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I. INTRODUCTION

In 1948, the United Nations General Assembly passed the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") to prevent the Nazi atrocities from reoccurring.[1] For the next forty years, the Genocide Convention went largely unused, not due to the absence of genocidal conduct, but due to cold war politics.[2] Since the fall of the Soviet Union, the international community has increasingly relied on the Genocide Convention, and this has created a jurisprudence of genocide.[3] This development, combined with the relative decline of the role of state actors, has created a much wider variety of genocidal scenarios than the drafters of the Convention had in mind in 1948.[4]

The purpose of this Comment is to address inconsistencies between judicial interpretations in the UN ad hoc tribunals as to the mens rea for accomplice liability of top state officials for genocide. The Comment will use, as a case study, a recent Zimbabwean land-seizure program to show that courts should apply a stricter, purpose-based standard, as opposed to a more expansive knowledge-based standard, to judge accomplice liability. Section I provides an overview of the Genocide Convention and recent cases involving the interpretation and development of the jurisprudence governing genocide. This

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1 Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UN Treaty Ser 278 (1951).

2 See Jeffrey S. Morton, *The International Legal Adjudication of the Crime of Genocide*, 7 ILSA J Intl Comp L 329, 330 (2001).

3 See id at 329.

4 See generally Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster 1996).

jurisprudence, combined with the purpose, history, and various enforcement issues particular to the Genocide Convention, bears critically on the normative scope of accomplice liability. Section II describes the disastrous land redistribution program in Zimbabwe that could possibly give rise to liability for genocide under a knowledge-based regime. The government designed this program to give land to its supporters, but the program was also associated with racist rhetoric and attitudes, as government officials emphasized and antagonized the racial division between their black supporters and the mainly white landowners. Section III applies the Genocide Convention to this program, showing possible avenues for prosecuting top Zimbabwean officials and noting the two distinct applications of aiding and abetting liability. This section shows that a knowledge mens rea standard for accomplice liability would subject top party leaders to criminal liability for genocide, while a purpose standard would not. Section IV argues that the majority mens rea requirement for accomplice liability provides an overbroad application of the Convention, reigning in too much conduct, and that the stricter, minority requirement is more appropriate to achieve the objectives of the Genocide Convention.

II. THE LAW AGAINST GENOCIDE

A. THE GENOCIDE CONVENTION'S IDIOSYNCRATIC HISTORICAL CHARACTER

Following World War II, the UN set about drafting and adopting the Genocide Convention. The drafting was greatly influenced by the Holocaust and the Cold War. An observer could characterize the drafting as composing two, slightly conflicting, purposes: to prohibit the specific atrocities committed by the Nazis and Japanese and to limit this prohibition as much as possible, to prevent criticism of US and Soviet Union policies.[5] Most notably, the Sixth Committee draft deleted "political groups" from the list of groups protected by the Genocide Convention at the insistence of authoritarian regimes.[6] The resulting document does an excellent job at condemning historical atrocities, but has had difficulties adjusting to equally horrific events that deviate from the Holocaust mold.[7] Despite this shortcoming, there have been no major textual changes to

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5 See id at 452–53.

6 See Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B U Intl L J 1, 42–43 (1985). But see Adam Jones, *Genocide: A Comprehensive Introduction* 14 (Routledge 2006).

7 See Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* 47 (Ashgate 2007) (discussing the difficulty in defining the Tutsi as a separate ethic group, and thus protected by the Genocide Convention); Steven R. Ratner and Jason S. Abrams, *Accountability*

the Genocide Convention since its passage,[8] and the label of genocide under the Convention is still a major milestone for mobilizing international energy towards humanitarian intervention.[9]

B. THE GENOCIDE CONVENTION

The Genocide Convention defines genocide as:

> 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 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 . . . .[10]

The "conditions of life" referred to in the definition were designed to be a catch-all that encompassed situations in which the actor does not actually kill the victim, but intends to cause a slow death that may or may not be realized. This item was included, primarily, to prevent situations like "the ghetto, where the Jews were confined in conditions which, either by starvation or by illness accompanied by the absence of medical care, led to their extinction."[11] Yet it was also intended to include a wide variety of conduct that could not be easily described as "killing."[12] The Genocide Convention thus prohibits actions that fall short of actual killings.

