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“Planning” under international criminal law specifically addressing the legal elements and the scope of the term to “plan” a crime under international criminal law.

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MEMORANDUM FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

ISSUE: "PLANNING" UNDER INTERNATIONAL CRIMINAL LAW

SPECIFICALLY ADDRESSING THE LEGAL ELEMENTS AND THE SCOPE OF THE TERM TO "PLAN" A CRIME UNDER INTERNATIONAL CRIMINAL LAW.

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I. INTRODUCTION

A. SCOPE

This memorandum discusses *planning* as a mode of individual criminal responsibility under international criminal law. It covers the legal elements of the crime of planning and illustrates the various conduct associated with planning within the context of war crimes. Since the bulk of today's jurisprudence on this topic comes mainly from the ad hoc tribunals, the memorandum is limited to case law from the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Court for Rwanda ("ICTR").

B. SUMMARY OF CONCLUSIONS

i. International Tribunals Do Not Rely on *Planning* to Obtain a Conviction.

Although the international tribunals have indicted a number of individuals in recent years for the planning of war crimes, no individual has been convicted solely on the charge of "planning." One key reason is that the prosecution usually can obtain a conviction without proving planning. Since the prosecution typically includes all the forms of criminal participation—planning, instigating, ordering, committing, and aiding and abetting—in an indictment, planning often becomes the least important among the charges. For example, in the case of Jean Mpambara, the ICTR Trial Chamber recognized that despite the indictment of Mpambara on planning, the prosecution's closing brief and final arguments made few, if any references, to "planning."[1]

This memo was prepared for the Extraordinary Chambers in the Courts of Cambodia. It addresses "planning" under International Criminal Law, specifically the legal elements and the scope of the term to "plan" a crime.

ii. The Lack of Reliance on *Planning* Has Created a Void in the Jurisprudence of this Mode of Individual Criminal Responsibility.

The ad hoc tribunals have spent little time discussing the legal elements of planning and applying the elements to the facts of cases. A few seminal cases in the ICTY and ICTR make up the bulk of the jurisprudence on the physical and mental elements of planning. Furthermore, the tribunals have not adequately distinguished planning from some other forms of criminal participation, namely aiding and abetting and complicity.[2]

iii. Despite the Cursory Treatment of *Planning* in the Ad Hoc Tribunals, this Mode of Criminal Participation Presents Unique Challenges and Opportunities for the Prosecution and Defense.

After reviewing the ICTY and ICTR case law, I identified the most common factors that the trial and appeals chambers consider when discussing the role of the accused in planning. Based on these, I created categories of objective and subjective indicators of planning. The objective factors to consider are the accused's: (1) communications, (2) use of weapons and offensive use of force, (3) physical presence at the scene of the crime, (4) position of authority, and (5) relationships with other war criminals. I further divided the category of communications into (a) meetings, (b) public statements, and (c) letters, lists, and other documents. The only subjective indicator of an accused's planning is evidence of a shift or change in attitude.

In analyzing these various factors, both the prosecution and defense should answer the following key questions.

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[1] Prosecutor v. Jean Mpambara, Case No. ICTR-01-65-T, Judgment, fn. 2 (Sep. 11, 2006) [reproduced in accompanying notebook at Tab 27].

[2] See William A. Schabas, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 285-303 (Cambridge Univ. Press 2000) for an extensive discussion of complicity [reproduced in accompanying notebook at Tab 4].

1. Did the accused's conduct contribute substantially to the commission of the crime (i.e., the requisite actus reus)? An accused's conduct need not have a direct effect on the commission of the crime.
2. Did the accused design a crime with the intent that the crime be committed, or did the accused design an "an act or omission" with the awareness of the substantial likelihood that the commission of a crime would result (i.e., the requisite mens rea)?
3. Are witnesses able to describe specifics, for example, location, time, people present, meeting agenda, and degree of accused's participation in meetings?
4. Is there a recognizable pattern or inconsistencies in the accused's actions?

Moreover, it is useful to approach the events in a chronological order. The ICTY and ICTR Trial Chambers repeatedly emphasize in their judgments that even if the accused is not liable at one stage of the planning, his liability may still be decided based upon subsequent events.[3]

II. "PLANNING" WITHIN THE INTERNATIONAL CRIMINAL TRIBUNAL STATUTES

Planning is a form of criminal participation in international law. Article 7(1) of the ICTY Statute[4][5] and Article 6(1) of the ICTR[6][7] Statute both include *planning* among other modes of

[3] Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 458 (June 7, 2001) [reproduced in accompanying notebook at Tab 22].

[4] ICTY Statute art. 7(1) (stating, "[a] person who *planned*, instigated, ordered, committed or otherwise aided and abetted in the planning preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute shall be individually responsible for the crime." (emphasis added)) [reproduced in accompanying notebook at Tab 7].

[5] *Id.* at art. 8 (addressing the Former Yugoslavia Tribunal's territorial and temporal jurisdiction, which extends to crimes committed within the former Socialist Federal Republic of Yugoslavia—including its land surface, airspace, and territorial waters. The time period covered begins on January 1, 1991).

[6] ICTR Statute Art. 6(1) (stating, "[a] person who *planned*, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the

participation for which an accused person may incur individual criminal responsibility. In all, there are five forms of participation—planning, instigating, ordering, committing, and aiding and abetting—that cover various stages in the commission of a crime.

A. PLANNING: DEFINITIONS AND LEGAL ELEMENTS

Our current understanding of planning as a form of criminal participation, for which an accused may be held individually responsible, primarily is rooted in the recent jurisprudence of the ICTY and ICTR Tribunals. Beginning with the trial judgment of the ICTY in the *Tadić* case,[8] the ad hoc tribunals have been developing and refining the legal elements of the various modes of criminal participation, to include planning. The Trial Chamber in *Tadić* reviewed a number of international conventions[9] and post-World War II judgments[10] to identify a set of criteria that would assist the Chamber in linking the conduct of the accused to crimes that he might have played a role in, but did not physically perpetrate himself.[11] The Chamber concluded the following:

> First, there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by *planning*, instigating, ordering, committing or otherwise aiding and abetting in the commission of a crime.

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present Statute shall be individually responsible for the crime." (emphasis added)) [reproduced in accompanying notebook at Tab 8]..

[7] *Id.* at Art. 7 (addressing the Rwanda Tribunal's territorial and temporal jurisdiction, which extends to crimes committed within Rwanda—including its land surface and airspace—and neighboring states. The time period covered is between January 1, 1994 and December 31, 1994).

[8] Gideon Boas et al., INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY: FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW, vol. 1, 344 (Cambridge Univ. Press 2007) [reproduced in accompanying notebook at Tab 5] (citing Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (May 7, 1997) [reproduced in accompanying notebook at Tab 9]).

[9] Tadić, Case No. IT-94-1-T at ¶ 663-64, 666 (referenced in Boas, *supra* 8, at 345) [reproduced in accompanying notebook at Tab 9].

[10] *Id.* at ¶ 675-87.

[11] Tadić, Case No. IT-94-1-T at ¶ 673 (referenced in Boas, *supra* 8, at 344) [reproduced in accompanying notebook at Tab 9].

