

***DOLUS SPECIALIS: THE INTERNATIONAL CRIMINAL TRIBUNALS'***  
**INTERPRETATIONS OF GENOCIDAL INTENT**

by

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## ABSTRACT

In 1941, the “crime of crimes”<sup>1</sup> was a “crime without a name.”<sup>2</sup> The 1948 Convention on the Prevention and Punishment of the Crime of Genocide criminalized “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”<sup>3</sup>. Despite that definition, how does the interpretation of genocidal intent vary in international criminal law? This study intended to demonstrate that interpretations vary as judges balance the qualitative and quantitative natures of the crime, or the essence of the human tragedy and the extent of the biological destruction. Thus the researcher discursively analyzed the judgments in which the International Criminal Tribunals for the Former Yugoslavia and Rwanda acquitted and convicted individuals of genocide. The researcher aimed to move beyond the debate on genocide’s definition in order to examine the effects of that academic debate on the term’s legal application.

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<sup>1</sup> *Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, par.16.

<sup>2</sup> Winston Churchill, *The Churchill War Papers: The Ever-Widening War*, ed. Martin Gilbert, vol. 3: 1941 (New York: W. W. Norton, 2000), quoted in Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: HarperCollins Publishers Inc., 2003), 30.

<sup>3</sup> “Convention on the Prevention and Punishment of the Crime of Genocide,” United Nations, [http://treaties.un.org/doc/Treaties/1951/01/19510112%2008-12%20PM/Ch\\_IV\\_1p.pdf](http://treaties.un.org/doc/Treaties/1951/01/19510112%2008-12%20PM/Ch_IV_1p.pdf) (accessed February 2010), Art. 2.

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## INTRODUCTION

If national judicial systems delineate crimes by degrees, why does international political discourse confine a heart-wrenching, human tragedy to a single, legal term: “genocide”? One word cannot contain this injustice. Genocide denies more than an individual his or her right to life; genocide denies entire communities their right to exist. Genocide destroys communities for a fact out of the members’ control: their identity.<sup>4</sup> Of course, “identity” is subject to social interpretation. In cases of genocide, that interpretation does not occur in ivory towers, rather on front lines. Thus anecdotally genocide involves destruction in large numbers for who you are.

Perhaps given the extent of destruction—a community and, in this case, European Jewry—Auschwitz serves as a metonym for the Holocaust. Yet, the bureaucratic, systematic, and state-sponsored “Final Solution” evolved over a decade and involved persecution, ghettoization, and forced labor as well as gassing, cremation, and execution. Genocide is similarly understood as mass murder.<sup>5</sup> That 8,000 Bosniak Muslim men died within six days in Srebrenica<sup>6</sup> and that 35 to 43 thousand Tutsi displaced persons died within six hours in Butare<sup>7</sup> exemplify the genocides in the former Yugoslavia and Rwanda, respectively. That understanding neglects that both genocides evolved from, and involved, quotidian human rights abuses as well. In fact, the crime’s international legal definition requires neither large numbers of victims nor even their death. The daily deprivations of identity and acts of inhumanity rather constitute genocide.

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<sup>4</sup> Freda Kabatsi, "Defining or Diverting Genocide: Changing the Comportment of Genocide," *International Criminal Law Review* 5, no. 3 (2005): 387.

<sup>5</sup> David Alonzo-Maizlish, "In Whole or in Part: Group Rights, the Intent Element of Genocide, and the 'Quantitative Criterion'," *New York University Law Review* 77, no. 5 (2002): 1384.

<sup>6</sup> Martin Mennecke, "Genocidal Violence in the Former Yugoslavia: Bosnia-Herzegovina and Kosovo," in *A Century of Genocide: Critical Essays and Eyewitness Accounts*, ed. Samuel Totten and William Parsons (New York City: Taylor & Francis, 2008), 512.

<sup>7</sup> Adam Jones, *Genocide: A Comprehensive Introduction* (London: Routledge, 2006), 239.

In June 1991, Slovenia and Croatia seceded from the Federal People's Republic of Yugoslavia. Slovenia's secession provoked a 10-day "public relations" war. The militaries of Slobodan Milosevic's Serbia-Montenegro and the Yugoslav Federal Army (JNA) invaded only to realize President Milosevic's rhetoric of defending the dissolving federation. Given Croatia's Dalmatian coastline, lucrative in terms of tourism and trade, and significant Serb minority, 12% of the republic's population, its secession outraged Serbia. Serbia's aerial bombardment of Croatia's historic Dubrovnik, however, outraged the world audience. In its outrage over aesthetics, the world ignored that the Croatian independence war destroyed 10,000-20,000 lives and displaced another 700,000 people in seven months of war crimes and crimes against humanity. The international community's recognition of this nation-state effectively ended the violence.

With Slovenia and Croatia independent, Bosnia-Herzegovina faced the following decision: should the state with 43% Bosnian Muslims or Bosniaks, 35% Orthodox Serbs, and 18% Catholic Croats remain in a Serb-majority, rump Yugoslavia? Following Western advice, Bosnia held and honored a referendum on the issue. In March 1992, Bosnia declared its independence from federal Yugoslavia, and Bosnian Serbs declared their independence from Bosnia. The world's example of multiethnic harmony disintegrated into forced displacement and ethnic cleansing, mass rape and murder, systematic maltreatment and starvation in detention camps, and genocide.

Although all parties committed atrocities, Serb forces—the Serb-dominated JNA as well as the Bosnian Serb military and paramilitaries—devastated Bosnian Muslims, Bosnian Croats, and Bosnia's eastern region, the newly declared Republika Srpska. Serbs desecrated mosques and Muslim cemeteries, tortured and executed prominent Bosniaks and Croats, and laid siege to

the former Olympic, capital city Sarajevo. In the most extreme example of the violence, Serb forces deported 20,000 already displaced women, elderly persons, and children from the United Nations safe haven in Srebrenica, only to execute the 7,000 to 8,000 remaining men. By November 1995, the international community negotiated the Dayton Peace Accords, and the conflict resolved at least militarily. But the Bosnian genocide had killed at least 100,000 people, internally displaced 1.3 million, and internationally displaced another 1.2 million.<sup>8</sup>

Similarly, at least 800,000 Tutsi died and over 2 million Rwandans were displaced in the spring and summer of 1994. In Rwanda, the Belgium colonial administration, like its European counterparts throughout Africa and Asia, employed indirect rule, which rather arbitrarily privileged the minority Tutsi ethnicity. This minority fled in the hundreds of thousands into neighboring Burundi, Uganda, and Zaire (now the Democratic Republic of the Congo) when a Hutu coup d'état ousted the Belgium authorities and reversed the political order in the early 1960s. In the early 1990s, these Tutsi refugees, united as the Rwandan Patriotic Front (FPR) provoked war with regional Hutu political parties. War exacerbated the economic crisis, and radio propaganda provoked ethnic tensions. Although by spring 1994, the international community had dispatched the United Nations Assistance Mission for Rwanda (UNAMIR) and negotiated the Arusha Peace Accords, Hutu parties refused to cooperate with Tutsi politicians.<sup>9</sup>

At 8:30am on April 6, 1994, these "Hutu Power" extremists shot down President Juvenal Habyarimana's plane, and by 9:18am, they'd erected roadblocks, began checking identity cards and executing political opponents. With the torture and murder of 10 Belgian peacekeepers, foreign governments yanked their militaries from UNAMIR and their journalists from Rwanda. Carnage spread to the countryside as Hutu political and military authorities and Interahamwe

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<sup>8</sup> Mennecke, 507-521.

<sup>9</sup> Rene Lemarchand, "The 1994 Rwandan Genocide," in *A Century of Genocide: Critical Essays and Eyewitness Accounts*, ed. Samuel Totten and William Parsons (New York City: Taylor & Francis, 2008), 483-493.

(“those who stand together”) militias massacred Tutsi civilians. Civilians sought refuge in churches, football stadiums, and schools to no avail; their attackers pursued, raped, and killed them. “93.7% of the victims were killed because they were identified as Tutsi; 1% because they were related to, married to or friends with Tutsi; 0.8% because they looked like Tutsi; and 0.8% because they were opponents of the Hutu regime at the time or were hiding people from the killers.”<sup>10</sup>

Although the United Nations Security Council ridiculed characterizing the Rwandan violence as genocide, and the International Court of Justice acquitted Serbia and Montenegro of genocide against Bosnia-Herzegovina, the scholarly community accepts both conflicts as genocidal. Yet, can this term with its exhaustive lists of only five physical offenses and of only four protected groups, and with its three intentional requirements capture the reality its perpetrators inflicted? Can this term with its highly political application in post-conflict reconciliation and reconstruction capture the reality its victims suffered? This study examines how someone warps their head around something like genocide. It questions how the interpretation of genocidal intent, the *sine quo non* of genocide, varies in international criminal law.

### Literature Review

Before interpreting intent, the international community needed to define the crime committed. Reflecting on Nazi Germany’s atrocities as the Reich’s army invaded the Soviet Union, British Prime Minister Winston Churchill decried “a crime without a name.”<sup>11</sup> Yet, since

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<sup>10</sup> Jones, 245.

<sup>11</sup> Churchill, 29, quoted in Power, 30.

before Hitler's Nazi Party came to power, Raphael Lemkin (1900-1959) had been attempting to name those atrocities.

The Ottoman Empire's World War II-era expulsion of its Armenian population appalled the Polish jurist. In 1933, to the Fifth International Conference for the Unification of Criminal Law in Madrid, he proposed the criminalization of barbarity and vandalism. Barbarity was "the premeditated destruction of national, racial, religious and social collectivities," and vandalism was "the systematic and organized destruction of the art and cultural heritage...of a collectivity."<sup>12</sup> By 1944, Lemkin had combined these crimes, the Greek root for nation ("genos"), and the Latin root for murder ("cide") to invent genocide. In his monograph *Axis Rule in Occupied Europe*, Lemkin defined genocide as "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups completely."<sup>13</sup> Yet, some controversy developed over Lemkin's definition.

In adopting Lemkin's term, the United Nations inherited this controversy in its 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).<sup>14</sup> According to the Convention, genocide constitutes "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;

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<sup>12</sup> Jones, 9.

<sup>13</sup> Scott Straus, "Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide," *Journal of Genocide Research* 3, no. 3 (2001): 360.

<sup>14</sup> Dirk A Moses, "The Holocaust and Genocide," in *The Historiography of the Holocaust*, ed. Dan Stone (London: Palgrave, 2008), 10-11.



(e) Forcibly transferring children of the group to another group.”<sup>15</sup>

Not only does the Convention define those five acts as amounting to genocide, given the specific intent, but also it punishes five other genocidal acts: genocide, complicity in genocide, attempt to commit genocide, conspiracy to commit genocide, and direct and public incitement to commit genocide. The perpetrator commits these punishable acts through any of the enumerated material offenses and with the necessary mental element. For instance, the imposition of measures intended to prevent births can constitute complicity in genocide and/or attempted to genocide, depending on the perpetrator’s participation and purpose. Since the Convention’s adoption in 1948 and entry into force in 1951, scholars have proposed alternative definitions to incorporate Lemkin’s formulation and to address the Convention’s failings. Having introduced the Genocide Convention’s definition of genocide, this introduction will now survey social science’s definitions of genocide.

