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## NOTE

### RETHINKING GENOCIDAL INTENT: THE CASE FOR A KNOWLEDGE-BASED INTERPRETATION

*Alexander K.A. Greenawalt*

*From its initial codification in the 1948 Convention on the Prevention and Punishment of Genocide to its most recent inclusion in the Rome Statute of the International Criminal Court, the international crime of genocide has been defined as involving an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The predominant interpretation of this language views genocide as a crime of "specific" or "special" intent, in which the perpetrator deliberately seeks the whole or partial destruction of a protected group. This Note pursues an alternate approach. Relying on both the history of the Genocide Convention and on a substantive critique of the specific intent interpretation, it argues that, in defined situations, principal culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions.*

On December 9, 1948, H.V. Evatt, the Australian President of the United Nations General Assembly, announced that "the supremacy of international law had been proclaimed and a significant advance had been made in the development of international criminal law."<sup>1</sup> The event at issue was the General Assembly's unanimous adoption of Resolution 260(A) (III), the International Convention on the Prevention and Punishment of the Crime of Genocide.<sup>2</sup> And while the lackluster enforcement of international criminal norms during much of the last fifty years may suggest that Mr. Evatt spoke too soon, the statement must have seemed unassailable at the time. Indeed, the post-World War II climate, haunted as it was by fresh memories of the Holocaust, produced an as-yet-unprecedented consensus in favor of vigorous international enforcement of human rights norms. The chief achievements of that era include the ad hoc International Military Tribunal at Nuremberg which tried high Nazi officials for war crimes;<sup>3</sup> the International Military Tribunal for the Far East,<sup>4</sup> which prosecuted Japanese officials; the Universal Declaration of

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1. U.N. GAOR, 3d Sess., 179th plen. mtg. at 852, U.N. Doc. A/PV.179 (1948).

2. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, U.N. G.A. Res. 260, U.N. GAOR, 3d Sess., 179th plen. mtg. at 174, U.N. Doc. A/810 (1948) [hereinafter Genocide Convention].

3. See generally Telford Taylor, *The Anatomy of the Nuremberg Trials* (1992); *The Nuremberg Trial and International Law* (George Ginsburgs & V.N. Kudriavtsev eds., 1990); Ann Tusa & John Tusa, *The Nuremberg Trial* (1983).

4. See generally Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (1987); Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (1971).

Human Rights,<sup>5</sup> unanimously adopted by the U.N. General Assembly on the day after the Genocide Convention; and the institution of the United Nations itself, whose Charter pledges the pursuit of international peace and the respect of human rights.<sup>6</sup>

The Genocide Convention occupies a prominent place among these post-war efforts. Identifying genocide as an "odious scourge" that "has inflicted great losses on humanity,"<sup>7</sup> it intrudes into historically-protected areas of state sovereignty by proclaiming genocide a "crime under international law" that states must "undertake to prevent and to punish."<sup>8</sup> Transcending the state-focused nature of international law,<sup>9</sup> moreover, it assigns an individual responsibility that is unmitigated by any state action requirement or head-of-state immunity. As Article IV of the Convention maintains, "[p]ersons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals."<sup>10</sup> And unlike the Nuremberg Charter, which restricted its jurisdiction to crimes committed in connection with Germany's war of aggression,<sup>11</sup> the Genocide Convention establishes genocide as a crime under international law "whether committed in time of peace or in time of war."<sup>12</sup>

But despite the bold language of the Convention, the post-1948 history has been mixed at best. On the level of legal development, the pro-

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5. G.A. Res. 217, U.N. Doc. A/810 (1948).

6. See U.N. Charter. The Preamble expresses the determination of "We the Peoples of the United Nations . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." Article One also states that a purpose of the Charter is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. Charter art. 1, para. 3.

7. Genocide Convention, *supra* note 2, at preamble.

8. Genocide Convention, *supra* note 2, at art. 1. As Professor Louis Henkin has written, "Historically, how a state treated persons within its territory was its own affair, implicit in its sovereignty over its own territory and in the freedom to act there as it would unless specifically forbidden by international law . . . . Real, full-blown internationalization of human rights came in the wake of Hitler and World War II." Louis Henkin, *The Internationalization of Human Rights*, Proc. of the Gen. Educ. Seminar, (Colum. U.), Fall 1977, at 7-9.

9. See, e.g., Louis Henkin, *International Law: Politics Values and Functions*, 216 *Recueil des Cours* 22 (1989-IV) ("The purposes of international law, like those of domestic law, are to establish and maintain order and enhance reliable expectations, to protect 'persons', their property and other interests, to further other values. But the constituency of the international society is different. The 'persons' constituting international society are not individual human beings but political entities, 'States', and the society is an inter-State system, a system of States.").

10. Genocide Convention, *supra* note 2, at art. 4.

11. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, art. 6. [hereinafter *Nuremberg Charter*].

12. Genocide Convention, *supra* note 2, at art. 1.

hibition against genocide has become more and more entrenched in international law. As of 1999, a total of 127 states, including the United States, have ratified the Convention.<sup>13</sup> Perhaps more important, the prohibition against genocide is now widely recognized as expressing a peremptory norm of international law from which no state may derogate, even absent a conventional obligation.<sup>14</sup>

As regards enforcement, however, the international community has only recently begun to make efforts to bring perpetrators of genocide to justice. For most of the last five decades, as credible reports of genocide in places such as Cambodia<sup>15</sup> and Iraq<sup>16</sup> have failed to catalyze either prevention or punishment, the Convention has served primarily as a symbolic reminder of the international community's promises. Still, as observers of the last few years well know, the situation appears to be changing. In 1993 and 1994, the U.N. Security Council exercised its enforcement powers under Chapter VII of the U.N. Charter<sup>17</sup> to establish ad hoc international criminal tribunals charged with investigating and prosecuting violations of international criminal law committed in the former Yugoslavia and Rwanda respectively.<sup>18</sup> The statutes of both the United Nations International Criminal Tribunal for the former Yugosla-

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13. U.S. State Dep't, *Treaties in Force 377-78* (1999). The road to ratification by the U.S. was a particularly controversial process. After years of delay, the U.S. finally ratified, with multiple reservations and understandings, in 1986. See Lawrence J. LeBlanc, *The United States and the Genocide Convention* (1991).

14. The International Court of Justice proclaimed this principle in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 23 (May 28). See also *Case Concerning the Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5). Some have claimed that the customary definition of genocide is broader than that provided by the Convention. See, e.g., Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 *Yale L.J.* 2259 (1997) (arguing that the prohibition against genocide extends to the destruction of political groups). But this view has not been broadly embraced. See Report of the International Law Commission on the Work of Its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, at 87, U.N. Doc. A/51/10 (1996) [hereinafter ILC Report] ("The definition of genocide contained in article II of the Convention . . . is widely accepted and generally recognized as the authoritative definition of this crime . . ."). This and all subsequent references to the 1996 ILC Report refer to Chapter II, the Draft Code of Crimes Against the Peace and Security of Mankind and commentary.

15. See generally Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia Under the Khmer Rouge, 1975-79* (1996).

16. See generally George Black, *Genocide in Iraq: The Anfal Campaign Against the Kurds* (1993).

17. U.N. Charter art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.").

18. See S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993) (establishing the International Criminal Tribunal for the Former Yugoslavia); S.C. Res., U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) (establishing the International Criminal Tribunal for Rwanda).

via (ICTY) and the United Nations International Criminal Tribunal for Rwanda (ICTR) tribunals establish subject-matter jurisdiction over acts of genocide, with the crime's definition reproduced verbatim from Article II of the Genocide Convention.<sup>19</sup> The ad hoc tribunals have since issued several indictments alleging acts of genocide,<sup>20</sup> and in the last two years the ICTR has produced four genocide convictions,<sup>21</sup> the first such convictions ever reached by an international body. In addition, with the adoption in July 1998 of the so-called Rome Statute of the future International Criminal Court (ICC), the international community has made the first and crucial step towards erecting a standing international body capable of prosecuting future perpetrators of genocide.<sup>22</sup>

This recent transformation of the prohibition against genocide from a largely symbolic reminder of the horrors of World War II into an ap-

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19. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991, U.N. Doc. S/25704, Annex, reprinted in 32 I.L.M. 1192 (1994) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, S.C. Res. 955, U.N. SCOR, 3453d mtg. at 3., U.N. Doc. S/RES/955, Annex (1994), reprinted in 33 I.L.M. 1598, 1602 (1994) [hereinafter ICTR Statute].

20. Copies of public ICTY indictments are available at <<http://www.un.org/icty/BLS/ind.htm>> (visited Nov. 4, 1999). A summary of ICTR cases is available at the ICTR website <[www.icttr.org](http://www.icttr.org)> (visited Nov. 4, 1999).

21. The first conviction, in *The Prosecutor v. Jean Kambanda*, Judgement and Sentence, ICTR-97-23-S (Int'l Crim. Trib. Rwanda, Trial Chamber) <<http://www.icttr.org/>> (visited Nov. 4, 1999), followed a guilty plea. The landmark judgment in *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, (Int'l Crim. Trib. Rwanda, Trial Chamber I, Sept. 2, 1998) <<http://www.icttr.org/>> (visited Nov. 4, 1999) [hereinafter *Akayesu Judgment*], followed a full trial. Most recently, the ICTR convicted Clement Kayishema and Obed Ruzindana of genocide. See *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgement, (Int'l Crim. Trib. Rwanda, Trial Chamber II, May 21, 1999) <<http://www.icttr.org/>> (visited Nov. 4, 1999) [hereinafter *Kayishema Judgment*]. Although the judgment was announced on May 21, the text of the decision was not made public until October of 1999, as this Note entered publication.

22. Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) <<http://www.un.org/icc/part1.htm>> (visited Nov. 4, 1999) [hereinafter *Rome Statute*]. The treaty-based statute provides for a permanent international criminal court to assert jurisdiction over genocide, crimes against humanity, and war crimes. *Id.* art. 5(1). Adopted by a vote of 120 states in favor, 7 against, and 21 abstentions, see Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 Am. J. Int'l. L. 22, 22 (1999), the treaty will enter into force once 60 states have ratified it. See *Rome Statute*, art. 126. Among the few states opposing the statute was the United States, who favored more limitations on the tribunal's jurisdiction than the treaty provides. For a statement of the U.S.'s specific objections see David J. Scheffer, *The United States and the International Criminal Court*, 93 Am. J. Int'l. L. 12 (1999) (authored by U.S. Ambassador-at-Large for War Crimes and the leader of the U.S. delegation to the Rome Conference). For a general overview of the Rome Statute, including its jurisdictional framework, see Arsanjani.

plied mechanism of criminal prosecution opens up great possibilities for those who seek to bolster the international commitment to human rights norms.<sup>23</sup> At the same time, the development raises new concerns. Some of these are political in nature, concerning in particular the effects of international prosecutions on world order.<sup>24</sup> There are also legal problems, those endemic to the development of new legal systems generally and those uniquely complicated by the particular international context. The jurisprudence of the ad hoc tribunals thus far has had to grapple with issues ranging from the choice of procedural rules,<sup>25</sup> to the quandary of how to fill “gaps” in the law,<sup>26</sup> to the interpretation of the substantive crimes themselves.<sup>27</sup>

This Note is concerned with the definition of genocide itself, specifically the problem of genocidal mens rea. Despite the fact that the Genocide Convention is now fifty years old, the question “What is genocide?” remains difficult to answer. The drafters of the Genocide Convention faced a range of choices, including whether the definition of genocide should be restricted to acts committed against only certain categories of victims (and, if so, which categories) and whether or not the actus reus of

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23. See, e.g., M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 *Harv. Hum. Rts. J.* 11 (1997) (calling for the establishment of a permanent system of international criminal justice to enforce human rights).