Also of particular note in the text of the Convention is the requirement of intent and the absence of a motive prerequisite. Scholars generally view the

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for Human Rights Atrocities in International Law 246 (Oxford 1997) (discussing the difficulty of defining the killings in Cambodia as a genocide). See also Alex de Waal, *Reflections on the Difficulties of Defining Darfur's Crisis a Genocide*, 20 Harv Hum Rts J 25, 25–33 (2007).

8 Various parties attempted to amend the convention in 1978 and 1985, however. See Lippman, 15 Ariz J Intl & Comp L at 463–68 (cited in note 6).

9 See generally, Michael J. Kelly, *"Genocide"—The Power of a Label*, 40 Case W Res J Intl L 147 (2007–2008).

10 Art 2, Convention on the Prevention and Punishment of the Crime of Genocide (cited in note 1) (emphasis added).

11 William A. Schabas, *Genocide in International Law* 166 (Cambridge 2000), quoting Ad Hoc Committee on Genocide at 14, UN Doc. E/AC.25/SR.4 (Apr 7, 1948).

12 The drafting committees meant to include the encouragement of drug addiction under the definition of genocide. However, where this prohibition is located is uncertain. It is proscribed under either section (c) or as a mental harm under section (b). See John Quigley, *The Genocide Convention: An International Law Analysis* 102 (Ashgate 2006).

intent requirement as specific intent or *dolus specialis*.[13] "A specific intent offense requires performance of the actus reus but in association with an intent or purpose that goes beyond the mere performance of the act."[14] This requirement shrinks the variety of conduct that the Genocide Convention prohibits. For genocide by killing, a perpetrator must have the purpose of destroying the group when he or she commits the killing. If the killing only effectively destroys the group (even if the actor is in full knowledge of this fact) the killing is not genocide.[15]

The Sixth Committee included the language "as such" in the text of the Genocide Convention as a substitute for a list of motives.[16] The Committee desired to increase the range of motives beyond the World War II–era list of racial purity and hate.[17] As opposed to the intent requirement, this has the effect of widening the scope of conduct that the Genocide Convention prohibits, while still requiring the prosecution to prove that the victim was targeted because of his or her membership in a protected group.

C. JURISPRUDENCE OF GENOCIDE

1. Issues Particular to the Development of International Jurisprudence

While there were almost no prosecutions in the forty years following the passage of the Genocide Convention, since the end of the Cold War prosecutors have made up for this lost time. The International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the International Court of Justice ("ICJ") have all invoked the Genocide Convention in a number of decisions, providing convictions, acquittals, and lengthy opinions that define its terms. A jurisprudence pertaining to the interpretation of the Genocide Convention has developed as a result. While international law has no formal principle of stare decisis,[18] the various

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13 Schabas, *Genocide in International Law* at 214 (cited in note 11).

14 Id at 218 (cited in note 11).

15 The requirement of purpose, instead of knowledge, is most evidenced by the fear of the drafters that large-scale bombing campaigns would be made illegal as genocides. See Lippman, 3 BU Intl L J at 42 (citing the New Zealand delegation as fearing that "bombing which might destroy groups . . . might be called a crime of genocide; but that would obviously be untrue") (cited in note 6).

16 See Quigley, *The Genocide Convention: An International Law Analysis* at 120–21 (cited in note 12).

17 See id at 123.

18 See Statute of the International Court of Justice (June 26, 1945) art 59, 59 Stat 1031 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

courts have cited one another in their decisions interpreting the Genocide Convention, and the finality and relative success of their decisions have a persuasive effect on future applications of the Convention.[19]

Universal jurisdiction and the non–self-executing nature of the Genocide Convention further hamper the development of a jurisprudence of genocide, due to the wide variety of courts and statutes affecting the prosecution of genocide. Genocide is subject to the principle of universal jurisdiction.[20] The crime of genocide is so serious that any state has the power to prosecute it under the banner of universal jurisdiction. This multi-jurisdictional nature can lead to inconsistent results, as individual states incorporate the exact same Genocide Convention terms into conflicting bodies of law. Rules of evidence, procedure, and interpretation vary and can have strong effects on the enforcement of identical statutes. For example, both common law and civil law courts might incorporate the Genocide Convention's specific intent requirement, but these two jurisdictions have different, and often conflicting, definitions of specific intent.[21] These different interpretations could lead to opposing verdicts under different legal regimes, despite identical facts and statutory terms.