> Second, the prosecution must prove that there was participation in that the conduct of the accused contributed to the commission of the illegal act.[12]

As this statement describes, each mode of criminal participation has two parts—a mental element or mens rea and a physical element or actus reus. In order to establish individual criminal responsibility, the ICTR Trial Chamber reiterated in the *Kayishema and Ruzindana* judgment that the prosecution must satisfy a "two stage test": a demonstration of "(i) participation, that is the accused's conduct contributed to the commission of an illegal act, and (ii) knowledge or intent, that is awareness by the actor of his participation in a crime."[13] The following sections explain in detail these physical and mental elements associated with the planning of a crime under international criminal law.

i. Actus Reus

Generally, an individual can be held liable for planning a crime only when that crime is actually perpetrated.[14] For example, in the ICTY *Kordić and Čerkez* case, the Appeals Chamber explained that "[t]he *actus reus* of 'planning' requires that one or more persons design the criminal conduct constituting one or more statutory crimes *that are later perpetrated*."[15] Similarly, the ICTR Trial Chamber in the *Mpambara* judgment stated, "[p]lanning is the formulation of a design by which individuals *will execute a crime*."[16]

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[12] Tadić, Case No. IT-94-1-T at ¶ 674 (emphasis added) (quoted in Boas, *supra* note 8, at 345) [reproduced in accompanying notebook at Tab 5].

[13] Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 198 (May 21, 1999) [reproduced in accompanying notebook at Tab 21].

[14] Boas, *supra* note 8, at 357 n.91 [reproduced in accompanying notebook at Tab 5].

[15] Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 26 (Dec. 17, 2004) (emphasis added) [reproduced in accompanying notebook at Tab 14].

[16] Mpambara, ICTR-01-65-T at ¶ 20 (Sep. 11, 2006) (emphasis added) [reproduced in accompanying notebook at Tab 27].

The ICTY and ICTR Statutes explicitly state that an individual becomes liable for planning the following crimes only when the offenses have been committed: Crimes against Humanity,[17] Violations of Article 3 Common to the Geneva Convention and of Additional Protocol II,[18] Grave Breaches of the Geneva Conventions of 1949,[19] and Violations of the Laws and Customs of War. There is, however, an exception in the ICTY and ICTR Statutes for the crime of genocide. Given the seriousness of the crime of genocide, an individual may incur criminal liability for merely planning attempted genocide.[20] The ICTR Trial Chamber in the *Musema* judgment explained this as follows:

> The Chamber observes that the principle of individual criminal responsibility, under Article 6(1), implies that the planning or the preparation of a crime actually must lead to its commission. However, the Chamber notes that Article 2(3) of the Statute, pertaining to the crime of genocide, foresees the possibility for the Tribunal to prosecute attempted genocide, among other acts. Since attempt is by definition an inchoate crime, inherent in the criminal conduct *per se*, it may be punishable as a separate crime irrespective of whether or not the intended crime is accomplished.[21]

[17] Crimes Against Humanity are covered by ICTY Statute Art. 5 [reproduced in accompanying notebook at Tab 7], and ICTR Statute Art. 3 [reproduced in accompanying notebook at Tab 8].

[18] Violations of Art. 3 Common to the Geneva Convention and of Additional Protocol II are covered by ICTR Statute Art. 4 [reproduced in accompanying notebook at Tab 8].

[19] Grave Breaches of the Geneva Conventions of 1949 are covered by ICTY Statute Art. 2 [reproduced in accompanying notebook at Tab 7].

[20] Genocide is covered by ICTY Statute Art. 4 [reproduced in accompanying notebook at Tab 7], and ICTR Statute Art. 2 [reproduced in accompanying notebook at Tab 8]. *See* Boas, *supra* note 8, at 358 n.91 [reproduced in accompanying notebook at Tab 5] (quoting Antonio Cassese, INTERNATIONAL CRIMINAL LAW 193 (2003) ("[I]t would seem that the gravity of international crimes (or at least the most serious among them) may warrant the conclusion that planning the commission of one or more such crimes is punishable *per se* even if the crime is not actually perpetrated.").

[21] Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 115 (Jan. 27, 2000) [reproduced in accompanying notebook at Tab 20]. *See also* Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶ 34 (Dec. 6, 1999) [reproduced in accompanying notebook at Tab 23].

(a) An Accused's Conduct Must Make a Substantial Contribution to the Commission of the Crime

Although the Trial Chamber in the *Tadić* judgment only addressed planning in a cursory manner, its extensive treatment of aiding and abetting has informed subsequent trial chambers on the topic of planning. The Chamber concluded in *Tadić* that in order for an accused to be found culpable of aiding and abetting his conduct must have had a "direct and substantial effect on the commission of the illegal act."[22] The *Tadić* judgment acknowledged that there is no definition of "substantial," but that the Nuremberg cases and other sources of customary law make "clear" that the "substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime."[23] Within the context of aiding and abetting, the Trial Chamber in the *Tadić* case provided the following examples to illustrate the point.

> [I]f there had been no poison gas or gas chambers in the Zyklon B cases, mass exterminations would not have been carried out in the same manner. The same analysis applies to the cases where the men were prosecuted for providing lists of names to German authorities. Even in these cases where the act in complicity was significantly removed from the ultimate illegal result, it was clear that the actions of the accused had a *substantial and direct effect on the commission of the illegal act*. . . .[24]

In the subsequent ICTY *Čelebići*[25] and *Aleksovski* cases,[26] the Trial Chambers relied on the analysis in the *Tadić* judgment and "appear to have extended it to *planning*, instigating, and

[22] Tadic, Case No. IT-94-1-T at ¶ 688-89 [reproduced in accompanying notebook at Tab 9].

[23] *Id.* at ¶ 688.

[24] *Id.* (emphasis added).

[25] Prosecutor v. Delalić, Mucić, Delić and Landžo, Case No. IT-96-21-T, Judgment (Nov. 16, 1998) [hereinafter Čelibići Trial Judgment] [reproduced in accompanying notebook at Tab 15].

[26] Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgment (June 25, 1999) [reproduced in accompanying notebook at Tab 12].

ordering,"[27] beyond the limited scope of aiding and abetting in *Tadić*. The *Čelebići* judgment specifically endorsed the direct and substantial requirement, stating:

> [I]n order for there to be individual criminal responsibility for degrees of involvement in a crime under the Tribunal's jurisdiction . . . . The requisite actus reus for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have '*a direct and substantial effect on the commission of the illegal act*.'[28]

(b) An Accused's Conduct Does Not Need to Directly Contribute to the Commission of the Crime.

The ICTY Trial Chamber in the *Aleksovski* judgment abandoned the "direct" portion of the contribution element and explained that "[i]t is unnecessary to prove that a cause-effect relationship existed between participation and the commission of the crime. The act of participation need merely have *significantly* facilitated the perpetration of the crime."[29] Presumably, the Trial Chamber considered "significantly" and "substantially" to be synonymous terms.

Moreover, the ICTR Trial Chamber in the *Kayishema* and *Ruzindana* case espoused a similar view, stating, "[i]t is not presupposed that the accused must be present at the scene of the crime, nor that his contribution be a direct one."[30] Rather, the Trial Chamber emphatically

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[27] Boas, *supra* note 8, at 345 n.9 (emphasis added) [reproduced in accompanying notebook at Tab 5] (referencing Čelibići Trial Judgment, Case No. IT-96-21 at ¶ 326; Aleksovski, Case No. IT-95-14/1-T at ¶ 61).

[28] Čelibići Trial Judgment, Case No. IT-96-21-T at ¶ 326 (emphasis added) [reproduced in accompanying notebook at Tab 15].