In fact, within eight years of the Convention’s entry into force, Pieter Drost found fault with the document. Alternatively, he defined genocide as “the deliberate destruction of physical life of individual human beings by reason of their membership in any human collectivity as such.”<sup>16</sup> Thus his proposal includes collectivities excluded in the Convention, such as economic and political groups. Yet, it does not correct the Convention’s exclusion of cultural genocide or ethnocide, versions of Lemkin’s vandalism. Similarly, a common sense interpretation of Drost’s “physical destruction” methodologically and temporally limits the crime, whereas the Convention criminalizes non-immediate destruction: physical or psychological harm, the

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<sup>15</sup> “Genocide Convention,” Art. 2.

<sup>16</sup> Pieter N. Drost, *The Crime of the State*, vol. 2 (Leyden: A. W. Sythoff, 1959), 125, quoted in Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* 3rd ed. (New Haven: Yale University Press, 1990), 13.

prevention of births, and the forcible transfer of children. Therefore rather than expand the definition, Drost contracts the crime.

Helen Fein, the founder and the first president of the International Association of Genocide Scholars, however, expands the acts enumerated as genocide. She introduces a typology of despotic genocides, eliminating non-threatening collectivities; developmental genocides, intentionally or unintentionally destroying the human impediments to economic resource exploitation; ideological genocides, eliminating constructed enemies and evils; and retributive genocides, retaliating against real or imagined threats. Given her inclusion of ethnocide and resistance—“regardless of the surrender or lack of threat offered by the victim”—and her widely-interpretable intentionality requirement—“to destroy...directly or indirectly”<sup>17</sup>—her definition demonstrates the most loyalty to the Convention and to Lemkin.

Continuing in comparative genocide studies, Frank Chalk and Kurt Jonassohn, co-directors of the Montreal Institute for Genocide Studies, produce a typology. Significantly, their definition challenges the Convention’s construction of the victim. Instead of expanding the protected collectivities to include political ones, Chalk and Jonassohn identify the victim groups from the perpetrator’s perspective. They define genocide as “a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator.”<sup>18</sup> Yet, they also accentuate the victims’ civilian status, thus allowing for genocide denial if the victims violently resist, however decentralized and ineffective. That accentuation about the victims and their own definition of the perpetrators emphasize the former’s *de facto* power over the latter. Thus Chalk and Jonassohn present or at least perpetuate

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<sup>17</sup> Helen Fein, *Genocide: A Sociological Perspective* (London: Publications / International Sociological Association, 1990), 24.

<sup>18</sup> Chalk, 23.

a stereotype from the Holocaust about all genocides: that states commit them against vulnerable populations.

Rejecting this myth, Leo Kuper returned to the Convention. As rationale, he cites the Convention's potential for preventive action since state parties "undertake to prevent and to punish" genocide.<sup>19</sup> Also he approves of its international acceptance since at that time, nearly 80 states had become party to the text. Yet, scholars introduced other genocidal crimes or crimes with similar, special intent: "culturecide, democide, ethnocide, femicide, gendercide, gernotocide, gynocide, politicide [and] ethnic cleansing, gendered atrocity, genocidal killing, genocidal massacre, genocidal rape, Holocaust, state crime, and state sponsored mass murder."<sup>20</sup> Similarly, anthropologist Nancy Scheper-Hughes expands the definition; her genocidal continuum constitutes "everyday violence" or "peacetime crime" as microcosms of and sanction for genocide.<sup>21</sup> This proliferation reflects genocide's politicalization. The International Criminal Tribunal for Rwanda in *Prosecutor v. Jean Paul Akayesu* found that genocide is the "crime of crimes."<sup>22</sup> But as the majority of international organizations and legal scholars affirm, genocide and crimes against humanity are equally atrocious. In fact, their accidental, separate codification—one in international treaty and the other in international custom—carries no significance in terms of the crimes' severity.<sup>23</sup> They require the same response.

This response includes protection, prevention, and punishment. In terms of genocide prevention and punishment, the statutes of the International Criminal Tribunals and the Rome

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<sup>19</sup> "Genocide Convention," Art. 1.

<sup>20</sup> Stuart Stein, "Conceptions and Terms: Templates for the Analysis of Holocausts and Genocides," *Journal of Genocide Research* 7, no. 2 (2005): 196: note 2.

<sup>21</sup> Nancy Scheper-Hughes, "The Genocidal Continuum: Peace-Time Crimes," in *Power and the Self*, ed. Jeannette Marie Mageo (New York: Cambridge University Press, 2002), 30.

<sup>22</sup> *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Judgment, par. 523, quoted in Kabatsi: 387.

<sup>23</sup> Steven R Ratner, "Can You Compare Evils?: The Enduring Debate on Genocide and Crimes against Humanity," *Washington University Global Studies Law Review* 6, no. 1 (2007): 584.

Statute of the International Criminal Court (ICC) reproduce the Genocide Convention verbatim. This reproduction provides further proof of its international acceptance besides the 141 states now party to its text. Thus this study adopts the Convention's definition of genocide in its analysis. Also since this study analyzes the legal application of the term "genocide," the legal definition is appropriate. In fact, this study analyzes the international criminal tribunals' interpretations of genocidal intent.

The degree and the evidence of this intent prove just as contentious as the definition of the crime. Having surveyed these definitions and settled on the Genocide Convention, this introduction will now discuss the interpretations advanced for genocidal intent. As scholars and practitioners debated genocide's *actus reas* or material element, especially the enumerated acts and protected groups, they also advanced alternative understanding of genocidal intent. According to Lemkin, genocidal intent constitutes a "coordinated plan," "aiming at the destruction" and "with the aim of annihilating."<sup>24</sup> Drost defines it as "deliberate destruction,"<sup>25</sup> and Fein articulates it as "sustained purposeful action."<sup>26</sup> Kuper, Chalk, and Jonassohn, however, return to the Convention's intent. Scholars advance such alternatives because the Convention does not clarify the crime's special character. Whereas any crime involves intent—a *mens rea* or malice aforethought<sup>27</sup>—the Convention elevates this element to a "special" or "specific" standard, *dolus specialis*.

Each enumerated act requires *mens rea*, such that "stripped of genocidal intent, the prohibited acts independently stands as punishable criminal acts."<sup>28</sup> *Dolus specialis* elevates

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<sup>24</sup> Straus: 360.

<sup>25</sup> Drost, 125, quoted in Chalk, 13.

<sup>26</sup> Fein, 24.

<sup>27</sup> Howard Abadinsky, *Law and Justice: An Introduction to the American Legal System*, 6th ed. (Upper Saddle River: Pearson Prentice-Hall, 2008), 231.

<sup>28</sup> David Alfonzo-Maizlish, "In Whole or in Part: Group Rights, the Intent Element of Genocide, and the 'Quantitative Criterion,'" *New York University Law Review* 77, no. 5 (2002): 1381.

these crimes to genocide. To clarify, intent differs from motive. The Committees drafting the Convention, however, may have removed any motive requirement. They anticipated an affirmative defense, which “claimed that a crime was committed for motives other than those specified.”<sup>29</sup> Similarly, they determined to forbid destruction for any reason.<sup>30</sup> Some drafting states and later scholars read the Convention’s “as such” phrase as an unenumerated motive requirement. According to that interpretation, the perpetrator commits genocide against individuals from a collective for reasons of their membership in that collective. Although I adopt this latter interpretation, the Tribunals largely ignore motive.

Instead, they elaborate on intent’s standard. Even the “special” standard, as any intent, can take three forms: *dolus eventualis*, *dolus indirectus*, or *dolus directus*. In events of *dolus eventualis*, the perpetrator predicts possible, though uncertain, consequences. Then he or she commits the act regardless of the consequences, or recklessly, as under the Model Penal Code (MPC). Recklessness, however, differs from negligence. Negligence evolves either when an individual deviates from the reasonable standard of care or when an individual should recognize and does not relieve a substantial, unjustifiable risk.<sup>31</sup> In terms of genocide, Article II of the Convention prohibits negligent genocide because the crime requires intent.<sup>32</sup> Negligence, however, cannot be confused with omission, which occurs under *dolus indirectus* and *dolus directus*. Omission, the failure to act, addressed the crime’s *actus reus* rather than *mens rea*. *Dolus indirectus* and *directus* involve certain consequences. In crimes of indirect intent, the

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<sup>29</sup> United Nations Economic and Social Council, “Ad Hoc Committee on Genocide: Summary Record of the Eleventh Meeting,” United Nations, <http://daccess-dds-ny.un.org/doc/UNDOC/DER/NL4/800/54/PDF/NL480054.pdf?OpenElement> (accessed April 2010), quoted in William A. Schabas, *Genocide in International Law : The Crime of Crimes* 2nd ed. (Cambridge Cambridge University Press, 2009), 247.

<sup>30</sup> Schabas, 247.

<sup>31</sup> Johan D. van der Vyver, "Prosecution and Punishment of the Crime of Genocide," *Fordham International Law Journal* 23, no. 286 (1999): 10.

<sup>32</sup> Schabas, 226.

perpetrator knows of his or her crime's secondary consequences and commits the crime anyway, and in crimes of direct intent, the perpetrator desires those consequences. In other words and under the MPC, *dolus indirectus* and *dolus directus* correspond to knowledge and purpose, respectively. With either knowledge or purpose, an individual may omit to act. This omission—in the case of genocide, often the failure to prevent the circumstances, which involve the crime or to punish the perpetrators, who committed the crime—can constitute the crime itself.

An individual may also premeditate to commit a crime. But the drafters determined that “the psychological moment of plotting [is] not necessary for classifying an act of intended destruction as genocide.”<sup>33</sup> Thus the prosecution need not demonstrate premeditation, or the planning and preparation of the commission of a crime. Premeditation, however, differs from planning. As William A. Schabas, the Director for the Irish Center for Human Rights and an expert of public international law, explains: an individual may participate in genocide with knowledge of a plan but without premeditation.<sup>34</sup> For a conviction, however, courts effectively require proof of a plan.

Similarly, although neither the Convention nor the courts establish a “numerical threshold,”<sup>35</sup> genocide's *mens rea* includes the phrase “in whole or in part”—“the intent to destroy in whole or in part a...group, as such.” According to a common sense interpretation and the interpretation of the criminal tribunals, the genocidaire intends to destroy either an entire community or intends to destroy a part thereof. Thus the Convention differentiates between attempted and partial destruction. In the crime of attempted genocide, the accused does not realize his or her intent, whereas in the crime of genocide, the accused only intends partial

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<sup>33</sup> Nehemiah Robinson, *The Genocide Convention: A Commentary* (New York: Institute of Jewish Affairs, 1960), 60., quoted in David L. Nersessian, "The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals," *Texas International Law Journal* 37, no. 2 (2002): 268.

<sup>34</sup> Schabas, 226.