24. More specifically, the prospect of a more prominent role for international criminal tribunals has stoked a debate regarding whether or not the interests of justice may be at cross purposes with those of peace. For a sample of the debate compare Antonio Cassese, *Reflections on International Criminal Justice*, 61 *Mod. L. Rev.* 1, 8–9 (1998) (advocating international criminal prosecutions as a response to mass atrocities), with W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, *Law & Contemp. Probs.*, Autumn 1996, at 75 (cautioning against “judicial romanticism”).

25. See, e.g., *Prosecutor v. Tadić*, Case no. IT-94-I-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, at para. 28 (Int’l Crim. Trib. former Yugo., Trial Chamber, Aug. 10, 1995) (stating that the tribunal is “in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence”) <<http://www.un.org/icty/tadic/trialc2/decision-e/100895pm.htm>> (visited Nov. 4, 1999).

26. See, e.g., *Prosecutor v. Erdemović*, Case No. IT-96-22, Judgment (Int’l Crim. Trib. Former Yugo., Appeals Chamber, 1997) <<http://www.un.org/icty/erdemovic/appeal/judgment/71007jt3-e.htm>> (visited Nov. 4, 1999) where the Appeals Chamber ruled that international criminal law did not recognize duress as a complete defense. For a critical appraisal of the underlying trial chamber judgment which the appeals chamber upheld see Sienho Yee, *The Erdemović Sentencing Judgement: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia*, 26 *Ga. J. Int’l & Comp. L.* 263 (1997).

27. See, e.g., *Prosecutor v. Tadić*, Case No. IT-94-I-T, Opinion and Judgment, at para. 694 (Int’l Crim. Trib. former Yugo., Trial Chamber, May 7, 1997) (observing that the crime against humanity of persecution had “never been clearly defined” in either international or national law) <<http://www.un.org/icty/tadic/trialc2/jugement-e/970507jt.htm>> (visited Nov. 4, 1999) [hereinafter *Tadić Judgment*]. For a critical appraisal of the ICTY’s jurisprudence see Jose E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 *Mich. L. Rev.* 2031 (1998).

the crime was limited to murder, or inclusive of crimes like torture or even cultural destruction. And although the drafters of the Convention succeeded to some extent in clarifying the crime's definition, they nevertheless produced a text that remains susceptible to remarkably divergent interpretations, with far-reaching implications for the scope of the Convention's application.

Article II of the Genocide Convention lays out the substantive definition of the crime as follows:

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>28</sup>

As the International Law Commission (ILC) has observed, "[t]he definition of the crime of genocide . . . consists of two important elements, namely the requisite intent (*mens rea*) and the prohibited act (*actus reus*)."<sup>29</sup> The definition of the genocidal acts enumerated by the Convention has provoked its own source of controversy, from questions concerning what types of acts are contemplated, to those concerning how many victims must be targeted.<sup>30</sup> As regards the question of intent, the prevailing interpretation assumes that genocide is a crime of specific or special intent, involving a perpetrator who specifically targets victims on the basis of their group identity with a deliberate desire to inflict destruction upon the group itself.

While the prevailing understanding has an intuitive appeal in light of its World War II associations, this approach has difficulty translating from the level of general characterization to that of individual criminal liability. This Note proposes an alternate interpretation. Drawing upon a

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28. Genocide Convention, *supra* note 2, art. 2. In addition to genocide, the Convention also identifies the following crimes: conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, complicity in genocide. See *id.* art. 3.

29. ILC Report, *supra* note 14, at 87. The ILC was established by the U.N. Secretariat to codify international law. Although this theoretically means that the ILC simply identifies existing law, governments have generally accepted a progressive role for the ILC in the development of international law. See Oscar Schachter, *International Law in Theory and Practice* 66-69, 71-72 (1991).

30. Although this Note focuses on the question of intent, some interpretive questions regarding the definition of genocidal acts are discussed below. See *infra* notes 145-149 and accompanying text.

more traditional understanding of intent, it argues that, in defined situations, culpability for genocide should extend to those who may personally lack a specific genocidal purpose, but who commit genocidal acts while understanding the destructive consequences of their actions for the survival of the relevant victim group. Part I lays the ground for this interpretation by considering the ambiguity of genocidal intent in the context of general principles of criminal law, and the Genocide Convention's drafting history. Part II examines the practical and theoretical problems of the prevailing interpretation. Part III lays out the proposed interpretation of intent and defends the integrity of this model in light of anticipated criticisms.

#### I. THE AMBIGUITY OF GENOCIDAL INTENT IN THEORY AND HISTORY

In its 1996 commentary to the Draft Code of Crimes Against the Peace and Security of Mankind, the International Law Commission states that "[t]he prohibited [genocidal] act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group . . . . The intention must be to destroy the group 'as such,' meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group"<sup>31</sup> Similarly, in its recent conviction of Jean-Paul Akayesu, an ICTR trial chamber explained that "[t]he perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, for the realisation of an ulterior motive, which is to destroy, in whole or part, the group of which the individual is just one element."<sup>32</sup> This strict reading of the crime exemplifies the prevalent understanding of genocide: the perpetrator must select victims on the basis of their group identity and must desire the destruction of the group as a group.<sup>33</sup> Although the opinion of such authoritative sources carries its own weight, there is nothing in the text of the Genocide Convention that requires such a reading. This Part considers the interpretive ambiguity of the Genocide Convention's intent standard. Beginning with a consideration of general criminal law doctrine, it shows that traditional understandings of intent in common and civil law jurisdictions have encompassed a broad range of mental states, a trend that has been followed by the recently adopted Rome Stat-

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31. ILC Report, *supra* note 14, at 88.

32. Akayesu Judgment, *supra* note 21, at para. 520.

33. See, e.g., Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B.U. Int'l L.J. 1, 41 [hereinafter Lippman, *Drafting*] (1985) ("It is clear that under article II the requisite intent to commit genocide must be accompanied by proof of motive . . . ."). Some states have even written this definition into their own domestic legislation. In the United States, for example, the federal crime of genocide is defined in terms of a "specific intent to destroy." 18 U.S.C. § 1091(a) (1994). The Senate also submitted this construction as an understanding when it consented to ratification of the Convention. See Resolution of Ratification (Lugar-Helms-Hatch Sovereignty Package), S. Exec. Rep. 2, 99th Cong., 1st sess. 27 (1985).



ute of the ICC. Next, it takes a new look at the development of the concept of genocide from its first formulation by the scholar Raphael Lemkin in 1944 through its codification in the Genocide Convention. It concludes that while the drafting history does not clearly mandate a knowledge-based understanding of genocidal intent, neither does it clearly support a purpose standard. Instead, the history reveals a vigorous and confused debate over the intent standard that remained alarmingly unresolved at the time of the Convention's adoption.

#### A. *The Meaning of Intent*

With its use of the word "intent," the Genocide Convention appeals to a central concept of criminal culpability. The problem is that the historical understanding of criminal intent has eluded uniform understanding. According to the traditional common-law doctrine, criminal perpetrators intended the consequences of their actions if they knew to a practical certainty what the consequences of those actions would be, regardless of whether or not they deliberately sought to realize those consequences.<sup>34</sup> At the same time, however, common law jurisdictions have also employed an alternate model of intent-based liability. In the case of so-called "specific intent" crimes, liability attaches only to perpetrators whose actual aim or purpose is to realize certain forbidden consequences.<sup>35</sup> Typical examples are the common law crime of burglary, which consists of breaking and entering with intent to commit a felony inside, and larceny, which involves an intent to permanently deprive someone of her property.<sup>36</sup> The specific intent of committing a felony or permanently depriving someone of her property is distinguished from the more conventional "general intent" required to commit the breaking and entering or physically possess her property.<sup>37</sup>

Historically, this variable usage has proved a consistent source of controversy and confusion for courts interpreting intent-based offenses without clear rules of construction. For instance, in the famous case of

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34. See, e.g., Glanville Williams, *The Mental Element in Crime* 20 (1965) ("Intention is a state of mind consisting of knowledge of any requisite circumstances plus desire that any requisite result shall follow from one's conduct, or else foresight that the result will certainly follow."). Professor George P. Fletcher traces this doctrinal tradition to the nineteenth-century utilitarian John Austin. See John Austin, *Lectures on Jurisprudence* 433-34 (3d ed. 1869); George P. Fletcher, *Rethinking Criminal Law* § 6.5.1 (1978). H.L.A. Hart makes a similar point by reference to a famous Victorian case from 1868, *R. v. Desmond, Barrett and Others*. The accused attempted to liberate two prisoners by dynamiting a wall, knowing that there were people living nearby. Even though "[i]t was no part of Barrett's purpose or aim to kill or injure anyone; the victims' deaths were not a means to his end; to bring them about was not his reason or part of his reason for igniting the fuse, but he was convicted on the ground that he foresaw their death or serious injury." H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 120 (1968).

35. See, e.g., Glanville Williams, *Criminal Law: The General Part* 34 (1961). See also Hart, *supra* note 34, at 116-21.

36. See Williams, *supra* note 35, at 51.

37. See *id.*

*Abrams v. United States*, to take an example that predates the Genocide Convention, the U.S. Supreme Court interpreted a federal statute prohibiting the unlawful uttering, printing, and writing of language “intended to incite, provoke and encourage resistance to the United States in [the war against Germany]” as holding defendants responsible for the natural consequences of their intended actions even if those actions were motivated by unrelated concerns.<sup>38</sup> In subsequent years, however, the evolution of First Amendment doctrine led the Court to take the opposite approach, and construe similarly worded criminal incitement statutes more narrowly according to a specific intent model.<sup>39</sup>

In the post-World War II United States, the influential Model Penal Code (MPC) has done much to rationalize the law of mens rea. Avoiding the word “intent” entirely, the Code instead divides the traditional understanding of the term into three more precisely defined mental states:

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38. 250 U.S. 616 (1919). The Court upheld defendants’ conviction under the Espionage Act of 1917. The defendants asserted that the aim of the activities for which they were convicted (propaganda calling, inter alia, for workers in munitions factories to cease producing weapons) was not to hinder the American war effort, but rather, to aid the cause of the Russian Revolution, against which American weapons were also being used.

Justice Holmes’ dissent, famous for its separate interpretation of the free speech clause of the First Amendment, argued that specific intent crimes should be held to define specific purposes regarding consequences. However, as his comments make clear, he did not see himself as pronouncing an established understanding of the law:

I am aware of course that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

*Id.* at 626–27.

39. In *Yates v. United States*, 354 U.S. 298, 301 n.1, 320–27 (1957), for example, the Court found that direct advocacy of illegal action with specific intent was a necessary element of a Smith Act provision forbidding certain forms of advocacy committed “with intent to cause the overthrow or destruction” of a United States government. Such interpretations are a precondition of constitutionality under the test enunciated in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (declaring unconstitutional laws that “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

“recklessness,”<sup>40</sup> “knowledge,”<sup>41</sup> and “purpose,”<sup>42</sup> the latter of which corresponds to specific intent.<sup>43</sup> States modeling their codes after the MPC have preserved this explicit distinction, although most have substituted the word “intent” for “purpose,” thus re-defining “intent” as specific intent.<sup>44</sup> Yet despite this trend, broader constructions of the term persist.<sup>45</sup>

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40. The Code states that “[a] person acts recklessly with respect to a material element of an offenses when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.” Model Penal Code § 2.02(2)(d) (Proposed Official Draft 1962).

41. “A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct . . . he is aware that his conduct is of that nature . . . and (ii) 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.” *Id.* at § 2.02(2)(b).

42. “A person acts purposely with respect to a material element of an offense when . . . 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 . . . .” *Id.* at § 2.02(2)(a).