[29] Aleksovski, Case No. IT-95-14/1-T at ¶ 61(emphasis added) [reproduced in accompanying notebook at Tab 12].

[30] Kayishema & Ruzindana, Case No. ICTR-95-1-T at ¶ 200 [reproduced in accompanying notebook at Tab 21].

asserted, "[w]hat is clear is that the contribution to the [criminal] undertaking be a substantial one, and this is a question of fact for the Trial Chamber to consider."[31]

With respect to planning, specifically, the ICTR Trial Chamber in the *Semanza* judgment also rejected the notion that an accused's conduct must "directly" effect the commission of a crime. In that case, the Trial Chamber only required that an accused's "level of participation must be *substantial*, such as formulating a criminal plan or endorsing a plan proposed by another."[32]

ii. Mens Rea

The mental element or mens rea essentially is the same for all five modes of criminal participation. The ICTR Trial Chamber in the *Akayesu* judgment explained that "[t]he forms of participation referred to in Article 6 (1) [of the ICTR Statute] cannot render their perpetrator criminally liable where he did not act knowingly, and even where he should have had such knowledge."[33]

In 2000, the ICTY Trial Chamber in the *Blaškić* case formulated a new interpretation of the mens rea requirement. The Trial Chamber stated, "[p]roof is required that whoever *planned*, instigated, or ordered the commission of a crime possessed the criminal intent, that is, that he *directly* or *indirectly* intended that the crime in question be committed."[34] In introducing this new concept of criminal intent, the Chamber failed to explain what is meant by direct and

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[31] *Id.* at ¶ 199.

[32] Prosecutor v. Semanza, Case No. ICTR-97-20-T , Judgment and Sentence, ¶ 380 (May 15, 2003) (emphasis added) [reproduced in accompanying notebook at Tab 25].

[33] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 479 (Sept. 2, 1998) [reproduced in accompanying notebook at Tab 24].

[34] Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 278 (March 3, 2000) (emphasis added) [reproduced in accompanying notebook at Tab 11]. *See* Boas, *supra* note 8, at 347 [reproduced in accompanying notebook at Tab 5].

indirect intent. Nearly one year later, the ICTY Trial Chamber in the *Kordić* and *Čerkez* judgment reiterated this same "direct and indirect intent dichotomy."[35] The Trial Chamber stated, without further explanation, "[a]n accused will only be held responsible for *planning*, instigating or ordering a crime if he *directly* or *indirectly* intended that the crime be committed."[36]

A few months later, the ICTR Trial Chamber in the *Bagilishema* case referred only to general criminal intent—"that the [accused] intended that the crime be committed."[37] Finally, in December 2004, the ICTY Appeals Chamber in the *Kordić* and *Čerkez* judgment provided the most nuanced description of the mental element. The Appeals Chamber held that mens rea could be established "if the perpetrator acted with *direct* intent in relation to his own *planning*, instigating, or ordering."[38] Further, the Appeals Chamber added, specifically with respect to planning:

> [A] person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite mens rea for establishing responsibility under Article 7(1) of the [ICTY] Statute pursuant to planning. Planning with such awareness has to be regarded as accepting that crime.[39]

The Appeals Chamber's decision to describe direct intent in one statement, followed by a discussion of the accused's degree of "awareness," appears to be an attempt to articulate the difference between direct intent and indirect intent. Together, these two statements—evidence of

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[35] Boas, *supra* note 8, at 348 [reproduced in accompanying notebook at Tab 5].

[36] Kordić & Čerkez, IT-95-14/2-T at ¶ 386 (Feb. 26, 2001) [reproduced in accompanying notebook at Tab 13].

[37] Bagilishema, ICTR-95-1A-T at ¶ 31 [reproduced in accompanying notebook at Tab 22].

[38] Kordić & Čerkez, IT-95-14/2-A at ¶ 29 (Dec. 17, 2004) (emphasis added) [reproduced in accompanying notebook at Tab 14].

[39] *Id.* at ¶ 31.

direct intent to bring about the commission of the crime or awareness of the substantial likelihood of the commission of the crime—establish the most explicit mens rea standard for planning, to date.[40]

Impact of the Indirect-Intent Mental Element on the Physical Element of Planning

The Appeals Chamber in the *Kordić* and *Čerkez* judgment described the actus reus of planning as "requir[ing] that one or more persons *design the criminal conduct* constituting one or more statutory crimes that are later perpetrated."[41] When the Appeals Chamber chose to factor the accused's degree of awareness into the mental element of planning, it created "an alternative physical element" for planning. That is, instead of designing the criminal conduct, the accused "need only design 'an act or omission,'[42] provided he is aware of the substantial likelihood that the physical perpetrator will commit a crime in the realization of that act or omission."[43]

To summarize, an accused may be held liable for planning only if: (1) his conduct substantially contributes to the commission of the crime; and (2) the accused designs a crime with the intent that the crime be committed or the accused designs "an act or omission" with the awareness of the substantial likelihood that the commission of a crime would result. Finally, the accused's conduct need not have a direct effect on the commission of the crime.

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[40] *See* Boas, *supra* note 8, at 352 n.54 (explaining that many judgments in the ad hoc tribunals have failed to mention any mental element at all for planning even when they have discussed the physical elements of planning). *See generally* Boas, *supra* note 8, at 352, 429 (discussing the lack of jurisprudence in the ad hoc tribunals with respect to the requisite mental elements for specific-intent crimes, such as genocide and persecution as a crime against humanity) [reproduced in accompanying notebook at Tab 5].

[41] Kordić & Čerkez, IT-95-14/2-A at ¶ 26 (emphasis added) [reproduced in accompanying notebook at Tab 14].

[42] *Id.* at ¶ 31.

[43] Boas, *supra* note 8, at 353.

iii. Unique Attributes of Planning as a Mode of Criminal Participation

Antonio Cassese, international law professor and former Judge and President of the ICTY, describes, in general terms, that "[p]lanning consists of devising, agreeing upon with others, preparing, and arranging for the commission of a crime."[44] *Archbold on International Criminal Courts* elaborates further that "[e]ven though an individual may not physically commit a crime under the Statute [e.g., ICTY or ICTR], he or she will still be liable when he participates in planning a crime."[45]

(a) The Number of People it Takes to Make a "Plan"

In the first ICTR judgment, *Prosecutor v. Akayesu*, the Trial Chamber defined *planning* as "implying that *one or several persons* contemplate designing the commission of a crime at both the preparatory and execution phases."[46] Therefore, one person, acting alone, is capable of planning and could be culpable for the commission of a crime. For example, in the case of Jean-Bosco Barayagwiza, the ICTR Trial Chamber convicted him of essentially single-handedly planning the extermination of Tutsi civilians in the town of Gisenyi, Rwanda.[47] By contrast, the ICTY Trial Chamber convicted Mladen Naletilić, a Bosnian Croat paramilitary commander, for his role in "drawing up, *together with others*, a plan to transfer the Muslim civilian population out of the Bosnian village of Sovići."[48]

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[44] Antonio Cassese, INTERNATIONAL CRIMINAL LAW 225 (Oxford Univ. Press 2d ed. 2008) [reproduced in accompanying notebook at Tab 2].

[45] ARCHBOLD INTERNATIONAL CRIMINAL COURTS 503 (Cambridge Univ. Press 2006) [reproduced in accompanying notebook at Tab 1].

[46] Akayesu, ICTR-96-4-T at ¶ 480 (emphasis added) [reproduced in accompanying notebook at Tab 24].

