J.* [Reproduced in accompanying notebook at tab]. *Also see* *Prosecutor v. Tadic*, Case No. IT-95-1-A, Judgment, 15 July 1999 [Reproduced in accompanying notebook at tab A25]

To instigate is to “goad or incite someone to take some action or course.”⁵⁷ Such action was demonstrated by Jean-Paul Akayesu when he ordered the killing of thousands of Tutsis in April of 1994.⁵⁸ The Trial Chamber in *Prosecutor v. Akayesu* found that an individual may be held liable for Complicity by Instigation if they give instructions to commit Genocide or by inciting the commission of Genocide.⁵⁹ Therefore, Akayesu’s behavior conformed to that described in Section 1 of Article 91 of the Rwandan Penal Code. Akayesu, further, used his position of authority to encourage the commission of Genocide upon the Tutsis.⁶⁰ This behavior substantially conforms to the reprehensible behavior the ICTR seeks to prosecute in its mission to restore peaceful relations within the nation. The Chamber reemphasized and followed the rule of law proscribed in Article 91 in *Prosecutor v. Ruggio* and affirmed that “direct and public incitement [to commit genocide] is a form of complicity.”⁶¹

The ICTY has also held that acts of incitement and encouragement are sufficient to fulfill the requirements for and thus serve as the *actus reus* for complicity in Genocide.⁶² Thus, both the ICTY and the ICTR have held individuals criminally responsible for Complicity in Genocide for their acts of instigation, encouragement, and incitement. Thus, individuals who are involved in the instigation, encouragement, and

⁵⁷ BLACK’S LAW DICTIONARY, (Seventh Edition, 1999). [Reproduced in accompanying notebook at tab A20]

⁵⁸ *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T at ¶116. [Reproduced in accompanying notebook at tab A5]

⁵⁹ *Id.* at ¶90.

⁶⁰ *Id.*

⁶¹ *Prosecutor v. Ruggio*, Case No. ICTR-97-32-I, Judgment and Sentence, at ¶16. [Reproduced in accompanying notebook at tab A11]

⁶² *Prosecutor v. Tadic*, Case No. IT-94-1 at ¶141. [Reproduced in accompanying notebook at tab A10]

incitement of Genocide should be criminally liable for such acts under the legal premise Complicity in Genocide.

b. Complicity by Procuring Means

Procurement is the act of getting or obtaining something.⁶³ In terms of procurement, criminal liability is imputed when an individual obtains weapons, instruments, or any other means and these instruments and/or means are used in the commission of the crime of Genocide.⁶⁴ Additionally, the individual has to have obtained the weapon with the knowledge that they would be used in the commission of the acts of Genocide.⁶⁵ It does not matter that the individual who procures the weapons is not the individual who actually commits the crime; rather it is the underlying principle that contributing weapons enables the Genocidal acts to take place. For these activities, an individual may be held criminally liable for Complicity through Procurement.

c. Complicity by Aiding and Abetting

To aid and abet means to “facilitate the commission of a crime, or to promote its accomplishment.”⁶⁶ In order to aid in a crime, it is not necessary that an individual is present at the scene of the crime; it is enough that the individual “knowingly aid[ed] or abet[ed] a perpetrator of [G]enocide in the planning or enabling acts thereof.”⁶⁷ An individual may be held responsible for the killing of another by 1)Soliciting or aiding another in killing, 2)by agreeing with another party that a third party should be killed who

⁶³ Black’s Law Dictionary (Seventh Edition, 1999) [Reproduced in accompanying notebook at tab A20]

⁶⁴ Prosecutor v. Akayesu, Case No. ICTR 96-4-T at ¶90.[Reproduced in accompanying notebook at tab A5]

⁶⁵ *Id.*

⁶⁶ BLACK’S LAW DICTIONARY, Seventh Edition, 1999 [Reproduced in accompanying notebook at tab A20]