<sup>35</sup> *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, par. 316.

destruction. The International Law Commission further clarifies this differentiation and partial destruction: “it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. None the less the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.”<sup>36</sup>

‘Substantial’, according to the Commission of Experts investigating violations of international humanitarian law in the former Yugoslavia, means substantial numbers or substantial members, like a group’s leadership, or even substantial within a territory.<sup>37</sup> Thus these clarifications of the Convention’s phrase “in part” allow for more contextualized interpretations of genocidal intent. In fact, the drafters included the phrase because they anticipated the accused’s defense that genocide only occurs if all individuals in a victim group die. Unfortunately, more victims evidence intent more obviously. In other words, regardless of the allowances for and emphases on complex, contextual interpretations, “the challenges of objectively proving, in a judicial context, a genocidist’s state of mind” remain.<sup>38</sup>

Scholars debate even the standard equivalent to *dolus specialis*. Obviously, *dolus directus* qualifies as *dolus specialis*, but Alexander K.A. Greenwalt argues for a knowledge-based interpretation of intent. “Genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest of the campaign was the destruction of the group in whole or in part.”<sup>39</sup> Interestingly, he adopts the Convention’s confusing “in part” phrase and genocide jurisprudence’s emphasis on planning. The international community has not adopted this approach. The Rome Statute of the

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<sup>36</sup> “Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No.10,” United Nations International Law Commission, [http://untreaty.un.org/ilc/documentation/english/A\\_51\\_10.pdf](http://untreaty.un.org/ilc/documentation/english/A_51_10.pdf) (accessed March 2010), quoted in Schabas, 236.

<sup>37</sup> Schabas, 236-7.

<sup>38</sup> Nersessian: 236.

<sup>39</sup> Alexander K.A. Greenwalt, "Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation," *Columbia Law Review* 99, no. 8 (1999): 2288.

International Criminal Court, signed by 139 states, thus confirming the international community's agreement, defines *mens rea* as knowledge and purpose. "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."<sup>40</sup> As investigated later, case law of the international criminal tribunals also interprets intent as knowledge and purpose. *Dolus indirectus* is easier to demonstrate; the prosecutor can prove the accused could not have not known. Nonetheless, this standard raises questions as to an individual perpetrator's knowledge of a plan.<sup>41</sup>

For instance, "to this day, debates continue about how widespread the knowledge was within the German Government, army, and population as a whole about the plan to destroy the Jews of Europe."<sup>42</sup> According to intentionalists, Adolf Hitler and Nazi true believers or those Party elite who swallowed the anti-Semitic and racist worldview, intended to exterminate Europe's Jewish population. This evocative historiographic position advanced the International Military Tribunal at Nuremberg lacks historical proof. Outside vague and unconfirmed statements by party officials, intentionalists can cite only Hitler's insinuation in his autobiography *Mein Kampf*. "At the beginning of the Great War, or even during the War, if twelve or fifteen thousand of these Jews who were corrupting the nation had been forced to submit to poison-gas...then the millions of sacrifices made at the front would not have been in vain." Functionalists see the Final Solution to the Jewish Question, however, as bureaucratic and incremental, evolving from Nazi dissatisfaction with expropriation and concentration policies.

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<sup>40</sup> "Rome Statute of the International Criminal Court." United Nations International Criminal Court. <http://untreaty.un.org/cod/icc/statute/romefra.htm> (accessed March 2010), Art. 30 (1).

<sup>41</sup> Schabas, 207-10.

<sup>42</sup> *Ibid.*, 210.



Raul Hilberg clarified the Nazis' step-by-step process as definition, expropriation, concentration, and annihilation.<sup>43</sup>

This debate seems anachronistic and unnecessary, given as Marion Kaplan notes that the Third Reich's victims experienced neither intentionalism nor functionalism<sup>44</sup> and that the Holocaust is an accepted example of—in fact, exemplifies—genocide. Again, this crime under the Convention demands the “intent to destroy.” Yet, absent is analysis of the interpretations genocidal intent. As the preceding literature review proves, Holocaust historians debate the Nazis' intent, and social scientists define genocidal intent. Increasingly, scholars of international law analyze the application of the Genocide Convention. Beside the occasional policy proposal, like Alexander Greenwalt's article, most analysis (see Roberta Arnold, Lori Bruun, Claus Kreß, David Neressian, William Schabas, Cecile Tournaye, and Guglielmo Verdirame) introduces or otherwise summarizes the Convention's judicial interpretation. Such summaries, however, take the Tribunals' judgments at face value. Addressing a gap in the literature, this study analyzes the meaning behind their words. I question: how does the interpretation of genocide intent varies in international criminal law?

### Research Design

In an attempt to answer this question, I hypothesized that judges who interpret genocidal intent balance the qualitative and quantitative natures of the crime, or the essence of the human tragedy, on the one hand, and extent of the biological destruction, on the other. In testing this hypothesis, I conducted a multiple-case study and discursively analyzed the judgments in which

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<sup>43</sup> David Engel, ed. *The Holocaust: The Third Reich and the Jews*, ed. Clive Emsley and Gordon Martel, Seminar Studies in History (Harlow: Longman, 2000), 32.

<sup>44</sup> Marion Kaplan, *Between Dignity and Despair: Jewish Life in Nazi Germany* (New York: Oxford University Press, 1998), 4.

the International Criminal Tribunal for the former Yugoslavia (ICTY) and for Rwanda (ICTR) acquit and convict individuals of genocide. In other words, whereas scholarship on the ICTY and ICTR summarizes the Tribunals' development of international criminal law, I studied whether the Tribunals in fact developed that legal field. I aimed to move beyond the debate on genocide's definition in order to examine the effects of that academic debate on the term's legal application through discursively analyzing that application.

Discourse analysis is the study of the meaning of language in context. The context includes not only the context in which the language occurs but also the context to which the language refers. Thankfully, the texts themselves acknowledge the context to which they refer. As an introduction to the legal findings, the Tribunals' judgments include the factual findings. Acknowledging the context in which the language occurs, this analysis adopts the Hague and Arusha Tribunals as samples. The researcher identified these Tribunals for their simultaneous, prominent, and successful application of the Genocide Convention.

Significantly, these contemporaneous and contemporary bodies eliminate intervening legal developments from influencing the judges and expose current judicial interpretation of genocidal intent. The Tribunals' Statutes succeed in including genocide as a separate crime in their jurisdictions, as opposed to genocide's exclusion from the Charter of the International Military Tribunal at Nuremberg and the charters, indictments, and convictions of the same city's subsequent denazification trials. Similarly, the ICTY and the ICTR remain the only international institutions to convict individuals of the crime. Domestic convictions, especially since state parties may have issued reservations with their ratification, introduce contextual interpretation differences,<sup>45</sup> which the researcher preferred to avoid. Finally, the Tribunals' prominence in the interpretation of international criminal law recommend them to this research, Their Statutes

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<sup>45</sup> Nersessian: 262-268.

reproduce verbatim Article II of the Genocide Convention, and “the interpretation of any of these analogous documents is persuasive evidence of a plausible interpretation of the Genocide Convention”<sup>46</sup> itself. Since this study analyzes the legal interpretation of genocidal intent, samples which legally interpret genocidal intent prove reliable. In other words, the Tribunals are reliable samples.

To analyze these samples, the researcher first downloaded the relevant documents. From the ICTY and ICTR’s publically-accessible and official web sites, the researcher downloaded the Trial Chambers’ judgments and sentences in cases of genocide acquittals and convictions. Reading the legal findings related to genocide, I analyzed the terminology and structure. As significant, I scrutinized terminology related to the Convention’s and scholars’ definitions of genocidal intent: forms and synonyms of the words ‘intent’ and ‘destroy’, references to the geographic distribution and total quantity of victims or scale and scope of atrocities, and identifications of the victim. Whereas analysis of word choice occurred within sentences, I also observed the judgments’ overall structure: where words or phrases occurred within the judgment. Finally, I examined the Tribunals’ expression of its opinion, namely value judgments. From these sources, I studied how the ICTY and ICTR interpreted intent.

To demonstrate this research design, I will analyze the paragraph, which piqued my interest the Tribunals’ interpretations. According to the legal findings of the International Criminal Tribunal for Rwanda’s Trial Chamber judgment in *Prosecutor v. Jean Paul Akayesu*,

It has been established that on the evening of 20 April 1994, Akayesu, and two Interahamwe militiamen and a communal policeman, one Mugenzi, who was armed at the time of the events in question, went to the house of Victim Y, a 69 year old Hutu woman, to interrogate her...During the questioning which took place in the presence of Akayesu, the victim was hit and beaten several times. In particular, she was hit with the barrel of a rifle on the head by the communal policeman. She was forcibly taken away and ordered by Akayesu to lie on the ground. Akayesu himself beat her on her back with

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<sup>46</sup> Ibid.: 242.

a stick. Later on, he had her lie down in front of a vehicle and threatened to drive over her if she failed to give the information he sought.<sup>47</sup>

First, this paragraph from the legal findings chapter reveals its own significance in that it repeats other chapters' findings. The factual findings chapter would corroborate the victim's story, but this paragraph reminds that "it has been established." Similarly, law chapter's section on individual criminal responsibility establishes just the accused's responsibility for the alleged crimes. This legal findings paragraph, however, details that the accused not only commits crimes, beating and threatening the victim, but also that crimes occur in his presence, which the ICTR and ICTY interpret as encouragement or aiding and abetting. Second, this story significantly establishes another element of genocidal intent; since it stresses the victims' vulnerability. An elderly woman faces four men. At least three men have self-defense and likely more aggressive training as well and weapons knowledge, and one attacker was armed. Also, Akayesu enjoys and exploits political authority over the woman. Notably, the Genocide Convention does not identify the victims as vulnerable, rather as members of ethnic, national, racial, or religious groups.

This judgment also introduces the vulnerability requirement to their identity, in affirming the Convention's exhaustive, enumerated, protected groups. Although the woman belongs to an ethnic or racial group, the Tribunal dismisses the acknowledged "serious bodily and mental harm" she endured as amounting to genocide. The ICTR contextually interprets her identity as a political she suffered not as a Hutu but as an individual opposed to the genocidal regime. Thus Akayesu did not possess the intent to destroy a protected group and not commit genocide. Perhaps, the judges include this paragraph because the brutalization makes the accused the brute

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<sup>47</sup> *Akayesu*, par. 720.

and the crime concrete. Perhaps, judges can better extrapolate Akayesu's destruction against a discriminated group, when he committed these atrocities against an elderly, Hutu woman.

These example and the final results may not prove valid for another researcher. Given discourse analysis' context dependence, he or she could identify other elements as significant. I adopted this interpretative strategy because I accepted the Genocide Convention's definition of genocide and so of genocidal intent. Again, the Convention's chapeau defines genocidal intent as the "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such," so I identified those three elements as significant. Obviously, the Tribunals' expressions of opinion and statements of value reveal just those facts. Where the judgments say what—the structure—express opinion and state values equally obviously. Thus I identified if and how the Tribunals' prioritized elements and interpretations of intent. Ultimately, given my acceptance of the Genocide Convention's definition of genocide and genocidal intent, I doubt that the scholarly community will significantly dispute my results.

Political discourse constrains genocide's judicial definition. The Convention resulted from political compromise, notably the exclusion of cultural genocide and political groups. Political conflict invokes the Convention, which promises state parties to "undertake to prevent and to punish"<sup>48</sup> the crime. Thus any research on genocide provokes controversy as to what acts constitute genocide, who constitutes a victim or a perpetrator, how to resolve the conflict and how to punish the crime. To avoid engaging these ethnic and political issues, this research proposes neither a definition of nor policy for genocide. Rather, this research in accepting the Genocide Convention's definition aimed to move beyond the debate on genocide's definition. Similarly, this study examined the effects of that academic debate the term's legal application.

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<sup>48</sup> "Genocide Convention," Art. 1.