In addition to ICJ and ad hoc tribunal statutes, the Genocide Convention also requires individual states to enact its terms in their criminal code. Each country that ratified the Genocide Convention implemented the Convention's provisions into their penal codes. Many states, however, made changes to the Convention's provisions.[22] While these changes have not yet had an effect on specific cases, they make general and theoretical comparisons difficult.[23]

2. Current Application and Genocide Jurisprudence

Despite the difficulties of development, international prosecutors have developed three avenues to criminal responsibility for genocide: direct responsibility for genocide, aiding and abetting a genocide ("accomplice

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19 See, for example, *Prosecutor v Delalic*, Case No IT-96-21-T, Judgment, ¶ 478 (ICTY Nov 16, 1998) (the ICTY citing the ICTR); *Prosecutor v Nahimana*, Case No ICTR-99-52-T, Judgment, ¶ 1071 (Dec 3, 2003) (the ICTR citing the ICTY).

20 See Christopher K. Hall, *Universal Jurisdiction: Developing and Implementing an Effective Global Strategy*, in Wolfgang Kaleck et al, eds, *International Prosecution of Human Rights Crimes* 85–87 (Springer 2007).

21 See Alexander K.A. Greenawalt, Note, *Rethinking Genocidal Intent: The Case for a Knowledge-based Interpretation*, 99 Colum L Rev 2259, 2268–69 (1999).

22 See Quigley, *The Genocide Convention: An International Analysis* at 15–20 (cited in note 12). See also Offenses against the Person and Reputation, RSC 1985, c C-46, §318(4) (Canada) (expanding the protected groups to include sexual orientation).

23 The International Criminal Court has the possibility of resolving many of these discrepancies, but this has yet to happen.

liability"), and command responsibility for genocide.[24] Direct responsibility arises when an actor is responsible for his or her—and only his or her—actions, while accomplice liability and command responsibility are both forms of derivative liability, whereby the accomplice or commander is responsible for another's actions. These avenues of culpability interact and help define each other. This interaction is crucial to this Comment's argument in favor of a stricter mens rea requirement for accomplice liability, so a discussion of direct and command responsibility is necessary for a proper understanding of accomplice liability.

a) Direct responsibility for genocide. Direct responsibility for genocide is the most common and most intuitive form of responsibility for genocide. The actus reus for direct responsibility is achieved if the actor performs items a–e of Article 2 of the Genocide Convention. Thus, killing or causing serious bodily or mental harm satisfies the actus reus requirement.

International courts, such as the ICTY and the ICTR, are unanimous that the mens rea requirement for direct responsibility is specific intent or *purpose*.[25] They have defined the requirements for specific intent for genocide as consisting of two elements: "(1) the prohibited act must be committed against an individual because of his membership in a particular group and (2) as an incremental step in the overall objective of destroying the group."[26] Thus, a killing without the intent to destroy a protected group is not genocide. This mens rea requirement is distinct from knowledge. "Knowledge is a subjective, practical certainty that a particular result will occur in the ordinary course of events, but without any positive desire to bring it about."[27] If an actor knows that his or her acts will destroy a protected group, but the destruction was not the purpose of the act, he or she is not liable for genocide. While this might seem like an odd exculpating element for conduct with such horrible effects, the Cold War drafters of the Genocide Convention were acutely worried about prohibiting large-scale bombing campaigns that, incidentally, destroyed a protected group.[28]

While there is disagreement, most case law considers participation in a common criminal enterprise or joint criminal enterprise ("JCE") to be a form of

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24 *Prosecutor v Blagojevic*, Case No IT-02-60-T, Judgment, ¶ 683 (ICTY Jan 17, 2005) (discussing the difference between command responsibility and accomplice liability). These three avenues ignore liability for publishing "hate media," which is either included in aiding and abetting or is a separate offense depending on the jurisdiction.