⁶⁷ Prosecutor v. Akayesu, Case No. ICTR 96-4-T at ¶90 [Reproduced in accompanying notebook at tab A5]

is subsequently killed by the other party, 3) by causing an innocent person to kill, and 4) by causing the death of another individual.⁶⁸ Aiding and abetting can be found when an accomplice is ready to come to the aid of a perpetrator regardless of whether the accomplice does so or not.⁶⁹ Additionally, criminal liability can be imputed to an individual who prevents innocent individuals from attempting to intervene in the commission of a crime.⁷⁰

The standard utilized by the ICTY is one of “substantial assistance.”⁷¹ A person may be found criminally liable if his conduct either directly or substantially assisted in the commission of a crime.⁷² Model Penal Code §2.06(3) posits that an individual demonstrating the conduct to establish criminal complicity is both “one who solicits or aids [and] also one who agrees to aid or attempts to aid in the planning or commission” of an offense.⁷³ Complicity in Genocide by aiding and abetting means an individual has made themselves available for the commission of the crime by helping to plan and/or further the commission of the crime. If an individual —through acts or omissions — substantially assists in the furtherance of the crime of genocide, the individual is criminally liable for Complicity in Genocide.

C. Command Responsibility and its implications for criminal liability

⁶⁸ Michael S. Moore ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW, 233, Note 98 (Clarendon Press, 1993) [Reproduced in accompanying notebook at tab A21]

⁶⁹ Prosecutor v. Tadic, Case No. IT-94-1 at ¶138. [Reproduced in accompanying notebook at tab A10]

⁷⁰ *Id.* at ¶140. [Reproduced in accompanying notebook at tab A10]

⁷¹ *Id.* at ¶141. [Reproduced in accompanying notebook at tab A10]

⁷² *Id.*

⁷³ Model Penal Code §2.06(3) [Reproduced in accompanying notebook at tab A3]

Forcing individuals to be criminally accountable for the horrific tragedies experienced by the Jewish population during the reign of the Third Reich, the Nuremberg Tribunal expressed that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁷⁴

The modern doctrine of command responsibility stems from the laws of war resulting from the Nuremberg and Tokyo trials at the close of World War II.⁷⁵ During this period cases emerged in which there was no evidence that a superior officer had either ordered the subordinate’s actions or had the same intent to commit the actions of the subordinate, however the superior officer did have the authority to take steps to ensure that the criminal activity was not completed.⁷⁶ The doctrine of command responsibility ensured that a superior officer could be held liable for the same “substantive crimes as their subordinates.”⁷⁷

Under the doctrine of command responsibility, a superior officer may be held criminally responsible for the actions of his or her subordinates if the superior knew or should have known that crimes were being committed, and the superior officer failed to take reasonable remedial actions to prevent the occurrence of the crimes or to punish the

⁷⁴ The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, at 445, 447 (1950). [Reproduced in accompanying notebook at tab]

⁷⁵ Timothy Wu & Yong-Sung (Jonathan) Kang, *Recent Development: Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and its Analogues in the United States Law*. 38 HARV. INT’L L.J. 272, 274 (1997). [Reproduced in accompanying notebook at tab 26]

⁷⁶ *Id.*

⁷⁷ *Id.*

subordinate officer for committing the crimes.⁷⁸ Article 6(3) of the Statute for the ICTR provides:

“The fact that any of the acts referred to in Articles 2 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”⁷⁹

Assigning individual responsibility to individuals who occupy positions of authority helps to ensure that individuals do not use and/or abuse their official positions to avoid criminal prosecution for war crimes or crimes against humanity.

