MEMORANDUM FOR
OFFICE OF THE PROSECUTOR

ISSUE #8:
COMPLICITY IN GENOCIDE
AS AN ALTERNATIVE COUNT
TO GENOCIDE

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I. Introduction and Summary of Conclusions

A. ISSUE

Complicity in genocide as an alternative count to genocide.

B. INTRODUCTION

The United Nations Security Council established the International Criminal Tribunal for Rwanda in order to prosecute those persons responsible for genocide.\(^1\) Included in the list of acts punishable under Article 2 paragraph 3 of the ICTR Statute is complicity in genocide.\(^2\) With numerous genocide crimes being closely related, it seems possible that complicity in genocide may be overlooked or grouped with another crime. That could have been the situation in the case of Jean-Paul Akayesu. The statute lists complicity in genocide as a separate act that is within the tribunal’s jurisdiction to prosecute. Therefore, those alleged to have committed complicity should be held liable for their acts regardless of what other crimes they may have committed.


C. SUMMARY OF CONCLUSIONS

Individuals can be prosecuted for the crime of complicity in genocide where they have participated in or contributed to the commission of the crime of genocide. ³ To determine if the accomplice incurs individual criminal responsibility, we look to the act committed by the accused as well as his mental state at the time the act was committed.

As to the act committed, the Chamber has looked to the Rwandan Penal Code and to the general practice of other states to help define those acts of an accomplice that fulfill the requirement to incur liability.⁴ In the opinion of the ICTR, the form of the act should fall into one of three categories: complicity by instigation, complicity by procuring means, or complicity by aiding and abetting.⁵ To impose liability for complicity, the prosecutor must show


⁴United Nations International Criminal Tribunal for Rwanda, Chamber I, Office of the Prosecutor, Case No. ICTR-96-4-T at 89 (1998). Three forms of accomplice participation are recognized in most criminal civil law systems: instigation, aiding and abetting, and procuring means. See for example the Senegalese Penal Code and the new French Penal Code. See also, The Prosecutor v. Duscan Tadic, Case No. IT-94-1 at 141 stating aiding and abetting, assisting, procuring means, words, acts, encouragement or support are recognized by the ICTY. (Tabs 7 & 8)

⁵The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T at 89. (Tab 8)
that the acts of the accomplice gave assistance or encouragement in the commission of the crime.

The second criteria is the mental state of the accomplice. There are several different theories on the mens rea element of intent. The Chamber has opted for the lower threshold requirement of knowing. Thus, to meet the mens rea requirement for imposing liability, all the accomplice had to do was act knowing he was providing assistance to the commission of the principal offense.

The crime of complicity is an open one. Although it must be shown at least by evidence that genocide took place for the prosecution to obtain a conviction, the identity of the principal does not have to be known. Further, the low mens rea requirement does not even require that the accomplice have the specific intent to "destroy in whole or in part...", all that is needed is for the accomplice to know

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6 The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T at 904. The accused must have acted knowingly. See also National Coal Board v. Gamble National Coal Board v. Gamble, 1 QB 11, (1959) stating the low threshold of knowing is enough to incur liability. See also, Backum v. United States, 112 F. 2d. 635, (4th Cir. 1940), which states knowing assistance is enough to incur liability. This is in conflict with United States v. Peoni, 100 F. 2d. 401 (1938), which holds their needs to be a purpose, as well as knowledge to incur liability. See also, The Prosecutor v. Duscon Tadic, Case No. IT-94-1 at 136, the Nuremberg war crime trials mens rea requirement needs more than just knowing. (Tabs 8,5,20,21,7)

7 The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4 at 91. (Tab 8)

8 The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4 at 91. (Tab 8)
that he is in some way facilitating the crime. Still, even with these low threshold requirements, convictions for complicity in genocide do not come easy.

The case of Jean-Paul Akayesu is a good example of how an accomplice can meet the actus reus and mens rea requirements and still not be convicted of the crime. Here, it seems the Tribunal based its non-conviction on one of two theories. First, the Rwanda Penal Code which does not allow a conviction for both genocide and complicity in genocide for the same act. The Second is the possibility that the Chamber gave great deference to Rwandan Organic Law which states that only the most serious crime of an accused may lead to a conviction.

