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Gross Negligence And Recklessness As Sufficient Mens Rea For A Crime Against Humanity Assuming The Accused Has Knowledge Of The Chapeau Elements

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE ICTR

ISSUE: GROSS NEGLIGENCE AND RECKLESSNESS AS SUFFICIENT MENS REA FOR A CRIME AGAINST HUMANITY ASSUMING THE ACCUSED HAS KNOWLEDGE OF THE CHAPEAU ELEMENTS

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I. Introduction and Summary of Conclusions

A. Issue[1]

This memorandum addresses whether, in the International Criminal Tribunal for Rwanda ("ICTR"), a *mens rea* of recklessness or gross negligence can lead to a conviction of a crime against humanity assuming the accused has knowledge of the widespread and systematic attack against a civilian population on discriminatory grounds. The first part of this memorandum demonstrates the context in which the issue arises in the international criminal tribunals. This part defines *mens rea*, discusses the role *mens rea* plays within the elements of a crime against humanity and provides a hypothetical scenario to help illustrate the context of the issue. The second part of this memorandum analyses how recklessness and gross negligence in the underlying crime may be used to obtain convictions for crimes against humanity in the ICTR.

B. Summary of Conclusions

1. The Lack of Specificity in the Statutes of the International Criminal Tribunals Allows for Broad Interpretation of the *Mens Rea* Requirement for the Underlying Crimes of a Crime Against Humanity

The fact that the statutes of the international criminal tribunals are (for the most part) silent on the *mens rea* requirement for the underlying crimes of a crime against humanity, has given the Chambers freedom to include recklessness and gross negligence as appropriate *mens rea*. Even though the Rome Statute of the International Criminal Court ("ICC Statute") has been said to provide for a narrow *mens rea* standard, the ICC Statute should not be interpreted to limit *mens rea* to only the most culpable mental states (intent and/or knowledge).

[1] Issue: Is recklessness or gross negligence sufficient *mens rea* for conviction of a Crime Against Humanity if one has knowledge of the widespread and systematic attack against a civilian population on discriminatory grounds? For definition of *mens rea*, *see infra* pp. 5-7.

First, the ICC Statute allows reliance on sources of law which accept *mens rea* with lesser culpability (recklessness, gross negligence and simple negligence) in criminal convictions. Second, the ICC is yet to try a case, and therefore, the ICC Statute has not been interpreted or applied by the court which it governs. Until the ICC begins developing case law, the ICC Statute remains open to interpretation. Third, the ICC Statute can be read to include even the least culpable *mens rea* to be sufficient to convict for crimes against humanity. Essentially, the lack of guidance from the Statutes of the international criminal tribunals should be interpreted as an opportunity to broaden the scope of appropriate *mens rea* for crimes against humanity.

2. The International Criminal Tribunals and General Principles of Law Support Convictions of Crimes Against Humanity by Means of a *Mens Rea* of Recklessness, Gross Negligence and Simple Negligence for the Underlying Crimes

The case law of the international criminal tribunals and general principles of law provide the ICTR with an abundance of precedent favoring the use of recklessness, gross negligence and simple negligence to obtain convictions for crimes against humanity. Nonetheless, policy concerns and conflicts of opinion between the Chambers of the ICTR have proven to be a barrier to a broadened frame of reference for *mens rea*.

Despite these roadblocks, recklessness, gross negligence and simple negligence have emerged as established forms of criminal culpability in the ICTR and the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). Admittedly, the emergence of lesser culpable mental states in the tribunals has been inconsistent and ambiguous. However, this memo will argue that murder, extermination, rape and "other inhumane acts" are underlying crimes of a crime against humanity with clear ICTR/ICTY precedent to support a conviction of a crime against humanity using the *mens rea* of

lesser culpability. Also, gross negligence and even negligence will be shown to be sufficient *mens rea* to convict an individual with command responsibility or who is involved in a joint criminal enterprise. The case law of the ICTR and ICTY and general principles of law are powerful weapons of the prosecutors to obtain convictions for crimes against humanity.

II. Factual Background

A. *Mens rea:* An Unsettled Issue in International Criminal Law

Those accused of crimes against humanity in the international criminal tribunals face ambiguous and unsettled notions of the fundamentals of international criminal law in the Chambers of the ICTR and ICTY. Ambiguity surrounding the concepts of criminal culpability is no exception. While domestic courts offer a wealth of time-tested precedent on the standards of criminal liability for specific crimes, it is difficult to identify the different forms of criminal culpability in international criminal law.[2] There is a general deficiency of substantive rules, customary international law, and jurisprudence defining the variations and degrees of culpability for the perpetration of crimes against humanity.[3] Domestic law provides often detailed assessments of the elements of crimes which are common to international criminal tribunals, such as murder, rape and imprisonment. However, a person accused of a crime against humanity in an international criminal tribunal is subject to different elements of the *prima facie* and harsher punishment than in the case of national crimes developed in the centuries of existing domestic law. Additionally, crimes against humanity include other individual

[2] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 159 (Oxford University Press 2003). [Reproduced in the accompanying notebook at Tab 31.]

[3] *Id*. at 159, 160.

crimes which have not been extensively developed in the world's legal systems nor under customary international law, including: persecution, deportation, enslavement, and "other inhumane acts." Since *mens rea* and criminal culpability are so closely related,[4] and the law of crimes against humanity is not always clear, the international criminal tribunals have not unanimously defined the *mens rea* required for the underlying crimes. However, over the course of time the tribunals have and will continue to work towards establishing solid notions of *mens rea*. This memorandum will discuss the current state of acceptance of recklessness and gross negligence as requisite *mens rea* in the international criminal tribunals.

B. Hypothetical: The Reckless Priest

The following hypothetical fact-pattern is to illustrate some of the issues in determining appropriate *mens rea* for the underlying crime in a crime against humanity. At the end of this memo, this hypothetical is discussed to help develop final thoughts:

The hypothetical country of Utopia is ravaged by civil war. The civil war has been fought between the current Utopian government and the Rebel Group. Utopia is also populated by many separate tribal groups of the same ethnicity, who, until recently, were neutral bystanders to the civil war. The devastated political, economic and human rights conditions in Utopia have caused many of the tribal groups to fight amongst themselves and take sides in the civil war.

A Catholic priest has been providing shelter at a mission for 1,000 refugees of a certain tribal group in southern Utopia. The priest has been offered food rations from a tribal group from western Utopia which has generally had friendly ties with the refugees

[4] *Infra* p. 6.

at his mission. However, the priest is aware that the tribal group providing the food rations has allied with the Utopian government. The southern Utopian tribal group taking refuge at the mission has traditionally opposed the Utopian government.

The priest has heard credible rumors that the Utopian government recently supplied poisoned food rations to different tribal groups in southern Utopia who are also in opposition of the Utopian government. Aware of this risk, and against his best judgment the priest accepts the food rations and provides them to the refugees. Unfortunately, the food rations were poisoned and all 1,000 refugees die.

The priest is later indicted for the crime against humanity of extermination by the International Criminal Tribunal for Utopia ("ICTU"). If the ICTU accepts recklessness or gross negligence as the requisite *mens rea* for the crime against humanity of extermination then the priest conceivably faces conviction and life imprisonment and the terrible public stigma of committing a most heinous crime. However, if the *mens rea* requirement is limited to knowledge and intent, then the priest is not criminally liable and would be acquitted of the charges.

III. Legal Discussion

A. Defining *Mens Rea*

In criminal courts, the necessity that an accused have a certain *actus reus* (physical act, or omission) and *mens rea* (mental state) is "'universal and persistent in mature systems of law.'"[5] Literally, *mens rea* is a mental state said to mean "guilty

[5] The Prosecutor v. Mucic, *et al.* (the Celebici case), IT-96-21, Judgment of 16 November 1998, para 424. [Reproduced in the accompanying notebook at Tab 21.]

mind."[6] The use of *mens rea* in determining criminal liability has its root in belief that punishment should depend upon moral guilt and evil-doing.[7] Although, the concept of *mens rea* has changed over time with the movements and objectives of criminal justice.[8] Modern ideas of *mens rea* have moved in the direction of meaning an intention which unduly endangers social or public interests.[9]

The *mens rea* requirement is not without exception. In the case of strict, or absolute liability criminal conduct alone leads to a conviction. However, thus far, the ICTR and the other international criminal tribunals have rejected absolute liability even in the cases where the least culpable *mens rea* can lead to a conviction.[10] As international humanitarian law now stands, *mens rea* is a mandatory element of all criminal prosecutions.[11]

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[6] William A. Schabas, *Mens Rea and the International Criminal Court for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015 (2003). [Reproduced in the accompanying notebook at Tab 38.]

[7] Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 988 (1932). [Reproduced in the accompanying notebook at Tab 39.]

[8] *Id.* at 1016.