43. The Code also defines a category of criminal negligence, covering cases where “[a] person . . . should be aware of a substantial and unjustifiable risk that [a material element of an offense] exists or will result from his conduct.” *Id.* at § 2.02(d). Although this category does not fall within traditional understandings of criminal intent, it does overlap with the theories of those who have sought to define intent in objective rather than subjective terms. Justice Holmes is the most famous advocate of this approach. Despite adopting a specific intent interpretation of the Espionage Act in his *Abrams* dissent, see *supra* note 38, Holmes generally favored an interpretation of criminal intent according to which the accused need only have known of circumstances whose tendency to cause prohibited results would be apparent to a reasonable man. See American Law Institute, Model Penal Code and Commentaries 2.02, at 234 n.9. (Official Draft and Revised Comments 1985) (citing *Commonwealth v. Chance*, 174 Mass. 245, 252, 54 N.E. 551, 554 (1899); Oliver Wendell Holmes, Jr., *The Common Law* 61 (Mark DeWolfe ed., 1963) (1881). In 1961, influenced in part by Holmes’ analysis, the British House of Lords interpreted the words “wounding with intent to inflict grievous bodily harm” to assert a purely objective standard for murder liability, applying to all situations in which a reasonable man would have understood the harmful consequences of his actions. *Director of Public Prosecutions v. Smith*, [1961] App. Cas. 290. The controversial decision was subsequently overruled by statute. See P. S. Atiyah, *The Legacy of Holmes Through English Eyes*, 63 B.U. L. Rev. 341, 347–49 (1983).

44. See, e.g., New York Penal Law § 15.05(1) (McKinney 1998) (stating that a person acts “intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct).

45. Thus, for example, in *United States v. Johnson*, 24 M.J. 101, 105 (C.M.A. 1987), the Court of Military Appeals interpreted the phrase “intent to injure or interfere with national defense” to mean “knowing that the result is practically certain to follow.” Similarly, Minnesota’s criminal code provides that “[i]ntentionally” . . . “[w]ith intent to” or “with intent that” means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result,” Minn. Stat. § 609.02 (1998), while the Wisconsin criminal code contains an almost identical provision providing that “intent,” “with intent that,” and “with intent to” “means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.” Wis. Stat. § 939.23 (1998)

The practice of civil law countries confirms the difficulty of defining genocidal intent. Under French law, the precise meaning of intent has provided a consistent source of confusion, with French courts applying both a stricter conception of intent and a looser, unrefined notion of *dol général*, understood merely as “the conscious and voluntary action to violate the law.”<sup>46</sup> German law, meanwhile, employs specific terminology to define certain crimes in terms of a deliberate desire to realize specified consequences, but treats criminal intent in a broader sense to encompass perpetrators who perform criminal acts with *dolus eventualis*—an acceptance of or willingness to realize possible criminal consequences that in some ways intersects with the MPC definition of recklessness.<sup>47</sup> Similarly, the criminal code of pre-1991 Yugoslavia, to take the example of a country from which genocide charges have emerged, specifies a single broad intent standard extending liability to those who perform a deed knowing “it could have criminal consequences.”<sup>48</sup>

Perhaps most significantly, the recently adopted Rome Statute of the International Criminal Court, the body that may ultimately play the greatest role in interpreting the prohibition against genocide, also embraces a relatively broad understanding of intent analogous to the Model Penal Code definition of “knowledge.”<sup>49</sup> In this vein, the Statute specifies that “[A] person has intent where a) In relation to conduct, that person means to engage in the conduct; b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.”<sup>50</sup> However, even assuming all future genocide trials are before the ICC, the statutory framework only guides interpretation “[u]nless otherwise provided.”<sup>51</sup> In this way, the statute provokes an interesting interpretive question. Although nothing in the statute explicitly provides for a distinct genocidal intent standard, one might argue that the origins and development of the prohibition against genocide provide an external source of interpretive authority that trumps the Rome Statute’s default mens rea provision. If so, the central question

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46. Bartholémy Mercadel, *Recherches sur l’intention en droit pénal*, 22 *Revue de Science Criminelle et de Droit Pénal Comparé* 1, 20, 31 (1967) (translation by author); see also Fletcher, *supra* note 34, § 6.5 n.49.

47. See Fletcher, *supra* note 34, § 4.5.2.

48. *Krivični Zakon*, art. 7. (1970) (Yugo.) (“A criminal act is committed with intent when the perpetrator was aware of his deed and intended its completion; or when he allowed himself to perform the deed despite being aware that the deed could have forbidden consequences.” (translation by author)). See also *Komentar Krivičnog Zakona Socijalističke Federativne Republike Jugoslavije* 12 (Nikola Sržentić ed., 1978) (stating that awareness and purpose are indistinguishable).

49. See *supra* note 41.

50. Rome Statute, *supra* note 22, at art. 30(2). The Statute further specifies that “[f]or the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.” *Id.* at art. 30(3). The treatment of intent and knowledge is thus identical with respect to the consequences of one’s actions.

51. *Id.* at art. 30(1).

remains the same as before: Does “intent” have a special meaning within the context of genocide?

### B. *The Origins and Drafting of the Genocide Convention*

Article 32 of the widely ratified Vienna Convention on the Law of the Treaties states that where the terms of a treaty are “ambiguous or obscure,” “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.”<sup>52</sup> Unfortunately, an investigation of the origins and drafting of the Genocide Convention only reinforces the ambiguity of the treaty’s intent provision. This Section looks to the history of genocidal intent from the coining of the term “genocide” by Raphael Lemkin in 1944, to the completion of the Genocide Convention in 1948.<sup>53</sup> It reveals that, from the start, the standard of genocidal culpability was subject to conflicting aspirations and interpretations that eluded resolution even at the final stages of the Convention’s drafting.

1. *Raphael Lemkin and the Beginnings of a Definition.* —The preamble to the Genocide Convention asserts that “at all periods of history Genocide has inflicted great losses on humanity.”<sup>54</sup> Despite the historical reach of these words, the term is of fairly recent origin, coined during World War II by the jurist Raphael Lemkin.<sup>55</sup> Lemkin was a Polish citizen of Jewish descent who fled to the United States after Hitler invaded Poland in 1939. He spent much of the war working for the U.S. government, during which time he collected evidence of Nazi crimes.<sup>56</sup> In 1944 Lemkin published *Axis Rule in Occupied Europe*, a documentation of the strategies pursued by the Axis powers against populations in occupied territories.<sup>57</sup> Grouping these activities under the rubric of “genocide,” Lemkin defined the term as follows:

By “genocide” we mean the destruction of a nation or of an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing) . . . . Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when ac-

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52. The Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331.

53. This discussion selectively focuses on what the documentary sources have to say about the concept of intent. For a more general treatment of the Convention’s origins see Lippman, *Drafting*, supra note 33. See also Matthew Lippman, *The Convention on the Prevention and Punishment of Genocide: Fifty Years Later*, 15 *Ariz. J. Int’l & Comp. Law* 415, 449–63 (1998) [hereinafter Lippman, *Fifty Years*]; Nehemiah Robinson, *The Genocide Convention: A Commentary* 17–30 (1959).

54. Genocide Convention, supra note 2, preamble.

55. For a general survey of Lemkin’s role in the creation of the Genocide Convention, see LeBlanc, supra note 13, at 16–19; Lippman, *Drafting*, supra note 33, at 17–19.

56. See LeBlanc, supra note 13, at 19.

57. Raphael Lemkin, *Axis Rule in Occupied Europe* (1944).

completed by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.<sup>58</sup>

As the quoted language makes clear, this original conception applied to activities deliberately targeting specified groups—at this stage only national and ethnic groups—for destruction. At the same time, however, other passages reveal that Lemkin's understanding envisioned a range of genocidal activities so much broader than that eventually defined by the Genocide Convention that it is difficult to imagine that all of them could have fit within the framework of a plan to destroy a group. For Lemkin, "destruction of the essential foundations of a group" included almost any activity that was discriminatory in nature, whether explicitly or only implicitly so, and whether it attacked the cultural or physical existence of the group. As Lemkin's subsequent discussion makes clear, his definition contemplates not merely the extremities of the Holocaust, but more broadly, the general relationship between the Axis powers and virtually all the peoples of the lands they conquered. For example, Lemkin defined as genocidal acts ranging from the confiscation of property from Poles, Jews, and Czechs, to legislation encouraging the renunciation of Catholicism by Belgian youths, to "morally debasing" policies making pornography and alcohol more affordable in wartime Poland.<sup>59</sup> While these disparate activities might conceivably display a deliberate genocidal purpose when seen from the vantage of a leader who simultaneously pulls many strings, Lemkin was also prepared to extend liability well beyond the architects of the "coordinated plan" constituting genocide. In remarks urging the creation of a genocide convention, he contemplated "the liability of persons who *order* genocide practices, as well as of persons who *execute* such orders."<sup>60</sup>

If Lemkin's understanding of genocide is elusive, this may be explained in part by the context in which he was writing. At the time when

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58. *Id.* at 79.

59. See *id.* at 82–90. The bulk of the book details instances of "genocide" pursued against the general populations (both Jewish and non-Jewish) of, *inter alia*, Albania, Austria, Lithuania, Latvia, Estonia, Belgium, Czechoslovakia, Denmark, France, Greece, Luxembourg, the Netherlands, Norway, Poland, the USSR, and Yugoslavia. See *id.* at 99–264.

60. *Id.* at 93.

he published *Axis Rule in Occupied Europe*, World War II was still in progress and, as a result, the specific policies of the Axis powers were his immediate subject. In this light, his definition reads not so much as an attempt to clearly delineate a form of individual criminal liability, but rather, as an indictment of the Axis Powers' general treatment of the populations that they subjugated. In addition, the breadth of Lemkin's concept may be explained in light of the threat he perceived genocide as posing. Lemkin was ultimately less concerned with the evil motivations of genocidal acts themselves than with the preservation of the rich array of nations and cultures that constituted the world community. In this sense, Lemkin offered a Romantic vision in the Herderian tradition.<sup>61</sup> As Lemkin wrote,

[t]he world represents only so much culture and intellectual vigor as are created by its component national groups. Essentially the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and a well-developed national psychology. The destruction of a nation, therefore, results in the loss of its future contributions to the world.<sup>62</sup>

2. *The General Assembly Definition.* —This last sentiment was echoed by the U.N. General Assembly when it initiated the process leading to the adoption of the Genocide Convention. On December 11, 1946, motivated in large part by Lemkin's lobbying, the Assembly unanimously adopted Resolution 96(I), declaring genocide to be an international crime and calling upon member states to enact legislation for its prevention and punishment.<sup>63</sup> The preamble to the Resolution speaks of the "great losses to humanity in the form of cultural and other contributions" wrought by the "denial of the right of existence of entire human groups" and states that "many instances of such crimes have occurred when racial, religious, political and other groups have been destroyed, entirely or in part."<sup>64</sup> The Resolution then refines this definition, affirming

that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable.<sup>65</sup>

Of course, this text does not purport to provide a statutory definition, but its language does signal a departure from Lemkin's initial conception of genocide as a crime consisting of acts that deliberately discriminate against members of particular national or ethnic groups. In the

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61. See generally Johann Gottfried von Herder, *Reflections on the Philosophy of the History of Mankind 1784–91* (Frank E. Manuel ed., University of Chicago Press 1968).