In conclusion, the ICTR Statute suggests that complicity in genocide is a separate crime under Article 2. Case Law provides that to impose accomplice liability, the required actus reus and mens rea must be established. In regards to complicity in genocide, there must be sufficient evidence to show the crime of genocide was committed. Once all this has been proven, there should be a conviction. The

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9 The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4 at 81. (Tab 8)

10 Mark Drumble, Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda’s Domestic Trials. (Tab 34)

Akayesu court disagrees it seems by looking at national law. This theory, however, is not primary where an international crime has taken place. The international law should prevail under the principle of supremacy.\textsuperscript{12}

II. FACTUAL BACKGROUND

The genocide in Rwanda began on the evening of 6 April 1994 after Juvenal Habyarimana, the President of Rwanda, had his plane shot down.\textsuperscript{13} The Hutu people immediately blamed the Tutsis.\textsuperscript{14} This led to the Hutu extremists killing 500,000 Tutsis within the next 100 days.\textsuperscript{15} Eventually, the Rwanda Patriotic Front gained control of the government and put an end to the killings.\textsuperscript{16}

In November of 1994, the International Criminal Tribunal for Rwanda was established.\textsuperscript{17} Their responsibility

\textsuperscript{12} 2 Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda 231 n. 882 (1993). See also The Prosecutor v. Duscon Tadic, Case No. IT-94-1 at 133, The International Tribunal is only empowered to apply international humanitarian law that is "beyond any doubt customary law." (Tabs 25,7)

\textsuperscript{13} See 1 Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda 53 (1998). (Tab 24)

\textsuperscript{14} See 1 Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda 53 (1998). (Tab 24)

\textsuperscript{15} See 1 Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda 58 (1998). (Tab 24)

\textsuperscript{16} See 1 Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda 58 (1998). (Tab 24)

\textsuperscript{17} See 2 Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda 5 (1998). (Tab 25)
is to investigate and prosecute everyone involved in committing acts of genocide.\textsuperscript{18} The crime of complicity in genocide is included in the genocide acts that the Tribunal is to prosecute. As shown by the case of Jean-Paul Akeyesu, it is difficult to get a conviction for complicity in genocide as this crime may be overlooked, or combined with another crime.

III. LEGAL DISCUSSION

A. AUTHORITY FOR PROSECUTING COMPLICITY IN GENOCIDE

In response to the genocide that had taken place in Rwanda, the U.N. Security Council adopted Resolution 955\textsuperscript{19} which created the International Criminal Tribunal for Rwanda [hereinafter ICTR].\textsuperscript{20} Authoritative basis used to establish the ICTR is international humanitarian law, including in particular the Genocide Convention of 1948.\textsuperscript{21}

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\textsuperscript{19} See Council Resolution 955 (1994), S/RES/955 (1194), (November 8, 1994). (Tab 1)


\textsuperscript{21} See Leo Kuper, Genocide (1981). The legislative history of the Genocide Convention. See also Timothy L.H. McCormack & Gerry
Convention acknowledges that genocide is an international crime. The notion of prosecuting complicity in genocide is not new as "participation by complicity in the most serious violations of international humanitarian law was considered a crime as early as Nuremberg."  

The ICTR Statute's provisions defining genocide and complicity in genocide mirror the language contained in Articles 2 and 3 of the Genocide Convention.  

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23 The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T at 88. See also, Steven R. Rutner and Jason S. Abrams, Accountability for Human Rights Atrocities in International Law 118 (1997). (Tabs 8 & 31)

Convention's definition of the crime of genocide includes related secondary offenses which may be charged separately. Complicity in genocide is one of the secondary offenses.\textsuperscript{25}

Under Article 2(3)(e) of the ICTR statute, the tribunal has the power to prosecute persons who have committed complicity in genocide.\textsuperscript{26} Furthermore, all criminal law systems view complicity as a form of criminal participation.\textsuperscript{27} Being recognized as an international crime, an act of complicity in genocide will be punished.\textsuperscript{28}


It is obvious that the purpose of punishing and preventing genocide would not be achieved by declaring punishable only those acts which constitute genocide in accordance with the provisions of Article II. Persons are accessories to group destruction by cooperating with those directly guilty of genocide or by performing certain acts preparatory to genocide. The involvement could mean participation in a common design of annihilation by planning, scheming, giving orders or otherwise preparing for, or assisting in, the commission of the acts of genocide. All such culprits must be included in the group of persons subject to punishment. NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 66 (1960).

\textsuperscript{26} See 2 Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda (1998). (Tab 25)

\textsuperscript{27} See generally The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T. (Tab 8)

\textsuperscript{28} See generally Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda (1998), See also Michael P. Scharf, Lessons from the First International War
B. COMPLICITY IN GENOCIDE DEFINED

A finding of complicity in genocide results in holding an accused liable as an accomplice for participating in or contributing to the commission of genocide.\textsuperscript{29} The act of complicity itself is not inherently criminal, so the accomplice borrows the criminality of the act committed by the principal perpetrator.\textsuperscript{30} Therefore, only if the primary offense of genocide has actually been committed by someone else can an individual be held responsible for complicity.\textsuperscript{31}

In determining the limits of accomplice liability, a court must consider the two basic criteria for individual criminal responsibility, namely: the act committed (actus

\textsuperscript{29} See 2 Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda, 233 n. 889 (1998). "The possible range of persons who may be held guilty of war crimes or crimes against humanity is not limited to those who physically performed the illegal deed. Many others have been held to be sufficiently connected with an offense to be held criminally liable..." United National War Crimes Commission, XV Law Reports of Trials of War Criminals 49 (1949) (citations omitted). (Tab 25)

\textsuperscript{30} See generally The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T. (Tab 8)

reus) and the mental state of the wrongdoer (mens rea). Generally, the common law holds one liable as an accomplice to the crime if:

"(a) he gave assistance or encouragement or failed to perform a legal duty to prevent it (b) with the intent thereby to promote or facilitate commission of the crime".