[9] *Id.* at 1017-1019 ("It is clear that *mens rea* means something quite distinct from mere immorality of motive. An act performed for a laudable or even religious motive may constitute a crime, just as an act performed for a depraved or immoral purpose may not constitute a crime. [W]hatever the early conception of *mens rea* may have been, as the law grew the requisite mental elements of the various felonies developed along different lines to meet exigencies and social needs which varied with each felony."), *see also* CHERIF M.BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 170 (Charles C. Thomas 1978) ("Thus the determination of intent, its existence, and extent is a matter of social policy which reflects social values and may to that extent contain an element of moral blameworthiness. As an element of determined by social policy, intent is viewed as directly linked to the purposes of punishment and is usually framed only to the extent that, if found to exist in a crime, the punishment which ensues will be in keeping with the policies of the criminal sanction."). [Reproduced in the accompanying notebook at Tab 37.]

[10] The Prosecutor v. Ignace Bagilishema, ICTR-95-1, Judgement of 7 June 2001, para. 44, [Reproduced in the accompanying notebook at Tab 9]; *contra* SCHABAS, *supra* note 4 at 1016 ("Recently, the United Nations agreed to include such an "absolute liability" offence within the subject matter jurisdiction of its third ad hoc tribunal, the Special Court of Sierra Leone, which is supposedly designed to prosecute only "those who bear the greatest responsibility" for the atrocities committed during that country's civil war."). [Reproduced in the accompanying notebook at Tab 38.]

[11] *Id.*

The major legal systems of the world agree that there are different degrees of *mens rea*.[12] In other words, the level of the perpetrator's (or participant's) culpability depends on his/her frame of mind. There are four main categories of mental states that justify punishable criminal conduct: intent, recklessness, culpable or gross negligence, and inadvertent or simple negligence.[13] The civil law systems usually combine knowledge and intent into one mental state, intent.[14] Common law systems tend to separate intent and knowledge and place a lesser culpability on a *mens rea* of knowledge than for intent.[15] The following are generally accepted definitions of the culpable mental states:

1. Intent

Antonio Cassese defines intent and provides an example: "the will to bring about a certain result: I use a gun to shoot at a person because I want to kill him. This class of *mens rea* is normally called intent."[16] However, the word "intent" is ambiguous because it has other meanings.[17] Black's Law Dictionary defines intent as "the state of mind

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[12] CHERIF M. BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 300 (Kluwer Academic Publishers, 1992); CASSESE, *supra* note 1 at 161. [Reproduced in the accompanying notebook at Tab 32.]

[13] *Id.*

[14] *Id.* at 164.

[15] *Id.*

[16] *Id.* at 161.

[17] BLACK'S LAW DICTIONARY 813 (7th ed. 1999); citing, JOHN SALMOND, JURISPRUDENCE, 383-84 (Glanville L. Williams ed., 10th ed. 1947) ("The phrase 'with intent to,' or it equivalents, may mean any one of at least four different things: -- (1) That the intent referred to must be the sole or exclusive intent; (2) that it is sufficient it is one of several concurrent intents; (3) that it must be the chief or dominant intent, and others being subordinate or incidental; (4) that it must be a determining intent, that is to say, an intent in the absence of which the act would not have been done, the remaining purposes being insufficient motives by themselves. It is a question of construction which of those meanings is the true one in the particular case."). [Reproduced in the accompanying notebook at Tab 33.]

accompanying an act, esp. a forbidden act."[18] This definition represents a general, culpable mental state similar to the broad definition of *mens rea*. Black's Law Dictionary uses the term "specific intent" to refer to the category of intent expressed in Mr. Cassese's definition above. Specific intent is "the intent to accomplish the precise criminal act that one is later charged with."[19] The Model Penal Code ("MPC") opts for the term "purpose" instead of specific intent, or Mr. Cassese's "intent," possibly to avoid problems of interpretation. The MPC definition of "purpose" is when it is a person's conscious object to engage in conduct and/or to cause a certain result.[20]

2. Knowledge

Again, the *mens rea* of knowledge is most familiar to common law systems. The MPC of the United States defines "knowledge" as a person's awareness of that person's conduct or of certain circumstances, and awareness that a certain result is practically certain to be caused by the conduct and/or circumstances.[21] Example: a terrorist plants a car bomb on the vehicle used by a targeted government official. The terrorist is aware that in addition to the targeted government official, several other, non-targeted individuals will be inside the vehicle at the explosion of the car bomb. The terrorist does not intend to kill other individuals but knows that it is practically certain that they will die

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[18] *Id.*

[19] *Id.*

[20] ALI MODEL PENAL CODE, §2.02 (Proposed Official Draft 1962). [Reproduced in the accompanying notebook at Tab 1.]

[21] *Id.* ("A person acts knowingly with respect to a material element of an offence when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; 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.").

in the blast. The terrorist's *mens rea* as to the death of the other, non-targeted individuals is knowledge.

3. Recklessness[22]

The New York Penal Law defines recklessness as: "a person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when she is aware of and consciously disregards a substantial unjustifiable risk that such a result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."[23]

4. Gross Negligence

Antonio Cassese defines and discusses gross negligence as follows: gross negligence is "failure to pay sufficient attention to or to comply with certain generally accepted standards of conduct thereby causing harm to another person when the actor believes that the harmful consequences of his action will not come about, thanks to the measures he has taken or is about to take (for instance…one of two persons playing with a loaded gun points it at the other and pulls the trigger believing that it will not fire because neither bullet is in the opposite barrel; however, the gun is a revolver, it does fire, killing the other person)."

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[22] The term *dolus eventualis* is interchangeable with recklessness. *See* CASSESE, *supra* note 2 at 176. [Reproduced in the accompanying notebook at Tab 31.]

[23] New York Penal Law § 15.05.3, *available at* http://wings.buffalo.edu/law/bclc/web/nycriminallaw.htm; [Reproduced in the accompanying notebook at Tab 2.] *see also supra* note 20 ("A person acts recklessly with respect to a material element of an offense 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, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."). [Reproduced in the accompanying notebook at Tab 1.]

The MPC definition is essentially the same:[24] "A person acts negligently with respect to a material element of an offense when he should be aware of 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."[25]

5. Simple Negligence

Although simple negligence is generally not a criminally culpable *mens rea*, under narrow circumstances, the international criminal tribunals have found negligence to justify conviction of a crime against humanity. A negligent person is someone who does not act as a "reasonable person" and fails to realize what is natural and foreseeable.[26] Note that when a court applies an objective test to determine an accused's mental state, the *mens rea* requirement is considered to be reduced to negligence.[27]

B. The Recognition of Lesser Culpable Mental States in the Criminal Courts of Pre and Post-World War II

[24] The MPC definition of negligence is criminal negligence, or gross negligence. *Id.*

[25] *Id.*

[26] SCHABAS, *supra* note 6 at 1033. [Reproduced in the accompanying notebook at Tab 38.]

[27] WAYNE R. LAFAVE, AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW 328 (West Publishing Co. 1986) ("While negligence thus requires that the defendant's conduct create an unreasonable risk of harm to others, he is nonetheless negligent though he is unaware of the fact that his conduct creates any such risk. All that negligence requires is that he ought to have been aware of it (i.e., that a reasonable man would have been aware of it). Thus negligence is framed in terms of an objective (sometimes called "external") standard, rather than in terms of a subjective standard."). [Reproduced in the accompanying notebook at Tab 34.]

At the inception of adjudication of crimes against humanity, in pre and post-World War II German and British cases, lesser forms of culpable *mens rea* appear as legitimate grounds for convictions. These cases supply background and a point of reference for the modern day international criminal tribunals with regard to the subject matter of this memorandum.

In 1946, the Offenburg Tribunal (*Landgericht*) found an accused guilty of the crime against humanity of persecution based upon a *mens rea* of recklessness.[28] This case, K. and M., dealt with a German soldier, Konninger, at home on leave who spoke against the German leadership while having drinks at a dinner party with friends and acquaintances.[29] One of the acquaintances reported Konninger's behavior to German authorities and Konninger was subsequently found guilty of defeatism and sentenced to death. K., the acquaintance who reported Konninger, was later indicted and found guilty despite the fact that K. did not intend for Konninger to be executed. The Offenburg Tribunal found: "It is entirely credible that the accused K. did not intend all that. However, he was to expect that this would be the result of his talk at the restaurant. He must foresee this result. He tacitly approved it. There was therefore recklessness on his part."[30]

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[28] Other cases brought before two post-World War II courts similarly found reckless to be sufficient to convict for crimes against humanity: the Tribunal of Walshut (W., judgment of 16 February 1949, at 147), the German Supreme Court in the British Occupied Zone (K., judgment of 27 July 1948) ("According to the court the accused 'was aware that the denunciation could have entailed the most grave consequences for M. [the victim], was the accused knew of the criminal and arbitrary manner in which the Gestapo abused its power at the time."); L. and others, judgment of 14 December 1948 ("'it was inconceivable' that they, who were old officials of the Nazi party, 'did not at least think it possible and consider that in the case at issue, through their participation, persons were being assaulted by a system of violence and injustice; more is not required for the mental element."). CASSESSE, *supra* note 2, at 170, 171. [Reproduced in the accompanying notebook at Tab 31.]