62. Lemkin, *supra* note 57, at 91.

63. G.A. Res. 96(I), U.N. Doc. A/63/Add.1 (1946).

64. *Id.*

65. *Id.*

first place, the Resolution specifies no mens rea requirement whatsoever, referring instead to genocide simply as the destruction of human groups. In addition, the Resolution specifically rejects the idea that the culpability for genocide should depend upon the “grounds” of persecution. In this sense, it suggests a broader theory of mental culpability.<sup>66</sup>

3. *The Secretariat's Draft.* —And yet, if the international unanimity exhibited in the General Assembly Resolution suggested movement towards a looser standard of genocidal mens rea, subsequent attempts to define the crime pushed the doctrinal pendulum in the other direction. Resolution 96(I) had turned to the U.N.'s Economic and Social Council (ECOSOC) for assistance, asking it to “undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.”<sup>67</sup> The ECOSOC then fulfilled this request by asking the U.N. Secretariat to draw up a draft convention.<sup>68</sup> In June of 1947 the Secretariat submitted a draft created by United Nations Division of Human Rights in consultation with three legal experts including, most notably, Raphael Lemkin himself.<sup>69</sup> After a series of procedural steps which included a referral back to the General Assembly and then back again to the ECOSOC, the next substantial step was the creation of an ECOSOC Ad Hoc Committee on Genocide which, after considering the Secretariat's suggestions, produced yet another draft convention.<sup>70</sup> This draft was submitted to the General Assembly, where it was further modified by the General Assembly's Sixth Committee.<sup>71</sup> This committee produced the final text, which later became the Genocide Convention itself.<sup>72</sup>

Article I of the Secretariat's draft defined genocide as a “criminal act directed against any one of the aforesaid groups of human beings [racial, national, linguistic, religious, or political] with the purpose of destroying it in whole or in part, or of preventing its preservation or development.”<sup>73</sup>

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66. The Resolution also provides an expansive definition of what groups may be the victims of genocide, referring as it does to the destruction of racial, religious, political, and *other groups*. In addition, it is unclear whether this Resolution follows Lemkin in contemplating the existence of purely cultural or “spiritual” genocide, or whether it exclusively contemplates acts that threaten the physical existence of groups. Although the text does not specifically address the issue, phrases such as “the right to existence of entire human groups” and “groups have been destroyed,” without further modification, do seem to connote physical destruction. The General Assembly's willingness to dispense with a motive requirement and expand the definition of protected groups into “political” and “other” groups further bolsters this interpretation.

67. G.A. Res. 96(I), U.N. Doc. A/64/Add.1 at 189 (1946).

68. See Lippman, *Drafting*, supra note 33, at 9.

69. See *id.* The other two experts were Professor Donnedieu de Vabres of the Paris Faculty of Law and Professor Pella of the International Penal Association. See *id.*

70. See *id.* at 20–22.

71. See *id.* at 37.

72. See *id.* at 58.

73. Draft Convention on the Crime of Genocide, U.N. ESCOR, 5th Sess., at 5, U.N. Doc E/447 (1947) [hereinafter *Secretariat's Draft*].



The intent standard here is thus specifically identified as that of "purpose." In its commentary to the draft, the Secretariat emphasized that genocide is the deliberate destruction of a human group and that this strict definition "must be rigidly adhered to; otherwise there is a danger of the idea of genocide being expanded indefinitely . . ."<sup>74</sup>

4. *The Ad Hoc Committee Draft.*—The second draft convention as prepared by ECOSOC's Ad Hoc Committee marked a determined step toward the final version. The seven delegates to the Committee, representing China, France, Lebanon, Poland, the U.S., the U.S.S.R. and Venezuela, convened from April 5 to May 10, 1948 at Lake Success, New York.<sup>75</sup> They produced a draft resembling the final convention in its basic structure yet different in crucial respects. Most significantly, the Ad Hoc Committee included a phrase enumerating the specific "grounds" of genocide, so that genocidal mens rea became defined as "intent to destroy a national, racial, religious or political group on grounds of the national or racial origin, religious belief, or political opinion of its members."<sup>76</sup>

At first glance, this language appears redundant if "intent" is construed as specific intent. If one deliberately seeks to destroy a group, then the realization of this goal naturally involves the selection of victims "on grounds" of their defining group characteristics. One might attempt to resolve this quandary by appealing to criminal law's traditional distinc-

74. *Id.* at 16. Professor Matthew Lippman has suggested that the Secretariat somewhat undermined its insistence on a rigid standard by failing to specify whether the Convention should only prohibit physical genocide, or also include "'biological' genocide (the prevention of births) and 'cultural genocide.'" Lippman, *Drafting*, *supra* note 33, at 10. This ambiguity contributed in part to the cool reception the draft received among certain U.N. member-states. See *id.*

75. See Lippman, *supra* note 33, at 28.

76. Report of the Ad Hoc Committee on Genocide to the Economic and Social Council on the Meetings of the Committee Held at Lake Success, New York, from April 5 to May 10, 1948, U.N. ESCOR, 7th Sess., Supp No. 6, U.N. Doc. E/794 (1948). The full definition reads as follows:

In this Convention genocide means any of the following deliberate acts committed with intent to destroy a national, racial, religious or political group on grounds of the national or racial origin, religious belief, or political opinion of its members;

1. Killing members of the group;
2. Impairing the physical integrity of members of the group;
3. Inflicting on members of the group measures or conditions of life aimed at causing their deaths;
4. Imposing measures intended to prevent births within the group.

The definition of genocidal intent includes political groups as a protected category and omits the phrase "in whole or in part." *Id.* Complementing Article II, Article III consisted of a separate prohibition against cultural genocide including an almost identical intent standard. See *id.* The only difference is the omission of political groups, against whom the idea of cultural genocide did not seem to apply. Article II bears a close resemblance to the final Convention in its limited enumeration of genocidal acts with the latter version defining Articles II(2) and II(3) more strictly and adding an additional prohibition against the forcible transferring of children.

tion between “intent” and “motive.” Although the distinction can be analytically blurry, intent—even specific intent—generally signifies the basic volition required to perform a deliberate action or seek a specific result. Motive, on the other hand, concerns the personal or internal reasons that guide one’s actions, and is frequently seen as irrelevant for establishing criminal guilt.<sup>77</sup> In this vein, one might argue that the Ad Hoc Committee’s “on the grounds of” phrasing sought to define genocide specifically in terms of anti-group prejudice or animus as opposed to selection of the group for other reasons.<sup>78</sup>

But the Summary Record of the Ad Hoc Committee’s deliberations is remarkably unclear as to whether this construction of narrow construction of motive is indeed the correct one. On a general level, the treatment of the “on grounds of” clause lacks rigorous analysis of the slippery slope between motive and specific intent. Indeed, neither in these nor any of the other deliberations leading up to the Convention’s adoption is there any sustained discussion about what exactly “intent” or “motive” mean. Most significantly, while some delegates did explicitly phrase the issue as one of motive, much of the discussion appears to collapse motive and specific intent, assuming that the absence of the “on grounds of” phrasing would render genocide a general intent crime.

The inclusion of the relevant clause was initially proposed by the Soviet Representative and Vice-Chairman of the Committee, Mr. Morozov.<sup>79</sup> The Record observes that when the Chairman, U.S. representative Mr. Maktos, suggested that the intent standard read “[i]n this Convention genocide means intentional destruction, in whole or in part, of racial, national or religious groups as such,”<sup>80</sup> Mr. Morozov objected to the words “as such,” and “emphasized that the qualifying fact was not simply the destruction of certain groups but destruction for the reason that the people in them belonged to a given race or nationality, or had specific

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77. Wayne R. LaFave & Austin W. Scott, Jr. have described the difference in terms of an ends/means distinction: “Intent relates to the means and motive to the ends, but . . . where the end is the means to yet another end, then the medial end may also be considered in terms of intent. Thus, when A breaks into B’s house in order to get money to pay his debts, it is appropriate to characterize the purpose of taking money as the intent and the desire to pay his debts as the motive.” Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* 228 (2d ed. 1986). As this analysis makes clear, the intent/motive distinction may turn more on the way one defines a crime than on essential psychological categories. A mental state seen as motive in one context may become a specific intent once it enters the definition of a crime.

78. A distinction along these lines is often made in the literature on hate crimes. See, e.g., Frederick M. Lawrence, *Punishing Hate: Bias Crimes Under American Law* 3–4 (1999) (distinguishing between hates crimes of “racial animus” and those of “discriminatory selection”). Interestingly, however, terminology such as “on the grounds of,” absent further elaboration, would seem to denote the model of selection, not that of racial animus.

79. U.N. ESCOR, 3d Sess., 10th mtg. at 14, U.N. Doc. E/AC.25/SR.10 (1948).

80. U.N. ESCOR, 3d Sess., 11th mtg. at 1, U.N. Doc. E/AC.25/SR.11 (1948).

religious beliefs.”<sup>81</sup> This statement is ambiguous as to whether it separates the concept of motive from that of intent. But the French representative, Mr. Ordonneau, equated motive and specific intent when he added that “[t]he exact meaning should be clear. If genocide was destruction for any reason whatsoever, *this was contrary to the previous decision that ‘intention’ was paramount.*”<sup>82</sup> And later, in a similar discussion regarding a slightly different proposal, he made this assumption even more explicit when he “repeated that *it was not sufficient to be acquainted with the fact that a group had been destroyed*, but that the reason for the destruction had to be determined. It was there that the unlawful motive of persecution entered.”<sup>83</sup>

On the opposing side, Mr. Maktos perceived even broader stakes in defense of the “as such” phrasing. The Record states that he “believed that if reasons were mentioned, it might be claimed that a crime was committed for motives other than those specified. Political groups, for instance might be eliminated on economic grounds.”<sup>84</sup> To this end, Mr. Maktos proposed instead a loose standard of intent, one oddly based on an apparent combination of common law conspiracy doctrine and the felony murder rule. As the Record reveals,

The CHAIRMAN observed that under United States law any person who participated, to any extent whatsoever, in a criminal act, was held responsible for the crime, even though he personally had no intention of committing it. (For instance, if a person intended to take part in a robbery and stood on watch, and another participant committed a murder, the accomplice was held responsible).<sup>85</sup>

In the end, however, the stricter definition triumphed as the Ad Hoc Committee adopted the “on grounds of” clause instead of the “as such” phrasing.<sup>86</sup>

5. *The Sixth Committee.* —If the Ad Hoc Committee had seen the enumeration of “motives” as crucial to the definition of genocide, then the Sixth Committee of the General Assembly’s re-introduction of the words “as such” reflected discomfort with such a narrow understanding of genocidal mens rea. In general, the debate resembled that of the Ad Hoc Committee, except that in this case those opposing the enumeration of motives prevailed. The change was suggested by Venezuela, whose delegate to the fifty-member committee, Mr. Perozo, argued the view gener-

81. *Id.*

82. *Id.* at 2 (emphasis added).

83. U.N. ESCOR, 3d Sess., 12th mtg. at 7, U.N. Doc. E/AC.25/SR.12 (1948) (emphasis added). The issue here was that the Chinese delegate, Mr. Lin, suggested expanding the wording of the motive requirement with the words “whether on national, racial, religious ([p]olitical) or any other grounds.” *Id.* at 4–5.