## ANALYSIS

Exemplifying the political controversy genocide provokes, the international community dragged its heels during the genocides in the former Yugoslavia and Rwanda—debating the necessity, the legality, and the funding of humanitarian intervention. Yet, the United Nations Security Council jumped at the chance to resolve the internal conflicts judiciously. Almost immediately after Helsinki Watch reported “prima facie evidence that genocide is taking place” in Bosnia-Herzegovina, the United Nations Security Council unanimously adopted resolution 780. They established a Commission of Experts to investigate these reports. With confirmation of widespread and systematic violations of humanitarian law, the Security Council again unanimously adopted a resolution. Resolution 808 created the International Criminal Tribunal for the former Yugoslavia. The ICTY has jurisdiction over grave breaches of the Geneva Conventions of 1949, crimes against humanity, war crimes, and genocide committed in the former Yugoslavia since 1991.<sup>49</sup>

In reference to Rwanda, the United Nations portentously expressed concern at the deteriorating security and humanitarian situations one day before President Juvenal Habyarimana’s assassination. But only as the violence died down in July 1994, did the Security Council commission experts to investigate violations of humanitarian law. With this Commission’s report of widespread and systematic crimes against humanity and violations of the Geneva Conventions, the Security Council adopted resolution 955, establishing the International Criminal Tribunal for Rwanda. Like with the jurisdiction of the ICTY, the United Nations geographically and temporally limits that of the ICTR. The ICTR has jurisdiction over violations of Article 3 common to the Geneva Conventions and to the Additional Protocols,

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<sup>49</sup> “Statute of the International Criminal Tribunal for the Former Yugoslavia,” United Nations International Criminal Tribunal for the Former Yugoslavia, [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf) (accessed February 2010).

crimes against humanity, and genocide committed in Rwanda or by Rwandan citizens between January and December 1994.<sup>50</sup>

Just as the differences in geographic and temporal jurisdiction reflect the conflicts' perpetration—in those countries and during those periods—the crimes included in each Tribunal's Statute indicate the laws' violated. These crimes are either codified in international law, or the Tribunals define them, namely crimes against humanity which constitute

“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: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.”<sup>51</sup>

The Tribunals also adopt verbatim the Genocide Convention, which along with punishing genocide punishes acts of genocide. Thus they prosecute conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.

In these prosecutions, each Tribunal employs three Trial Chambers, and the two organs of international justice share one Appeals Chambers. The United Nations General Assembly elects 16 judges to the ICTR for four-year terms with eligibility for re-election. The ICTY's equal number of “persons of high moral character, impartiality and integrity”<sup>52</sup> enjoy permanent positions. At the request of each Tribunal's President, the General Assembly also appoints *ad litem* judges. Similarly, the Chief Prosecutor, shared between the Tribunals until 1999, serves a four-year term with the possibility of re-election. His or her investigation and prosecution teams, the latter consisting of trial, appellate, information, and evidence sections, rotate annually.

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<sup>50</sup> “Statute of the International Criminal Tribunal for Rwanda,” United Nations International Criminal Tribunal for Rwanda, <http://www.un.org/ictt/statute.html> (accessed February 2010).

<sup>51</sup> “Statute of the International Criminal Tribunal for the Former Yugoslavia;” “Statute of the International Criminal Tribunal for Rwanda.”

<sup>52</sup> “Statute of the International Criminal Tribunal for Rwanda.”

Given such personnel changes—in fact, each case catalogued in the project presented a different combination of judges and prosecutors, not to mention defense attorneys and support staff—and the Statutes’ geographic and temporal limitations, the researcher acknowledged that those factors would affect interpretation. Unfortunately, I could not find the extent of the effect. Instead, I concluded that the Tribunals interpret intent both from somewhat objective sources, namely statistics on the alleged atrocities committed and the systematic perpetration of those atrocities or their planning and premeditation, and subjectively, from the stories or the statements of victims, witnesses, or the accused himself. In the subsequent subsections, I will analyze the Tribunals’ interpretation of intent from these sources.

### *Mens Rea*

Despite differences in jurisdiction and personnel, the Tribunals accepted each other’s jurisprudence in terms of the required *mens rea*. The degree of that element—*dolus directus*, *dolus indirectus*, or *dolus eventualis*—varies according to the genocidal act. For clarification, the Convention defines five prohibited acts, or acts that amount to genocide, given the specific intent:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberating inflicting on the group conditions of life calculated to bring about its destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>53</sup>

These “prohibited acts independently stand as punishable criminal acts”<sup>54</sup> in most states’ court systems; the mental state elevates the material offense to genocide or another of the five genocidal acts. Also the Convention punishes and so the Tribunals prosecute five genocidal acts:

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<sup>53</sup> “Genocide Convention,” Art. 2.

<sup>54</sup> Alfonzo-Maizlish: 1381.



genocide, complicity in genocide, attempt to commit genocide, conspiracy to commit genocide, and direct and public incitement to commit genocide.<sup>55</sup> Just as an individual commits genocide through any of the *actus reus*, he or she commits the other punishable acts through any of the prohibited acts. For instance, the imposition of measures intended to prevent births can constitute complicity in genocide and/or attempt to commit genocide, depending on the perpetrator's participation. Since in the Tribunals' Statutes, the same chapeau—"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"<sup>56</sup>—applies to these acts, the same *mens rea* requirement would seem to apply as well. The subsequent section tests this assumption.

According to the International Criminal Tribunal for Rwanda's Trial Chamber I in *Prosecutor v. Jean-Paul Akayesu* the principal perpetrator intends to destroy. An accomplice has knowledge of, but does not necessarily share, this intent,<sup>57</sup> though the person who is conspiring to commit genocide must share it.<sup>58</sup> In *Akayesu* again, the ICTR affirmed that "the person who is inciting to commit genocide must himself have the specific genocidal intent."<sup>59</sup> While all genocidal acts involve genocidal intent, the International Criminal Tribunals establish the *dolus directus* standard for those acts, except attempt to commit genocide and complicity in genocide. Since an international court has not prosecuted attempted genocide, an intentional standard does not exist for that crime. For complicity in genocide, however, a *dolus indirectus* standard suffices. Significantly, knowledge, instead of knowledge and purpose, eases the prosecution's burden. The prosecution can prove an accused's knowledge in the negative: the accused could not have been unaware.

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<sup>55</sup> "Genocide Convention," Art. 3.

<sup>56</sup> "Genocide Convention," Art. 2.

<sup>57</sup> *Akayesu*, par. 726.

<sup>58</sup> *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Trial Chamber Judgment, par. 192.

<sup>59</sup> *Akayesu*, par.560; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Chamber Judgment, par.854.

To complicate the prosecution's case further, "the *mens rea* varies according to the mode of liability."<sup>60</sup> According to both Statutes, individuals who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" are criminally responsible for genocide.<sup>61</sup> The ICTR case law defined these modes.

In *Prosecutor v. Semanza*, the ICTR Trial Chamber defined planning as "one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime," and ordering as "a situation where an individual has a position of authority and uses that authority to order – and thus compel – another individual, who is subject to that authority, to commit a crime."<sup>62</sup> Interestingly, this definition allows for *de facto* as well as *de jure* authority. In other words, it reflects a contextual, social scientific understanding rather a black and white, legal one. *Prosecutor v. Ndindabahizi* defined instigation as "urging or encouraging, verbally or by other means of communication, another person to commit a crime, with the intent that the crime will be committed," and which directly and substantially contributes to the commission of that crime. Similarly, the same Trial Chamber continued that aiding and abetting constitute "any form of assistance and encouragement given to another person to commit a crime," which directly and substantially contributes to the commission of the crime. Finally, the aider and abettor need not share the intent, but must have knowledge of the principal perpetrator's general intent to commit the punishable act, and, in the crime of genocide, specific intent to commit genocide.<sup>63</sup> In terms of varying intentional standards, aiding and abetting necessitates *dolus indirectus* but instigation needs *dolus directus*.

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<sup>60</sup> *Prosecutor v. Protais Zigiranyirazo*, Case No. IT-01-73-T, Trial Chamber Judgment, par. 398.

<sup>61</sup> "Statute of the International Criminal for the Former Yugoslavia;" "Statute of the International Criminal Tribunal for Rwanda."

<sup>62</sup> *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Trial Chamber Judgment, par. 380.

<sup>63</sup> *Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-2001-71-I, Trial Chamber Judgment, par. 456-7.

The literature summarizes the jurisprudences on intentional standards and argues their acceptability. Such summary remains outside the scope of this study, which explores the Tribunals' establishment of a mental state from circumstantial evidence. Yet, I detailed the complexities of the international criminal tribunals' degrees of *dolus specialis* because they demonstrate the wide variations in genocidal intent.

Regardless of the accused's alleged participation in genocide—again, the Genocide Convention and the Statutes of the Tribunals punish acts of genocide along with genocide and then punish these acts under modes of liability—the Chambers reject recklessness or *dolus eventualis*. Because “by their very nature the enumerated acts are conscious, intentional, and volitional acts,”<sup>64</sup> negligence arising under any standard does not suffice either. Largely, the Chambers settled on a *dolus directus* standard for genocide.

#### Logical Comparisons, ‘Systematic’ Allusions

Now, this analysis will discuss that standard's application; the Tribunals found sources or ‘presumptions of fact’ from which to interpret genocidal intent. According to *Prosecutor v. Akayesu*, the Tribunals infer the intent from

from the general context of the perpetration of other culpable acts systematically directed against the same group whether these acts were committed by the same offender or by others...the scale of atrocities committed, their general nature, in a region or country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding members of other groups.<sup>65</sup>

*Prosecutor v. Kayishema and Ruzindana* elaborated that the Chambers consult “the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of

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<sup>64</sup> *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgment, par. 58.

<sup>65</sup> *Akayesu*, par. 523.

planning, the systematic manner of killing”<sup>66</sup> as well. These “presumptions of fact” separate into two categories—the genocidal acts’ discriminatory commission or widespread and systematic perpetration—and suggest two components of the three-part *dolus specialis* and add another condition. First, discriminatory acts, including cultural genocide or ethnocide, address the component that genocidaires intend to destroy a group “as such.” Second, widespread acts, implying the extent, quantity, or scale of destruction, attend to the component that genocidaires intend to destroy a group “in whole or in substantial part.” Systematic acts, however, add the condition of the genocidaires’ plan to destroy a group. Though these sources expand genocide’s intentional element, the Trial Chambers of the International Criminal Tribunal for the Former Yugoslavia elaborated further. In *Prosecutor v. Radoslav Brdanin*, the Chamber concluded that an inference from presumptions of fact “has to be the only reasonable inference available on the evidence.”<sup>67</sup> This “reasonable” requirement not only protects a presumption of innocence but also introduces logical or objective comparison into the Tribunals’ interpretation of intent.

In interpreting the intent of Milomir Stakic and Momcilo Krajisnik, the ICTY Trial Chamber consulted the principle of command responsibility. According to this principle, the Chamber logically considered the intent of subordinate and superior officers as it reflected on the accused. “A crime committed by a person of low political or military rank without genocidal intent may nevertheless be characterized as an act of genocide if it is procured by a person of higher authority acting with that intent.”<sup>68</sup> The Tribunals contested but *Prosecutor v. Sylvestre Gacumbtsi* reconciled whether command responsibility operates outside formal superior-subordinate relationships. *Gacumbtsi* advocated a contextual interpretation of the accused’s

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<sup>66</sup> *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber Judgment, par. 93.