[29] *Id.* at 169.

[30] *Id.* at 170.

Also, in 1921, the Leipzig Supreme Court in the case of Stenger and Crusius convicted an accused of ordering the execution of wounded Frenchmen, based upon a negligently misinterpreted verbal order from his superior. The court found that "in view of the accused's background and personality, he should have anticipated the illegal outcome which is easily demonstrated even if his mental and emotional states at the time were to be fully taken into consideration."[31] The accused, Crusius, was convicted for causing death with a *mens rea* of culpable negligence and was sentenced to two years' imprisonment. Another case, from the British Court of Appeal in the British Zone of Control in Germany, convicted a group of German police officers and doctors for crimes against humanity. The police officers induced individuals of gypsy blood to sign consent to sterilization through threats, and the doctors performed the sterilizations. One of the physicians, Günther, was convicted for having a *mens rea* of gross negligence for not inquiring as to whether the gypsies were being sterilized on account of their race.[32]

Clearly, the application of recklessness and gross negligence has its roots in cases which form part of the legacy of modern international courts. These early cases demonstrate that lesser culpable mental states have been recognized in the history of international criminal jurisprudence.

C. Sources of *Mens Rea* in a Crime Against Humanity

To begin an analysis of *mens rea* for crimes against humanity in modern courts, it is important to first describe the sources of the mental elements that compose a crime against humanity. There are three sources of *mens rea* in a crime against humanity; (1)

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[31] *Id.* at 174.

[32] *Id.*

the chapeau elements; (2) the underlying crime[33]; and (3) individual criminal responsibility.

1. The Chapeau Elements

The chapeau elements bring a crime enumerated in Article 3 of The Statute of the International Criminal Tribunal for Rwanda ("ICTR Statute") to the level of a crime against humanity. In other words, when an underlying crime, such as murder, is committed within the context of the chapeau elements, the severity of the crime then raises to a degree of atrocity considered to be a crime against humanity. The ICTR Statute defines the chapeau elements in Article 3: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[34]

Generally, the *mens rea* requirement for the chapeau elements has been found to be knowledge.[35] Given that the issue analyzed in this memo assumes the requisite

[33] The Prosecutor v. Dario Kordic and Mario Cerkez, IT-95-14/2, Judgment of 26 February 2001, para. 211. [Reproduced in the accompanying notebook at Tab 10.]

[34] The chapeau elements of a crime against humanity in the ICTR Statute are distinct from the chapeau elements of a crime against humanity in the statutes of other international criminal tribunals in that the ICTR Statute includes elements on discriminatory grounds.

The chapeau elements of Article 2 of the Statute of the Special Court of Sierra Leone are: "The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population." STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE, *available at* http://www.sc-sl.org. [Reproduced in the accompanying notebook at Tab 3.]

The chapeau elements of Article 5 of the Statute of the International Criminal Tribunal for Yugoslavia: "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population" STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL OF YUGOSLAVIA, *available at* http://www.un.org/icty/legaldoc/index.htm. [Reproduced in the accompanying notebook at Tab 4.]

[35] JOHN R. W. D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA 111, (Transnational Publishers 2000) ("Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does

knowledge of the chapeau elements, the scope of this memo will not touch on whether recklessness or gross negligence is sufficient *mens rea* for the chapeau elements.

2. The Underlying Crime in a Crime Against Humanity

An underlying crime is one of the enumerated crimes spelled out in Article 3 of the ICTR Statute and similarly expressed in the statutes of the other international criminal tribunals.[36] As enumerated in the ICTR Statute, the underlying crimes are: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts.[37] Generally, the statutes of the international criminal tribunals, including the ICTR Statute, provide little insight

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not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore, the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict."). [Reproduced in the accompanying notebook at Tab 36.]

[36] The underlying elements of the crimes against humanity in the ICTY Statute are: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution and other inhumane treatment. STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL OF YUGOSLAVIA, ARTICLE 2, *available at* http://www.un.org/icty/legaldoc/index.htm. [Reproduced in the accompanying notebook at Tab 4.]

The underlying elements of the crimes against humanity in the Statute of the Special Court for Sierra Leone are: murder; extermination; enslavement; deportation; imprisonment; torture; rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; persecution on political, racial, ethnic or religious grounds; and other inhumane treatment. STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE, ARTICLE 2, *available at* http://www.sc-sl.org. [Reproduced in the accompanying notebook at Tab 3.]

The underlying elements of the crimes against humanity in the ICC Statute are: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization, or any other form of sexual violence of comparable gravity; persecution discriminatory grounds; enforced disappearance of persons; the crime of apartheid; and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, ARTICLE 7, *available at* http://www.un.org/law/icc/statute/romefra.htm. [Reproduced in the accompanying notebook at Tab 5.]

[37] STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, ARTICLE 3, *available at* http://www.ictr.org/ENGLISH/basicdocs/statute.html. [Reproduced in the accompanying notebook at Tab 6.]

into the *mens rea* requirement needed for the underlying crime to convict an accused for a crime against humanity.[38]

3. Individual Criminal Responsibility

The third and final source of *mens rea* in a crime against humanity is individual criminal responsibility. Article 6 of the ICTR Statute enumerates the basis of individual criminal responsibility:

> 1. 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 present Statute, shall be individually responsible for the crime.
>
> 2. The official position of any accused person, whether head of state of government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
>
> 3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measure to prevent such acts or to punish the perpetrators thereof.
>
> 4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal of Rwanda determines that justice so requires.

Individual criminal responsibility is based on the concept of personal culpability, or *nulla poena sine culpa*. "The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena*

[38] CASSESE, *supra* note 2, at 159. [Reproduced in the accompanying notebook at Tab 31.]

sine culpa)."[39] Article 6 of the ICTR Statute, and similar articles in the statutes of the other international criminal tribunals, define the circumstances in which an accused is criminally responsible for his/her actions in the execution of a crime against humanity.[40] Article 6 provides general guidelines but does not identify the scope of the situations in which a person becomes criminally responsible for his/her acts or omissions.[41] Fortunately, the international criminal tribunals have interpreted the individual criminal responsibility statutes and have formulated specific circumstances in which an accused incurs individual criminal responsibility. In his book, International Criminal Law, Antonio Cassese describes nine categories of individual criminal responsibility for conduct and omission as developed in the international criminal tribunals. Eight of these categories deal with conduct: perpetration, co-perpetration, participation in a common purpose or design, aiding and abetting, incitement or instigation, inchoate crimes, planning, ordering, and attempt.[42] Criminal responsibility for omissions occurs in the case of superior responsibility.[43]

As discussed below, individual criminal responsibility provides a practical method of utilizing a *mens rea* of recklessness or gross negligence as a vehicle to a conviction of a crime against humanity.

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[39] The Prosecutor v. Dusko Tadic, IT-94-1, Judgment of 15 July 1999, para. 186. [Reproduced in the accompanying notebook at Tab 11.]

[40] VIRGINA MORRIS AND MICHAEL SCHARF, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 198 (Transnational Publishers 1998). ("In order to be criminally responsible for a crime against humanity, the underlying crime must actually be committed. This differs from the crime of genocide where the crime does not need to be executed to derive criminal responsibility."). [Reproduced in the accompanying notebook at Tab 35.]

[41] Criminal responsibility creates accountability for both action *and* inaction; the conduct and omissions of an accused.

[42] CASSESE, *supra* note 2 at 181-196. [Reproduced in the accompanying notebook at Tab 31.]

[43] *Id.* at 203.

D. *Mens Rea* And The Underlying Crimes

Generally, there is no argument that intent and knowledge are sufficient *mens rea* to convict an accused of an underlying crime of a crime against humanity.[44] However, the international tribunals have established that other mental states satisfy the *mens rea* standard for the underlying crime, but have not been consistent in determining exactly which categories of *mens rea* apply. There are various sources of law that the tribunals may rely upon. Some of these sources of law offer clear rules on the application of *mens rea*, while other sources provide ambiguous guidance. So, two questions arise; what do the sources of law say about *mens rea* and the underlying crime; and which law ought to be applied in an international criminal tribunal, especially when one or more of the sources of law may be ambiguous or inconsistent? As a preliminary matter, Article 21 of the ICC Statute instructs to rely on the following sources of law (in order of priority): first, the statutory provisions; second, customary international law; and third, general principles of law from the legal systems of the world, including the law of the "States that would normally exercise jurisdiction over the crime."[45]

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[44] SCHABAS, *supra* note 6 at 1024. ("[T]here has never been any doubt that intent or knowledge be a requirement for proof that an individual has committed crimes against humanity."). [Reproduced in the accompanying notebook at Tab 38.]