25 See Schabas, *Genocide in International Law* at 217–21 (cited in note 11). See, for example, *Prosecutor v Jelisic*, Case No IT-95-10-T, Judgment, ¶ 86 (ICTY Dec 14, 1999).

26 *Jelisic*, IT-95-10-T, Judgment at ¶ 66 (citations omitted)).

27 David L. Nersessian, *Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes*, 30 SUM Fletcher F World Aff 81, 83 (2006).

28 See Lippman, 3 BU Intl L J at 41–42 (cited in note 6).

direct responsibility for genocide.[29] JCE liability exists when all members of the enterprise act pursuant to a common plan and possess the same criminal intent.[30] Thus, the actus reus and mens rea for JCE liability are the same as for an individual commission of genocide, but with the additional requirements of more than one actor and a common plan. For example, in a bank robbery, the stick-up artist and the getaway driver are both guilty of direct liability under the theory of JCE, as they are both acting under the same plan. Both actors committed the actus reus, and both possessed the same criminal intent, so both would be directly liable.[31]

b) Aiding and abetting a genocide. The UN ad hoc tribunals, in their application of the Genocide Convention, have borrowed from the laws of various states in creating accomplice liability for genocide. Accomplice liability has led to the conviction of many defendants in the ad hoc tribunals for genocide.[32] Article 7(1) of the International Criminal Tribunal for the Former Yugoslavia Statute and Article 6(1) of the International Criminal Tribunal for Rwanda provide that:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime.[33]

The two ad hoc tribunals have also discussed liability for complicity in genocide as distinct from aiding and abetting genocide. This distinction has added to the confusion regarding the elements of accomplice liability. However, most commentators believe that there is at least considerable overlap between the two theories, and it is unclear what the difference, if any, between the two forms of liability is.[34] Adding to this confusion is the dearth of convictions for complicity

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29 See Chile Eboe-Osuji, *'Complicity in Genocide' versus 'Aiding and Abetting Genocide'*, 3 J Intl Crim Just 56, 64–66 (2005) (noting that the ICTY, despite an occasionally conflicting judgment, has ruled that joint criminal enterprise is a form of direct commission).

30 Id at 64–65.

31 See Nersessian, 30 SUM Fletcher F World Aff at 84 (discussing JCE liability in the bank robbery scenario and possible JCE liability in a genocide scenario) (cited in note 27).

32 See, for example, *Prosecutor v Krnojelac*, Case No IT-97-25-T, Judgment, ¶ 127 (ICTY Mar 15, 2002); *Prosecutor v Akayesu*, Case No ICTR-96-4-T, Judgment, ¶ 684 (Sept 2 1998).

33 Article 7, International Criminal Tribunal for the Former Yugoslavia Statute (1993), available online at <http://www.icls.de/dokumente/icty_statut.pdf> (visited Apr 17, 2009); Article 6, International Criminal Tribunal for Rwanda (1994), available online at <http://www.un.org/ictr/statute.html> (visited Apr 17, 2009).

34 See *Prosecutor v Semanza*, Case No ICTR-97-20-T, Judgment, ¶ 394 (May 15, 2003) ("There is no material difference between complicity in article 2(3)(e) of the Statute and the broad definition accorded to aiding and abetting in Article 6(1)."). See also Grant Dawson and Rachel Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations*

in genocide and the short shrift courts give in discussing the theory because of its alternative nature with a separate count of genocide.[35] A conviction for aiding and abetting precludes a conviction for complicity, so there is little discussion in the ad hoc tribunals regarding complicity, as courts have often found the defendant guilty of aiding and abetting and quickly disposed of the incompatible count for complicity. For purposes of this Comment, all forms of accomplice liability, including complicity, will be referred to as simply accomplice liability.