1. ACTUS REUS

The first basic criteria for individual criminal responsibility is the act committed by the wrongdoer: the actus reus.

a. ACTUS REUS DEFINED

The Tribunal defined complicity under Article 2(3)(e) of the ICTR Statute by emphasizing the Rwandan Penal Code. Specifically, Article 91, accomplice liability which states:

An accomplice shall mean:

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33 See Wayne R. LeFave and Austin W. Scott, Jr., Substantive Criminal Law 136 (1996). (Tab 28)


35 The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T at 90. (Tab 8)
1. A person or persons who by means of gifts, promises, threats, abuse of authority or power, culpable machinations, or artifice, directly incite(s) to commit such action or order(s) that such action be committed.

2. A person or persons who procure(s) weapons, instruments or any other means which are used in committing such action with the knowledge that they would be so used.

3. A person or persons who knowingly aid(s) or abet(s) the perpetrator or perpetrators of such action in the acts carried out in preparing or planning such action or in effectively committing it."36

The Nuremberg Tribunal defined complicity as having an awareness while participating in the following acts: planning, instigating, ordering, committing or otherwise aiding and abetting in the commission of a crime37. The International Criminal Tribunal for Yugoslavia [hereinafter ICTY] defined the crime of complicity as aiding and abetting or otherwise assisting, providing the means, or by words or acts that lend encouragement or support as long as it is done knowingly.38

36 The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T at 89-90. Article 91 of the Penal Code in “Codes et lois du Rwanda”, Universite nationale du Rwanda, 31 December 1994 update, Volume 1, 2nd edition: 1995, p. 395. [unofficial translation]. It should be noted that Article 91 of the Rwandan Penal Code includes two other forms of accomplice participation. These other forms are not covered under Article 2(3)(e). (Tab 8)

37 The Prosecutor v. Duscon Tadic, Case No. IT-94-1 at 136. (Tab 7)

38 The Prosecutor v. Duscon Tadic, Case No. IT-94-1 at 141. See also Tadic at 134, citing other international law, for example “Article 4 (1) of he convention against torture and other cruel, inhumane or degrading treatment or punishment uses the phrase
As for civil law systems, the conduct is essentially the same, however there are some differences. France, for example, holds an accomplice liable if they knowingly instigated, supplied arms or tools, gave orders, or aided or assisted in the crime. In the United States, one who aids, counsels, hires or otherwise procures the crime is liable as an accomplice. Australian common law includes the same instigation, procurement, and aiding and abetting forms of actus reus, however they go further stating that presence alone can be a form of encouragement or support.

The three forms of conduct that the ICTR uses to incur liability is prevalent in both customary international law as well as in most criminal civil law systems. Although the acts are basically the same, the application seems to differ. These three physical elements (actus reus) that

"complicity or participation in torture", and Article III of the International Convention on the suppression and punishment of the crime of apartheid cites as criminally culpable those who "participate in, directly incite, or conspire in, or...directly abet, encourage or cooperate in the commission of the crime." (Tab 7)

39 The Prosecutor v. Duscon Tadic, Case No. IT-94-1 at 135. Referring to the Trial of Wagner and Six Others from the War Crimes trials after the Second World War. (Tab 7)

40 Commonwealth v. Perry, 149 Mass. 357, 256 N.E. 2d 745 (1970). Accomplice is one who aids, counsels, hires, or otherwise procures the crime. (Tab 9)

41 The Prosecutor v. Duscon Tadic, Case No. IT-94-1 at 135. Citing Australian Common Law, "the most marginal act of assistance or encouragement can amount to an act of complicity...[including] presence." (Tab 7)
define accomplice participation are recognized under customary international law\(^{42}\) as well as in most criminal civil law systems\(^{43}\).

b. COMPLICITY BY INSTIGATION

According to the ICTR chamber, a person is liable for complicity by instigation by giving instructions to commit genocide or by directly inciting to commit genocide and if the aforementioned is accompanied by "gifts, promises, threats, abuse of authority or power, machinations or culpable artifice".\(^{44}\)

The ICTR Chamber found Akayesu, beyond a reasonable doubt, was present, gave orders and even endorsed the killing of Tutsi after April 18, 1994.\(^{45}\) This act of instigation, coupled with his "abuse of authority or power"