<sup>67</sup> *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-T, Judgment, par. 970.

<sup>68</sup> *Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39-T, Trial Chamber Judgment, par. 857.

“social, economic, political or administrative standing, or from his abiding moral principles” and his exercise of coercion.”<sup>69</sup> Thus later judgments, like 2009’s *Prosecutor v. Callixte Kalimanzira*, assessed the accused’s *de facto* moral and *de jure* political authority. “The evidence does not establish that he could have lent moral support or political credibility in any significant way [and] any authority or influence he may have possessed in the view of the audience paled in comparison to that of” the other attendees.<sup>70</sup> Raising this requirement to command responsibility, another ICTR Trial Chamber requires that the accused not only enjoy *de facto* or *de jure* authority over subordinates but also “at least have reason to know” that those subordinates engaged in genocidal activity. For each count from the indictment, the Trial Chamber judgment in *Prosecutor v. Musema* repeats that Musema exercised *de facto* and *de jure* authority over his supposed subordinates, that he “knew, or, at least, had reason to know” of his subordinates’ actions, and rather than prevent or punish the crimes, participated. This logical reasoning in accordance with command responsibility allows the judge to avoid the accused’s statements and the ‘systematic’ atrocities themselves. Thus the judge consults more dispassionate facts than discriminatory crimes.

Similarly, the ICTY Trial Chamber logically compared Brdanin’s intent to destroy and intent to displace. The Bosnian Serb forces “muster[ed] the logistic resources to forcibly displace tens of thousands of Bosnian Muslims and Bosnian Croats, resources which, had such been the intent, could have been employed in” their destruction in eastern Bosnia. Consulting the widespread and systematic perpetration of the genocidal acts, the Chamber found that the evidence of the intent to displace outweighed the evidence of the intent to destroy. This cold, logical comparison ignores whether Brdanin’s intent to displace outweighed his intent to destroy,

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<sup>69</sup> *Prosecutor v. Sylvestre Gacumbtsi*, Case No. ICTR-2001-64-T, Trial Chamber Judgment, par. 282.

<sup>70</sup> *Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, Trial Chamber Judgment, par. 182.

considering only the logistical evidence of those intents. Similarly, it ignores whether the two intents can exist concurrently and what the Serbian forces intended in Bosnia-Herzegovina. For instance, the former ICTY jurist Cecil Tournaye concludes that “the objective of the conflict in the former Yugoslavia was not to exterminate an ethnic group, but to rather expel it in order to create ethnically pure territories.”<sup>71</sup> Continuing comparisons, the ICTR addressed plans: “preparations are completely consistent with a plan to commit genocide. However, they are also consistent with plans for a military or political struggle.”<sup>72</sup> This judgment applies the “only reasonable inference” requirement to dismiss the evidence against Bagosora and to escape intentional interpretation.

The ICTR applied logical comparisons to avoid interpreting intent. Comparing the intent to incite genocide and the intent to commit genocide, the Trial Chamber concluded that the intent to incite incorporated not only the intent to destroy but also the intent to commit genocide: “he who incited to commit genocide also has the specific intent to commit genocide.”<sup>73</sup> Having factually found incitement and legally found responsibility therefore, the Chamber infers from those findings intent to commit genocide and circumvents interpreting intent. Similarly, *Prosecutor v. Sylvestre Gacumbitsi*, having found that the accused aided and abetted the commission of genocide, follows that “the requisite specific intent to establish genocide is in itself evidence of the Accused’s intention to participate in the commission of such acts of genocide.”<sup>74</sup> Although the same *mens rea* standard applies to these acts, they constitute different

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<sup>71</sup> Cecile Tournaye, “Genocidal Intent before the ICTY,” *International and Comparative Law Quarterly* 52, no. 2 (2003): 447.

<sup>72</sup> *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Case No. ICTR-98-41-T, Trial Chamber Judgment, par. 2110.

<sup>73</sup> *Akayesu*, par. 729.

<sup>74</sup> *Gacumbitsi*, par. 287.

degrees of participation. The intent to incite and the intent to aid and abet do not necessarily translate into the intent to commit the crime.

In other cases, the Chambers analyze illogically or abandon logic. For instance, *Prosecutor v. Emmanuel Ndingabahizi* reversed *Brdanin*'s "only reasonable inference" standard. The ICTR's Trial Chamber I determined that "even in the absence of other massacres, a brutal attack, targeting several thousand members of an ethnic group, is itself indicative of the requisite intent to destroy an ethnic group, in whole or in part."<sup>75</sup> An attack, however brutal, admits intent to attack, whereas a brutal attack in the context of brutal attacks can demonstrate intent to destroy. This determination reverses *Brdanin* and instead relies on the earlier *Akayesu* judgment and its evidential sources. Even in this reliance, *Ndingabahizi* prefers the second source advanced in *Akayesu*—"the scale of atrocities committed"—to the first presumption of fact—"the general context of the perpetration of other culpable acts."<sup>76</sup> Though that historic judgment admits no hierarchy to the sources, syntactic order in judicial orders often indicates one. To some extent, *Prosecutor v. Ndingabahizi* reverses *Akayesu* as well.

Yet, the sources advanced in *Akayesu* and *Kayishema and Ruzindana* affirmed the Genocide Convention's definition of genocidal intent; they addressed its discriminatory and numerical conditions and established a planning condition. And the standards advanced in *Brdanin* affirmed criminal law's presumption of innocence. Whether affirming or rejecting the sources from which to infer intent and the standards to which to hold them, logical or objective comparisons of intent avoid interpretations of intent. In comparing the intent to commit a crime against the intent to commit another, the judge would avoid consulting the acceptable sources

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<sup>75</sup> *Ndingabahizi*, par. 461.

<sup>76</sup> *Akayesu*, par. 523.

and so would avoid the atrocities themselves. The judge avoids balancing the qualitative and quantitative measures of the crimes.

Quantitatively comparing genocidal intent, the Chambers return not to the crime's *mens rea* requirements, but to its simplistic, traditional definition: state-sponsored, systematic mass killing. Although almost no scholar, intergovernmental body, or advocacy organization so defines genocide, the g-word's politicization—activists allege the term describes to everything from abortion,<sup>77</sup> bisexuality,<sup>78</sup> and dieting,<sup>79</sup> to HIV/AIDS,<sup>80</sup> “methadone programs,”<sup>81</sup> and racial desegregation<sup>82</sup>—reveal that this simpler definition suffices for the general public. In that simpler vein, the ICTY and ICTR Trial Chambers emphasize the acts' widespread and systematic execution and statistical effects.

“Widespread or systematic” describes crimes against humanity. Genocide evolved from crimes against humanity. Before the Genocide Convention, the International Military Tribunals at Nuremburg and Tokyo convicted defendants of war crimes and crimes against humanity for conduct that included the constituent elements of genocide.<sup>83</sup> As an alternative to the Genocide Convention and as a reflection of crimes against humanity, Helen Fein defines genocide as “sustained purposeful action,”<sup>84</sup> or systematic. In fact, the director of the Duke University-Geneva Institute for Transnational Law, Madeline Morris, determines that intent distinguishes

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<sup>77</sup> Gregg Cunningham, "Why Abortion Is Genocide", Center for Bio-Ethical Reform <http://www.abortionno.org/Resources/abortion.html> (accessed 4 March 2010).

<sup>78</sup> Helen Fein, "Genocide, Terror, Life Integrity, and War Crimes," in *Genocide: Conceptual and Historical Dimensions*, ed. George Andreopoulos (Philadelphia: University of Pennsylvania Press, 1994), 95.

<sup>79</sup> "Forget Weight Loss--Low-Carb Diets May Be Essential to Surviving", <http://www.prweb.com/releases/2008/04/prweb861444.htm> (accessed 4 March 2010).

<sup>80</sup> Abdul Alim Muhammad, "Shocking Revelations on Aids Research by Our North American Correspondent," *New Dawn* 1992.

<sup>81</sup> Fein, "Genocide, Terror, Life Integrity, and War Crimes," 95.

<sup>82</sup> Jack Nusan Porter, "Introduction," in *Genocide and Human Rights: A Global Anthology*, ed. Jack Nusan Porter (Washington, DC: Univeristy Press of America, 1982), 9-10, quoted in *Ibid.*

<sup>83</sup> Madeline Morris, "Genocide Politics and Policy: Conference Remarks," *Case Western Reserve Journal of International Law* 35, no. 2 (2003): 206.

<sup>84</sup> Fein, *Genocide: A Sociological Perspective*, 24.



genocide from crimes against humanity.<sup>85</sup> The two categories of crimes “are a product of historical accident.”<sup>86</sup> Accounting for this accident, the Tribunals infer intent from the “general context,” the deliberate or systematically directed or targeted acts,<sup>87</sup> “the methodological way of planning, [and] the systematic manner of killing.”<sup>88</sup> Thus “systematic” applies to victim selection as well as denoting a plan, pattern, or policy, and connoting the bureaucratic, state-sponsored Nazi Holocaust. Although the Genocide Convention does not require a plan, the ICTY Trial Chamber determined that “it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organization or a system.”<sup>89</sup> The ICTR Trial Chamber concluded to infer intent from “a consistent pattern of conduct” by the accused.<sup>90</sup>

Thus all Trial Chambers emphasized genocide’s widespread and systematic commission. For instance, *Krstic*, *Brdanin*, and *Rutaganda* repeated the word “systematic,” in describing the atrocities, which the accused committed.<sup>91</sup> Similarly, *Brdanin* referred to “the existence of a genocidal plan or policy”<sup>92</sup> and *Stakic* to “a comprehensive pattern.”<sup>93</sup> Interestingly, *Stakic* determined that perpetrators “devise the genocidal plan at the highest level.”<sup>94</sup> These references and repetitions allude to the acts’ discriminatory and planned commission. They compare genocide to crimes against humanity, which are widespread and systematic, and to the Holocaust, which was bureaucratic, state-sponsored, and systematic. They do not confirm that commission or even the general context, in which the accused perpetrated the acts. From

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<sup>85</sup> Morris: 207.

<sup>86</sup> Ratner: 584.

<sup>87</sup> *Akayesu*, par. 523.

<sup>88</sup> *Kayishema and Ruzindana*, par. 93.

<sup>89</sup> *Prosecutor v. Goran Jelusic*, Case No. IT-95-10-T, Trial Chamber Judgment, par. 101.

<sup>90</sup> *Musema*, par. 927.

<sup>91</sup> *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Trial Chamber Judgment, par. 546.

<sup>92</sup> *Brdanin*, par. 980.

<sup>93</sup> *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, Trial Chamber Judgment, par. 546

<sup>94</sup> *Ibid*, par. 532.

evaluation of factual findings, the judges issue legal findings. Interestingly, the legal findings repeat some facts, yet not the facts, which prove systemization. Given that in the legal findings, the adjective “systematic” rather than factual evidence of systemization suffices, the Tribunals seem to lower their standards for genocidal intent.