The actus reus for accomplice liability is that the defendant "carried out an act which consisted of practical assistance, encouragement, or moral support to the principal offender."[36] Further, the "act of assistance may be either an act or omission, and it may occur before, during, or after the act of the principal offender."[37] This definition of the actus reus for accomplice liability covers a wide swath of conduct.

The mens rea for accomplice liability is subject to a disagreement between the courts reviewing the matter. *Prosecutor v Jelisic*, the minority view, holds that the accomplice's mens rea standard is the same as that of the principal.[38] Thus, the accomplice must assist the principal with the *purpose* of destroying the group. *Prosecutor v Blagojevic*, the majority view, holds that the accomplice is guilty of the crime if "it is shown that he assisted in the commission of the crime in the knowledge of the perpetrator's specific intent."[39] Thus, under the majority approach, the mens rea for an accomplice is lowered to *knowledge*. The accomplice is liable for genocide if he or she assists and knows that the principal intends to destroy the group, regardless of his or her desires in the situation. Despite this disagreement, it is notable that either mens rea requirement for accomplice liability, along with the broad actus reus requirements of the Genocide Convention, has the potential to criminalize a large amount of conduct.

c) Command responsibility for genocide. Because of the official and military nature of the atrocities in Yugoslavia and Rwanda, prosecutors and courts have

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Ad Hoc Tribunals, 21 Harv Hum Rts J 241, 276 (2008) ("The fact that the elements for both seem to be identical suggests there truly is no practical difference between both these provisions, and that any theories which might seem to properly explain their co-existence would not make any substantial vertical difference in application."). But see Eboe-Osuji, 3 J Intl Crim Just at 56 (cited in note 29).

35 See Dawson and Boynton, 21 Harv Hum Rts J at 275–76 (cited in note 34).

36 *Krnojelac*, IT-97-25-T, Judgment at ¶ 88.

37 Id, ¶ 88.

38 *Jelisic*, IT-95-10-T, Judgment at ¶ 86. See also *Akayesu*, ICTR-96-4-T, Judgment at ¶ 485. Note that both the ICTY and the ICTR have held this position.

39 *Blagojevic* IT-02-60-T, Judgment at ¶ 782. See also Greenawalt, 99 Colum L Rev at 2281–83 (cited in note 21).

invoked command responsibility, or superior criminal responsibility,[40] to prosecute violations of the Genocide Convention.[41] Command responsibility requires a superior-subordinate relationship.[42] While an official command relationship might be helpful in establishing a superior-subordinate relationship, it is not required.[43] The court uses the effective control test to determine whether a superior-subordinate relationship exists.[44] The ICTY has defined effective control as "the material ability to prevent or punish the commission of the [subordinate's] offenses."[45] A court looks at the superior's ability to prevent and punish the subordinate's activities to determine whether this relationship "is similar to that of military commanders."[46] The doctrine, however, does not hold civilian, military leadership—such as the US President—responsible for most complex military actions in the field.[47] Civilian leadership is deemed to be more of a figurehead in the execution of complex military operations.

The actus reus for command responsibility, along with the requirement for a superior-subordinate relationship, is that "the superior failed to take necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof."[48] Thus, command responsibility is another form of accessory liability, similar to accomplice liability, except that: (1) a special relationship between the principal and the accessory is required and (2) a slightly broader mens rea exists, as the explanation below describes.

"[T]he mens rea for superiors to be held responsible for genocide . . . is that the superiors knew or had reason to know that their subordinates (1) were about to commit or had committed genocide and (2) that the subordinates possessed the requisite specific intent."[49] Thus, the mens rea required to hold a superior responsible for genocide is *knowledge or constructive knowledge.* Command responsibility mens rea is broader than even the majority view of accomplice

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40 Superior criminal responsibility is the term used in a civilian context, while command responsibility is the same principle in a military context. See *Prosecutor v Brjdjanin*, IT-99-36-T, Judgment, ¶ 274 n 732 (ICTY Sept 1, 2004).

41 See, for example, id at ¶ 275. See generally Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 Yale J Intl L 89 (2000).

42 *Blagojevic*, ICTY-02-60-T, Judgment at ¶ 790 (cited in note 24).