[47] Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003) [hereinafter Barayagwiza Trial Judgment] [reproduced in accompanying notebook at Tab 26]. *See* discussion *infra* pp. 33-4.

[48] Boas, *supra* note 8, at 355 (emphasis added) (referencing Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-T, Judgment, ¶ 127, 131-32 (Mar. 31, 2003) [reproduced in accompanying notebook at Tab 19]).

(b) Liability for either Creating or Endorsing a Plan

To reiterate, the ICTR Trial Chamber in the *Akayesu* judgment stated that the accused must "[c]ontemplate designing the commission of a crime at both the preparatory and execution phases." No ad hoc tribunal has explained what this phrase means, although a number of judgments have held the same view.[49] In *Forms of Responsibility in International Law,* the authors offer one possible meaning: "[t]hat the planner must design all aspects of the criminal activity, including not only when and how the planned conduct will be carried out, but also the preliminary steps the physical perpetrator must take in order to carry through with the conduct at a later time."[50]

Moreover, an individual may be culpable for his endorsement of a plan. In 2001, the ICTR Trial Chamber Judgment in the *Bagilishema* case first held that "[t]he level of participation must be substantial, such as formulating a criminal plan or endorsing a plan proposed by another."[51] For example, in the case of Dario Kordić, a senior Bosnian Croat politician, the Appeals Chamber upheld the lower chamber's conviction, which found him guilty of planning.[52] The Appeals Chamber determined that Kordić, "[b]y approving the general criminal plan

[49] *Accord* Naletilić and Martinović, IT-98-34-T at¶ 59 [reproduced in accompanying notebook at Tab 19]); Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶ 601 (Aug. 2, 2001) [reproduced in accompanying notebook at Tab 17]; Blaškić, IT-95-14-T at ¶ 279 [reproduced in accompanying notebook at Tab 11]; Musema, ICTR-96-13-T at ¶ 119) [reproduced in accompanying notebook at Tab 20]; Rutaganda, ICTR-96-3-T at ¶ 37 [reproduced in accompanying notebook at Tab 23].

[50] Boas, *supra* note 8, at 356 [reproduced in accompanying notebook at Tab 5].

[51] Bagilishema, ICTR-95-1A-T at ¶ 30 [reproduced in accompanying notebook at Tab 22]. *Accord* Mpambara, ICTR-01-65-T at ¶ 20 [reproduced in accompanying notebook at Tab 27]; Semanza, ICTR-97-20-T at ¶ 380 [reproduced in accompanying notebook at Tab 25].

[52] Kordić & Čerkez, IT-95-14/2-A at ¶ 982 [reproduced in accompanying notebook at Tab 14]. *See* discussion *infra* pp. 25.

discussed on the 15 April 1993 meeting, acted with the awareness that there was a substantial likelihood that the criminal conduct would be repeated."[53]

(c) Precluded from Being Held Liable for both Planning and Physically Committing the Same Crime.

Recent judgments from the ad hoc tribunals establish that an accused may not be liable for planning a crime and for physically perpetrating that same crime, for the reason that the actual commission of the crime "absorbs" the lesser crime of planning.[54] As a result, a tribunal may only take into account a defendant's planning as an aggravating factor in sentencing.[55]

(d) How Planning Differs from Complicity and Aiding & Abetting

The ICTY Trial Chamber in the *Akayesu* Judgment stated, "[p]lanning is similar to the notion of *complicity* in Civil law, or *conspiracy* under Common Law . . . . But the difference is that planning, unlike complicity or plotting can be an act committed by one person."[56] This definition focuses on the key element common to complicity and conspiracy—an agreement between two or more persons to commit a crime—that distinguishes them from planning. When two or more people carry out a plan, no agreement is required.

Separately, William Schabas, Professor of International Law and Director of the Irish Centre for Human Rights, argues that it is "inaccurate to associate 'planning' with conspiracy as it is intended in the common law, because conspiracy is an inchoate crime. 'Planning' within the

[53] *Id.*

[54] Cassese, *supra* note 44, at 226 [reproduced in accompanying notebook at Tab 2].

[55] Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 443 (July 31, 2003) [reproduced in accompanying notebook at Tab 16]; Kordić and Čerkez, Case No. IT-95-14/2-T at ¶ 386-87 [reproduced in accompanying notebook at Tab 13].

[56] Akayesu, ICTR-96-4-T at ¶ 480 (emphasis in original) [reproduced in accompanying notebook at Tab 24].

meaning of the statutes of the ad hoc tribunals is only criminal if the underlying crime is committed."[57] To elaborate on Schabas' point, an accused cannot incur liability for having engaged in planning if his planning did not contribute substantially to the actual commission of a crime—with the exception provided for attempted genocide. Moreover, unlike conspiracy, an individual cannot be convicted of both planning the crime and the actual commission of the crime.

There is little legal scholarship or jurisprudence in the ad hoc tribunals that explores the differences between the crime of aiding and abetting and the crime of planning in international criminal law. Schabas explains that aiding and abetting in the ICTY and ICTR Statutes is a "common law formulation of complicity."[58] *Black's Law Dictionary* defines an aider and abettor as "[o]ne who assists another in the accomplishment of a common design or purpose; he must be aware of, and consent, to such design or purpose."[59] There appears to be an agreement between the aider and abettor and the person he is assisting, which differentiates aiding and abetting from the crime of planning where no agreement is necessary.

In addition, according to the ICTR *Akayesu* judgment, "[a]iding means giving assistance to someone. Abetting . . . would involve facilitating the commission of an act by being sympathetic thereto."[60] The Trial Chamber in *Akayesu* concluded that either aiding or abetting alone is "sufficient to render the perpetrator criminally liable."[61] However, the ICTY in the

[57] Schabas, *supra* note 2, at 292 [reproduced in accompanying notebook at Tab 4].

[58] *Id.* at 292-93.

[59] BLACK'S LAW DICTIONARY 68-69 (6th ed. 1990) [reproduced in accompanying notebook at Tab 6].

[60] Akayesu, ICTR-96-4-T at ¶ 484 [reproduced in accompanying notebook at Tab 24].

[61] *Id.*

Tadić case made no distinction between the two terms, choosing instead to address them collectively.[62]

III. CASE STUDIES

The following case examples illustrate the type of facts the ad hoc tribunals consider when assessing allegations of planning. The cases also demonstrate the type and quantity of evidence that the tribunals have either found to be convincing or insufficient in establishing a conviction. The case explanations include an analysis of relevant arguments made by the prosecution and defense. Notably, the ICTR Trial Chamber's extensive treatment of planning in the *Bagilishema* case offers many insights and lessons for the future.

The discussion centers on five indicators of planning—objective and subjective factors—that the ad hoc tribunals have raised when assessing an individual's involvement in planning. The objective factors are: (1) communications, (2) use of weapons and offensive use of force, (3) physical presence at the scene of the crime, (4) position of authority, and (5) relationships with other war criminals. Finally, there is a subjective factor—an accused's attitude or change in attitude—that may reveal signs of his intent to plan, and provide a better understanding of his actions overall.