In fact, the references and repetitions imply crimes against humanity and the Holocaust as interpretations of genocidal intent. Again, the Statutes define crimes against humanity as “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”<sup>95</sup> And since it provoked the Genocide Convention, the Holocaust serves as a proto-genocide. Other genocides, especially their extent of bureaucratization, state-sponsorship, and systematization, are thus compared to the Holocaust. And of the Holocaust, Hannah Arendt determines that “such a crime could be committed only by a giant bureaucracy using the resources of government.”<sup>96</sup> In the Trial Chambers’ judgments, this comparison and comparisons to crimes against humanity occur through the reiteration of “systematic” and similar phrases. In other words, the Tribunals interpret genocidal intent by implying similarity to other atrocities. Like logical evaluations, these comparisons allow the judge to avoid considering the atrocities themselves and so balancing the qualitative and quantitative measures of genocide.

### Statistics and Geography

In quantitative measures, the Tribunals most frequently interpret intent from a statistical analysis of the atrocities. This section analyzes the Tribunals’ interpretations of genocidal intent

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<sup>95</sup> “The International Criminal Tribunal for the Former Yugoslavia,” “The International Criminal Tribunal for the Rwanda.”

<sup>96</sup> Hannah Arendt, “Postscript,” in *Eichmann in Jerusalem: A Report on the Banality of Evil* (Harmondsworth: Penguin, 1977), 289, quoted in Akio Kimura, “Genocide and the Modern Mind: Intention and Structure,” *Journal of Genocide Research* 5, no. 3 (2003): 410.

from statistics. The Genocide Convention defines genocide's *mens rea* as "the intent to destroy, in whole or in part, a...group, as such." Frank Chalk and Kurt Jonassohn propose an alternative to this ambiguous phrase; they define genocide as "mass killing."<sup>97</sup> The Tribunals, however, interpret that intent according to the International Law Commission's (ILC) Draft Code of Crimes against the Peace and the Security of Mankind's analysis of the Genocide Convention. The ILC interprets "in part" as a substantial part, numerically or in terms of the community. Thus the *Jelusic* judgment questions "what proportion of the group is marked for destruction and beyond what threshold could the crime be qualified as genocide?"<sup>98</sup> *Prosecutor v. Radislav Krstic* answers

that the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it... Indeed, the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue.<sup>99</sup>

Although this jurisprudence allows for a non-statistical interpretation of genocidal intent, the ICTY's early judgments stress numbers within a given geography. *Jelusic* cites that "approximately 66 bodies were discovered scattered about in four mass graves."<sup>100</sup> *Krstic* continues that "within a period of no more than seven days, as many as 7,000-8,000 men of military age were systematically massacred while the remainder of the Bosnian Muslim population present at Srebrenica, some 25,000 people, were forcibly transferred to Kladanj."<sup>101</sup> In introducing this fourth and geographic element to a *mens rea* already "difficult, even impossible to determine,"<sup>102</sup> the ICTY restricts interpretations of genocidal intent. Yet, this

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<sup>97</sup> Chalk, 23.

<sup>98</sup> *Jelusic*, par. 80.

<sup>99</sup> *Krstic*, par. 590.

<sup>100</sup> *Jelusic*, par. 90.

<sup>101</sup> *Krstic*, par. 594.

<sup>102</sup> *Akayesu*, par. 523.

geographic emphasis also expands genocide; it allows for more nuanced interpretations, namely defining destruction regionally or municipally rather than internationally.

Nuance does not necessarily mean that the judges consider qualitative measures. Like the Tribunal's logical reasoning and "systematic" repetition removes the judge, this statistical interpretation ignores the essence of the human tragedy, while, interestingly, including the discriminatory and dreadful atrocities. The ICTR cites numbers in *Musema* and *Seromba*: the accused substantially contributed to attacks against 40,000<sup>103</sup> and to the death of 1,500 refugees,<sup>104</sup> respectively. Certainly, these statistics shock the audience, so they could introduce the human element to the interpretation. I, however, read statistics as an objective, rational, and quantitative interpretation of genocidal intent.

This quantitative criterion, as legal scholar David Alonzo-Maizlish discovered, features more prominently in the ICTY's genocide jurisprudence, whereas the ICTR prefers identifying "thousands," "large numbers," or even "substantial numbers" of victims.<sup>105</sup> In fact, the ICTR rejected the qualitative criterion; *Prosecutor v. Gacumbitsi* determined that "the phrase 'destroy in whole or in part a[n] ethnic group' does not imply a numeric approach."<sup>106</sup> Similarly, *Prosecutor v. Nindabahizi* found that killing an individual with genocidal intent constitutes genocide,<sup>107</sup> thus substantiating the elevating quality of *dolus specialis*. Significantly, the International Criminal Court has adopted Nindabahizi's interpretation: "there is a minimum quantity threshold of at least *one* victim."<sup>108</sup> Although some judgments specify numbers, the ICTR's more vague quantification of "in part" honors the intention of the Genocide Convention.

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<sup>103</sup> *Musema*, par. 901.

<sup>104</sup> *Seromba*, par. 334.

<sup>105</sup> *Nindabahizi*, par. 454, 460.

<sup>106</sup> *Gacumbitsi*, par. 258, quoted in Paul Kim, "The Law of Genocide in the Jurisprudence of ICTY and ICTR in 2004," *International Criminal Law Review* 5, no. 3 (2005): 437.

<sup>107</sup> *Nindabahizi*, par. 471.

<sup>108</sup> Roberta Arnold, "The Mens Rea of Genocide under the Statute of the International Criminal Court," *Criminal Law Forum* 14, no. 2 (2003): 137.

And as Alonzo-Maizlish argues and I agree, this criterion forgets the Convention's intention—to promote and to protect group rights. Insisting on a qualitative measure of genocidal intent forgets that “destruction of such groups harms the entirety of humanity”<sup>109</sup> and introduces an extrastatutory policy concern, namely the trivialization of genocide.

Yet, the Rwandan Tribunal could have adopted the Yugoslavian criterion. According to the Trial Chamber in *Prosecutor v. Kayishema and Ruzindana*, the Tribunal adopted the sources for inference of genocidal intent from the Commission of Experts in their Final Report on the Situation in Rwanda and the Special Rapporteur's Report of the Sub-Commission on Genocide. The Commissions respectively enumerate “the number of group members affected” and “the relative proportionate scale of the actual or attempted destruction of a group” as evidencing *dolus specialis*.<sup>110</sup> Instead of comparing destruction to total population, the ICTR evaluated scale or scope without a definition. For instance, describing only the perpetrators and the situation, *Bagambiki* determines “the scale of these killings of the Tutsi refugees and the length of time required to kill such a large number of victims prove that these killings were intentional.”<sup>111</sup>

Whereas the foundational commissions and documents of the Tribunals qualitatively interpret partial intent, the ICTY introduces a quantitative interpretation. Interestingly, the Tribunals disagree. The ICTY defines genocidal destruction with statistics, and the ICTR describes large-scale destruction with that terminology. Again, I reject the ICTY's and prefer the ICTR's interpretation because the latter considers the statistics in context. Even a qualitative measure of genocidal intent considers groups, as such, not masses of individuals.

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<sup>109</sup> Alonzo-Maizlish: 1380.

<sup>110</sup> *Kayishema and Ruzindana*, par. 93.

<sup>111</sup> *Bagambiki*, par. 689.

### Statements: the Accused

Consulting individuals, the ICTY and ICTR interpret genocidal intent from the statements and the stories of the accused and the victims, and I will now analyze this source of *dolus specialis*. Although the Tribunals advance alternative sources of genocidal intent, they prioritize the accused's statements. "In the absence of a confession,"<sup>112</sup> the Tribunals consult presumptions of facts, according to *Akayesu*. *Prosecutor v. Ndindabahizi* reaffirmed this ruling: "the requisite intent may be proven by overt statements of the perpetrator or, as with any crime, by drawing inferences from circumstantial evidence of intent."<sup>113</sup> Significantly, the Chamber identifies the accused's statements before alternative sources, and again, syntactic order in judicial orders often indicates an order. That the accused's statements do not necessitate corroboration whereas circumstance evidence invokes the "only reasonable" requirement also indicates the Tribunals' preference. *Prosecutor v. Brdanin*, found that an inference from presumptions of fact or circumstantial evidence "has to be the only reasonable inference available on the evidence."<sup>114</sup>

Yet, the ICTR Trial Chambers considered the accused's statements either as related to corroborated evidence or as related by a witness as proving genocidal intent, and the ICTY dismissed the accused's statements as proving genocidal intent. For instance, the *Musema* Trial Chamber judgment includes Musema's testimony about violence against Tutsi civilians and refugees at roadblocks and attacks elsewhere.<sup>115</sup> The judgment ignores whether Musema addressed his alleged participation in these crimes. In fact, his testimony only corroborates the roadblocks and the violence occurring there was "systematic." As previously analyzed, the

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<sup>112</sup> *Akayesu*, par. 523.

<sup>113</sup> *Ndindabahizi*, par. 454.

<sup>114</sup> *Brdanin*, par. 970.

<sup>115</sup> *Musema*, par. 928-930.

Tribunals accept references to “widespread and systematic” violence as proof of genocidal intent. In finding the accused guilty of genocide, the *Akayesu* judgment cites victim testimony, namely that of women assaulted either in his presence, under his orders, or by himself. Although *Akayesu* does not admit saying “don’t ever ask again what a Tutsi woman tastes like,”<sup>116</sup> the ICTR accepts witness testimony of this statement.

At the other extreme, the ICTY Trial Chambers in *Prosecutor v. Jelusic* and *Prosecutor v. Brdanin* admitted the accused’s statements but dismissed them as demonstrating genocidal intent. For instance, Goran Jelusic introduced himself as the “Serbian Adolf” to the Chamber and to his victims, who also allegedly heard him declare his hatred for and desire to kill all Muslims.<sup>117</sup> Given Jelusic’s psychological state and randomly perpetrated violence, the judgment negatively concludes that he did not commit genocide. Similarly, Brdanin stated few Bosnian Croats and Muslims would remain in the Serbian Bosnia Autonomous Region of Krajina (ARK) and suggested drowning all Bosnian Croat and Bosnian Muslim children in the Vrbas River. In the Chamber’s opinion, “these utterances strongly suggest the Accused’s discriminatory intent, however, they do not allow for the conclusion that the Accused harboured the intent to destroy the Bosnian Muslims and Bosnian Croats of the ARK.”<sup>118</sup> At face value, the Tribunals prioritize the accused’s confession or other overt statement of intent. Discursively analyzing the Trial Chambers’ judgments, however, demonstrates that these Chambers critique these statements as harshly as other sources.

Although the Tribunals admit the accused’s statements, the judges’ description of the accused better evidence their interpretations of genocidal intent. Some judgments, according to the standards of judicial neutrality, dismiss the accused’s statements neutrally. For instance, in

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<sup>116</sup> *Akayesu*, par. 709.

<sup>117</sup> *Jelusic*, par. 102.

<sup>118</sup> *Brdanin*, par. 986-7.

*Prosecutor v. Ntakirutimana*, “the Chamber notes that the alibi raised by the two Accused was found not to raise a reasonable” doubt.<sup>119</sup> Considering only the burden and dismissing the content of the alibi, the *Ntakirutimana* Trial Chamber remains neutral about the accused’s alleged participation. Other judgments, like *Prosecutor v. Kalimanzira*, more directly dismiss the substance of the accused’s statements. The Chamber notes that the accused avoided contested points and that it “disbelieves” the accused’s alibi.<sup>120</sup> *Kalimanzira*’s legitimate comments, though expressed in more concrete language than *Ntakirutimana*, remain relatively neutral toward the perpetrator.