84. U.N. ESCOR, 3d Sess., 11th mtg. at 1–2, U.N. Doc. E/AC.25/SR.11 (1948).

85. U.N. ESCOR, 3d Sess., 9th mtg. at 9, U.N. Doc. E/AC.25/SR.9 (1948).

86. See Report of the Ad Hoc Committee on Genocide, U.N. ESCOR, 7th Sess., Supp. No. 6, at 5, U.N. Doc E/794 (1948); Lippman, Drafting, *supra* note 33, at 37.

ally shared by the provision's supporters, that an enumeration of motives was "dangerous . . . as such a restrictive enumeration would be a powerful weapon in the hands of the guilty and would help them avoid being charged with genocide."<sup>87</sup>

Those who opposed this change maintained that the very idea of genocide required that the crime be defined in terms of motives. For example, Mr. Kaeckenbeeck of Belgium argued that it

was not sufficient to mention intent, as it was now defined, in order to distinguish between genocide and other political crimes and crimes under common law. The main feature of genocide was the intent to destroy a certain group . . . . The concept of intent had thus lost some of its clarity on account of an unfortunate confusion between acts and consequences on the one hand and intention on the other."<sup>88</sup>

Mr. Reid of New Zealand expressed similar worries, observing that "Modern war was total, and there might be bombing which might destroy whole groups. If the motives for genocide were not listed in the convention, such bombing might be called a crime of genocide."<sup>89</sup> The Haitian representative, Mr. Demesmin, offered a compromise solution, stating that the question of motive should not be part of the crime's definition, but rather, should determine whether or not the crime becomes subject to international jurisdiction. He maintained that if "the motives were such that the criminal act could be described as genocide, the appropriate tribunal would be an international tribunal; if, on the other hand, the motives were such that the act could be described as a crime under common law, it would have to be dealt with by national tribunals."<sup>90</sup>

The statements of Mr. Kaeckenbeeck, Mr. Reid, and Mr. Demesmin are notable for their assumption that genocide, as defined without specific enumeration of motive, cannot be a purpose-based crime.<sup>91</sup> However, the fact that not all delegates agreed on whether or not the substitution of the words "as such" would retain or remove a motive requirement confuses matters. For instance, Mr. Raafat of Egypt argued that the words simply "added yet another description of the groups covered by the con-

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87. U.N. GAOR 6th Comm., 3d Sess., 76th mtg. at 124, U.N. Doc. A/c.6/Sr. 61-140 (1948).

88. *Id.* at 122.

89. U.N. GAOR 6th Comm., 3d Sess., 75th mtg. at 119-20, U.N. Doc. A/c.6/Sr. 61-140 (1948).

90. U.N. GAOR 6th Comm., 3d Sess., 76th mtg. at 125, U.N. Doc. A/c.6/Sr. 61-140 (1948).

91. Mr. Reid's comments are obvious on this point, since the defensive bombing campaign he contemplates is clearly not motivated by a desire to eliminate a group. Mr. Kaeckenbeeck reaches a similar conclusion when he worries that the crime is turning into a question of "acts and consequences" instead of "intent." Mr. Demesmin is less clear on this point, but he too seems to imply a similar approach by distinguishing between genocidal motive and the intent required of crimes at common law. Elaborating on what he meant by common law intent, he explained that "there was no crime unless there was criminal intent." *Id.*

vention, while it did not define the motives for the crime."<sup>92</sup> Near the end of the debate, Mr. Perozo attempted to clarify the Venezuelan proposal by stating that "as such" *did* indicate motives to the extent that a group "must be destroyed *qua* group," but simply achieved this result "without . . . doing so in a limitative form which admitted of no motives other than those which were listed."<sup>93</sup>

However, this explanation did not resolve the debate. As the matter went to a vote, divergent interpretations persisted. Both Mr. Chaumont of France and Mr. Demesmin of Haiti stated that they would support the proposal in light of Mr. Perozo's explanation. Mr. Amado of Brazil then countered "that his delegation would vote for the Venezuelan amendment because it *did not* include the motives for the crime."<sup>94</sup> This prompted Mr. Kaeckenbeeck to point out "that the Committee had to vote on the text of a proposal and not on the interpretation of such text, whether that interpretation were given by its author or by other delegations."<sup>95</sup> The Chairman and Mr. Maktos of the U.S. supported this statement, as did Mr. Spiropoulos of Greece who emphasized that "interpretation of the provisions of the convention must be left to those who would have to apply them."<sup>96</sup> After the Chairman had repeated this admonition again, the matter was put to a vote, and the Venezuelan phrasing passed by twenty-seven votes to twenty-two with two abstentions.<sup>97</sup> Immediately afterwards, Prince Wan Waithayakon of Siam indicated that he had voted for the provision on the understanding that it did not define genocidal intent as involving specific motives. The Record notes that "[h]e thought there were two possible interpretations of the words 'as such'; they might mean 'in that the group is a national, racial, religious, or political group', or 'because the group is a national, racial, religious or political group'. He himself would adopt the first of those interpretations."<sup>98</sup>

The confusion which the "as such" language had engendered was reinforced during the Committee's Seventy-Eighth Meeting on October 19, when Mr. Rios of Uruguay asked that a working group be set up to consider the problem of the Venezuelan amendment. He explained that

[T]he vote had given rise to three different interpretations. Some delegations had intended to vote for an express reference to motives in the definition of genocide; others had intended to omit motives while retaining intent; others again, among them the Uruguayan delegation, while recognizing that, under the terms of the amendment, genocide meant the destruction of a group perpetrated for any motives whatsoever, had wanted the

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92. *Id.* at 126.

93. *Id.* at 131.

94. *Id.* at 132.

95. *Id.*

96. *Id.*

97. See *id.* at 133. The Record merely lists the vote count, keeping the distribution of votes anonymous.

98. *Id.* at 133.

emphasis to be transferred to the special intent to destroy a group, without enumerating the motives, as the concept of such motives was not sufficiently objective.<sup>99</sup>

Distinguishing between “motive,” “special intent,” and “intent” (which in context presumably indicates a broader understanding of intent), this was the clearest statement of the interpretive possibilities that the deliberations would see. But it came too late. Having already voted, the Sixth Committee rejected the Uruguayan request for a working group without taking steps to clarify the interpretive question.<sup>100</sup> The Venezuelan phrasing thus became a part of the final Convention with the definition of genocidal mens rea left unresolved.<sup>101</sup>

## II. THE IMPLICATIONS OF DEFINING INTENT AS PURPOSE

Having established that the Genocide Convention’s intent standard is subject to multiple interpretations, this Note now takes up the conceptual and practical problems faced by the purposive framework. In particular, it focuses on two distinct scenarios that may render the specific intent interpretation unattractive as a statement of substantive principle and exceedingly difficult to apply as an evidentiary matter. The first of these is the challenge presented by subordinate perpetrators who claim merely to be carrying out the genocidal directives of their superiors. The second is the problem posed by situations in which perpetrators knowingly engage in the extermination of protected groups but in which the ideology of persecution evades encapsulation within the specific intent framework.

### A. *Subordinate Responsibility*

1. *The Basic Problem.* —As a general principle, international criminal law rejects the existence of superior orders as a defense for the criminal conduct of subordinates. Article 8 of the Nuremberg Charter established this fundamental tenet when it specified that “[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility.”<sup>102</sup> The ICTY, ICTR, and Rome Statutes have also reaffirmed this general principle.<sup>103</sup> The Rome Statute, moreover, seems to contemplate that genocidal liability can extend to those acting under orders when it states that “orders to commit genocide or

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99. *Id.* at 139.

100. *See id.* at 145.

101. As such there is reason to doubt Professor Lippman’s confident assessment when he concludes from the Sixth Committee’s Record that “[i]t is clear that under article II the requisite intent to commit genocide must be accompanied by proof of motive.” Lippman, *Drafting*, *supra* note 33, at 41.

102. *See* Nuremberg Charter, *supra* note 11, at art. 8.

103. *See* ICTY Statute, *supra* note 19, at art. 7(4); ICTR Statute, *supra* note 19, at art. 6(4); Rome Statute, *supra* note 22, at art. 33.

crimes against humanity are manifestly unlawful.”<sup>104</sup> Similarly, as demonstrated above, Raphael Lemkin argued that genocidal liability should extend to those who followed orders as well as to those who executed them.<sup>105</sup> This sentiment also appears in Article V of the Secretariat’s draft, which stated that “command of the law or superior orders shall not justify genocide.”<sup>106</sup>

However, as the Secretariat’s own language admits, superior orders is a potential defense, not a standard of liability. But the issue in the case of genocide is that a defendant might invoke superior orders to negate the genocidal intent required for the establishment of a *prima facie* case, irrespective of what excuses the defendant might invoke. During the meetings of the Ad Hoc Committee (which strongly favored a strict motive standard), the Lebanese delegate recognized this point and successfully moved to delete any reference to superior orders from the Committee’s draft.<sup>107</sup> The provision was never reintroduced, and, as a result, the Convention itself is silent on the question of superior orders.

This aspect of genocidal intent poses a particular problem given the type of “administrative massacre” presented by the Holocaust, where a state deploys an entire bureaucracy and military chain of command to

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104. Rome Statute, *supra* note 22, at art. 33(2). Although the quoted phrase itself says nothing about subordinate liability for genocide, the context is clear. Article 33(1) outlines the limited exception to the doctrine of subordinate responsibility by specifying that liability does not extend to a subordinate who followed unlawful orders as long as the subordinate “was under a legal obligation to obey orders of the Government or superior in question,” the subordinate “did not know that the order was unlawful,” and the order itself was not “manifestly lawful.” *Id.*

The ILC’s commentary to its Draft Code of Code of Crimes Against the Peace and Security of Mankind makes similar assumptions when it states that “[a] subordinate is presumed to know the intentions of his superiors when he receives orders to commit the prohibited acts against individuals who belong to a particular group. He cannot escape responsibility if he carries out the orders to commit the destructive acts against victims who are selected because of their membership in a particular group by claiming that “he was not privy to all aspects of the comprehensive genocidal plan or policy. The law does not permit an individual to shield himself from criminal responsibility by ignoring the obvious.” ILC Report, *supra* note 14, at 90. To the extent that this statement contemplates a form of principal responsibility for genocide, it presents an obvious conflict with the ILC advocacy of a specific intent standard. See *supra* note 31 and accompanying text. However, it appears that the ILC may be describing a type of derivative liability similar to that pronounced by the ICTR in the *Akayesu* judgment. See *infra* notes 115–121 and accompanying text.

105. See *supra* note 60 and accompanying text.

106. U.N. ESCOR, 4th Sess. at 5, U.N. Doc E/447 (1947).

107. “Mr. Azkoul (Lebanon) thought that special attention should be given to offenders who committed a crime of genocide on superior orders. For although orders could not justify the crime, they could alter its nature. The concept of genocide was a new concept, implying murder with intent to commit genocide. An offender could participate in an act of genocide although he was not personally prompted by the specific intention of destroying a group of human bodies as such. The Committee agreed that before deciding that a State was guilty of genocide, the motives that had inspired its action must be established.” U.N. ESCOR, 3d Sess., 9th mtg. at 8, U.N. Doc. E/AC.25/SR.9 (1948).

realize the genocidal plan. In such scenarios almost everyone, including high-ranking perpetrators, is a subordinate on some level. This is not to say that a genocidal purpose could never be demonstrated when a person commits genocidal acts under orders. For example, one might argue that the very nature of certain orders requires a subordinate to exercise a specific genocidal intent. In this vein, when the District Court of Jerusalem convicted Adolf Eichmann under an Israeli version of the prohibition against genocide, it rejected the plea of superior orders by stating that “the very wide compass of [Eichmann’s] activities” testified to his intent.<sup>108</sup> Although the court did not make itself entirely clear, this statement appears to argue that Eichmann’s role in the collection and transportation of Jewish victims to death camps was so broad that any order he may have followed was equivalent to a directive stating “organize the destruction of the Jewish people.” As such, Eichmann could not have performed his duties without directing himself towards their ultimate genocidal purpose.

But this example may depend excessively on the contingencies of Eichmann’s specific role. Suppose instead that Eichmann were the head of a death camp and that his role was to oversee the daily killing of whichever prisoners happened to arrive. In this case Eichmann performs an assigned task in full knowledge that he is personally effecting the destruction of an entire people, but his specific duties require no particular attitude toward the identity of his pre-selected victims. Now it seems that the only way to demonstrate a specific genocidal intent is to show that Eichmann himself is personally motivated by a desire to participate in genocide. Yet even assuming that such motives are demonstrable (as is unlikely to be the case in many instances of subordinate liability) this possibility raises legitimate questions as to whether Eichmann’s own reasons for following orders should matter as question of substantive principle, particularly given the extent to which his specific duties may be incidental to those motives.