A. COMMUNICATIONS

Communications probably is the most common factor that the ad hoc tribunals address when discussing allegations of planning. Naturally, when people engage in planning they tend to discuss their plan with others, for example in private meetings or in public statements. They also may document their planning preparations in writing, for example by drafting lists or

[62] Tadić, IT-94-1-T at ¶ 689 [reproduced in accompanying notebook at Tab 9].

memoranda. As a result, communications may be the most tangible of all the factors because of the likelihood that there is either documentation of a plan or portions of a plan, and the chance that there are eyewitnesses who were present when the plan was being formulated.

i. Meetings

(a) Ignace Bagilishema (ICTR)—Attendance at Meetings Insufficient to Establish Culpability of Accused; Absence of Evidence Demonstrating Genocidal Intent Results in Acquittal.

In the ICTR case of Ignace Bagilishema, the prosecution repeatedly argued that the meetings Bagilishema attended were dispositive of his criminal liability for "planning."[63] While meetings are indicative of "planning," their mere occurrence provides probative value only. The prosecution must provide additional evidence—such as meeting minutes, timing of the meeting, list of attendees, and an account of the discussion that took place—to support the contention that the presence of the accused at a meeting demonstrates his participation in planning.

Ignace Bagilishema entered the Rwandan civil service in 1978. He first worked for the Ministry of Youth. In 1980, he was appointed *Bourgmestre*, local mayor, of Mabanza commune in the Kibuye Prefecture, a position that he held until mid-July 1994 when he fled the country for former Zaire.[64] Bagilishema's indictment alleged that, following the news of the death of Rwandan President Habyarimna, Bagilishema attended several meetings between April 9-13, 1994, with the Prefect of Kibuye, Clement Kayishema, and other local authorities, including the Commanding officer of the Gendarmerie Nationale stationed in Kibuye.[65] The Trial Chamber considered each meeting separately to determine if the accused, at any point, participated in the planning of genocide or crimes against humanity.

[63] Bagilishema, ICTR-95-1A-T at ¶ 458 [reproduced in accompanying notebook at Tab 22].

[64] *Id.* at ¶ 7, 137 [reproduced in accompanying notebook at Tab 22].

[65] *Id.* at ¶ 347.

The Trial Chamber concluded that the prosecution failed to present "any evidence to the effect that the meeting of 9 April 1994 was held in furtherance of a plan to massacre Tutsi."[66] Although the accused admitted to attending a meeting in Kibuye town on April 9, 1994, the prosecution presented no evidence—neither meeting minutes nor witnesses—to establish Bagilishema's involvement in *planning* genocide.[67] The prosecution presented a weak argument in its rebuttal, claiming that the absence of meeting minutes should not exclude the possibility that the attendees developed a genocidal plan on April 9.[68] The Trial Chamber appropriately rejected this argument, focusing instead on the evidence provided by the defense.

The defense introduced a letter and report on the security situation in Kibuye—both dated April 10, 1994—to support the argument that the meeting in question "addressed conventional security concerns" rather than the *planning* of genocide.[69] The report described the gathering of the security committee, including members of the restricted Prefectural Security Council, *bourgmestres*, and representatives of the United Nations Assistance Mission in Rwanda ("UNAMIR").[70] Bagilishema's testimony corroborated this information, acknowledging the presence of UNAMIR at the 9 April meeting.[71]

Bagilishema's indictment also alleged that he met with Prefect Clement Kayishema on April 12, 1994, during which Kayishema told him that his commune was the only one left in

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[66] *Id.* at 352.

[67] *Id.* at 348-49.

[68] *Id.* at 348 ("[I]n the absence of the Minutes of this Meeting the assumption that the meeting was not to concert with a view to carrying out genocide is unattainable.") (quoting Prosecution's Rebuttal, Sept. 14, 2000, 4, ¶14).

[69] *Id.* at 350.

[70] *Id.*

[71] *Id.*

Kibuye with "scum and filth."[72] The prosecution claimed that this meeting was instrumental in demonstrating the genocidal intent of the accused. The prosecution relied, however, on witnesses who made contradictory statements and whose testimony was not corroborated.[73] The Trial Chamber concluded that the inconsistency in several witnesses' testimonies and the discrepancies between the witnesses' earlier written statements and statements made in court raised sufficient doubt as to whether the meeting ever occurred.[74]

The prosecution's failure to establish beyond a reasonable doubt that a meeting took place on April 12, 1994 between Bagilishema and Prefect Kayishema undermined the remaining allegations against the accused. The prosecution framed Bagilishema's actions on April 13, 1994, and afterwards all within the context of the 12 April meeting, claiming that Bagilishema acted pursuant to a "plan" decided upon during his meeting with Prefect Kayishema. The prosecution stated that "[i]f you accept that the genocidal intent has been formed on the 12th April . . . it is immaterial whether or not he was following them in a vehicle. Which was all in the scheme of things. If he didn't follow them himself, he asked the communal police to follow them."[75]

The case against Bagilishema hinged on the Trial Chamber's affirming that at some point prior to April 13, 1994, Bagilishema demonstrated the mens rea of possessing a specific genocidal intent or general intent to commit crimes against humanity. Absent the requisite mens

[72] *Id.* at ¶ 376.

[73] *Id.* at ¶ 412, 417-18.

[74] *Id.* at ¶ 418, 421 (recognizing that "the passage of time, trauma suffered by the witnesses, and the context in which questions were posed" are all factors that potentially contribute to differences in a person's earlier statements as compared to later statements. However, with respect to the 12 April meeting, the Chamber concluded that the significant degree of inconsistency called into question the credibility of the witnesses.).

[75] *Id.* at ¶ 423.

rea, it was impossible for the Trial Chamber to view Bagilishema's actions as steps taken to carry out a plan of genocide.

As the defense aptly illustrated, without a clear showing of the mens rea, Bagilishema's actions appeared to be an attempt to protect the refugees. The defense submitted evidence that following a telephone call Bagilishema received on the morning of 13 April from his counterpart in Rutsiro, he "advise[d] refugees to go south, towards Kibuye town, as he feared that they would be attacked by *Abakiga* coming from the north."[76] The record showed that the *Abakiga* did attack the Mabanza commune on 13 April and in subsequent days, validating Bagilishema's concern for the safety of the refugees if they stayed in Mabanza.[77] Furthermore, the defense admitted that Bagilishema asked the communal police to escort the refugees to the halfway point. Bagilishema also testified that he called Prefect Kayishema and asked him to provide an escort to ensure the safety of the refugees for the remainder of the journey.[78]

The Trial Chamber determined that the ultimate fate of the refugees in Kibuye town or in the hands of Prefect Kayishema was not dispositive of Bagilishema's planning of genocide. The Trial Chamber explained that the evidence did not show that Bagilishema should have known what would happen to the refugees once in Kibuye town.[79] Furthermore, Bagilishema could not be liable for *planning* if he was unaware of the existence of a plan and if he did not knowingly participate in it. For these reasons, the Trial Chamber concluded that Bagilishema's explanation that he acted out of concern for the safety of the refugees was plausible.[80] The Chamber

[76] *Id.* at ¶ 425.

[77] *Id.* at ¶ 425, 457.

[78] *Id.*

[79] *Id.* at ¶ 445.

[80] *Id.* at ¶ 444.

explained that since Bagilishema was unaware of a plan to kill the refugees by April 13, 1994, his criminal liability—if any—would need to be based on subsequent events.[81]

(b) Laurent Semanza (ICTR)—Defense Contends Lack of Meeting Specifics Precludes Conviction on Planning.