43 See Daryl A. Mundis, *Current Developments at the Ad Hoc International Criminal Tribunals*, 1 J Intl Crim Just 520, 523 (2003).

44 *Blagojevic*, ICTY-02-60-T, Judgment at ¶ 791.

45 Id, ¶ 791 (citations omitted).

46 *Prosecutor v Delalic*, Case No IT-96-21-T, Judgment, ¶ 378 (ICTY Nov 15, 1998).

47 *Akayesu*, ICTR-96-4-T, Judgment at ¶ 490 (citing Judge Röling approvingly).

48 *Blagojevic*, ICTY-02-60-T, Judgment at ¶ 790 (citations omitted).

49 Id, ¶ 686 (citations omitted).

liability, as it creates culpability despite an unreasonable mistake about the principal's activities and intentions. This incredibly broad standard can lead to the odd, and presumably rare, result of convicting a defendant of a crime that he or she did not actually know occurred.[50] The command responsibility doctrine limits this widening, however, through the requirement of a superior-subordinate relationship. Thus, the doctrine holds a military, or similar, superior to a slightly higher standard than that of an ordinary person.

III. ZIMBABWE'S LAND SEIZURE PROGRAM

Zimbabwe achieved formal independence in 1980. Following independence there were promises of land redistribution. While some small-scale land redistribution occurred immediately after independence, as of 1997 a group of approximately 70,000 whites, who comprised 1 percent of the country's population, still owned 45 percent of the arable land.[51] Following a referendum loss in February of 2000, President Robert Mugabe, head of the ruling political party, ZANU-PF, instituted the "fast-track" land reform plan. Fast-track land reform was an aggressive land redistribution regime designed to garner political support.[52] The regime consisted of the occasionally violent occupation and seizure of white-owned farmland for redistribution to landless, black Mugabe supporters. The policy resulted in the confiscation of almost all white-owned farmland and the death of nearly a hundred white farmers and their families.[53]

Fast-track land reform was hardly fast. It often involved Mugabe supporters squatting on white-owned farms for months before finally seizing complete control of the farms.[54] Many white farmers lived in constant fear of violence from their unwanted guests. The situation occasionally erupted into mob violence and lynchings.[55]

While Mugabe's motivation for the land redistribution was entirely political and the motivation of most of his supporters was economic self-interest, racial overtones ran throughout the policy. In discussing the land policy and the attempts by white farmers to rein it in through litigation, Mugabe stated that "our party must continue to strike fear in the hearts of the white man, our real

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50 See generally Nersessian, 30 SUM Fletcher F World Aff 81 (cited in note 27).

51 See Trevor Grundy, *White Farmers Fear Black 'Invasion'*, Scotland on Sunday (Oct 19, 1997). See also *White Xmas in Zimbabwe Comes with Fear and Menace*, S African Press Ass (Dec 22, 2000).

52 See *Judges Say Mugabe's Plan to Seize Land Owned by Whites is Illegal*, Chicago Trib 9 (Nov 12, 2000). See also *State Department Issues Background Note on Zimbabwe*, US Fed News (July 1, 2005).

53 See Douglas Marle, *Mugabe Digs in with Farm Terror Campaign*, Sunday Times 22 (Apr 13, 2008).

54 See Rachel L. Swarns, *White Farmers Flee to Mozambique*, NY Times 1A (Dec 16, 2001).

55 See Marle, *Mugabe Digs in with Farm Terror Campaign*, Sunday Times (cited in note 53).

enemy," and that "an evil white alliance" was attempting to overthrow all black governments in Southern Africa.[56] Those surrounding Mugabe also influenced these racial overtones. For example, the leader of Zimbabwe's "war veterans," the group carrying out the occupation of white-owned farms, preferred the nickname "Hitler."[57] Reinforcing the theme that the redistribution was more than a dividend to loyal Mugabe supporters, an aspect of punishment seems to have pervaded the campaign. For example, Britain offered to organize and pay for the seizures, but the Zimbabwean government refused,[58] implying that the government wanted the farmers to suffer. While the racial rhetoric and refusal of British support does not prove a motivation different from politics and the redistribution of wealth, it shows that Mugabe and senior Zimbabwean leadership were aware of widespread racial hatred and animosity in the country.[59]