The danger of adhering to a specific intent standard in such situations is not merely that culpable perpetrators will escape liability for genocide, but perhaps more ominously that the evidentiary problems will compel courts to squeeze ambiguous fact patterns into the specific intent paradigm. This potential is apparent in the ICTR’s treatment of genocidal intent in its historic *Akayesu* judgment.<sup>109</sup> Although the trial chamber

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108. *Attorney General of the Government of Israel v. Adolf Eichmann*, 36 I.L.R. 228 (D.C. Jm. 1961).

109. The charges against the accused centered on his responsibility for the massacre and rape of between 2,000 and 7,000 Tutsi civilians in Rwanda’s Taba commune, where Akayesu occupied the senior political post of bourgmestre. *Akayesu Judgment*, supra note 21, at paras. 48–77, 157–268. Among the notable aspects of the judgment is the court’s holding that Akayesu’s genocidal liability derived in part from his liability for rape, found to be a means of preventing procreation among Tutsi and thus a genocidal act. See *id.* at paras. 508, 732–34. These events took place within the general context of systematic atrocities committed against Rwanda’s Tutsi minority in 1994. See *id.* at paras. 78–129.



cited specific evidence that the accused Jean-Paul Akayesu himself had acted with a deliberate genocidal purpose,<sup>110</sup> it also lamented that genocidal intent “is a mental factor which is difficult, even impossible, to determine.”<sup>111</sup> To this end it posed a broad evidentiary standard, stating that “it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others.”<sup>112</sup> The use of circumstantial evidence to demonstrate mens rea is of course nothing new, but the ICTR’s standard suggests that courts should presume specific intent largely by virtue of the fact that a perpetrator participates in a genocidal campaign. In this way, it begs the question as to whether the specific intent standard does any work at the individual level.<sup>113</sup>

2. *Circumventing Specific Intent with Complicity Doctrine.* —In addition to enunciating a broad evidentiary standard for specific genocidal intent, the *Akayesu* judgment also suggested another strategy to avoid the restrictive framework of the specific intent paradigm: deployment of a broad complicity framework. Despite finding Akayesu to be guilty of genocide as a principal perpetrator, the court also took the position that a perpetrator lacking specific genocidal intent could nevertheless be guilty of complicity in genocide for knowingly aiding or abetting a principal who does possess the requisite intent.<sup>114</sup> Once again, however, while the

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For a history of the Rwandan genocide, see Gérard Prunier, *The Rwandan Crisis: History of a Genocide* (1997).

110. In reaching this judgment, the court was able to look not merely at the fact that Akayesu had participated in a broader genocidal campaign, but moreover that he had made public statements calling for the extermination of Tutsi. See *Akayesu Judgment*, supra note 21, at paras. 332–62.

111. *Id.* at para. 523.

112. *Id.*

113. The implications of such evidentiary imputations may extend beyond doctrinal awkwardness and the risk of inconsistent determinations. To return to the Eichmann case, Hannah Arendt’s famous account of the Jerusalem trial poignantly depicts the prosecution’s attempts to characterize the accused as a rabid anti-Semite personally committed to the extermination of the Jewish people. See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1994). For Arendt, however, the truly disturbing aspect of Eichmann’s crimes was the “banality” of Eichmann’s evil, the fact that “[h]e ‘personally’ never had anything against the Jews” and that “[d]espite all the efforts of the prosecution, everyone could see that this man was not a ‘monster.’” *Id.* at 26, 54. Although the trial court found specific intent on grounds that did not require inquiry into motive, see supra note 108 and accompanying text, the appellate judgment upholding the conviction embraced the prosecution’s narrative, and referred, inter alia, to the “fanatical enthusiasm and the insatiable bloodthirstiness of the appellant and those who did his bidding.” *Attorney General of the Government of Israel v. Adolf Eichmann*, 36 I.L.R. 277. 340 (S. Ct. 1962), Arendt, at 249. The problematics of fictionalization are of course not reducible to the interpretation of genocidal intent. However, to the extent that the specific intent paradigm increases the pressure to rely on such demonizing narratives, it is possible to see how adherence to a specific intent standard could promote a simplistic social understanding of human evil.

114. *Akayesu Judgment*, supra note 21, at para. 540.

court's solution may have the end result of extending genocidal liability to subordinates who lack specific intent, the approach in some ways seems an attempt to uphold the specific intent standard while simultaneously evading it.

In their conventional application, doctrines of derivative liability provide a means of attaching criminal responsibility to perpetrators who do not themselves perform the physical act constituting the *actus reus* of the relevant crime.<sup>115</sup> In this sense, conviction for genocide is almost by its very nature a crime of complicity. In the *Eichmann* judgment, for example, the Jerusalem District Court looked to derivative liability doctrine as a means of connecting Eichmann's genocidal *mens rea* to the countless acts of killing which he furthered but did not personally perform.<sup>116</sup> At the same time, however, the Jerusalem court treated genocidal *mens rea* as a core requirement of Eichmann's culpability.<sup>117</sup> The same principle has held true in the recent ICTR judgments, all of which found the accused to be guilty of genocide on a combination of genocidal intent and command responsibility for genocidal acts.<sup>118</sup>

But the trial chamber's curious dictum in *Akayesu* pushes the derivative liability framework one level further. Take, for example, the case where perpetrator A, lacking specific intent, physically exterminates members of a protected victim group. By these acts alone, perpetrator A is guilty of murder. But perpetrator B, who has ordered these acts with specific genocidal intent, is thus guilty of genocide by way of his complicity in A's actions. Under the ICTR's analysis A's knowledge of B's purposes will have the further effect of rendering A guilty by way of complicity in B's genocidal crime. Thus, despite the fact that A himself has committed the *actus reus* of genocide, he is only culpable because he is

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115. See Fletcher, *supra* note 34, at § 8.5.

116. *Eichmann*, 36 I.L.R. at 230-37.

117. *Id.* at 228.

118. See *Kayishema Judgment*, *supra* note 21, at paras. 551-71; *Akayesu Judgment*, *supra* note 21, at paras. 702-34. Interestingly, the ICTR Statute imposes a negligence-based command responsibility standard, providing that a superior is responsible for a subordinate's genocidal acts if the superior "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." ICTR Statute, *supra* note 19, at art. 6(3). As a result, this standard sets the stage for a curious two-tier analysis whereby responsibility for genocide rests on a juxtaposition of specific intent with regard to genocidal *mens rea* and negligence with regard to genocidal acts (or even the mere after-the-fact failure to punish such acts). It is this combination of elements that appears to inform the *Akayesu* court's otherwise confusing statement that "[w]ith regard to the crime of genocide, the offender is culpable only when he has committed one of the offences charged under Article 2(2) of the Statute with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group." *Akayesu Judgment*, *supra* note 21, at para. 520.

The Rome Statute adopts a similar approach, holding military commanders to a "should have known" standard, but applying a somewhat stricter standard of "conscious disregard" in the case of civilian superiors. See Rome Statute, *supra* note 22, at art. 28.

complicit in someone else's complicity in his own actions. In the end, this curious approach presents an awkward circumvention of the specific intent requirement.

This is not to say, however, that the complicity approach is entirely irrational. On a certain level, it taps into an intuitive understanding that all individual perpetrators are complicit in a larger crime, the "coordinated plan of different actions" identified by Lemkin as constituting genocide.<sup>119</sup> By redefining the crime at this level, one might appeal to a standard of conspiracy liability, such as that provided by Article 25(3)(d) of the Rome Statute, which specifies that "a person shall be criminally responsible . . . for a crime within the jurisdiction of the Court if that person . . . in any . . . way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose."<sup>120</sup> As the statute further elaborates, the liability requirements are satisfied where the contribution is "intentional" and "made in the knowledge of the intention of the group to commit the crime."<sup>121</sup> Framed in these terms, the specific crime of an individual subordinate might constitute a sort of inchoate offense, performed in knowing furtherance of the larger actus reus of group destruction.

Whether the future International Criminal Court will construct this provision broadly enough to cover subordinate perpetrators remains to be seen. If it does, it will face difficult questions regarding how to place principled limitations on the potential scope of liability, particularly if the Court views entire civil and military bureaucracies either as acting with a common criminal purpose or as contributing to the criminal purpose of a leadership class.<sup>122</sup> The conspiracy framework may also be over-inclusive in a different sense. As suggested above, the extension of genocidal liability under Article 25(3)(d) requires individual genocidal acts to be viewed as inchoate contributions to a larger crime. Under the terms of the statute, this reconceptualization would extend the liability of particular contributors to the entire genocidal campaign. An individual soldier who commits a murder under orders is now guilty of the entire genocide, and not simply one genocidal act. As a "one-size-fits-all" theory of liability, this solution to the problem of subordinate liability may elide important distinctions in the scope of individual responsibility. In addition, it will fly in the face of the current practice of the ICTR, whose judgments have care-

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119. See *supra* note 60 and accompanying text.

120. Rome Statute, *supra* note 22, at art. 25(3)(d).

121. *Id.*

122. The use of conspiracy doctrine represented a particularly controversial aspect of the Nuremberg trials precisely because of its potential to greatly expand the scope of criminal liability. For an overview see Stanislaw Pomorski, *Conspiracy and Criminal Organizations*, in *The Nuremberg Trial and International Law* 213 (George Ginsburgs & V.N. Kudriavtsev eds., 1990).

fully defined genocidal crimes in terms of the particular criminal acts for which the relevant perpetrators have been directly responsible.<sup>123</sup>

### B. *Ambiguous Motives*

Even assuming, however, that an emerging international norm of complicity may assign genocidal liability to subordinates who knowingly further a superior's genocidal designs, this doctrinal development will do little to address a second type of situation: that in which a group falls prey to discriminatory extermination in a campaign of persecution that lacks a clear objective to destroy the group in its collective sense. Take, for example, the atrocities committed in Cambodia during the 1970s. Under the leadership of Pol Pot, the Communist Party of Kampuchea Center, or Khmer Rouge, killed an estimated 1.5 million people, about twenty percent of the Cambodian population, between 1975 and 1979.<sup>124</sup> Although members of one of Cambodia's ethnic groups, the Muslim Chams, were particularly targeted by the terror, the fact that the campaign was committed in the name of communist ideology makes it difficult to fit this destruction within the model of a purpose to destroy a group qua group.<sup>125</sup> Similarly, between 1962 and 1972 as many as fifty percent of Paraguay's Northern Aché Indians were killed as part of an effort to free Aché territory for economic development.<sup>126</sup> When asked about these events, the Paraguayan Defense Minister admitted the attacks but denied that the requisite genocidal intent existed since the purpose of the campaign was to further economic development and not to destroy the Aché as a group.<sup>127</sup> One can anticipate similar explanations for the Bosnian Serb Army's slaughter of thousands of unarmed Bosnian Muslim men and boys, following the capture of the U.N.-declared "safe haven" of Srebrenica. The ICTY has indicted former Bosnian Serb President Radovan Karadžić and General Ratko Mladić for genocide because of their respective roles in the attack,<sup>128</sup> but there is some evidence that the slaughter was perceived at least in part as targeting military-age men (lib-

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123. See *Kayishema Judgment*, supra note 21, at paras. 546–71; *Akayesu Judgment*, supra note 21, at paras. 704–34.

124. For a history of the Cambodian atrocities see Kiernan, supra note 15.

125. See *id.* at 460–63.

126. See Mark Münzel, *Manhunt*, in *Genocide in Paraguay* 19, 38–39 (Richard Arens ed., 1976). See also Lippman, *Fifty Years*, supra note 53.

127. Richard Arens, *A Lawyer's Summation*, in *Genocide in Paraguay* 132, 141 (Richard Arens ed., 1976) ("The Paraguayan Minister of Defense, General Marcial Samaniego, has acknowledged the attacks on the Aché nation. Addressing himself to the constituent elements of genocide as defined by the Genocide Convention, he chose to deny solely the element of 'intent to destroy.' 'Although there are victims and victimizers, there is not the third element necessary to establish the crime of genocide—that is 'intent.' Therefore, as there is no intent, one cannot speak of genocide.'").