\(^{42}\) See generally The Prosecutor v. Duscon Tadic, Case No. IT-94-1, individual criminal responsibility for aiding and abetting, directly inciting, cooperating, providing means...The Nuremberg Tribunal defined acts of instigating, ordering, aiding and abetting. (Tab 7)

\(^{43}\) The Prosecutor v. Jean-Paul Akeyasu, Case No. ICTR-96-4-T at 89. See for example Article 46 of the Senegalese Penal Code and Article 121-7 of the New French Penal Code. See also Commonwealth v. Perry, 149 Mass. 357, 256 N.E. 2d 745 (1970). Accomplice is one who aids, counsels, hires, or otherwise procures the crime. (Tabs 8 & 9)

\(^{44}\) The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T at 90. (Tab 8)

\(^{45}\) The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T at 116. (Tab 8)
should be enough to meet the requirements of conduct that meet the complicity in genocide criteria.

The Trial Chamber of the ICTY has found that acts of encouragement may reach the level of accomplice liability needed to fill the actus reus requirement for complicity.\footnote{The Prosecutor v. Duscon Tadic, Case No. IT-94-1 at 141. (Tab 7)} Further, the law of the United States also recognizes accomplice liability by instigation. Inducement through threats or promises or inducement by words or gestures of encouragement have led to accomplice liability. \footnote{See generally State v. Scott, 80 Carom. 317 (1907), see also, Wayne R. LeFave and Austin W. Scott Jr., Substantive Criminal Law (1998). (Tab 10 & 28)}

c. COMPLICITY BY PROCURING MEANS

Procuring means is a common form of complicity.\footnote{Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T at 90. (Tab 8)} As pertaining to genocide, procuring means is defined as “procuring weapons, instruments or any other means used to commit genocide, with the accomplice knowing that such means would be used for such a purpose.”\footnote{Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T at 90. (Tab 8)} The British Military Court held that the suppliers of poison gas used to kill inmates of concentration camps are liable for complicity by
procuring means. Likewise, a German court during the Auschwitz Trials held Robert Mulka, a camp commander liable for procuring Zylon B gas [amongst other acts].

The United States defines accomplice liability by procuring means through its case law. The accomplice who has furnished guns, money, supplies or instrumentalities for use in committing the crime have been held liable.

Prosecuting for complicity by procuring means may be easier than prosecuting for complicity by instigation because the defendant actually did do something. With the existence of a procuring act, it seems the only thing needed

50 The Prosecutor v. Duscon Tadic, Case No. IT-94-1 at 138 referring to the Trial of Burn Tesch and Two Others (Zyklon B case). (Tab 7)

51 The Prosecutor v. Duscon Tadic, Case No. IT-94-1 at 140, Camp commander at Auschwitz was convicted as an accessory in the murder of approximately 750 persons. (Tab 7)


53 Malatokoski v. United States, 179 F. 2d 905 (1st Cir. 1950). See also, Wayne R. LeFave and Austin Scott Jr., Substantive Criminal Law (1996). (Tab 12 & 28)

54 Bacon v. United States, 127 F. 2d 985 (10th Cir. 1942). See also, Wayne R. LeFave and Austin Scott Jr., Substantive Criminal Law (1996). (Tab 13 & 28)


56 See Wayne R. LeFave and Austin W. Scott, Jr., Substantive Criminal Law, 139 (1996). (Tab 28)
for liability is whether the accomplice knew that such means was going to be used in the commission of the crime.

d. COMPLICITY BY AIDING AND ABETTING

The ICTR states that an accomplice may be held liable for "knowingly aiding or abetting a perpetrator of genocide in the planning or enabling acts thereof." The British Military Court has held that aiding and abetting can be found when the accomplice is ready to come to the aid of the perpetrator whether he does so or not. Further, the BMC has held that an accomplice who prevents strangers from disturbing the perpetrators is also liable.

The ICTY takes the approach that an accused may be found culpable if his conduct of aiding and abetting directly or substantially assists in the commission of the crime. In the United States, state provisions based on the Model Penal Code Section 2.06(3)(a)(ii) are used for

57 Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T at 90. (Tab 8)


60 The Prosecutor v. Duscon Tadic, Case No. IT-94-1 at 141, I.L.C. Draft Code Art. 2(3)(a)&(d) (emphasis added). (Tab 7)
finding an accomplice liable through aiding and abetting. The legal definition of “aider” is “one who assists, supports, or supplement’s the efforts of another.” The word “abettor” means “one who instigates, advises, or encourages the commission of a crime.” There are many ways for an accomplice to aid and abet. Driving the get-away-car, signaling that the victim is approaching and acting as the lookout are all forms of aiding and abetting. Conversely, merely accompanying the perpetrator to the location of the crime and watching as the crime is committed is not sufficient to constitute “aid.”