[45] THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, ARTICLE 21, *available at* http://www.un.org/law/icc/statute/romefra.htm.

(The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rule of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.). [Reproduced in the accompanying notebook at Tab 5.];

1. *Mens Rea* and the Underlying Crimes in the Statutes of the International Criminal Tribunals

While the statutes of the ICTR, ICTY and the Special Court for Sierra Leone provide no guidance in determining the minimum *mens rea* of the underlying crime,[46] the ICC Statute treats *mens rea* directly. It may be said that Article 30 of the ICC Statute of the International Criminal Court favors knowledge or intent as sufficient *mens rea* for a conviction of an underlying crime: "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge." However, there are compelling arguments to expand the range of acceptable mental states.

The Preparatory Commission for the International Criminal Court ("PCNICC")[47] found that where no specific reference to *mens rea* of an underlying crime is written in the language of the ICC Statute, the requisite *mens rea* for a conviction is "intent, knowledge or both."[48] Antonio Cassese agrees that, although the Article 30 requires

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see also, Tadic, *supra* note 39 para. 287 ("The same conclusion is reached if Article 5 is construed in light of the principle whereby, in case of doubt and whenever the contrary is not apparent from the text of a statutory or treaty provision, such a provision must be interpreted in light of, and in conformity with, customary international law. In the case of the Statute, it must be presumed that the Security Council, where it did not explicitly or implicitly depart from general rules of international law, intended to remain within the confines of such rules."). [Reproduced in the accompanying notebook at Tab 11.]

[46] *Supra* notes 34, 36, 37. [Reproduced in the accompanying notebook at Tabs 3-6.]

[47] This report is also called the "Elements of Crimes" which Article 9 of the ICC Statute states "shall assist the Court in the interpretation of and application of Articles 6, 7, and 8." Again, Article 6 of the ICC Statute enumerates the crimes against humanity. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, ARTICLE 6, *available at* http://www.un.org/law/icc/statute/romefra.htm. [Reproduced in the accompanying notebook at Tab 5.]

[48] U.N. Preparatory Commission for the International Criminal Court (hereafter, "PCNICC"), *Report of the Preparatory Commission for the International Criminal Court*, Addendum 2, at 5, PCNICC/2000/1/Add.2 (2000). [Reproduced in the accompanying notebook at Tab 7.]

intent *and* knowledge, the interpretation of the requisite *mens rea* written in Article 30 should be intent or knowledge or both.[49]

It is no surprise that the PCNICC's report (the "Elements of Crimes") avoids defining the *mens rea* requirement for the underlying crimes in the crimes against humanity. The definition of each and every underlying crime discussed in the Elements of Crimes provides only a *mens rea* of intent or knowledge of the chapeau elements,[50] and additional "awareness" of various factual circumstances surrounding the underlying crimes in the case of: deportation, imprisonment, sexual violence, enforced disappearance, apartheid, and other inhumane acts.[51] Here, "awareness" denotes a *mens rea* of knowledge and not recklessness or gross negligence.[52] Therefore, Article 30 may be interpreted to require a *mens rea* of intent and knowledge where the PCNICC's report and the ICC Statute have not defined the appropriate mental states for the underlying crimes.

However, the ICC Statute and the Elements of Crimes should be considered open to interpretation by the other international criminal tribunals due to the fact that the ICC Statute and the Elements of Crimes have not been interpreted or applied by the court

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[49] CASSESE, *supra* note 2, at 160. [Reproduced in the accompanying notebook at Tab 31.]

[50] PCNICC, *supra* note 48 at 9, (Example: the definition of the crime against humanity of murder the PCNICC report states, "the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population."). [Reproduced in the accompanying notebook at Tab 7.]

[51] *Id.* at 11-17.

[52] THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, ARTICLE 30, *available at* http://www.un.org/law/icc/statute/romefra.htm, ("For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events."). [Reproduced in the accompanying notebook at Tab 5.]

which they govern.[53] Accordingly, the ICC Statute should not be assumed to limit *mens rea* to only the most culpable mental states. The ICC Statute should be interpreted to include recklessness and gross negligence as appropriate mental states in convictions of crimes against humanity for two reasons; (1) the ICC Statute allows reliance on sources of law which explicitly permit *mens rea* with lesser culpability; and (2) the ICC Statute can be read to include even the least culpable *mens rea* as sufficient to convict for crimes against humanity.

First, Article 30 of the ICC Statute is governed by sources of law which allow for recklessness and gross negligence as acceptable *mens rea*. Notice that Article 30 falls under Part 3 of the ICC Statute which is entitled, "General Principles of Criminal Law."[54] Keep in mind that Article 21 of the ICC Statute identifies "general principles of law from the legal systems of the world" as a source of law upon which the court is to rely. Conceivably, the drafters of the ICC Statute could have indicated the application of other sources of law by naming this Part 3 after a different source of law, such as, "Customary International Law" or "General Principles of International Criminal Law." However, the placement of the article that governs the mental state elements of the crimes against humanity in the part of the statute categorized as "General Principles of Criminal Law" logically leads one to believe that the *mens rea* standard ought to be governed by general principles of criminal law as used in the major legal systems of the world. As will be demonstrated below, general principles of criminal law in the major legal systems of the

[53] As of the drafting of this memo, November 22, 2003, the ICC had not yet tried a case.

[54] ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, PART 3, *available at* http://www.un.org/law/icc/statute/romefra.htm. [Reproduced in the accompanying notebook at Tab 6.]

world clearly recognize at least and recklessness and gross negligence as proper *mens rea* to warrant convictions for some of the crimes enumerated as crimes against humanity.[55]

Second, Article 30 of the ICC Statute does not isolate the *mens rea* to only knowledge and intent. In Article 30, the "intent" and "knowledge" should be taken to identify the required *mens rea* for the underlying crimes and the chapeau elements, respectively. In other words, the "intent" expressed in Article 30 denotes the general meaning of intent[56] for the underlying crimes which includes recklessness and gross negligence. Also, the "knowledge" referred to in Article 30 corresponds to the mental state required for the chapeau elements.[57] This interpretation of Article 30 is concurrent to findings of *mens rea* for crimes against humanity in the ICTY: "The requisite *mens rea* for crimes against humanity appears to be comprised by (1) the intent to commit the underlying offence, combined with (2) knowledge of the broader context in which that offence occurs."[58] The result of this argument is that Article 30 of the ICC Statute gives only very general instructions and reiterates broad definitions of the sources of *mens rea* and leaves the determination of appropriate *mens rea* for the underlying crimes to the Chambers.

In summary, the ICC Statute and the statutes of the other international criminal tribunals do not explicitly allow for recklessness or gross negligence as an appropriate

[55] *Infra* at p. 7.

[56] *Infra* at p. 8.

[57] The *mens rea* of knowledge is generally accepted as the required mental state for the chapeau elements. *See infra* at p. 13.

[58] Prosecutor v. Zoran Kupreskic, *et al.*, IT-95-16, Judgment of 14 January 2000, para. 556. [Reproduced in the accompanying notebook at Tab 13.]

mens rea standard for the underlying crimes in a crime against humanity.[59] Nevertheless, the silence of the statutes on *mens rea* should not be interpreted to limit *mens rea* to knowledge or intent. Indeed, as will be discussed below, the above mentioned statutes have not limited the international criminal courts in their acceptance of recklessness, gross negligence and simple negligence as legitimate *mens rea* standards for the underlying crimes.

2. *Mens Rea* and the Underlying Crime in the Jurisprudence of Domestic Courts and the International Criminal Tribunals

In 1994, the Canadian Supreme Court in Regina v. Finta mirrors the rule of Article 21 of the ICC Statute to resort to general principles of law of the major legal systems of the world when confronted with a lack of direction from statutory language and jurisprudence of the international criminal tribunal. Finta pointed out that the international criminal courts lacked established standards for the *mens rea* requirement of the underlying crimes of crimes against humanity.[60] Finta stated that "the strongest source in international law for crimes against humanity, however, are the common domestic prohibitions of civilized nations. The conduct listed under crimes against humanity was of the sort that no modern civilized nation was able to sanction."[61] Finta found that since international courts frequently ignore the mental element of the underlying crime in war crimes and crimes against humanity, "it seems justified to use

[59] CASSESE, *supra* note 2, at 176. [Reproduced in the accompanying notebook at Tab 31.]

[60] R. v. Finta, [1994] 1 R.C.S. 701, 754. [Reproduced in the accompanying notebook at Tab 12.]