In other cases, while recapitulating the evidence instead of, for instance, finding for a conviction, the ICTR Trial Chambers express a negative opinion about the accused. In *Prosecutor v. Ferdinand Nahimana, Jean Bosco Barayagwiza, and Hassan Ngeze*, the ICTR ruled that “if the downing of the [Rwandan President Juvénal Habyarimana’s] plane was the trigger, then RTLM, Kangura and CDR [the media outlets under the accused’s oversight] were the *bullets in the gun*” (emphasis added).<sup>121</sup> The same case continues that Radio Télévision Libre des Milles Collines (RTLM) was Nahimana’s “weapon of choice,” and that Nahimana was RTLM’s “mastermind,” but that Barayagwiza was the “lynchpin among the three Accused.”<sup>122</sup> These statements, as opposed to the Tribunal’s in *Ntakirutimana* or *Kalimanzira*, express the Tribunals’ negative opinion of the accused. The criminal and violent imagery convict the accused before the Court does in the final sentencing chapter.

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<sup>119</sup> *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases No. ICTR-96-10 & ICTR-96-17-T, Trial Chamber Judgment and Sentence, par. 782.

<sup>120</sup> *Ibid.*, par. 179, 215.

<sup>121</sup> *Prosecutor v. Ferdinand Nahimana, Jean Bosco Barayagwiza, and Hassan Ngeze*, Case No. ICTR-99-52-T, Trial Chamber Judgment, par. 953.

<sup>122</sup> *Ibid.*, par. 966, 974, 1050.



Yet, this bias does not exist as an anomaly in one case; it extends to other cases.

*Prosecutor v. Renzaho* repeated *Nahumana*, *Barayagwiza*, and *Ngeze*'s violent language, and *Ntakirutimana* struggled to present the accused positively: the judgment describes the search for Tutsis in animalistic terms, as "hunting down" or "chasing," as opposed to "pursuing,"<sup>123</sup> a humanizing word occurring later. Of course, the Chambers do not have an obligation to present the accused positively or even to withhold their judgments. Rather this obviously negative language expresses the Tribunal's opinion and so emphasizes the accused's guilt.

The accused's statements and statements about the accused qualitatively measure genocidal intent. Even though the ICTY and the ICTR dismiss the accused's statements as supporting evidence of *dolus specialis*, the statement's themselves and their inclusion in the judgment of genocidal intent force the judges to confront the essence of the human tragedy.

#### Stories: the Victims

The judges confront genocide's human heartbreak more explicitly in witness and victim testimony. In terms of the accused's statements, the ICTY and ICTR generally discredited them as demonstrating genocidal intent. Interesting, in terms of statements from and stories of witnesses and victims, the Tribunals' treatment diverges. Either the Trial Chambers discredit their experiences and so dismiss them as evidence of *dolus specialis*, or they emphasize the victims' vulnerability as civilians, refugees, women and children, thus introducing a new element to genocidal intent. Although now a common interpretation of the victim group's identity, subjective identity interpretation caused hesitation in Arusha, so it remained the sphere of scholars. For instance, Chalk and Jonassohn proposed defining the victim "group and

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<sup>123</sup> *Ntakirutimana*, par. 828, 832.

membership in it [as] defined by the perpetrator.”<sup>124</sup> This fifth and final section analyzes the interpretation of genocidal intent from the statements from and the stories of victims.

In the ICTY’s first prosecution of a genocide indictment, the *Jelusic* judgment historically acquitted the accused because the Tribunal dismissed the evidence of *dolus specialis*, explicitly victim testimony. The judgment reported witness testimony as “according to” or “as related by,” and as “alleged,” “purported,” or “reputed.”<sup>125</sup> Similarly, it includes discrepancies between testimonies: “On 8 May 1992 [Jelusic] reputedly said to one witness that it was his sixty-eighth victim, on 11 May that he had killed one hundred and fifty persons, and finally on 15 May to another witness following an execution that it was his ‘eighty-third case.’”<sup>126</sup> Fortunately, instead of crediting these discrepancies to the victims, the Tribunals attribute the differences between dates and executions to the accused’s excited exaggerations: “he took a certain pride in the number of victims that he had allegedly executed.”<sup>127</sup> Unfortunately, the discrepancies’ inclusion already casts doubt on the victims’ testimony, as does the Trial Chamber’s obvious statement about the testimony’s lack of support: “he had *allegedly* executed” (emphasis added). Finally, the ICTY reads the executions’ randomness as proof that Jelusic neither planned nor desired the group’s destruction. The random killings could have, however, reinforced the executioner’s power and terrorized the survivors.

In the ICTR’s most similar instance, Trial Chamber III in *Prosecutor v. Bagambiki* questions not the events and the experiences, but their destructive nature: “the Chamber concludes that the mistreatment was not such as to cause...serious bodily injury.”<sup>128</sup> In other

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<sup>124</sup> Chalk, 23.

<sup>125</sup> *Jelusic*, par. 102-105.

<sup>126</sup> *Ibid.*, par. 103.

<sup>127</sup> *Ibid.*, par. 104.

<sup>128</sup> *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe*, Case No. ICTR-99-46-T, Trial Chamber Judgment, par.692.

words, *Bagambiki* questions the *actus reus* not the *mens rea*. *Bagambiki* is even anomalous in ICTR's jurisprudence. More commonly, the "Chamber found the witnesses to be credible and their evidence reliable, and [that] various circumstances supported their testimonies."<sup>129</sup> Instead of discrediting witnesses, the ICTR Trial Chambers remarked that they corroborated each other's testimony and other evidence.

Given this corroboration, the ICTR's Chambers consulted witness and victim testimony. In fact, the ICTR interpreted the accused's intent to destroy from the personal tragedies of his or her victims. Not only do personal stories portray the accused as vicious, but also they paint the victims as vulnerable. *Musema* describes in graphic detail, the accused's rape on 13 May 1994 of the young Tutsi teacher Nyiramusugi.<sup>130</sup> Nyiramusugi's brutalization not only makes Musema the brute but also makes the crime concrete. Moving away from evaluations of an "ethnic, national, racial, or religious group, as such" and in substantial part, Nyiramusugi's experience demonstrates the accused's destruction. As opposed to large-scale, systematic destruction, personal stories demonstrate genocide's human tragedy.

Interestingly and in a similar vein, *Prosecutor v. Akayesu* includes the accused's attack on elderly Hutu woman.

It has been established that on the evening of 20 April 1994, Akayesu, and two Interahamwe militiamen and a communal policeman, one Mugenzi, who was armed at the time of the events in question, went to the house of Victim Y, a 69 year old Hutu woman, to interrogate her...During the questioning which took place in the presence of Akayesu, the victim was hit and beaten several times. In particular, she was hit with the barrel of a rifle on the head by the communal policeman. She was forcibly taken away and ordered by Akayesu to lie on the ground. Akayesu himself beat her on her back with a stick. Later on, he had her lie down in front of a vehicle and threatened to drive over her if she failed to give the information he sought.<sup>131</sup>

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<sup>129</sup> *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01-63-T, Trial Chamber Judgment, par. 333.

<sup>130</sup> *Musema*, par. 907.

<sup>131</sup> *Akayesu*, par. 720.

First, this paragraph corroborates or credits the victim's story—"it has been established"—and even establishes the accused's criminal liability. He commits crimes, namely beating and threatening the victim; and crimes occur in his presence, which the international criminal tribunals interpret as encouragement or aiding and abetting. Second, this story stresses the victims' vulnerability: an elderly woman faces four men. At least three men have self-defense and likely more aggressive training as well, and one attacker was armed. Akayesu enjoys and exploits political authority over the woman. Notably, the Genocide Convention does not identify the victims as vulnerable, rather as members of ethnic, national, racial, or religious groups. Immediately identifying her as the ethnic or racial Hutu group—the genocidaires as opposed to the victims—the ICTR dismisses that the "serious bodily and mental harm" she survived constituted genocide. Yet, the harm's inclusion in the judgment evidences Akayesu's ability to engage in biologically destructive behavior. His infliction of such violence on an already vulnerable member of his own group makes his perpetration of genocide against an already discriminated group seems more plausible.

As *Akayesu* established, this targeting evidences genocidal intent. Yet, the victims' perceived vulnerability does not prove *dolus specialis*. Nevertheless, the *Brdanin* judgment identifies the victims not only as a protected group—a national, ethnical, racial, or religious group—but also as individuals. The Manjaca detention facility held civilians, including underage and elderly detainees,<sup>132</sup> and the Omarska internment camp held 30 to 35 women, minors, and mentally impaired individuals.<sup>133</sup> Similarly, *Prosecutor v. Seromba* specifies that refugees suffered. Within five sentences, the judgment mentions "refuge" or "refugee" eight

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<sup>132</sup> *Brdanin*, par. 750.

<sup>133</sup> *Ibid*, par. 841-2.

times,<sup>134</sup> and *Prosecutor v. Ntakirutimana* uses the word eight times within one paragraph.<sup>135</sup>

Technically, the fleeing Tutsi population was internally displaced people not refugees, but the latter term, given its less technical nature and longer historical use, conjures stronger emotions, perhaps explaining the ICTR's preference for the term.

Comparing the attackers and their victims, *Akayesu* emphasizes the latter's weakness. Other judgments from both Tribunals stress the victims' state and genocide's human heartbreak by contrasting the crime's location and the victims' expectation of safety there. In addition to the victim's internal displacement, other ICTY and ICTR judgments emphasize that the victim faced armed and trained attackers in traditionally secure settings. The judgments detail that crimes consciously occurred in churches, elementary schools, football stadiums, firehouses, police stations, and private homes; members of the Serb military and paramilitaries established detention facilities in these former safe havens.<sup>136</sup> The ICTR elaborates on that unexpected transformation: "Elizaphan Ntakirutimana conveyed attackers to Murambi Church and ordered the removal of the church roof so that it could no longer be used as a hiding place for the Tutsi."<sup>137</sup> Of churches, elementary schools, football stadiums, firehouses, police stations, and private homes, the public expects safety, so displaced persons sought refuge there. Similarly, these locations symbolize intercultural integration, which genocidaires attack and which genocides destroy. Genocide's denial of the right to exist "shocks the conscience of humankind, causes tremendous and irreversible loss to humanity, and stands against the principles of humanity that are embodied in the United Nations."<sup>138</sup> That destruction of the victim group and

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<sup>134</sup> *Seromba*, par. 326.

<sup>135</sup> *Ntakirutimana*, par. 832.

<sup>136</sup> *Brdanin*, par. 742-968.

<sup>137</sup> *Ntakirutimana*, par. 828.

<sup>138</sup> Harvey Marcel Haldorson, "Genocide: A Philosophic Criticism of Genocide as It Is Defined in the United Nations' Convention on the Prevention and Punishment of Genocide" (Concordia University, 1992), 67.

of the intercultural connections affects the country in long-term reconciliation and reconstruction. Post-war, no one enjoys an expectation of safety. In fact, everyone feels vulnerable to reprisal violence. Such an emphasis reflects the judges' empathy toward the victims. These contrasts between the victims and their attackers, between the attacks and their traditionally safe settings, further highlight the victims' vulnerability.