128. See *Prosecutor v. Karadžić*, Case No. IT-95-18, Indictment (Int'l Crim. Trib. former Yugo., Nov. 14, 1995) <<http://www.un.org/icty/indictment/english/95-18-i.htm>> (visited Nov. 4, 1999).

erally understood) to avenge and deter attacks by Bosnian government forces.<sup>129</sup>

These examples are disturbing because it seems that, on some level, the tormentors devalue the lives of the victims precisely because of their group identity. Indeed, commentators have routinely relied on the combination of anti-group discrimination and massive destruction to characterize all three of these situations as genocidal.<sup>130</sup> Yet as the ILC has observed, the specific intent approach to genocide requires more than discriminatory selection accompanied by knowledge of the consequences of one's actions. Rather, "the intention must be to destroy the group . . . as a separate and distinct entity, and not merely some individuals because of their membership in a particular group."<sup>131</sup> In other words, a specific intent to destroy a group requires a particular mental attitude toward the collective survival of the group as a distinct unit. Yet in cases where the proclaimed motive of persecution is something other than that of group destruction, this attitude may be absent or difficult to identify. One might argue that such situations constitute genocide on the theory that genocidal purpose can be a means and not an end.<sup>132</sup> Certainly, one could not exonerate Hitler on the grounds that his purpose was the pursuit, for example, of "German purity" and that the destruction of Jews was merely a means to this end. But exploration of hy-

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129. See David Rhode, *Endgame: The Betrayal and Fall of Srebrenica, Europe's Worst Massacre Since World War II* 215-16, 349 (1997); see also Jan Willem Honig & Norbert Both, *Srebrenica: Record of a War Crime* 56-57, 176-77 (1996).

130. In Paraguay, the destructive acts involved the killing of Aché in organized manhunts and the selling of Aché women into slavery and prostitution. See Münzel, *supra* note 126, at 20. Richard Arens makes the case as follows: "The Aché, then, are biologically and culturally inferior, and they are inconvenient to industry and agriculture. On those two perceptions rests genocide." Arens, *supra* note 127, at 141. Elie Wiesel, normally reluctant to compare situations to the Holocaust, made an exception in this case: "I read the stories of the suffering and death of the Aché tribe in Paraguay and recognize familiar signs . . . . There are here indications, facts which cannot be denied: it is indeed a matter of a Final Solution." Elie Wiesel, *Now We Know*, in *Genocide in Paraguay* 166 (Richard Arens ed., 1976).

Events in Bosnia took place within the context of well-publicized "ethnic cleansing," involving mass murder, mass torture, mass rape, and forced displacement of Muslim and Croat civilians. For a general account of these events, see, e.g., Noel Malcolm, *Bosnia: A Short History* 234-52 (1994); David Rieff, *Slaughterhouse: Bosnia and the Failure of the West* 96-116 (1996); Laura Silber & Allan Little, *Yugoslavia: Death of a Nation* 244-57 (1996).

As regards Cambodia, historian Ben Kiernan applies a purpose standard to argue that the Khmer Rouge did in fact commit genocide against the Chams. See Kiernan, *supra* note 15, at 460-63. The key for Kiernan is evidence of particular discrimination against Chams, such as the fact that Chams were often forced to eat pork in violation of their Muslim beliefs. See *id.* at 461. From this he concludes that the Khmer Rouge targeted the Chams "for racial reasons," and thus, he extrapolates, they intended to destroy the Chams "as such." *Id.* at 462.

131. ILC Report, *supra* note 14, at 88.

132. This point recalls LaFave & Scott's distinction between motive and intent. See *supra* note 77 and accompanying text.

pothetical scenarios based on this example simply reveal the extent to which purpose to destroy a group qua group exists on a continuum that resists analytical discrimination. To take the example of the Aché, one can imagine a situation in which it would be difficult to distinguish between targeting an indigenous people because, as a collective group, they are considered to be an obstacle to economic development, and an objective to clear a certain land accompanied by a discriminatory indifference to Aché lives. Similarly, in the case of massacres motivated by political ideology one can distinguish between, on the one hand, forms of "positive persecution" that deliberately target entire groups as groups, and, on the other hand, "negative persecutions" that view certain group characteristics, such as linguistic or cultural traits, as threatening to the dominant ideology, but that are in some larger sense indifferent as to whether the group itself assimilates or is destroyed.<sup>133</sup>

Such cases draw a blurry line. And defenders of the specific intent approach will argue that the role of a strict standard is to prevent doctrinal expansion along a slippery slope that destroys the particular focus of the prohibition against genocide by converting almost every act of large-scale destruction into a form of genocide. This argument is most persuasive in cases where the threat to group survival is posed by actions lacking a discriminatory selection of victims.<sup>134</sup> However, to the extent that vic-

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133. Along these lines, Professor Lippman criticizes the Genocide Convention for imposing an intent standard that allows individuals "to evade responsibility by portraying the violence against these groups as having been based on political grounds or are able to argue that the violence was incidental to the achievement of non-genocidal purposes." Lippman, *Fifty Years*, supra note 53, at 507. Professor M. Cherif Bassiouni mounts a similar attack on the specific intent standard, focusing on the evidentiary problems of proving intent. M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* § 8.3.3.3 (1996). However, both arguments assume that the specific intent interpretation is in fact the correct interpretation of genocide's statutory definition.

134. As discussed above, concerns were raised during the Sixth Committee deliberations that an expansive definition of genocide might become simply synonymous with modern war. See supra note 89 and accompanying text. Such concerns reemerged during the Vietnam War when the so-called "Russell Tribunal," a body formed by the philosopher Bertrand Russell in 1968 to "try" the U.S. government for war crimes, accused the U.S. of genocide. See *Against the Crime of Silence: Proceedings of the International War Crimes Tribunal* (John Duffet ed., 1970). In his contribution to the proceedings, the philosopher Jean-Paul Sartre conceded that the authors of this crime may not have been "thoroughly conscious of their intentions" but insisted that the logic of American imperialism nevertheless presupposed genocide. Jean-Paul Sartre, *On Genocide*, in *Against the Crime of Silence: Proceedings of the International War Crimes Tribunal* 612, 623 (John Duffet ed., 1970). This analysis garnered much criticism even from those otherwise outraged by U.S. conduct in the war. For example, Hugo Adam Bedau argued that the case for genocide was weak under *any* theory of criminal intent. See Hugo Adam Bedau, *Genocide in Vietnam?*, in *Philosophy, Morality, and International Affairs* 3, 21-46 (Virginia Held et al. eds., 1974). Richard Falk, meanwhile, agreed that accusation of genocide were implausible under an "Indictment Model" geared toward criminal prosecution, but suggested that the U.S. might still be liable for genocide under a looser "Responsibility Model" of political and moral obligation. See Richard A. Falk, *Ecocide, Genocide, and The Nuremberg Tradition of Individual Responsibility*, in *Philosophy*,

tims already are singled out on the basis of their group membership, the requirement that broader group destruction be a desired rather than foreseen consequence may be overly strict. Here, as in the paradigmatic cases of genocide, targeted persecutions threaten the collective survival of vulnerable groups. Powerful arguments dictate that in such cases genocidal liability should not depend on the contingencies of ideological or political motives.

### III. THE PROPOSED INTERPRETATION

Part II has highlighted the conceptual difficulties inherent in interpreting genocidal intent as requiring that the perpetrator possess a specific purpose to destroy a group qua group. This Note now suggests the following alternative: In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part. Drawing upon the Genocide Convention's core concern for the permanent losses to humanity that result from the annihilation of enumerated groups,<sup>135</sup> this approach emphasizes the destructive result of genocidal acts instead of the specific reasons that move particular individuals to perform such acts. It addresses the related problems of subordinate actors and ambiguous goals by unhinging the question of genocidal liability from that of the perpetrator's particular motive or desires with regard to the group as a whole. And in the particular case of subordinate perpetrators, it does so without relying on an expansive liability framework that would attach liability for acts that are far beyond the direct responsibility of the particular perpetrator. In this way, it seeks to assert a more objective and principled standard of liability than that offered by the specific intent interpretation.<sup>136</sup>

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Morality, and International Affairs 123 (Virginia Held et al. eds., 1974). For a discussion and analysis of this debate that includes consideration of the Paraguay problem see Lippman, *Fifty Years*, supra note 53 at 476-82.

135. The centrality of this concern is evident in the Convention's preamble, which notes "that in all periods of history genocide has inflicted great losses on humanity." Genocide Convention, supra note 2, at preamble. As discussed above, Lemkin had also emphasized this consideration as a rationale for enacting the prohibition against genocide. See supra notes 60-61 and accompanying text. In addition, the Secretariat's Draft Convention explicitly stated "the purpose of this Convention is to prevent the destruction of [enumerated] groups of human beings." Secretariat's Draft, supra note 73, at 5.

136. Despite its comparatively objective approach, however, the proposed interpretation retains the subjective element of knowledge. In this way, it differs from the entirely objective, and somewhat open-ended standard advanced by Leo Kuper, who suggests that "intent is established if the foreseeable consequences of an act are, or seem likely to be, the destruction of a group." Leo Kuper, *The Prevention of Genocide* 12 (1985).

This Part elaborates on the proposed standard in light of some anticipated criticisms and obstacles. It argues first that the proposed interpretation can be read consistently with the language of the prohibition against genocide without achieving absurd results. Next, it argues that the proposed reading retains a distinct place for the prohibition against genocide within the canon of international criminal law.

#### A. *The Text of the Convention*

1. *“Intent”*. — The proposed reading of genocidal intent combines two elements: selection of group members on the basis of their group identity and knowledge regarding the destructive consequences of one’s actions for the survival of the group. As is evident from the discussion in Part I, the second of these elements—knowledge as to consequences of actions—represents one possible reading of the word “intent” in light of traditional criminal law doctrine and the drafting history of the Convention. In particular, it coincides with the default intent standard imposed by the recently-adopted Rome Statute of the ICC.<sup>137</sup> The notion of targeted selection, on the other hand, does not follow directly from the word “intent” itself. However, it may be implied from other language in the prohibition against genocide, particularly the notion that genocidal acts may involve “killing members of the group.”<sup>138</sup> Similarly, the general context of the Genocide Convention’s drafting, which displayed a consistent concern for the persecution of people on the basis of group membership, supports this conclusion.

Ultimately, however, the proposed standard represents an attempt to reconcile the confused and conflicting concerns that pervaded the drafting and application of the prohibition against genocide. The element of knowledge addresses the difficulties of requiring and proving a specific purposive attitude toward the survival of a group in its collective existence. By requiring an element of selection, the proposal reasserts that genocide is a targeted crime, and thus addresses at least some of the dangers posed by an open-ended definition that does not require specific intent to destroy a group *qua* group.

It is important to emphasize, however, that the proposed standard does not contemplate that every individual perpetrator must necessarily select victims on the basis of their group identity. Rather, it views selection as part of the general context in which victims are targeted. To the extent that an individual perpetrator may target pre-selected victims, knowledge of the criteria for selection should be enough to extend liability. Similarly, the proposed conception of selection does not establish a “motive” requirement along the lines intimated by some delegates during the drafting of the Genocide Convention. For the purposes of the proposed standard it should be irrelevant whether or not perpetrators act

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137. See *supra* note 50 and accompanying text.