[61] *Id*. at 716, 717.

our established common law rules of *mens rea* where the international law does not have specific standards."[62]

> War crimes and crimes against humanity do not require an excessively high *mens rea* going beyond that required for the underlying offence. In determining the *mens rea* of a war crime or a crime against humanity, the accused must have intended the factual quality of the offence. In almost if not every case, the domestic definition of the underlying offence will capture the requisite *mens rea* for the war crime or crime against humanity as well. Thus, the accused need not have known that his or her act, if it constitutes manslaughter or forcible confinement, amounted to an "inhumane act" either in the legal or moral sense. One who intentionally or knowingly commits manslaughter or kidnapping would have demonstrated the mental culpability required for an inhumane act. The normal *mens rea* for confinement, robbery, manslaughter, or kidnapping, whether it be intention, knowledge, recklessness or willful blindness, is adequate.[63]

Finta found it logical to use established domestic notions of *mens rea* to the underlying crime in a crime against humanity. [64]

In considering the foregoing, national law provides support for using recklessness and gross negligence as sufficient *mens rea* for the underlying crime. This is evident particularly in the case of murder and extermination:

> The customary practice of states, evidenced by international and national military prosecutions, reveals that murder is not intended to mean only those specific intentional killings without lawful justification. Instead, state practice views murder in its *largo senso* meaning as including the creation of life-endangering conditions likely to result. Combining the practice of states in national military prosecutions and the *in extenso* definition of murder in major systems, one can conclude that murder as intended under Article 6(c) [of the ICTY Statute] includes a closely related form of unintentional but foreseeable death that the common law labels manslaughter.[65]

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[62] *Id.* at 754, 755.

[63] *Id.* at 713.

[64] *Id.* at 760 ("In finding a war crime or crime against humanity, the trial judge must, of course, look for the normal intent or recklessness requirement in relation to the act or omission that is impugned.").

[65] BASSIOUNI, *supra* note 12, at 301. [Reproduced in the accompanying notebook at Tab 31.]

Nine years after Finta, the judgments of the ICTR and the ICTY have made steps in developing the requisite *mens rea* for crimes against humanity. However, despite these developments, the *mens rea* standard for the underlying crimes continues to suffer from ambiguity in the jurisprudence of the international criminal tribunals.[66] The Appeals Chamber of both the ICTR and the ICTY have scarcely ruled on the requisite *mens rea* for the underlying crimes. The ICTY and ICTR Trial Chambers have made inconsistent judgments as to whether the stricter *mens rea* standard of recklessness and gross negligence is appropriate.[67] Note also that not all the underlying crimes have received substantial treatment in the international criminal tribunals. Nor have the *mens rea* standards of all the underlying crimes been questioned as to whether lesser culpable mental states than knowledge or intent are possible. This section will analyze the findings of the international criminal tribunals in favor of a *mens rea* of recklessness or gross negligence for crimes enumerated in Article 3 of the ICTR Statute.

i. Murder and Extermination

According to the International Law Commission (ILC) "murder is a crime that is clearly understood and well defined in the national law of every State. This prohibited act does no require any further explanation."[68] Despite this clear and simple assertion of the ILC, the brunt of the conflict of opinion in the Chambers on the *mens rea* standard for

[66] Kupreskic, *supra* note 56, at para. 556. ("The determination of the elements comprising the *mens rea* of crimes against humanity has proved particularly difficult and controversial."). [Reproduced in the accompanying notebook at Tab 13.]

[67] *Infra* pp. 24-32.

[68] Report of the ILC, 48th Session. 6 May – 26 July 1996, p. 96. [Reproduced in the accompanying notebook at Tab 8.]

the underlying crimes centers on the definitions of murder, and extermination.[69] There are three camps within the Chambers of the ICTY and ICTR that represent differing opinions on this issue. First, there are those cases that prefer recklessness as an adequate *mens rea* for the underlying crimes of murder and extermination. Second, are the cases which favor *mens rea* of intent and premeditation. Lastly, there are cases that have attempted to harmonize the differences in the first two camps.

The first ICTR court to wrestle with the definition of murder and extermination was the Trial Chamber in Akayesu.[70] The Akayesu court presents a notably careful analysis of *mens rea* and the underlying crimes. Akayesu discusses the discrepancy in the definition of the word "murder" between the English and French translations of the ICTR Statute. The English version, "murder," is the broader *mens rea* standard of the two translations where premeditation is not required and recklessness is sufficient.[71] Ultimately, Akayesu resolved the discrepancy in favor of the meaning of the English word "murder," rather than the French word "*assassinat*." Akayesu reasoned that customary international law demands the liberal *mens rea* requirement in "murder" rather than "*assassinat*."[72] Akayesu expressly defines the elements of murder as including a mental state of recklessness:[73]

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[69] BASSIOUNI, *supra* note 12, at 305. This is probably due to the fact that murder and extermination share essentially the same elements. The Prosecutor v. Clement Kayishema and Obed Ruzindana, Decision of 21 May 1999, para. 142. [Reproduced in the accompanying notebook at Tab 34.]

[70] The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4, Decision 2 September 1998. [Reproduced in the accompanying notebook at Tab 14.]

[71] *Id.* at para. 588; *see also* The Prosecutor v. Clement Kayishema and Obed Ruzindana, ICTR-95-1-T, Judgment of 1 June 2001, para. 138 ("For example, at the high end of murder the *mens rea* corresponds to the *mens rea* of *assassinat*, i.e., unlawful killing with premeditation. Conversely, at the low end of murder where mere intent or recklessness is sufficient and premeditation is not required, the *mens rea* of murder corresponds with the *mens rea* of *muertre*.").

[72] Akayesu, *supra* note 70, at para. 589. [Reproduced at accompanying notebook at Tab 14.]

> The Chamber defines murder as the unlawful, intentional killing of a human being. The requisite elements of murder are:
>
> 1. the victim is dead;
>
> 2. the death resulted from an unlawful act or omission of the accused or a subordinate;
>
> 3. at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not.[74]

Notice the definition uses the term "intentional killing" yet clearly provides for a recklessness *mens rea* as to the death of the victim. In this case, the word "intent" or "intentional" does not follow the general definition of "intent." It does not refer to the degree of culpability as defined as "purpose" or "specific intent."[75]

On the other hand, Akayesu takes a different approach to the crime of extermination and finds that a mental state of recklessness is not sufficient to convict. The Akayesu definition of extermination leaves out the recklessness language and favors a purely intentional standard:

> The Chamber defined the essential elements of extermination as the following:
>
> 1. the accused or his subordinate participated in the killing of certain named or described persons;
>
> 2. the act or omission was unlawful and intentional;

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[73] *Id.*

[74] The language of this definition mirror the language of the New York Penal Code definition of recklessness. *See infra* p. 9.

[75] *Infra* p. 8.

3. the unlawful act or omission must be part of a widespread or systematic attack;

4. the attack must be against the civilian population;

5. the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds.[76]

However, seven months after the Akayesu Trial Chamber findings, the ICTR Trial Chamber in the Kayishema disagrees with Akayesu in the definition of both murder and extermination. Curiously, Kayishema juxtaposes the Akayesu findings and states that extermination deserves the broad recklessness *mens rea* while murder requires premeditation and intent. Thus the Trial Chamber in Kayishema gave the following definition of the underlying crime of murder:

> The accused is guilty of murder if the accused, engaging in conduct which is unlawful:
>
> 1. causes the death of another;
>
> 2. by a premeditated act or omission;
>
> 3. intending to kill any person or,
>
> 4. intending to cause grievous bodily harm to any person.[77]

The Kayishema definition of murder explicitly leaves out the recklessness *mens rea* that the Akayesu judgment included. Kayishema reasoned that the ambiguity surrounding the discrepancy in the English and French translations of murder ought to be resolved in

[76] Akayesu, *supra* note 70, para. 592. [Reproduced at accompanying notebook at Tab 14.]

[77] Kayishema, *supra* note 71 at para. 140. [Reproduced at accompanying notebook at Tab 29.]

favor of the accused.[78] Therefore, the Kayishema judgment feels that the more lenient *mens rea* standard of "*assassinat*" should be adopted.[79]

In arriving at its definition of extermination, Kayishema relies on the Akayesu finding that elements of extermination and murder are the same with the exception that extermination "requires an element of mass destruction that is not required for murder."[80] However, Kayishema opposes the Akayesu ruling and concludes that a conviction of extermination requires a mental state of gross negligence or recklessness:

> The actor participates in the mass killing of others or in the creation of conditions of life that lead to the mass killing of others, through his act(s) or omission(s); having intended the killing, or being reckless, or grossly negligent as to whether the killing would result and; being aware that his act(s) or omission(s) forms part of a mass killing event; where, his act(s) or omission(s) forms part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.[81]

In justifying the stricter *mens rea* standard for extermination, Kayishema quotes Cherif Bassiouni:

> Extermination implies intentional and unintentional killing. The reason for the latter is that mass killing of a group of people involves planning and implementation by a number of persons who, though knowing and wanting the intended result, may not necessarily know their victims. Furthermore, such persons may not perform the *actus reus* that produced the deaths, nor have specific intent toward a particular victim.[82]

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[78] *Id.* at para. 139. ("If in doubt, a matter of interpretation should be decided in favour of the accused; in this case, the inclusion of premeditation is favourable to the accused. The Chamber finds, therefore, that murder and *assassinat* should be considered together in order to ascertain the standard of *mens rea* intended by the drafters and demanded by the ICTR Statute. When murder is considered along with *assassinat* the Chamber finds that the standard of *mens rea* required is intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection.").