Adhering to this interpretation, the *Krstic* judgment emphasizes the victims' vulnerability by identifying Srebrenica's Bosnian Muslims as a community rather than in the Convention's legal language of a protected group.<sup>139</sup> Other judgments, namely *Prosecutor v. Nchamihigo* and *v. Bagosora* identify other communities, notably Hutu political opponents and Belgium peacekeepers, respectively, as victims of genocide. In an example of the Prosecution's argument, the team charged that the killing of 10 Belgian peacekeepers was "intended to prompt Belgium to withdraw its contingent to UNAMIR and thus facilitate the ensuing massacres." The ICTR Trial Chambers did not accept the argument. In December 2008, Trial Chamber I dismissed the charge, and one month early, Trial Chamber III found "where the perpetrators of the genocide believed that eliminating Hutu political opponents was necessary for the successful execution of their genocidal project against the Tutsi population, the killing of Hutu political opponents cannot constitute acts of genocide."<sup>140</sup>

Again, in defining the victim as a collective rather than an individual, the Tribunals interpret genocidal intent from evidence of genocide against groups "as such." The Convention modifies the protected groups with the phrase "as such," which some drafting states and interpreting scholars read as a requirement that the perpetrator commits genocide against individuals for their group identity. In an example of this interpretation, Peter Drost's proposed

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<sup>139</sup> *Krstic*, par. 211.

<sup>140</sup> *Nchamihigo*, par. 338.

definition of genocide expands the protected groups to all “individual human beings” if deliberately destroyed “by reason of their membership in a human collectivity as such.”<sup>141</sup> The Tribunals’ own jurisprudence affirms that “the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group... which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.”<sup>142</sup> To this end, the Trial Chambers advanced, among other sources of genocidal intent, “the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding members of other groups” and “the use of derogatory language toward members of the targeted group.”<sup>143</sup>

As evidence of this discrimination or targeting, *Rutaganda* and *Brdanin* include the ethnic insults that the victims experienced. Just as the *Prosecutor v. Rutaganda* Trial Chamber judgment includes that the accused, speaking to Interahamwe, “stated there was a lot of dirt that needs to be cleaned up,”<sup>144</sup> other ICTR deliberations emphasized that at roadblocks, guards separated Hutu from Tutsi, and massacred Tutsi, “based on their ethnic identity” occurred.<sup>145</sup> Similarly, the *Prosecutor v. Brdanin* judgment introduces the ethnic humiliation that Bosnian Croat and Bosnian Muslim prisoners in Bosnian Serb detention centers experienced. In certain centers, detainees “were called ‘Balija,’ subjected to other ethnic slurs and humiliated,” “were forced... to assume a praying position,” and “were made to sing Serbian songs and to extend the Serbian three-fingered salute,” and the guards forced one prisoner, who wrote a statement in the Latin script, not only to eat that statement but also to rewrite it in Cyrillic.<sup>146</sup>

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<sup>141</sup> Drost, 125, quoted in Chalk, 13.

<sup>142</sup> *Akayesu*, par. 521.

<sup>143</sup> *Kayishema and Ruzindana*, par. 93.

<sup>144</sup> *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, par. 385.

<sup>145</sup> *Prosecutor v. François Karera*, Case No. ICTR-01-74-T, Trial Chamber Judgment and Sentence, par. 536.

<sup>146</sup> *Brdanin*, par. 776; 839; 834; 823.

The Trial Chambers advance these sources of genocidal intent or genocide committed against a group “as such.” Yet, most statements about or stories from the victims emphasize their vulnerability. The Genocide Convention, reproduced verbatim in the Statutes of the ICTY and ICTR, however, does not require the victims’ vulnerability, whether as individuals or as a collective. In fact, according to genocidal intent, only a substantial part of “a national, ethnical, racial or religious group, as such,” suffers biological destruction.

### CONCLUSION

Scholars debate whether genocide’s legal definition with its exhaustive lists of five physical offenses, four protected groups, and three intentional requirements and whether its political application in post-conflict countries expresses the reality its perpetrators inflicted and its victims suffered. Anecdotally, genocide is mass murder based on the victim’s identity.<sup>147</sup> Technically, genocide is “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>148</sup> Examining how this academic debate affects the judicial interpretation of genocidal intent, this study discursive analyzed the judgments in which the International Criminal Tribunals for the Former Yugoslavia and Rwanda acquitted and convicted individuals of genocide.

Scholarship summarizes the Genocide’s Convention judicial interpretation and so takes the International Criminal Tribunals’ judgments at face value, whereas I analyzed the meaning behind their words. Thus although the Tribunals advanced sources from which to infer genocidal intent, I identified four sources from which they interpreted it: logical comparisons, reference to and repetition of ‘widespread’ and ‘systematic,’ statistics of the atrocities, and the

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<sup>147</sup> Kabatsi: 387.

<sup>148</sup> “Genocide Convention,” Art. 2.



statements of or about the accused and stories of or about the victims. On the one hand, logical comparisons, references to and repetition of 'systematic', and statistics serve as objective sources from which to interpret intent. Not necessarily qualitative measures, they do dehumanize the crime, so the judges avoid genocide's human expression and effects. On the other hand, the statements about and stories from both the accused and the victims qualitatively measure genocidal intent. Obviously, these measures humanize the crime, forcing the judge to face the atrocities. As this study intended to demonstrate, a tension does exist between the essence of the human tragedy and the extent of the biological destruction, both of which the term 'genocide' attempts to capture.

This tension does not result in a judgment's reliance on either qualitative or quantitative measures. In fact, the Tribunals interpret intent from multiple sources perhaps because the Tribunals have multiple audiences, because they dismiss the evidence even if they accept the source, and because one source, like the term genocide, cannot capture the lived experience. The Tribunals are not only convicting or acquitting the defendant but also demonstrating their legitimacy to future defendants and the international community and establishing legal precedent. Besides the post-World War II International Military Tribunals at Nuremburg and Tokyo, these International Criminal Tribunals constitute the first international attempt to end impunity for violations not only of the laws of war but also of humanitarian and human rights law. As the first international, judicial bodies to interpret the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, they are obviously leaving a legacy. Also, as previously analyzed, the Tribunals may accept a source but dismiss the evidence. For instance, the Tribunals' jurisprudence prioritizes the accused's statements but dismiss these statements as demonstrating genocidal intent. Finally, these sources are incomplete. Just as a single, legal

term applied in a political context cannot capture the essence of the human tragedy and the extent of the biological destruction, one source cannot capture all of genocidal intent. Thus the Tribunals consult multiple sources.

Genocidal intent, according to the United Nations 1948 Convention on the Prevention and Punishment of the Crime of Genocide involves “the intent to destroy, in whole or in part, an ethnical, national, racial, or religious group, as such.”<sup>149</sup> The judgments reviewed here substantially added to the jurisprudence on what acts constitute genocide, but this study considered only genocidal intent. In that field, these judgments challenge the Convention in terms of the groups protected under the Convention, the interpretation of partial intent, the reference to and repetition of ‘systematic,’ and the sources of intent.

Again, the Tribunals interpret intent from logical comparisons, reference to and repetition of ‘widespread’ and ‘systematic,’ statistics of the atrocities, and the statements of or about the accused and stories of or about the victim. The Convention protects four groups: ethnic, national, racial, and religious. Notably, it excludes political and social collectivities, which scholars advocate protecting. Although the judgments largely adhere to the Convention’s list, the prosecution occasionally advocates expanding the protected groups. Again, in some cases, the prosecution argues that the destruction of one group, albeit political, protecting the discriminated group constitutes or at least facilitates genocide and so should also be prosecuted. While the Tribunals reject this interpretation, they do adopt another standard by which to identify the victims: their vulnerability. The ICTY and the ICTR emphasize the victims’ vulnerability, thus introducing another requirement to genocidal intent’s identification of the victim groups. “This subjective approach to the definition of the four protected groups, far from undermining the Convention, breathes new life into and ensures healthy interplay between the norms and the

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<sup>149</sup> “Genocide Convention,” Art. 2.

socio-cultural context in which they are applied.”<sup>150</sup> This contextual interpretation challenges that the perpetrators select victims according to their group membership and desire the groups’ destruction as a group.<sup>151</sup>

Similarly, the ICTY change the interpretation of “partial intent.” Whereas the commissions and documents establishing the Tribunals and even the ICTR interpret “in part” pseudo-qualitatively, in terms of community, the ICTY analyzes statistics. Obviously, “in part” implies numbers, so the Tribunals include statistics on the atrocities. Yet, the ICTY advances and the ICTR applies a definition of “in part” beyond these statistics, also considering whether the destruction was substantial in terms of the groups’ members. The ICTY, however, adds another element to genocidal intent, requiring that substantial numbers suffer within a given geography. Not only do the ICTY’s Trial Chambers emphasize numbers but also geography, thus introducing two interpretations to *dolus specialis*. This numerical emphasis contracts the crime’s definition. Instead of affirming groups’ right to exist, the significance of some populations to group survival, and the contribution of human groups to all of humanity, this qualitative criterion introduces an extrastatutory policy concern, namely the trivialization of genocide, to the Genocide Convention.<sup>152</sup> Yet, this geographic emphasis also expands genocide; it allows for more nuanced interpretations, namely defining destruction regionally or municipally rather than internationally.

The ICTY and ICTR Trial Chambers also expands genocide’s definition by emphasizing genocidal acts’ widespread and, specifically, systematic execution. ‘Systematic’ connote genocide’s predecessors: crimes against humanity and the Holocaust. Capturing this source, the

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<sup>150</sup> Guglielmo Verdirame, "The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals," *The International and Comparative Law Quarterly* 49, no. 3 (2000): 598.

<sup>151</sup> Greenwalt: 2265.

<sup>152</sup> Alonzo-Maizlish: 1392.

Tribunals not only consult the victims' systematic selection and the crime's degree of planning but also reference and repeat the term 'systematic.' Repetition of systematic or reference to state-sponsorship, however, do not confirm that systematic commission. Thus the Tribunals interpret genocidal intent by implying similarity to other atrocities, lowering their evidentiary standards for genocidal intent and allowing the judge to avoid considering the atrocities themselves and to avoid balancing the qualitative and quantitative measures of genocide.

Ultimately, the Tribunals interpret intent according to both qualitative and quantitative measures. More significantly, they add elements to genocidal intent: a qualitative criterion with a geographic emphasis, a vulnerability requirement for protected groups, and the crimes' systematic commission. Although the Tribunals advanced sources from which to infer intent, the fact that they interpret genocidal intent from unacknowledged sources, what the "intent to destroy" involves, what intentional standard to require, and where to locate genocidal intent remain unresolved issues.<sup>153</sup>

Thus this topic requires further study. I propose expanding this study to include not only the Trial Chamber judgments where the accused plead guilty to genocide but also to Appeals Chamber judgments of genocide. These studies also could investigate the interpretation of intent for other genocidal acts. Similarly, future research could compare national prosecutions for genocide with the international interpretation of *dolus specialis*. International prosecutions may soon include the International Criminal Court's judgments. Given that the ICC's Appeals Chamber's recent ruling on an arrest warrant for Sudanese President Omar al-Bashir lowered the standard for indictments for genocide, maybe more interpretations of genocidal intent will soon exist for study.

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<sup>153</sup> Kimura: 406.

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