1. Imputed by Officer’s Omission to Act

The doctrine of command responsibility seems to rest on two agreed upon principles: “first, a superior can be liable for an omission—that is, for failing to act when it is his duty to control a subordinate....Second, a superior is only liable if he knew or should have known that the subordinate committed or was about to commit a violation of humanitarian law.”⁸⁰ Liability under the doctrine of command responsibility is imputed through an affirmative duty on behalf of a superior officer, therefore an omission may constitute the actus reus portion of the crime.⁸¹ Since under this doctrine the liability of

⁷⁸ M. Cherif Bassiouni *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW*, 368 (Kluwer Academic Publishers, 1992). Bassiouni posits that the commanding officer’s failure to act regards his/her failure to “1) Prevent a specific unlawful conduct; 2) provide for general measures likely to prevent or deter unlawful conduct; 3) investigate allegations of unlawful conduct; and 4) prosecute, and upon conviction, punish the author of the unlawful conduct.” [Reproduced in accompanying notebook at A22]

⁷⁹ See Statute for the International Criminal Tribunal for Rwanda [Reproduced in accompanying notebook at tab A2]

⁸⁰ Timothy Wu & Yong-Sung (Jonathan) Kang, *Recent Development: Criminal Liability for the Actions of Subordinate—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT’L L.J. 272, 278 [Reproduced in accompanying notebook at A26]

⁸¹ *Id.* at 278

the superior comes from the subordinate's illegal act, "a duty must exist if there is to be a legally relevant connection between the subordinate's act, the superior's omission, and the eventual imposition of liability...[t]he superior thus defines the contours of the command responsibility doctrine—to whom and in what situations command responsibility should apply."⁸²

Prosecutor v. Karadzic is a principal case in which responsibility for criminal activity was imputed under the doctrine of command responsibility.⁸³ Each count in the indictment included charges of command responsibility, and the charge of genocide depended on Karadzic's failure to take adequate measures to prevent the actions of his subordinate officers.⁸⁴

2. Imputing Responsibility to Civilians

The Nuremberg Tribunal applied the doctrine of command responsibility to both military officials and civilians alike.⁸⁵ In doing so, individuals who would have otherwise been excused from being held accountable were made to answer for such atrocities as failing to either oppose or even prevent to some degree the atrocities against the Jewish population.⁸⁶ It is thought that individuals who are in higher ranking

⁸² *Id.*

⁸³ *Prosecutor v. Karadzic*, Case No. IT-95-18, Indictment, 16 November 1995. [Reproduced in accompanying notebook at tab A12]

⁸⁴ *Id.* at ¶45 "Radovan Karadzic and Ratko Mladic knew or had reason to know that subordinates...were about to kill or cause serious physical or mental harm to Bosnian Muslims and Bosnian Croats with the intent to destroy them, in whole or in part, as national, ethnic, or religious groups or had done so and failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof...BY these...omissions, [they] committed...GENOCIDE." [Reproduced in accompanying notebook at tab 12]

⁸⁵ Ilias Bantekas *The Contemporary Law of Superior Responsibility*, 93 A.J.I.L. 574 (1999). [Reproduced in accompanying notebook at tab 27]

positions—either civilian or military—are more often times in a much better position to exert some type of authority and therefore to prevent atrocities.⁸⁷ In terms of civilian leaders, some urge that “there does not seem to be any compelling reason why promoting responsible behavior by civilian leaders is a less important concern than with respect to military leaders.”⁸⁸ Rupa Bhattacharyya commented:

“If compliance can be imposed under international law on individuals who are acting in an official capacity, then there is no legitimate reason why individuals acting in private capacities are no subject to international laws. If, after all, the international legal order is to be constituted as a rule-of-law system, it is necessary that respect for that law be fostered through its equal application to all members of international society.”⁸⁹

Hence, this thought offers an explanation for holding both military and civilian individuals responsible for the actions of those in subordinate positions. It is the “public trust relationship” between military and civilian leaders which makes it reasonable and necessary to “impose some kind of legal duty on those who are in...[positions] to prevent atrocities.”⁹⁰

In reference to criminal liability for acts that violate human dignity, “the Nuremberg and other prosecutions of Axis defendants clearly established individual

⁸⁶ Ilias Bantekas, *The Contemporary Law of Superior Responsibility* 93 A.J.I.L. 574 (1999). Discussing the *Ministries* cases in which many high ranking officials in the Reich Government could have opposed or prevented the destruction of at least a portion of the Jewish population. [Reproduced in accompanying notebook at tab 27]