[79] *Id.* at para. 138, 139. [Reproduced at accompanying notebook at Tab 29.]

[80] *Id.* at para. 142.

[81] *Id*. at para. 144.

[82] *Id*. at para 143.

Since the decision in Kayishema to oppose Akayesu, the ICTR Trial Chambers have not cleared up the inconsistency. The Bagilishema judgment wholeheartedly agree with Kayishema on the *mens rea* required for murder and extermination.[83] Conversely, Musema[84] and Rutaganda[85] follow Akayesu on both murder and extermination. Two recent ICTR Trial Chambers to rule on the issue of *mens rea* and the underlying crime, Niyitegeka and Ntakirutimana, only exacerbate the ambiguity by failing to even mention a *mens rea* requirement for the underlying crimes.[86] In fact, the Ntakirutimana ruling mentions that the elements of Article 3 of the ICTR Statute are "well established" and then footnotes Akayesu and Bagilishema (which, of course, do not agree on the *mens rea* elements of murder and extermination[87]) and then defines the elements of murder and extermination and avoids the mental element of the underlying crimes altogether.[88]

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[83] Bagilishema, *supra* note 10 at para. 84, 89 [Reproduced in the accompanying notebook at Tab 9.]; The Prosecutor v. Larent Semanza, ICTR-97-20, Judgment of 15 May 2003, para. 335. [Reproduced in the accompanying notebook at Tab 26.]

[84] The Prosecutor v. Alfred Musema, ICTR-96-13, Judgment of 27 January 2000, para 215, 218. [Reproduced in the accompanying notebook at Tab 15.]

[85] The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, ICTR-96-3, Judgment of 6 December 1999, para. 80, 83. [Reproduced in the accompanying notebook at Tab 16.]

[86] The Prosecutor v. Eliezer Niyitegeka, ICTR-96-14, Judgment of 16 May 2003, para 441-447, 448-454 [Reproduced in the accompanying notebook at Tab 17.]; The Prosecutor v. Elizaphan and Gerard Ntakirutimana, ICTR-96-10,17, Judgment of 21 February 2003, para. 803, 812. [Reproduced in the accompanying notebook at Tab 18.]

[87] *Supra* note 10. [Reproduced in the accompanying notebook at Tab 9.]

[88] Ntakirutimana, *supra* note 86. (For example: "The elements of a crime against humanity are well established. In order for the Chamber to enter a conviction on this count, it must find that the following three elements have been proved beyond a reasonable doubt:

(i) That there was, at the relevant time, a widespread or systematic attack against a civilian population on political, ethnic, or racial grounds;
(ii) The Elizaphan Ntakirutimana or Gerard Ntakirutimana murdered one or more civilians; and
(iii) That the Accused knew that their act or acts of murder were part of a widespread or systematic attack against civilians on discriminatory grounds, although the Accused need not have any discriminatory intent."). [Reproduced in the accompanying notebook at Tab 18.]

Despite the unclear definition of the *mens rea* requirement for murder and extermination in the ICTR, the majority of the Trial Chambers in the ICTY that have ruled that the requisite *mens rea* for the underlying crimes of murder and extermination follow the Akayesu judgment on murder and the Kayishema judgment on extermination.[89] This has created a strong precedent to utilize recklessness as requisite *mens rea* to convict an accused for the underlying crimes of murder and extermination.

The ICTY Trial Chambers are not without at least some ambiguity on this issue.[90] The Kupreskic judgment, in 2000, relies on Akayesu and accepts the recklessness standard for murder. However, without significant explanation, Kupreskic cites Kayishema and combines the opposing *mens rea* standards of Akayesu and Kayishema.

[89] Kupreskic, *supra* note 56 at para. 560-561, [Reproduced in the accompanying notebook at Tab 13]; Kordic, *supra* note 29 at para. 190, [Reproduced in the accompanying notebook at Tab 10.]; The Prosecutor v. Tihomir Blaskic, IT-95-14, Judgment of 3 March 2000, para. 217, [Reproduced in the accompanying notebook at Tab 19.]; The Prosecutor v. Goran Jelisic, IT-95-10, Judgment of 14 December 1999, para. 51, [Reproduced in the accompanying notebook at Tab 20.]; Celebici, *supra* note 5, at para. 435, [Reproduced in the accompanying notebook at Tab 21.]; Prosecutor v. Krnojelac, IT-97-25, Judgment of 15 March 2002, para. 324, [Reproduced in the accompanying notebook at Tab 22.]; Prosecutor v. Krstic, IT-98-33, Judgment of 2 August 2001, para. 485, [Reproduced in the accompanying notebook at Tab 23.]; Prosecutor v. Kvocka, IT-98-30/1, Judgment of 2 November 2001, para. 132. [Reproduced in the accompanying notebook at Tab 24.]

[90] As of the writing of this memorandum, the most recent ICTY case to rule on the *mens rea* requirement of murder is the "Tuta and Stela" case, which follows the Akayesu definition:

> "(b) Murder and willful killing
>
> The underlying elements of the offences of murder under Article 3 and 5 of the Statute and willful killing under Article 2 of the Statute are the same. These elements are:
>
> a. death of the victim as the result of the action(s) of the accused,
>
> b. who intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death,

The general requirements under Articles 2, 3 and 5 of the Statute apply to these crimes." The Prosecutor v. Mladen Naletilic, aka "Tuta" and Vinko Martinovic, aka "Stela", IT-98-34, Judgment of 31 March 2003, para. 247. [Reproduced in the accompanying notebook at Tab 25.]

Essentially, Kupreskic has combined the discrepant English and French translations of "murder" and "*assassinat*." Paragraph 561 of Kupreskic reads:

> The requisite *mens rea* of murder under Article 5(a) is the intent to kill or the intent to inflict serious injury in reckless disregard of human life. In Kayishema it was noted that the standard of *mens rea* required is intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection. The result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events.

Finally, in May 2003, the ICTR Trial Chamber broke ground on the definition of murder in the Semanza judgment by reviewing the divergence of the ICTR Chambers.[91] Semanza gives a very complete analysis of *mens rea* and the underlying crimes but, still leaves ambiguity. Semanza relies on Article 33(4) of the Vienna Convention on the Law of Treaties to interpret the differences in the translation of "murder" and "*assassinat*." Article 33(4) "directs that when interpreting a bilingual or multilingual instrument the meaning which best reconciles the equally authoritative texts shall be adopted."[92] In so doing, Semanza merges the divergent interpretations of the English and French versions of murder, similar to the Kupreskic approach.[93] "The Chamber finds that it is possible to harmonize the meaning of the two texts by requiring premeditation."[94] Semanza distinguishes the *mens rea* requirement for genocide with that of crimes against humanity.[95] The *mens rea* requirement for genocide is specific intent[96] and the requisite

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[91] The Prosecutor v. Larent Semanza, ICTR-97-20, Judgment of 15 May 2003, para. 335. [Reproduced in the accompanying notebook at Tab 26.]

[92] *Id*. at para. 336.

[93] *Infra* at p. 31.

[94] Kupreskic, *supra* note 58 at para. 337. [Reproduced in the accompanying notebook at Tab 13.]

[95] *Id*. at para. 338.

mens rea standard for crimes against humanity is a more strict standard.[97] Therefore, it appears that Semanza and Kupreskic intend to require that an accused premeditate his act or omission ("a cool moment of reflection is sufficient"[98]) and still demand a recklessness *mens rea* for the resulting death of the victim.

In conclusion, in balancing the precedent that has been established in the ICTR and ICTY, the greatest weight leans in favor of accepting lesser culpable mental states. The ICTR Chambers are practically split on whether or not to embrace a stricter *mens rea* standard. However, the majority of the ICTY cases believe recklessness to be adequate. Further, the recent cases in the ICTY and ICTR which attempt to harmonize the differences of opinion recognize recklessness as a legitimate *mens rea*.

ii. Rape

Even though the ICTY Appeals Chamber in the Kunarac judgment states that the *mens rea* requirement of rape is "the intention to effect… sexual penetration, and the knowledge that it occurs without the consent of the victim,"[99] the practical application of *mens rea* in Kunarac seems to be negligence. In Kunarac, in order to determine whether the perpetrator had knowledge that the victim did not consent to the penetration, the Appeals Chamber considers the surrounding circumstances under which rapes were

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[96] MORRIS AND SCHARF, *supra* note 40 at 198. ("The specific intent required for the crime of genocide is not only the essence or the distinguishing characteristic of the heinous crime, it is also the element that makes it difficult to prove that the crime has been committed."). [Reproduced in the accompanying notebook at Tab 35.]