The indictment of Laurent Semanza, Secretary of the *Mouvement Democratique Republicain* ("MDR") political party, alleged that "as of the beginning of 1994, [he] chaired meetings to incite, *plan* and organize the massacres of the Tutsi civilian population."[82] The Trial Chamber's discussion of Semanza's role in planning is limited to the defense counsel's contention that the indictment is too vague. The defense claimed that the "exceedingly broad date ranges provide[d] grossly inadequate notice of particular conduct or events, making it difficult for the Accused to prepare his defen[s]e."[83]

(c) Radislav Krstic (ICTY)—Lack of Operational Planning Pursuant to Meeting Undermines Allegations that Accused had Knowledge of Plan

In the ICTY case of Radislav Kristic, the prosecution argued that because the plan to execute Bosnian Muslim men in Srebrenica was "well-organized and comprehensive," the Drina Corps must have conducted it as a "military operation."[84] The prosecution claimed that General Kristic's meetings with General Mladic between 9 and 13 July 1995 demonstrated Kristic's direct involvement in the "development of the plan" from the beginning.[85] The Trial Chamber rejected this argument, explaining that there was no evidence to show Kristic made any

[81] *Id.* at ¶ 458 (considering Bagilishema's presence at events from 13 to 18 April 1994. *See* discussion on presence *infra* pp. 31.

[82] Semanza, ICTR-97-20-T, Annex I at ¶ 3.8 [reproduced in accompanying notebook at Tab 25].

[83] *Id.* at ¶ 50 (The Defense Case).

[84] Krstić, IT-98-33-T at ¶ 85, 361

[reproduced in accompanying notebook at Tab 17].

[85] *Id.* at ¶ 361.

arrangements for the Srebrenica executions.[86] Furthermore, the Chamber recognized the improbability that Kristic could have participated in planning the Srebrenica massacre when he was in the midst of planning a separate operation at Zepa, which started on July 14, 1995, and included several units of the Drina Corps.[87] Finally, the Chamber concluded that although Kristic "must have known the men were being separated . . . and taken to detention sites," the prosecution did not establish beyond a reasonable doubt that Kristic had "direct knowledge" that the men would be executed.[88]

In summary, when providing evidence of meetings, it is imperative that the information is specific. Meeting minutes, attendance lists, and agendas, for example, help to depict the nature and content of the meeting and to determine the level of participation of the accused in the meeting.

ii. Public Statements

Public statements, such as those made on television or radio, are another type of communication that should be considered when determining if an accused engaged in planning.

Tihomir Blaškić (ICTY)—An Example of Public Statements on Television as Evidence of Planning

Tihomir Blaškić, commander of the Croatian Defense Council ("HVO")[89] armed forces headquarters in central Bosnia, was indicted for planning under Article 7 (1) of the ICTY

[86] *Id.*

[87] *Id.*

[88] *Id.* at 369.

[89] The HVO was established circa April 1992 and was the supreme executive, administrative, and defense authority for the Croatian Community of Herceg-Bosna ("HZ H-B") and the Croatian Republic of Herceg-Bosna ("HR H-B"). Kordic & Cerkez, IT-95-14/2-T at p. 348, ¶ 4, 6 (Feb. 26, 2001) [reproduced in accompanying notebook at Tab 13].

Statute.[90] General Blaškić did not actually perpetrate any of the alleged crimes (i.e., he lacked the *actus reus* for the commission of the crimes), so he was held criminally responsible for the crimes committed by others on the basis that he "*planned*, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of each of the crimes alleged."[91]

The Trial Chamber determined that the attack against the Muslim civilian population in the early morning of April 16, 1993 had been a "planned" attack.[92] According to the record, the attack targeted nine villages and consisted of approximately twenty simultaneous sites of combat.[93] The Chamber considered several factors in reaching this conclusion, including the content of public statements made by Blaškić both prior to the attack and following it.

Several witnesses who lived in the area at the time reported that Blaškić, as well as Dario Kordić, a high-ranking Bosnian Croat party leader and Vice President Croatian Republic of Herceg-Bosna,[94] publicly declared their military intentions during a television interview broadcast on April 15, 1993—one day before the attack. Blaškić and Kordić stated that because of the Muslim assault on "their soldiers" in Nadioći, negotiations with the Muslims would end since only war could resolve the matter.[95] Additionally, a witness also alleged that one month earlier, in March 1993, Kordić stated on television that the "Muslims would disappear from Bosnia."[96]

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[90] Blaskic, IT-95-14-T at ¶ 9 [reproduced in accompanying notebook at Tab 11].

[91] *Id.* at ¶ 265 (emphasis added).

[92] *Id.* at ¶ 385.

[93] *Id.*

[94] Kordić & Čerkez, IT-95-14/2-T at p. 348, ¶ 4, 9 (Feb. 26, 2001) [reproduced in accompanying notebook at Tab 13].

[95] *Id.* at ¶ 387.

[96] *Id.*

In establishing liability for planning, the most useful public statements probably would be those that articulate both an accused's political or military ambitions, for example, and indicate the accused has either undertaken preparations already or is in the process of preparing to achieve his goals.

iii. Letters, Lists, and Other Written Documents

(a) Ignace Bagilishema (ICTR)—Written Documentation Lends Credence to Defense's Argument

Written documentation often has a high degree of probative value. Official and unofficial letters or reports, for example, may assist the court in determining both the mens rea and the actus reus of the accused. In the ICTR case of Bagilishema, the accused admitted to having ordered the establishment in April 1994 of one "official" roadblock, known as Trafipro.[97] He denied, however, that he encouraged or was aware of crimes committed by those staffing the Trafipro roadblock.[98] Furthermore, he denied any involvement in the setting up of additional "unofficial" roadblocks. He claimed that he took immediate action against unofficial roadblocks when he learned of them.[99] In support of his claim, Bagilishema relied on a letter dated July 12, 1994, in which he asked two persons to remove unofficial roadblocks.[100]

The prosecution, in its closing argument, asserted that Bagilishema's "responsibility lies in the fact that in furtherance of a plan and in the execution of this plan . . . he, at some stage . . . agreed to set up these roadblocks."[101] Yet, the Trial Chamber explained Bagilishema could not be held responsible for the crimes committed at Trafipro or any other roadblocks, if he did not

[97] Bagilishema, ICTR-95-1A-T at ¶ 881 [reproduced in accompanying notebook at Tab 22].

[98] *Id.*

[99] *Id.* at ¶ 882.

[100] *Id.*

[101] *Id.* at 880.

possess the intent to use the roadblocks "to screen out and kill Tutsi civilians."[102] Even if the roadblocks were part of a genocidal plan, the record failed to demonstrate that Bagilishema was aware of any such plan and that he contributed any substantial support to the roadblocks. The Chamber supported its conclusion, in part, based on the written request in the letter to remove all unofficial roadblocks.

(b) Goran Jelisić (ICTY)—Evidence of Target Lists Fails to Support Allegations that Accused Acted in a Deliberate Manner.

Goran Jelisić's indictment did not include allegations of planning.[103] His case illustrates that written documentation is insufficient evidence of a plan when the actions of the accused are inconsistent with what is on the paper. The prosecution submitted into evidence several target lists, one of which was mainly composed of names of local Muslim politicians or leaders within the community.[104] Some Witnesses in Jelisić's case claimed that he selected victims from these lists of names.[105] However, other witnesses testified that he randomly chose the victims.[106] The Trial Chamber held "[i]t is not . . . possible to conclude beyond all reasonable doubt that the choice of victims arose from a precise logic to destroy the most representative figures of the Muslim community."[107]

[102] *Id.* at 938.