138. Genocide Convention, *supra* note 2, at art. 2(a).



out of a particular anti-group animus. To return to the Srebrenica situation, for example, the possibility that Muslim identity served merely as a proxy for targeting potential combatants in the Bosnian army should be irrelevant to the question as to whether victims were selected on the basis of their group identity.<sup>139</sup>

2. *"In whole or in part"*. — The Genocide Convention's inclusion of the words "in part" clearly seems to indicate that genocide can occur when the relevant intent extends to the destruction of some but not all of the protected group.<sup>140</sup> But the text of the Convention gives little guidance as to what exactly constitutes a "part." This fact poses problems for a knowledge-based interpretation to the extent that the word "part" is interpreted as establishing a relatively low bar. At the extreme, a culprit who murders two persons because they belong to the same religious group might conceivably be guilty of genocide since the man has acted "knowing" that the manifest effect of his intentions amounts to destroying a part (i.e. two members) of a group.<sup>141</sup> It is important to recognize, however, that the same problem exists under the strict purpose standard to the extent that the perpetrator may want only to destroy a miniscule portion of a group.

The drafting history of the Genocide Convention is somewhat confusing in this regard. The wording "in whole or in part" was proposed during the Sixth Committee's meetings by the Norwegian delegate, who ambiguously explained that "the Norwegian delegation simply wanted to point out . . . that it was not necessary to kill all the members of a group in order to commit genocide."<sup>142</sup> As one commentator has observed, such language suggests that the drafters may have been less focused on intent per se than on the question of how complete the actual destruction of a group need be before a particular persecution could be described as genocidal.<sup>143</sup> At the very least, it does not appear that the drafters contemplated a radical expansion of the concept of genocide. Echoing these sentiments, the ILC has supported relatively strict construction, writing that "[i]t is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. Nonetheless, the crime of genocide by its very nature requires the intention to destroy at least a *substantial* part of a particular group."<sup>144</sup>

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139. See *supra* note 130 and accompanying text.

140. See Genocide Convention, *supra* note 2, at art. 2.

141. I use the example of two victims because the Genocide Convention defines the relevant actus reus using a plural construction: "[k]illing members of the group." *Id.* art. 2(a).

142. UN GAOR 6th Comm., 3d Sess., 73d mtg. at 97, U.N. Doc. A/c.6/Sr. 61-140. (1948).

143. See LeBlanc, *supra* note 13, at 37-38.

144. ILC Report, *supra* note 14, at 89 (emphasis added). The term "substantial part" also figures in the understanding that the United States submitted when it ratified the Convention. See Resolution of Ratification (Lugar-Helms-Hatch Sovereignty Package), S.

One might question whether a “substantial part” test is necessary in cases where the individual perpetrator either possesses or knowingly furthers a specific genocidal intent. At least to the extent that culpability is based on knowledge of destructive effects, however, it makes sense to set a high bar. In cases where genocide involves a threat of massive destruction, the requirement of a specific intent to destroy seems particularly incidental. To this end, the proposed interpretation of genocidal intent requires that the perpetrator be aware that the campaign of persecution poses a very serious threat to future survival of either the group as a whole, or a clearly defined segment of the group (such as the Kosovo Albanians or the Iraqi Kurds).

3. *Genocidal Acts.* — A different set of questions addresses the relationship between a knowledge standard and the genocidal acts enumerated by the Genocide Convention. Although this Note has generally contemplated that genocide will assume the most paradigmatic form of mass murder, it is important to recognize that the Convention’s language defines a broader scope of activities as genocidal. Article II(a), for example, merely prohibits “[k]illing members of the group,”<sup>145</sup> without specifying that such killing take the form of murder. The other enumerated acts fall short of actual killing and include ambiguously phrased acts like “[i]mposing measures intended to prevent births within the group.”<sup>146</sup> By combining such phrasing with a knowledge standard of liability it is possible to imagine strained applications of the Genocide Convention, for example to a large-scale war of attrition, conducted according to rules of war, but resulting in the decimation of a country’s population.<sup>147</sup>

One might argue that a purpose standard is necessary to contain the definition of genocide within the sphere of activities that are properly defined as criminal. But as with the definition of “in whole or in part,” the problem is somewhat separable from the question of genocidal intent. In general, the interpretive trend has been to construct the relevant genocidal acts in such a way that each involves an independent criminal wrongdoing. This is precisely what the ICTR Trial Chamber does in the *Akayesu* case when it construes the word “killing” as signifying murder.<sup>148</sup> The ILC has also sought to limit the scope of the enumerated acts, maintaining that they are all coercive in nature and must threaten the “physical” or “biological” survival of a group.<sup>149</sup>

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Exec. Rep. 2, 99th Cong., 1st sess. 27 (1985). The same language also appears in the U.S.’s implementing legislation. See 18 U.S.C. § 1091(a) (1994).

145. Genocide Convention, *supra* note 2, at art. 2(a).

146. *Id.* at art. 2(d).

147. New Zealand’s delegate to the Sixth Committee raised this point when he asked whether, in the absence of a motive requirement, a military bombing campaign could be genocidal. See *supra* note 89 and accompanying text.

148. *Akayesu* Judgment, *supra* note 21, at para. 500.

149. See ILC Report, *supra* note 14, at 91. As regards Article II(b), the ILC specifies that mental harm must involve “some type of impairment of mental faculties” and that “[t]he bodily harm or the mental harm inflicted on members of a group must be of such a

Once again, one might question whether such narrowing is necessary in cases where a specific intent is evident. Thus, for example, a military commander who chose otherwise legal bombing targets with a specific intent to destroy a group residing in the targeted areas should arguably be subject to genocidal liability despite the fact that the relevant killings may not constitute murder. To the extent that liability is based on knowledge of consequences, however, it makes sense to require that genocide involve an independent criminal wrongdoing that is merely enhanced by the existence of genocidal intent.

### B. *The Place of Genocide Within International Criminal Law*

A second objection allows that the proposed interpretation is internally coherent, but contends that it so expands the definition of genocide as to erode its special place within the hierarchy of international criminal norms. In particular, this objection points to the overlap between the proposed interpretation and the separate category of "crimes against humanity," defined most recently in the Rome Statute as any one of a variety of acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."<sup>150</sup> To this

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serious nature as to threaten its destruction in whole or in part." *Id.* With regard to Article II(d), the ILC writes that "imposing measures intended to prevent births within the group" indicates "the necessity of an element of coercion. Therefore this provision would not apply to voluntary birth control programmes sponsored by a State as matter of social policy." *Id.* at 92. As noted above, the *Akayesu* judgment found that rape could qualify under this category. See *supra* note 109.

The ILC's concern about voluntary birth control programs responds in part to claims in the 1960s that U.S.-sponsored programs exhibited a genocidal relationship to African Americans. See LeBlanc, *supra* note 13, at 112-13; Robert Weisbord, *Genocide? Birth Control and the Black American* (1975).

150. Rome Statute, *supra* note 22, art. 7. The Statute lists the following acts as constituting crimes against humanity:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

See *id.*

end, it argues that a specific intent interpretation is necessary to preserved genocide as a distinct and special crime.

As regards the formal distinction between genocide and crimes against humanity, it bears observing that any similarities between the two crimes are hardly coincidental. As the ILC has observed, the concept of genocide grew in part out of the Nuremberg Charter's definition of the crime against humanity of "persecutions on political, religious, or racial grounds."<sup>151</sup> Accordingly, commentators typically view genocide as a special type of crime against humanity rather than as an entirely distinct crime.<sup>152</sup> And particularly now that the definition of crimes against humanity is understood to extend to acts committed during peacetime or in connection with purely internal conflicts,<sup>153</sup> it is virtually certain that any act of genocide will also constitute a crime against humanity, no matter how one construes genocide's mens rea requirements.

But despite inevitable similarities, it is equally clear that genocide is a special crime. As the ICTR noted in its *Akayesu* judgment, genocide and crimes against humanity "have different elements, and, moreover, are intended to protect different interests. The crime of genocide exists to protect certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations from persecution."<sup>154</sup> It is the threat to group survival, then, that distinguishes genocidal liability and that, under the terms of the Genocide Convention, imposes upon a states a positive legal obligation to undertake preventative and punitive measures.<sup>155</sup> This distinction remains under the proposed interpretation, which advances the interests of the prohibition against genocide by proscribing targeted actions that

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151. ILC Report, supra note 14, at 86; Nuremberg Charter, supra note 11, at art. 6(c).

152. See, e.g., Kofi Annan, Address at the Occasion of the Signing of the Rome Statute <<http://www.un.org/icc>> (stating that genocide is a crime against humanity); Kayishema Judgment, supra note 21, at para. 39 (1999) ("The crime of genocide is a type of crime against humanity.").

153. The category of crimes against humanity was first introduced in the Nuremberg Charter. As discussed above, the Charter restricted its jurisdiction to crimes committed in connection with the Second World War, thus suggesting that a "war nexus" was central to the definition of the crime. See supra note 11 and accompanying text. In addition, the ICTY Statute asserts the existence of an armed conflict as a jurisdictional requirement. See ICTY Statute, supra note 19, art 5. However, in the *tadić* Judgment, supra note 27, at para. 627, the deciding Trial Chamber stated that the Statute had "defined the crime in Article 5 more narrowly than necessary under customary international law." For a recent survey of the evolution of crimes against humanity as it pertains to the war nexus, see Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 Colum. J. Transnat'l L. 787 (1999).

154. See *Akayesu* Judgment, supra note 21, at para 469.

155. This obligation may also exist as a peremptory norm, independent of any conventional obligation. See supra note 14 and accompanying text. One argument dictates that the existence of genocide provides a legal basis for international military intervention. See Lori Lyman Bruun, Comment, *Beyond the 1948 Convention: Emerging Principles of Genocide in Customary International Law*, 17 Md. J. Int'l L. & Trade 193, 211-18 (1993).

threaten the survival of at least a substantial part of specified groups. The requirements of crimes against humanity, on the other hand, are much looser, requiring only the existence of a widespread *or* systematic attack on any civilian population.<sup>156</sup> Thus, an attack that is systematic but not widespread is sufficient to trigger liability. In addition, the only connection required between the perpetrator's crimes and this jurisdictional element is that the perpetrator know those crimes are part of the attack. There is no requirement that the perpetrator have any knowledge regarding the consequences of his acts for the collective survival of any particular group. As such, in most circumstances crimes against humanity will not rise to the level of the proposed model of genocide.

#### CONCLUSION

In 1950, the French Prosecutor Champetier de Ribes declared that the Nazis' crimes "were so monstrous, so undreamt of in history throughout the Christian era up to the birth of Hitlerism, that the term 'genocide' has had to be coined to define it."<sup>157</sup> Undeniably, the word "genocide" carries with it a symbolic and cultural resonance. Its definition is as much about questions of history and collective memory as it is about assigning individual criminal responsibility. The drafters of the Genocide Convention did not merely codify a crime; they codified a discourse for cataloguing human evil.

The interpretation of genocidal intent faces obstacles as a principled means of determining individual liability where mass atrocities are at stake. When faithfully applied, its stringency invites obfuscation by defendants, allowing them to escape genocidal liability through their manipulation of ideology and hierarchy. As an alternative interpretation of genocidal intent, the proposed standard of genocidal knowledge is worth considering. It finds support in the history of criminal law and, however indecisively, in the preparatory works of the Genocide Convention. It serves the Convention's purpose of protecting groups while simultaneously retaining for genocide a distinct identity within the canon of international criminal law.

The creation of the ICC augurs a new era of international criminal enforcement. It also offers a crucial opportunity to resolve interpretive questions concerning the substantive definitions of international crimes. If the prohibition against genocide is to become an effective and principled tool for assigning criminal liability, a reconsideration of genocidal intent is necessary.

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156. See Rome Statute, *supra* note 22, at art. 7. In this respect the ICC Statute upholds the jurisprudence of the ICTY. See *Tadić* Judgment, *supra* note 27, at para. 646.

157. XIX Trial of the Major War Criminals Before the International Military Tribunal 531 (1948).