[97] Kupreskic, *supra* note 58 at para. 338. [Reproduced in the accompanying notebook at Tab 13.]

[98] *Id*. at para. 339.

[99] The Prosecutor v. Dragoljub Kunarac, *et al.*, IT-96-23/1, Judgment of 12 June 2002, para. 127. [Reproduced in the accompanying notebook at Tab 27.]

generally perpetrated by the Appellants.[100] In considering the surrounding circumstances Kunarac uses an objective perspective to test the perpetrator's knowledge of the victim's consent.[101] Using an objective test to determine the *mens rea* of the accused effectively renders the requisite mental state to simple negligence:[102]

> While negligence thus requires that the defendant's conduct create an unreasonable risk of harm to others, he is nonetheless negligent though he is unaware of the fact that his conduct creates any such risk. All that negligence requires is that he ought to have been aware of it (i.e., that a reasonable man would have been aware of it). Thus negligence is framed in terms of an objective (sometimes called "external") standard, rather than in terms of a subjective standard.[103]

The following excerpt demonstrates the Kunarac Appeals Chamber's agreement with the Kunarac Trial Chamber's objective analysis of the Appellant's knowledge of the victim's consent: "Turning now to the issue of D.B.'s (the victim's) consent, the Trial Chamber found that, given the circumstances of D.B.'s captivity in Partizan, regardless of whether he knew of the threats by Gaga, the Appellant could not have assumed that D.B. was consenting to sexual intercourse."[104] The Kunarac judgment is not concerned with the perpetrator's subjective mental state. Rather what the Chamber finds important was whether the perpetrator ought to have been aware that "D.B." was not consenting; this is

[100] *Id*. at para 132.

[101] Kunarac, *supra* note 99. [Reproduced in the accompanying notebook at Tab 27.]

[102] *Infra* at p. 10.

[103] WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., *supra* note 27. [Reproduced in the accompanying notebook at Tab 34.]

[104] Kunarac, *supra* note 99 at para. 218. [Reproduced in the accompanying notebook at Tab 27.]

an objective standard.[105] When an objective test is used to discern a *mens rea* element of a crime, the *mens rea* requirement is reduced to negligence.[106]

The opinion of Kunarac, binding precedent on the ICTR Chambers, has taken away the subjective mental element of the knowledge of an accused with respect to the victim's consent to penetration in a crime of rape. It seems as though the ICTY Appeals Chamber has established the *mens rea* standard for the crime of rape: intent for penetration and negligence for consent.

iii. Other Inhumane Acts

The crime of "other inhumane acts" does not appear in any source of international or domestic law.[107] However, Article 7 of the ICC Statute defines "other inhumane acts" as: "Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health." The ICTY generally finds this an acceptable definition.[108] However, the Tadic Trial Chamber found that "other inhumane acts" included those crimes enumerated in the preceding articles, obviously including the underlying crimes of a crime against humanity.[109] The Kupreskic Trial Chamber agrees, "In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5 [(the article of the ICTY Statute enumerating crimes against

[105] WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., *supra* note 27. [Reproduced in the accompanying notebook at Tab 34.]

[106] *Id.*

[107] BASSIOUNI, *supra* note 12, at 330. [Reproduced in the accompanying notebook at Tab 32.]

[108] Blaskic, *supra* note 89 at para. 238, ("The willful infliction of serious injury and great suffering, both physically and mentally, to civilians."). [Reproduced in the accompanying notebook at Tab 19.]

[109] The Prosecutor v. Dusko Tadic, IT-94-1, Judgment of 7 May 1997, para. 748. [Reproduced in accompanying notebook at Tab 30.]

humanity)]."[110] Since at least some of the underlying crimes of a crime against humanity require a *mens rea* of recklessness or gross negligence (as discussed above), the word "intentionally" in the ICC Statute and ICTY jurisprudence again refers to the general meaning of "intent."[111] In support of this argument, Kayishema found the *mens rea* requirement to be at least recklessness: "[I]nhumane acts are… those which *deliberately* cause serious mental suffering. The Chamber considers that an accused may be held liable under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental suffering on the third party, or where the accused knew that his act was likely to cause serious mental suffering and was reckless as to whether such suffering would result."[112]

The development of the elements of "other inhumane acts" is far from established; however, the door has been opened to argue at least recklessness to convict a perpetrator of "other inhumane acts."

E. *Mens Rea* and Individual Criminal Responsibility: Two Exceptions to Knowledge or Intent

Commentators on the international criminal tribunals have identified two more exceptions to the overarching intent or knowledge *mens rea* requirement for crimes against humanity in which recklessness, gross negligence and simple negligence become appropriate *mens rea* to convict an accused of a crime against humanity. These exceptions are both found within the various, fact-driven situations in which an accused

[110] Kupreskic, *supra* note 58, at para. 566. [Reproduced in accompanying notebook at Tab 13.]

[111] *Infra* p. 8.

[112] Kayishema, *supra* note 71, at para. 153. [Reproduced in accompanying notebook at Tab 29.]

may be held criminally responsible for a crime against humanity.[113] In their respective 2003 scholarly publications, Antonio Cassese and William Schabas discuss these two exceptions, namely, command responsibility and criminal design (or "joint criminal enterprise").[114]

1. Command Responsibility

Recognizing superior responsibility as a form of individual criminal responsibility, Article 6(3) of the ICTR Statute states:

> "The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[115]

The language of Article 6(3) shows strikingly similar language to the definitions of gross negligence and recklessness.[116] The "knew or had reason to know" language resembles a

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[113] STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, ARTICLE 6, *available at* http://www.ictr.org/ENGLISH/basicdocs/statute.html. [Reproduced in the accompanying notebook at Tab 6.]

[114] CASSESE, *supra* note 2 at 169 ("Instances of recklessness are clearly envisaged in some international rules. Thus, for instance the rule on superiors' responsibility provides that the superior is criminally liable for the crimes of his subordinates if 'he consciously disregarded information which clearly indicated' that his subordinates were about to commit, or were committing, international crimes. In this case the superior is liable to punishment for having taken the risk, knowing that his subordinates were likely to commit or were committing crimes."), [Reproduced in accompanying notebook at Tab 31.]; *see also* SCHABAS, *supra* note 6 at 1025, ("There are two types of situations in which a person may be convicted of a crime for which the offender lacked full knowledge or intent. The first is established by the Statute itself. Article 7(3) [of the ICTY Statute] sets out the principle of superior responsibility, by which someone may be convicted of a crime committed by a subordinate when that 'knew or had reason to know that the subordinate was about to commit such acts.' The second has been devised by the judges, and in effect adds a form of criminal participation or complicity to the list that appears in article 7(1) [of the ICTY Statute] that has been baptized 'joint criminal enterprise.'"). [Reproduced in accompanying notebook at Tab 38.]

[115] *Supra* note 37. [Reproduced in accompanying notebook at Tab 6.]

[116] *Infra* p. 9.

situation in which a person fails to perceive something that a reasonable person would have perceived in the actor's situation.

Arguably, Article 6(3) sounds like a simple negligence standard.[117] The Secretary-General of the United Nations described superior, or command responsibility, as "imputed responsibility or criminal negligence."[118] On the other hand, it has been established that negligence or irresponsible command over subordinates does not make a commander criminally liable in the ICTY.[119] Still, legal scholars agree that gross negligence and recklessness are sufficient *mens rea* to convict an accused of a crime against humanity under command responsibility,[120] as has the Trial Chamber of the ICTR. The Akayesu case found that the *mens rea* requirement for superior responsibility is at least negligence that is "so serious as to be tantamount to acquiescence or even malicious intent."[121]

The ultimate word on the *mens rea* requirement for individual criminal responsibility in command responsibility is the Celebici Appeals Chamber. Celebici slightly narrows the seemingly broad scope of the Statutes of the international criminal tribunals with respect to command responsibility.

> A superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.

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[117] *Infra* p.109.

[118] SCHABAS, *supra* note 6, at 1026. [Reproduced in the accompanying notebook at Tab 38.]

[119] *Id.* at 1028.

[120] MORRIS AND SCHARF, *supra* note 40, at 257. [Reproduced in the accompanying notebook at Tab 35.]

[121] Akayesu, *supra* note 70, at para. 488. [Reproduced in the accompanying notebook at Tab 14.]