[103] Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 3, 7 (Dec. 14, 1999) (noting that Jelisić underwent a psychiatric examination, but was declared fit to stand trial) [reproduced in accompanying notebook at Tab 10].

[104] *Id.* at ¶ 91.

[105] *Id.* at ¶ 93.

[106] *Id.*

[107] *Id.*

When operating from a list, a person presumably would be engaged in a plan of some sort and act in a methodical and systematic manner to achieve the goals associated with the list. By contrast, Jelisić's arbitrary actions indicated that he was acting without a plan.

The value of written documentation, similar to the evidence of meetings, depends significantly on the availability of specific details. Furthermore, the information may be used to illustrate inconsistencies in the accused's conduct or to demonstrate a pattern of behavior.

B. WEAPONS AND OFFENSIVE USE OF FORCE

After communications, another key factor that demonstrates that the accused may be involved in planning is his acquisition and distribution of weapons and/or his participation in the use of organized force.[108]

Timhomir Blaškić (ICTY)—Methods of Attack Reveal Planning and Preparation

In the ICTY case of Tihomir Blaškić, commander of the HVO armed forces headquarters in central Bosnia, the Trial Chamber emphasized that the method of attack could reveal the level of preparation and planning undertaken by the perpetrators.[109] The Chamber recognized that the large scale of the assault of April 16, 1993, combined with its short duration, were signs of a well-organized operation.[110] Although Blaškić attempted to escape liability by demonstrating he did not have the authority to initiate an operation of this magnitude and asserting that the "order came from a higher authority in the hierarchy," he still was held responsible for the implementation of a genocidal plan.[111]

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[108] *See* discussion *infra* pp. 33-4 (referencing weapons distribution in the ICTR case of Jean-Bosco Barayagwiza).

[109] Blaškić, IT-95-14-T at ¶ 389 [reproduced in accompanying notebook at Tab 11].

[110] *Id.* at ¶ 431.

[111] *Id.*

Specifically, the Trial Chamber held that the attack of April 16, 1993, the explosion of the booby-trapped lorry on April 18, 1993, and the attack of July 18, 1993, could not have occurred without the support of Blaškić.[112] At the time, Blaškić controlled the local explosives factory where the perpetrators of the 18 April bombing procured between 450 and 700 kilograms of explosives to booby-trap the lorry—an amount that would have required Blaškić's authorization.[113] Similarly, Blaškić was the only person in the area entitled to authorize the use of artillery.[114]

The Trial Chamber recognized that since Blaškić was the "only one empowered to authorize the use of the assets necessary to carry out [these] operations," the troops must have either obeyed Blaškić's orders or received his assistance.[115] The Chamber concluded that "[t]he quantity of arms and explosives used were clear evidence of the accused's involvement in the organization and *planning* of those operations."[116]

C. PHYSICAL PRESENCE AT THE SCENE OF THE CRIME

Intuitively, the physical presence of the accused at the commission of a crime would appear to be dispositive of his involvement in the planning of the crime. However, the judgment in the ICTR *Bagilishema* case revealed that there are a number of reasons why an accused might be on the scene of the crime.

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[112] *Id.* at ¶ 530.

[113] *Id.* at ¶ 529.

[114] *Id.*

[115] *Id.* at ¶ 530.

[116] *Id.* (emphasis added).

Ignace Bagilishema (ICTR)—Mere Presence at the Commission of the Crime Does Not Establish Liability

The ICTR Trial Chamber emphasized, in the case of Bagilishema, that case law clearly establishes that "mere presence at the scene of criminal events is not in itself incriminating."[117] The Chamber recognized that the prosecution often uses presence at a crime scene to implicate the accused in "other elements of participation in the crime."[118] For this reason, the Chamber cautioned that an accused, particularly if he holds a position of authority, such as Bagilishema's, could be linked by his presence to the perpetrators of the crime "unless he is seen to be actively and demonstrably opposing the crimes."[119] Accordingly, the Chamber insisted that the prosecution provide evidence that contained sufficient detail to demonstrate the presence of the accused at the crime scene and his role during the incident.[120] Generally, a lack of detail in eyewitness accounts and uncorroborated statements raise doubts about the presence of an accused at a crime scene and his role, if any, in the planning and commission of a crime.

As for Bagilishema, the Trial Chamber held that the prosecution's evidence did not prove beyond a reasonable doubt that the accused was present at the stadium in Kibuye on April 13, 1994. The Chamber explained that even if the accused was there, the witnesses' testimonies provided "little information about the purpose of [Bagilishema's] visit" to the stadium.[121] The Chamber concluded that the evidence lacked a showing of criminal intent and since no crimes

[117] Bagilishema, ICTR-95-1A-T at ¶ 531 [reproduced in accompanying notebook at Tab 22].

[118] *Id.*

[119] *Id.*

[120] *Id.* at ¶ 532.

[121] *Id.* at ¶ 543.

under the ICTR Statute had been committed in the stadium on 13 April, no criminal liability attached to Bagilishema based on that day's events.[122].

Similarly, the Trial Chamber determined that the evidence offered in support of Bagilishema's presence at the stadium from 14 to 17 April lacked sufficient detail, contradicted earlier statements by the witnesses, or appeared implausible. For example, one witness, who claimed to be in a ground position inside the stadium, testified to having seen Bagilishema arrive at the stadium in a car and speak to the *gendarmes* outside of the main stadium gate.[123] The Chamber questioned how the witness "was able to see [Bagilishema] through the stadium gates, or . . . how she saw the car, which was parked on the other side of the stadium wall."[124] Reviewing all of the evidence, the Chamber concluded that Bagilishema could not "bear direct responsibility for the detention of the refugees or for the conditions of their detention" at the stadium from 13 to 17 April 1994.[125]

D. POSITION OF AUTHORITY

A defendant's position of authority may support allegations of his individual criminal responsibility in war crimes, including the specific crime of planning. Furthermore, an individual in a position of authority within a private or non-governmental entity may bear the same degree of individual responsibility for war crimes as would a person in a public or state leadership position. Yet, a person's lack of leadership or authority does not mean necessarily that he bears any less criminal responsibility for the commission of a crime, as evidenced by the judgment in the ICTR case of Laurent Semanza. Moreover, as seen in the ICTR case of Jean-

[122] *Id.*

[123] *Id.* at ¶ 551.

[124] *Id.*

[125] *Id.* at ¶ 555.

Bosco Barayagwiza, a defendant's leadership position within a political party or other non-governmental organization can provide access to resources and create opportunities to wield a significant degree of influence over others.

(a) Laurent Semanza (ICTR)—Lack of Official Leadership Position Does Not Absolve Accused of Liability.

Although Laurent Semanza's indictment did not charge him with the crime of planning, it alleged—as part of the crime of direct and public incitement—that he had chaired meetings during which he "incited, *planned*, and organized the massacres of Tutsi civilians."[126] The defense counsel argued that because Semanza did not hold an administrative or military position within the Rwandan Government or within the *Interhamwe* militia he could not be held liable for the criminal acts of these entities.[127] The defense counsel asserted, albeit unsuccessfully, that Semanza's lack of authority absolved him from bearing any criminal responsibility in the alleged crimes, including any planning associated with the crimes in the indictment.[128]

(b) Jean-Bosco Barayagwiza—Non-Governmental Leadership Role Facilitates Planning.