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61 ALI Model Penal Code Section 2.06(3)(a)(ii)(3) “A person is an accomplice of another person in the commission of an offense if: with the purpose of promoting or facilitating the commission of the offense, he (ii) aids or agrees or attempts to aid such other person in planning or committing it.” (Tab 2)

62 See Joshua Dressler, Criminal Law, 812 (1994). (Tab 29)

63 See Joshua Dressler, Criminal Law, 812 (1994). (Tab 29)


67 State v. Vaillancourt, 122 N.H. 1153, (1982). In this case, the accomplice walked around the side of the house with the perpetrator and stood by and watched his companion, talking to him intermittently while the perpetrator tried to pry open the window. The court said “mere presence” is not enough. (Tab 18)
The following question is often raised: Is it necessary that the aid given played a part in the commission of the crime?68 One court provided an interesting theory:

If the aid in homicide can be shown to have put the deceased at a disadvantage, to have deprived him of a single chance of life, which but for it he would have had, he who furnished such aid is guilty though it can not be known or shown that the dead man, in the absence thereof, would have availed himself of that chance.69

To obtain a conviction under aiding or abetting, it must be shown that the “act” (i.e. the aid or abet) was performed by the accomplice who knew the purpose of such aid. The assistance given does not have to contribute to the result “in the sense that but for it, the result would not have ensued”.70 It is enough if the aid makes it easier for the principal to accomplish the end intended.71

To meet the actus reas requirement to impose liability, the Prosecutor must show that the accomplice “gave assistance or encouragement”72 in the commission of a crime,

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68 See Wayne R. LeFave and Austin W. Scott Jr., Substantive Criminal Law 140 (1996). (Tab 28)


in this case, genocide. The conduct of Jean-Paul Akayesu seems to fall within all the interpretations of aid and abet. In particular, Akayesu’s conduct on April 19, 1994 where it is established that he took eight refugees, handed them over to Interahamwe militiamen and ordered that they be killed. The refugees were killed because they were Tutsi. This conduct by Akayesu should meet the actus reus requirement.

2. MENS REA

The second basic criteria for individual criminal responsibility is the mental state of the wrongdoer: the mens rea. 74

a. MENS REA UNDER THE ICTR

Generally, the ICTR has taken the following position on mens rea: “The intent or mental element of complicity implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offense. In other words, the

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72 See Generally Wayne R. LeFave, and Austin W. Scott, Jr., Substantive Criminal Law (1996). (Tab 28)

73 Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T at 117. (Tab 8)

accomplice must have acted knowingly." Further, the ICTR aligns itself with British law, stating that the accomplice does not even need to have a desire for the completion of the crime, nor a willingness to participate in the offense. Thus, anyone who voluntarily aids another knowing of their criminal purpose can be convicted of complicity regardless of their feeling as to the result.

Relating to the crime of genocide, the intent of the accomplice is to knowingly aid or abet one or more persons to commit the crime of genocide. The following is the ICTR Chamber’s opinion in regards to the mens rea element for complicity in genocide:

"an accomplice to genocide need not necessarily possess the dolus specialis of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such. Thus, if for example, an accused knowingly aided or abetted another in the

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75 Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T at 90. (Tab 8)

76 National Coal Board v. Gamble National Coal Board v. Gamble, 1 QB 11, (1959). Justice Devlin said "an indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor." (Tab 5)

77 DPP for Northern Ireland v. Lynch, AC 653 (1975). House of Lords. "Willingness to participate in the principal offense did not have to be established." (Tab 6)

78 Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T at 91. (Tab 8)

79 Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T at 91. (Tab 8)
commission of a murder, while being unaware that the principal was committing such a murder, with the intent to destroy, in whole or in part, the group to which the murdered victim belonged, the accused could be prosecuted for complicity in murder, and certainly not for complicity in genocide. However, if the accused knowingly aided or abetted in the commission of such a murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer's intent to destroy the group".  

This finding of the Chamber is in agreement with the International Criminal Tribunal for Yugoslavia. There, the Tribunal states that an accused will be found criminally liable where it is determined that he knowingly participated in the commission of an offense. Further, decisions from the Israeli courts that prosecuted accomplice liability (i.e. complicity in genocide), of the Nazi regime share this same view.