> This is consistent with the customary law standard of *mens rea* as existing at the time of the offences shared in the Indictment.[122]

While the language of ICTR Statute Article 6(3), specifically, "or had reason to know that the subordinate was about to commit such acts or had done so," reads as a negligence standard, Celebici finds that the commander must have had at least some information available to him with respect to the conduct of his/her subordinates. Willful blindness of the knowledge of "offences committed by subordinates" may even suffice:

> Proof of knowledge of the existence of the relevant fact is accepted in such cases where it is established that the defendant suspected that the fact existed (or was aware that its existence was highly probable) but refrained from finding out whether it did exist because he wanted to be able to deny knowledge of it (or he just did not want to find out that it did exist).[123]

Therefore, command responsibility presents the prosecution with a strong tool to convict an accused for a crime against humanity based upon a commander's negligent control over subordinates when the commander has knowledge of the subordinates' commission or imminent commission of a crime.

2. Joint Criminal Enterprise

Joint criminal enterprise occurs when perpetrators share a common design to pursue a criminal course of conduct. Specifically, a joint criminal enterprise arises where one of the perpetrators commits an act that was outside the common design yet is a natural and foreseeable consequence of the implementation of the common purpose.[124]

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[122] The Prosecutor v. Mucic, *et al.* (the Celebici case), IT-96-21, Judgment of 20 February 2001, para. 241. [Reproduced in the accompanying notebook at Tab 21.]

[123] Prosecutor v. Aleksovski, Judgment on Appeal by Anto Nobilo against Finding of Contempt, IT-95-14/1, 30 May 2001, para. 43. [Reproduced in the accompanying notebook at Tab 28.]

[124] SCHABAS, *supra* note 4 at 1031. [Reproduced in the accompanying notebook at Tab 38.]

The Appeals Chamber in Tadic gives an example of a situation where joint criminal enterprise arises:

> An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed.[125]

Accordingly, the binding Tadic (Appeals) opinion states a clear definition of the *actus reus*, and the corresponding *mens rea* sufficient for a conviction of joint criminal enterprise in paragraph 228:

> 227. In sum, the objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows:
>
> i. *A plurality of persons.* They need not be organised in a military, political or administrative structure, as is clearly shown by the *Essen Lynching* and the *Kurt Goebell* cases.
>
> ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
>
> iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.
>
> 228. By contrast, the *mens rea* element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's

[125] Tadic, *supra* note 39, at para. 204. [Reproduced in the accompanying notebook at Tab 11.]

> position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.[126]

Notice that with joint criminal enterprise it is not necessary to show that an accused knew of the risk and acts despite such risk. Rather, the unintended consequences of the implementation of the common design, must have been "natural and foreseeable." The tribunals have determined that an accused is judged based on an objective, reasonable person standard.[127] In other words, the requisite *mens rea* of a person accused of a joint criminal enterprise is negligence.[128]

William Schabas believes joint criminal enterprise to be the "magic bullet" for the Office of the Prosecutor of the ICTY. Since the introduction of the concept of joint criminal enterprise in the Appeal Chamber of the Tadic case, the ICTY has indicted Slobodan Milosevic and convicted General Kristic for being a part of a joint criminal enterprise.

F. Policy as a Barrier to a Broad *Mens Rea* Standard in the International Criminal Tribunals

The ICTY convicted General Kristic of genocide without proving that he actually intended to commit genocide.[129] It was only found that genocide was a "natural and

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[126] *Id.*

[127] SCHABAS, *supra* note 6, at 1033. [Reproduced in the accompanying notebook at Tab 38.]

[128] *Infra* at p. 10.

[129] SCHABAS, *supra* note 6, at 1033. [Reproduced in the accompanying notebook at Tab 38.]

foreseeable" result of his acts, and that a reasonable person would have understood the consequence of genocide.[130] General Kristic, a man in his fifties, was sentenced to forty-six years in prison.[131]

While recklessness and gross negligence have been established as legitimate *mens rea* for some crimes against humanity and under certain circumstances, the Tribunals are aware of the policy against broadening the scope of *mens rea* for the crimes against humanity. The ICTY Trial Chamber in Kordic makes this warning:

> The expansion of *mens rea* is an easy but dangerous approach. The Trial Chamber must keep in mind that the jurisdiction of this International Criminal Tribunal extends only to "natural persons" and only the crimes of those individuals may be prosecuted. Stretching notions of individual *mens rea* too thin may lead to the imposition of criminal liability on individuals for what is actually guilt by association, as a result is at odds with the driving principles behind the creation of this International Tribunal.[132]

Also, William Schabas states that securing convictions on a reduced culpability "diminishes the didactic significance of the Tribunal's judgments and… compromises its historical legacy."

These words of caution seem most plausible in cases where the accused is convicted of a crime against humanity or genocide based on the accused's merely negligent state of mind.[133] Despite mitigated sentencing for lesser culpable *mens rea*, the

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[130] *Id.*

[131] *Id.*

[132] Kordic, *supra* note 33, at para. 220. [Reproduced in accompanying notebook at Tab 10.]

[133] "A careful perusal of the penal codes of most civilized nations leads us to the conclusion that homicide involving less than culpable negligence is not universally recognized as an offense. Even in those American jurisdictions – still relatively few in number – which have given statutory recognition to either negligent homicide or vehicular homicide, the degree of negligence required is often held to 'culpable' or 'gross' – the same as that required for involuntary manslaughter. Imposing criminal liability for less than culpable negligence is a relatively new concept in criminal law and has not, as yet, been given universal

stigma attached to being convicted of a crime against humanity in an international criminal tribunal assigns punishment beyond the prison sentence which could linger a lifetime. In these cases the inherent severity of international criminal tribunals convictions, coupled with the minimally culpable nature of negligence could threaten legitimacy of the ICTR. If the people of Rwanda and the international community feel that ICTR decisions hand out excessive punishment for no fault behavior or nominal culpability, the ICTR may risk loosing its esteem and legitimacy internationally and within Rwanda.

In the "Reckless Priest" hypothetical presented above, it is easy to see how convictions derived from *mens rea* of recklessness or gross negligence could prove controversial as well.[134] The "Reckless Priest" was not malicious in his conduct and acted with the intention of aiding victims of civil unrest. If such an individual is indicted and convicted of a crime against humanity, the application of even clearly culpable *mens rea* could threaten the legitimacy of the ICTR.

However, it should be argued that the stigma associated with a conviction of a crime in the international criminal tribunals does not coincide with the mental state of the accused in relation to the *actus reus*. Rather, the stigma attaches to the inhumane degree inherent in crimes against humanity.[135] Finta makes this point in stating that "any stigma

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acceptance by civilized nations." CASSESE, *supra* note 2, at 172, *citing*, 4 CMR (1952), 104, 115 (CMA Lexis 661). [Reproduced in the accompanying notebook at Tab 31.]

[134] *Infra* pp. 4, 5.

[135] "In sum, murder, extermination, torture, rape, political, racial, or religious persecution and other inhumane acts reach the threshold of crimes against humanity only if they are part of a practice. Isolated inhumane acts of this nature may constitute grave infringements of human rights or, depending on the circumstances, war crimes, but fall short of meriting the stigma attaching to crimes against humanity. On the other hand, an individual may be guilty of crimes against humanity even if he perpetrates one or two of the offences mentioned above, or engages in one such offence against only a few civilians, provided those

attached to being convicted under war crimes legislation does not come from the nature of the offence, but more from the surrounding circumstances of most war crimes and often is a question of the scale of the acts in terms of numbers."[136] In this light, the broadened *mens rea* requirement to include negligence (as well as other lesser culpable mental states) for the underlying crime is not the driving force behind the added stigma of a conviction of a crime against humanity. Therefore, the argument that crimes against humanity deserve a narrower *mens rea* standard due to the elevated level of punishment fails because the mental state of the perpetrator is not the source of the added culpability. It is the perpetrator's state of mind, satisfying the chapeau elements that make crimes against humanity so heinous and make the added stigma a just desert.

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offences are part of a consistent pattern of misbehaviour by a number of persons linked to that offender (for example, because they engage in armed action on the same side, or because they are parties to a common plan, or for any other similar reason." CASSESE, *supra* note 2, at 66. [Reproduced in the accompanying notebook at Tab 32.] *See also, id.* at 82, ("To sum up, the requisite subjective element or *mens rea* in crimes against humanity is not simply limited to the criminal intent (or recklessness) required for the underlying offence (murder, extermination, deportation, rape, torture, persecution, etc.). The viciousness of these crimes goes far beyond the underlying offence, however wicked or despicable it may be. This additional element – which helps to distinguish crimes against humanity from war crimes – consists of awareness of the broader context into which this crime fits, that is knowledge that the offences are part of a systematic policy or of widespread and large-scale abuses. In addition, when these crimes take the form of persecution, another mental element is required: a persecutory or discriminatory animus. The intent must be to subject a person or group to discrimination.").

[136] Finta, *supra* note 60 at 717, 718. [Reproduced in accompanying notebook at Tab 12.]