Jean-Bosco Barayagwiza's leadership role as one of the founders of the political party Coalition for the Defense of the Republic ("CDR") and a principal board member of Radio Télévision Libre des Milles Collines ("RTLM") provided additional evidentiary support to eyewitness accounts that he coordinated massacres against the Tutsi population.[129] The Trial Chamber, describing Barayagwiza as being at the "organizational helm" of these groups,

[126] Semanza, ICTR-97-20-T at ¶ 11 (emphasis added) [reproduced in accompanying notebook at Tab 25].

[127] *Id.* at ¶ 71 (The Defence Case).

[128] *Id.*

[129] Barayagwiza, ICTR-99-52-T at ¶ 975 (Dec. 3, 2003) [reproduced in accompanying notebook at Tab 26].

assessed that he had "direct involvement" in the "expression of genocidal intent and in genocidal acts" undertaken by the CDR and its youth wing, the Impuzamugambi.[130] Specifically, the Trial Chamber concluded that Barayagwiza asserted a "leadership role" in the distribution of weapons.[131] Barayagwiza was found guilty of crimes against humanity for his "acts of planning the killing of Tutsi civilians" under Article 3(b), pursuant to Article 6(1) of the ICTR Statute.[132]

Key evidence indicated that Barayagwiza went to the town of Gisenyi in April 1994—one week after the shooting down of the President's plane—to oversee the delivery of a truckload of guns and machetes.[133] A credible eyewitness saw Barayagwiza arrive in Gisenyi in a separate vehicle, accompanying the truck of arms, and saw him speaking to the man whose house served as the distribution center for the weapons.[134] The witness also identified members of the CDR's youth wing, some of whom were wearing CDR caps, get out of the truck, and unload the weapons.[135] That same day, the witness saw members of the CDR youth wing kill thirty unarmed Tutsis with the weapons brought by Barayagwiza.[136] The Trial Chamber noted that the eyewitness account of Barayagwiza's supervision of the operation was "supported by the evidence of Barayagwiza's leadership role in the CDR."[137]

Although the Trial Chamber primarily relied on the testimony of one eyewitness with respect to Barayagwiza's role in the distribution of the arms, the witness withstood extensive cross-examination, his testimony was consistent with earlier statements, and he provided clear

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[130] *Id.*

[131] *Id.* at ¶ 730.

[132] *Id.* at ¶ 1067.

[133] *Id.* at ¶ 720, 727

[134] *Id.* at ¶ 720.

[135] *Id.*

[136] *Id.*

[137] *Id.* at ¶ 727.

and detailed answers to questions.[138] Notably, he provided names, locations, distances, and specific information "with precision."[139]

In summary, while a leadership position—governmental or nongovernmental—factors into any assessment of an accused's role in planning, it is not dispositive of his knowledge and participation in a plan.

E. RELATIONSHIPS WITH OTHER WAR CRIMINALS

The prosecution may use this final category of objective indicators to raise the presumption that because of the accused's ties to individuals who orchestrated war crimes, he too was involved in the planning of these crimes. It is essentially an attempt to establish guilt by association. Both the prosecution and defense can exploit this factor by delving in the accused's personal and professional relationships with other indicted or convicted war criminals.

Ignace Bagilishema (ICTR)—Ties to Convicted War Criminals May Strengthen or Weaken Guilt by Association Claims.

The defense counsel in the ICTR case of Bagilishema conversely used this category to illustrate that the accused had a "fractious relationship" with the indicted war criminal Laurent Semanza.[140] The defense revealed the existence of a political rivalry between the two men in order to disassociate Bagilishema from the war crimes committed by Semanza. By demonstrating that Bagilishema and Semanza subscribed to different political and social policies,

[138] *Id.* at ¶ 726.

[139] *Id.*

[140] Bagilishema, ICTR-95-1A-T at ¶ 112 (Asoka de Z. Gunawardana, J., concurring) [reproduced in accompanying notebook at Tab 22].

the defense undermined allegations by the prosecution that Bagilishema would have assisted Semanza or participated in the planning of the crimes committed by Semanza.[141]

F. SUBJECTIVE INDICATOR: CHANGE OF ATTITUDE

This indicator appears to be fundamentally different from the previous five categories because of its subjective nature. Although there is limited discussion of this factor in the ad hoc tribunals, it could be helpful in assessing the intent of the accused with respect to planning, as well as other modes of liability.

Ignace Bagilishema (ICTR)—Signs of a Change or Shift in Attitude May Reveal the Accused's Intentions.

In his concurring opinion on the ICTR case of Bagilishema, Judge Asoka de Z. Gunawardana disagreed with the prosecution's allegation that the accused, during a meeting on April 12, 1994, "changed from having a *bona fide* intent to protect the Tutsis, to a genocidal intent to exterminate" them.[142] Judge Gunawardana considered whether it is realistic for an accused to have a dramatic change of attitude in such a short time span. The Judge reasoned that a genuine "change of attitude" might have occurred if there were: (1) signs of the accused succumbing to persuasion, and (2) signs that the alleged attitude change corresponded to subsequent conduct of the accused.[143]

Having created this test, Judge Gunawardana determined that Bagilishema's circumstances did not meet the criteria. First, the prosecution did not present any evidence suggesting that the Prefect Kayishema persuaded or pressured Bagilishema into changing his

[141] *Id.* at ¶ 111.

[142] Bagilishema, ICTR-95-1A-T at ¶ 34, 36 (Asoka de Z. Gunawardana, J., concurring) (assuming *arguendo* that the meeting took place because the Trial Chamber judgment concluded that the evidence did not sufficiently establish the occurrence of the meeting) [reproduced in accompanying notebook at Tab 22].

[143] *Id.* at ¶ 35, 37.

disposition with respect to the Tutsis.[144] Second, Bagilishema's subsequent actions were not consistent with those of someone who allegedly had changed his attitude by adopting a genocidal intent. For example, the record indicated that after the alleged 12 April meeting with Kayishema, Bagilishema visited the stadium and invited the refugees back to Mabanza where peace had been restored.[145] According to Judge Gunawardana, this offer by Bagilishema appeared to be inconsistent with the prosecution's claim that he had decided to exterminate the refugees.[146]

While the ad hoc tribunals have yet to explore fully this subjective factor, Judge Gunawardana's discussion offers unique insight, which may prove useful in assessing an accused's intent and placing his conduct in perspective.

IV. SUMMARY AND CONCLUSIONS

Based on precedent, to convict the accused of planning there must be consistent documentary evidence or eyewitness testimony, which establishes the accused's intent and demonstrates conduct that contributed substantially to the commission of the crime. As illustrated by the case examples, proving intent can be particularly challenging since mere presence at the commission of the crime or at a meeting usually is insufficient proof of intent.

In addition to credible documentation and eyewitness accounts, the ability to demonstrate a recognizable pattern in the accused's actions—such as a taking a series of steps to procure and distribute weapons—can add significant weight to the prosecution's arguments. Lastly, it is important to recognize that planning does not need to be associated with a position of authority

[144] *Id.* at ¶ 35.

[145] *Id.* at ¶ 38.

[146] *Id.* at ¶ 40.

or leadership. While a senior ranking government official may be privy to resources and better able to facilitate his planning, a person without an organizational title can equally be convicted of planning.

Although the ad hoc tribunals have yet to convict an individual of war crimes based solely on their participation in planning, the jurisprudence on planning is growing. War crimes trials—such as that of former Liberian President Charles Taylor—offer the possibility of adding to this expanding body of case law.

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