⁸⁷ Timothy Wu & Yong-Sung (Jonathan) Kang, *Recent Development: Criminal Liability for the Actions of Subordinate—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT’L L.J. , 290. [Reproduced in accompanying notebook at tab A26]

⁸⁸ *Id.* At 292. [Reproduced in accompanying notebook at tab A26]

⁸⁹ Rupa Bhattacharyya, *Establishing a Rule-of-Law International Criminal Justice System*, 31 TEX. INT’L L.J. 57, 93-94 (1996). [Reproduced in accompanying notebook at tab A28]

⁹⁰ Timothy Wu & Yong-Sung (Jonathan) Kang, *Recent Development: Criminal Liability for the Actions of Subordinates—the Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT’L L.J. 272, 290 (1997). [Reproduced in accompanying notebook at A26]

criminal responsibility for crimes against peace, crimes against humanity, and war crimes”; however there are still several instances where individual liability should be imputed along with imputing the superior for an individual’s behavior.⁹¹

History demonstrates atrocities on the international front having to some degree of reoccurrence; however international criminal law should continue to force perpetrators of criminal activity to be held accountable for their actions. The focus should remain on individuals who perpetrate the crimes and those who facilitate the crimes, because as a general notion “personal accountability and punishment will serve as the best deterrent” to repeated commission of particular offenses.⁹²

Case law demonstrates both the U.S.’s domestic policy and the international law’s practice of holding superior officers criminally liable fore the behavior of their subordinates. In the *Yamashita* case, General Tomoyuki Yamashita was found criminally liable for the action of his subordinate officers during World War II.⁹³ Yamashita’s troops had committed various crimes against both the native Filipino population and on American prisoners of war. The commission held that the crimes committed by Yamashita’s troops were “so extensive and widespread, both as to time and area, that they must either have been willfully permitted by the accused, or secretly ordered by the accused...[where] there is no effective attempt by a commander to discover and control

⁹¹ See Steven R. Ratner & Jason Abrams ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW BEYOND THE NUREMBERG LEGACY (Clarendon Press 1997). [Reproduced in accompanying notebook at tab 23]

⁹² *Id.*

⁹³ In re Yamashita, 327 U.S. 1 (1947) [Reproduced in accompanying notebook at tab 13]

the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops.”⁹⁴

Similar to the *Yamashita* case, Jean Kambanda was held criminally liable for the actions of his subordinates in *Prosecutor v. Kambanda*.⁹⁵ As Prime Minister of the Interim Government of Rwanda Kambanda was the head of the 20 member Council of Ministers and had *de jure* authority over the members of his government.⁹⁶ Kambanda admitted to having attended meetings in which “the course of massacres were actively followed, but no action was taken to stop them.”⁹⁷ Kambanda’s acts and omissions to act allowed the Chamber to hold him criminally responsible for and guilty of the crime of Genocide, Conspiracy to Commit Genocide, Direct and Public Incitement to Commit Genocide, Complicity in Genocide, and Crimes against Humanity.⁹⁸ Thus, the court held that Kambanda’s omissions were sufficient to fulfill the *actus reus*, and ultimately to convict him of Complicity in Genocide.

3. Control Factor in Determining Responsibility

⁹⁴ *Id.*

⁹⁵ *See generally* *Prosecutor v. Kambanda*, Case No. ICTR 97-3-S, 4 September 1998 [Reproduced in accompanying notebook at tab 8]

⁹⁶ *Id.*

⁹⁷ *Id.* at ¶39(iii) In reference to Kambanda’s conviction on the crime of Complicity in Genocide, the Chamber wrote “By his acts or omissions described in paragraphs 3.10, 3.12 to 3.15 and 3.17 to 3.19 of the indictment, which do not constitute the same acts relied on for counts 1,2, and 3 Jean Kambanda was complicit in the killing and causing of serious bodily or mental harm to members of the Tutsi population, and thereby committed COMPLICITY IN GENOCIDE stipulated in Article 2(3)(e) of the Statute as a crime, and attributed to him by virtue of Article 6(1) and 6(3) which is punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.” [Reproduced in accompanying notebook at tab 8]