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80 Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T at 91. (Tab 8)

81 The Prosecutor v. Duscon Tadic, Case No. IT-94-1 at 142. (Tab 7)

82 Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T at 91. See also the District Court of Jerusalem (Dec. 1961) and the Supreme Court of Israel, the case of Adolf Eichmann (1962), Op. Cit., p. 340. The Israel Supreme Court stated "even a small cog, even an insignificant operator, is under our criminal law liable to be regarded as an accomplice in the commission of an offense, in which case he will be dealt with as if he were the actual murderer or destroyer". p. 323. The District Court also found that "participation in the extermination plan with knowledge of the plan rendered the person liable "as an accomplice to the extermination of all...victims from 1941 to 1945, irrespective of the extent of his participation". Id p. 14. Further,
It should be noted that the Nuremberg war crimes trials define the requirement of intent as the awareness of the act of participation coupled with the conscious decision to participate. This mens rea definition seems to require more than just the knowing intent that the ICTR seeks.

b. MENS REA UNDER COMMON LAW

The British Military Court has held that the mens rea requirement is met where the accused has knowledge that the perpetrator was going to commit a crime. Further, knowing the purpose for which the accomplice supplied means is also culpability in the British Military Court for mens rea.

In the United States, there is disagreement among jurisdictions as to what the mental state of an accomplice must be in order to incur liability for an offense committed by another.

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83 The Prosecutor v. Duscon Tadic, Case No. IT-94-1 at 136, looking at the Nuremberg War crimes trials. (Tab 7)

84 The Prosecutor v. Duscon Tadic, Case No. IT-94-1 at 137, referring to the Trial of Werner Rohde and Eight Others, Vol. XV Law Reports S1. (Tab 7)

85 The Prosecutor v. Duscon Tadic, Case No. IT-94-1 at 138, referring to the Trial of Burn Tesch and Two Others, (Zyklon B case) Vol. I Law Reports 93. (Tab 7)

86 See Wayne B. LeFave and Austin W. Scott Jr., Substantive Criminal Law. 141 (1996). (Tab 28)
The debate is one between use of the terms “knowingly” and “purposely.” On the one side, some courts hold that knowing assistance or encouragement is enough to establish accomplice liability.\footnote{Backun v. United States 112 F. 2d 635 (4th Cir. 1940). Here the Court said “the seller may not ignore the purpose for which the purchase is made if he is advised of that purpose...One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun. (Tab 20)} This seems to be the approach taken by the ICTR Chamber. The contrary position is that there needs to be more than just knowledge of the principal’s intent; there needs to be a purpose.\footnote{United States v. Peoni, 100 F. 2d. 401 (1938) generally, the court stated that having knowledge of a principal’s intentions have nothing to do with the end result (i.e. crime). Further, it is essential that the accomplice associate himself with the venture, that he participates to bring the results about. The accomplice seeks success in the result by his actions. According to the court the words used imply that the accomplice has a purpose that is coupled with his actions. (Tab 21)} This view is being accepted by a growing number of the courts in the United States, although there is still some debate.\footnote{See Wayne R. LeFave & Austin W. Scott Jr., Substantive Criminal Law 147 (1996). (Tab 28)}

Generally, there have been compromises toward the opposing views. For example, the more grave the crime committed, the more likely the lower threshold of “knowledge” would suffice for liability, whereas if the crime is menial, “purpose” might have to be shown to impose liability.\footnote{---}
Even though the United States jurisdictions are split on the requirements for mens rea, and are leaning towards the purposeful elements of intent, the compromise aspect of their decisions would be in line with what the ICTR Chamber has decided. Thus, regarding the grave crime of genocide, in all instances, the lower threshold of knowledge coupled with the actus reus should be sufficient to impose liability.

C. THE RELATIONSHIP BETWEEN PRINCIPAL AND ACCOMPlice

There must be a relationship between the principal and the accomplice for there to be accomplice liability. Even though the two individuals are linked together, the common law looks at each actor's own actus reus and mens rea to determine their culpability.91

In the opinion of the ICTR, the accomplice whose conduct facilitated the criminal enterprise of another is not liable in complicity until the crime has been consummated by the principal.92

90 See Wayne R. LeFave & Austin W. Scott Jr., Substantive Criminal Law 147 (1996). (Tab 28)

91 See Wayne R. LeFave and Austin W. Scott, Jr. Substantive Criminal Law 136 (1996) stating that in the process on determining whether a person has committed a crime it is useful to give separate consideration to whether the individual engaged in the requisite actus reus or mens rea. This same approach is used to determine accomplice liability. (Tab 28)

92 Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T at 91. (Tab 8)
Even though Hayes had the requisite actus reus and mens rea, he was not convicted.

The rationale for not convicting Hayes is that there was no crime committed by Hill as he lacked the requisite mens rea for burglary.\textsuperscript{96} Put differently, there was no crime consummated by the principal for which the accomplice could be held liable. Thus, even though accomplice liability is a distinct crime with its own separate analysis, there is still a relationship factor involved between accomplice and principal that must be addressed before one can be held liable for the criminal act of another.

In regard to complicity in genocide, it is the Chamber's belief that in order for an accused to be found guilty of complicity, it must be proven that the crime of genocide had been committed.\textsuperscript{97} Therefore, in an indictment for complicity in genocide, the analysis of the accomplice will be his own, as it is known that the crime of genocide did occur.

A further question is what if the crime of genocide did not occur but the crime of attempted genocide did? In the

\textsuperscript{96} State v. Hayes, 105 Mo. 76, 16 S.W. 514. Hill committed no crime when entering the warehouse. (Tab 23)

\textsuperscript{97} See generally, Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T. (Tab 8)
United States, the Model Penal Code states one can be held liable as an accomplice to attempt if the principal is guilty of the attempt to commit the crime. 98 Looking back at the Nuremberg War crime trials, part of finding one liable as an accomplice is the "commission" of the illegal act. 99 If attempted genocide was classified as an illegal act, then it seems an accomplice to such would be held liable. Looking ahead, in the adoption of an International Criminal Court, the Roman statute specifically holds one liable for attempt crimes. 100 Hopefully, this shows a trend towards accomplice liability for attempt crimes and the classification of attempt as a distinct crime that is punishable.

D. THE LIMITS TO COMPLICITY IN GENOCIDE

Generally, for an individual to be held responsible for complicity in genocide the following must be established:

1. The crime of genocide was committed

98 ALI Model Penal Code Section 5.01 (3) states a person who engages in conduct designed to aid another to commit a crime that would establish his complicity under Section 2.06 if the the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person. (Tab 3)

99 Prosecutors v. Duscon Tadic, Case No. IT-94-1 at 136, prosecutor must prove the accused contributed to the commission of an illegal act. (Tab 7)

100 Rome Statute of the International Criminal Court, Article 25 stating criminal responsibility for those who (b) order, solicit or induce the commission of such a crime which in fact occurs or is attempted. (Tab 4)
2. That a principal was apprehended or convicted

3. Or there must be the introduction of evidence sufficient to show the crime of genocide was committed. 101

It is now widely accepted that an accomplice may be convicted even if the principal has been acquitted, or not yet been tried. 102

The ICTR Chamber is of the opinion that all criminal systems allow an accomplice to be tried even where the principal has not been identified or where for any reason, guilt could not be proven. 103 This theory is in line with the Rwandan Penal Code Article 89, accomplice culpability. 104

For a prosecutor to indict on a count of complicity in genocide, they need to show they have a prima facie case. Which is to say that they have enough evidence to allow the case to go forward. They do not need to have the conviction of the principal, they do not even need to know who the


102 See Wayne R. LeFave and Austin W. Scott, Jr. Substantive Criminal Law 159, 160 (1996). (Tab 28)

103 See generally, Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T. (Tab 8)

104 The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T providing Article 89 of the Rwanda Penal Code: accomplices “may be prosecuted even where the perpetrator may not face prosecution for personal reasons, such as double jeopardy, death, insanity or non-identification” (unofficial translation). (Tab 8)
principal is, all they need to proceed is to show genocide was committed. This being the case, prosecution for complicity in genocide is limited only by showing a prima facie case and that genocide was committed.

E. COMPPLICITY IN GENOCIDE AS AN ALTERNATIVE COUNT TO GENOCIDE

Complicity in genocide is a separate and distinct crime from genocide. To proceed for complicity in genocide, you need the actus reus and mens rea described earlier in this memo. For the crime of genocide, the actus reus and mens rea required are very different from the crime of complicity. The ICTR has adopted the following definition of genocide as being punishable: Article 2 paragraph 2 states:

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

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

105 Article 2 of the ICTR statute. Article 2: Paragraph 3 listing punishable acts:
(a) genocide
(b) conspiracy to commit genocide
(c) direct and public incitement to commit genocide
(d) attempt to commit genocide
(e) complicity in genocide

106 See Supra, the memo pages 10-23.
abetting, procurement, or instigation of other crimes) which should constitute complicity in genocide.\textsuperscript{111}

It is likely that the ICTR did not find Akayesu guilty of complicity in genocide for the following two reasons. First, much is said in the Akayesu decision of the inability to try an accused as an accomplice and as a principal for the same act. The second theory is based on Rwanda’s Organic Law.

Under the first theory, the ICTR Chamber is of the opinion that an individual cannot be both the principle and accomplice for the same act.\textsuperscript{112} Further, the judges find that an act of the accused cannot be characterized as both genocide and complicity in genocide as these two crimes are mutually exclusive.\textsuperscript{113} This rationality of the tribunal

\textsuperscript{111} Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T at 117. Conclusion from paragraph 19 of the indictment, Akayesu aided and abetted in the killing of eight Tutsi refugees. Specifically, Akayesu ordered Intrahamwe militiamen to quickly kill the refugees, which they did in Akayesu’s presence. Under paragraph 20, Akayesu ordered that intellectuals be killed, in particular a professor named Samuel who was killed with a machete blow to the neck. Numerous others were killed on Akayesu’s instructions. (Tab 8)