⁹⁸ *Id.* at ¶40 (1-6)

In order to impute the actions of a subordinate to a superior officer, the officer has to have had some type of control over the actions of the subordinate officer. Actual or formal power of control over one's subordinates is a determining factor in charging civilians with superior responsibility.⁹⁹ An individual's belonging to a chain of command does not automatically impute a duty to "prevent or repress violations by a subordinate."¹⁰⁰ More specifically, an individual must exhibit a certain level of formal authority over his or her subordinate bases on the command hierarchy in order to be held responsible for the subordinate's actions.¹⁰¹ Therefore, if an individual lacks any position of authority or the ability to influence subordinate thought, it becomes more difficult to impute responsibility for the criminal activity of those thought to be the individual's "subordinates" to the individual.¹⁰²

IV. Conclusion

Individuals who commit criminal acts must be made to account for their activities and prosecuted for such actions. This memorandum provides substantial evidence in favor of holding a superior officer criminally liable for Complicity in Genocide when the superior

⁹⁹ Prosecutor v. Musema, Case No. ICTr 96-13-T, Judgement, 27 January 2000. [Reproduced in accompanying notebook at tab A7]

¹⁰⁰ Timothy Wu & Yong-Sung (Jonathan) Kang, *Recent Development: Criminal Liability for the Actions of Subordinate—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT'L L.J. 272, 292. [Reproduced in accompanying notebook at tab A26]

¹⁰¹ *Id.*

¹⁰² Prosecutor v. Ruggio, Case No. ICTR 97-32-I, Judgement and Sentence, 1 June 2000 at ¶45. Ruggio was a radio broadcaster who had been accused of inciting the commission of Genocide by advertising and promoting criminal activities on radio broadcasts. In determining Ruggio's sentence, the Chamber considered the fact that Ruggio "did not hold an official position in Rwanda or a senior position with RTLM." The Chamber further maintained that "He was a subordinate with no decision making powers." The Chamber contrasts Ruggio's position with that of Jean Kambanda—the Prime Minister of the Interim Government in Rwanda. Kambanda's position of authority made it possible for him to exert a level of power and influence over the people of Rwanda. On the contrary, Ruggio did not have an authoritative position of this nature to exert such power. [Reproduced in accompanying notebook at tab A11]

officer knew or should have known about the behavior of his/her subordinate officers and were remiss in acting to punish or altogether alleviate this behavior. By omitting to act to take remedial measures against these subordinate officers, superior officers are sending the signal that the behavior of the lower ranking officers is okay; additionally, by omitting to act to take remedial measures the superior officer is assisting in the furtherance of the criminal activity—in the present case of Genocide—and should be forced to account for his actions and the actions of the subordinate officer.

An individual charged with Complicity in Genocide has not necessarily committed the crime of Genocide. The two crimes are distinguishable, and a person can be charged with one without being charged with the other. For an individual to be convicted of Complicity in Genocide, however, it must be proven that the crime of Genocide has, in fact, occurred. If a superior officer is knowledgeable as to the Genocidal behavior of his or her subordinate officers and fails to take remedial measures against the officers, Article 6(3) of the ICTR Statute allows the criminality of the lower ranking officers to be imputed to the superior officer. The failure to act, therefore, should be sufficient to fulfill the *actus reus* requirement for the crime of Complicity in Genocide. An omission of this nature on the part of the superior officer should, therefore, make the officer criminally liable for the crime of Complicity in Genocide under Article 6(3) of the ICTR Statute. It is crucial that individuals be forced to account for their behavior, and as an extension of that when a superior officer is in a position to deter criminal activity it is crucial that they are made to account for the behavior of their subordinate officers.