\textsuperscript{112} The Prosecutor v. Jean-Paul Akayesu, ICTR Case No. 96-4-T at 81. Providing that Rwandan law states that it is not justifiable to convict an accused of two offenses in relation to the same set of facts where (a) one offense is a lesser included offense of the other or (b) where one offense charges liability as a principal, e.g. genocide and complicity in genocide. See also, 93 A.J.I.L. 195 stating in note 4 they [the tribunal] also acquitted [Akayesu] of a count charging complicity in genocide, having found him guilty as a principle. (Tab 8 & 35)

\textsuperscript{113} The Prosecutor v. Jean-Paul Akayesu, ICTR Case No. 96-4-T at 89. (Tab 8)
would work if we were dealing with a single act that stems from the same set of facts. On the contrary, we are dealing with multiple acts which have been committed with many sets of facts.\textsuperscript{114} Therefore, this theory which the court suggests in the decision seems to be off base with regard to the charge of complicity in genocide.

The rationale for the second theory is based on Rwandan Organic Law, which governs genocide prosecutions in Rwandan courts.\textsuperscript{115} Perhaps the ICTR looked to see what and how the country of Rwanda itself was prosecuting the thousands of Hutus accused of genocide crimes. Although these prosecutions (on the national level) deal with the less serious perpetrators, whereas the ICTR is dealing generally with the most serious perpetrators, the Chamber may have been influenced by what Rwanda considered to be important enough to incorporate into their organic law, thus the ICTR gave some deference to this. Stated generally, Rwandan Organic Law is:

\begin{quote}
Specialized legislation geared only for genocide and genocide-related offenses. This law came into force on September 1, 1996. All the crimes encapsulated within the Organic Law were previously and still remain sanctionable under Rwandan Penal
\end{quote}

\textsuperscript{114} See generally The Prosecutor v. Jean-Paul Akayesu, ICTR Case No. 96-4-T. See also this memo pages 28 & 29 footnote numbers 108 & 109. (Tab 8)

\textsuperscript{115} Mark Drumble, Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda’s Domestic Trials. Generally, the Organic Law was designed and drafted over the course of 1995 and 1996. (Tab 34)
Code. Nonetheless, although Rwanda had ratified the Genocide Convention, it has not provided in its Penal Code for punishments for the offenses of genocide and crimes against humanity. The Organic Law now creates such punishments.\(^{116}\)

This Organic Law seeks to satisfy the need for justice of the people of Rwanda.\(^{117}\)

The Organic Law preserves a definition of accomplice that is more strict than that found in the prior Rwandan Penal Code.\(^{118}\) Perhaps most importantly is Article 18 which stipulates "that a perpetrator who is sentenced for multiple crimes shall only serve the most severe sentence."\(^{119}\)

The ICTR may have looked to Rwandan Law for some support or guidance. Both theories come from the National Law. The first, from the Rwandan Penal Code and the second, the newly adopted Organic Law. This analysis may be helpful, but should not be dispositive.\(^{120}\) An international

\(^{116}\) The Prosecutor v. Jean-Paul Akayesu, ICTR Case No. 96-4-T at 89. (Tab 8)

\(^{117}\) The Prosecutor v. Jean-Paul Akayesu, ICTR Case No. 96-4-T at 89. (Tab 8)

\(^{118}\) The Prosecutor v. Jean-Paul Akayesu, ICTR Case No. 96-4-T at 89, providing that accomplice liability under organic law requires proof of providing "indispensable help." (Tab 8)

\(^{119}\) The Prosecutor v. Jean-Paul Akayesu, ICTR Case No. 96-4-T at 89, see also Daniel de Beer, The Organic Law of 30 August 1996, on the Organization of the Prosecution of Offenses Constituting the Crime of Genocide or Crimes Against Humanity, Commentary (1997). (Tab 8)

\(^{120}\) See 1 Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda 188 (1998), An international criminal tribunal should punish persons on the basis of international rules and standards. Also, it confirms the
In conclusion, it seems there is enough evidence and enough basis under international law, which is supreme to national law, to convict for complicity in genocide as well as genocide.

See 2 Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda 231 (1998). See also Id at 231 n. 882. "The principle that a person who has committed an international crime is responsible therefore and liable to punishment under international law, independently of the provisions of internal law, implies what is commonly called the 'supremacy' of international law over national law." See also, Prosecutor v. Duscon Tadic, Case No. IT-94-1 stating international law imposes duties and liabilities upon individuals as well as upon states. Further, the principle of individual responsibility and punishment for crimes under international law...is the cornerstone of international law. See also, 1 Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda 119 (1998), International law as the ultimate source of individual criminal responsibility for the crimes within its jurisdiction. Further, at 120, this approach ensures the application of the uniform rules and standards of international law rather than possibly divergent national criminal laws of different states depending on where a particular crime was committed. (Tabs 25, 7 & 24)