IV. APPLICATION OF THE GENOCIDE CONVENTION TO ZIMBABWE

At first glance, the actions in Zimbabwe do not appear to constitute genocide and are surely not what the drafters had in mind when they created the Genocide Convention. Zimbabwe in 2002 is very different from Poland in 1942. However, the majority view of accomplice liability could create liability for President Mugabe and other senior ZANU-PF leadership. A knowledge-based mens rea requirement prohibits a very wide variety of conduct and requires only a very tenuous connection between the accomplice and the principal. This factor, along with the broad and foreseeable consequences of government action, can lead to liability for top government officials.

The issue of whether white Zimbabweans constitute a "national, ethnic, racial or religious group" protected by the Genocide Convention is complex, but a court would almost certainly find that they do. It is unclear what type of group—national, ethnic, or racial—white Zimbabweans would fall under, and the Genocide Convention does not define these groups. It appears that white Zimbabweans are not easily categorized as a national, ethnic, or racial group; they have elements of each category. The ICTR was reluctant to consider these groups exclusive of each other, however, when considering the status of the

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56 Trevor Grundy, *Mugabe Rages against Whites as Violence Threatens to Explode*, Sunday Herald 17 (Dec 17, 2000).

57 See *Chenjerai Hunzvi, 51, Leader of Farm Takeovers in Zimbabwe*, NY Times B10 (June 5, 2001).

58 Rachel L. Swarns, *For Zimbabwe White Farmers, Time to Move on*, NY Times 1 (Aug 4, 2002).

59 It is not enough in a prosecution for genocide that the Mugabe government benefitted from this *animosity*, as the specific intent requirement requires the intent to *destroy*.

Tutsi.[60] The court allowed protected group status for groups comprising a blend of the enumerated characteristics.[61] The court considered the enumerated classes in the Genocide Convention as examples of protected groups, rather than exclusive categories. Along these same lines, a protected group according to the ICTR was a "stable and permanent group,"[62] which white Zimbabweans surely are. The court, while not providing a comprehensive list of factors, named membership by birth as a characteristic of a stable and permanent group.[63] The permanency and stability of skin color, membership through birth, and the agreement by both whites and blacks within Zimbabwe support the determination that white Zimbabweans would be a protected group under the Genocide Convention.[64] The Genocide Convention thus applies to the killing of white Zimbabweans.[65]

A. DIRECT LIABILITY FOR ZANU-PF OFFICIALS FOR GENOCIDE

There is a very weak case for subjecting President Mugabe and top ZANU-PF officials to direct criminal liability for genocide based on the violent seizure of white-owned farms. Mugabe did not actually kill, but Mugabe could possibly be liable for allowing landless blacks to live on white farms and for the fear that this imposed on the farmers. His actions would possibly satisfy one of the actus reus categories of "causing serious bodily or mental harm to members of the group" or "deliberately inflicting on the group conditions of life calculated to bring about its destruction in whole or in part."[66] Serious bodily or mental harm is notably undefined in the Genocide Convention and little in the *travaux préparatoires* defines the term.[67] The Israeli court that decided *Eichmann* considered "enslavement, starvation, deportation and persecution" as mental

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60 See David Lisson, Note, *Defining "National Group" in the Genocide Convention: A Case Study of Timor-Leste*, 60 Stan L Rev 1459, 1463–64 (2008).

61 See id.

62 *Akayesu*, ICTR-96-4-T, Judgment at ¶ 702. See also Quigley, *The Genocide Convention: An International Law Analysis* at 146–52 (cited in note 12).

63 *Akayesu*, ICTR-96-4-T, Judgment at ¶ 516.

64 See Lisson, Note, 60 Stan L Rev at 1463–64 (noting that the *Kayishema* court considered both self-identification and the identification of the perpetrators to distinguish a Tutsi as a protected group) (cited in note 60).

65 For an analysis of previous court discussions of a protected group, see Quigley, *The Genocide Convention: An International Law Analysis* at 146–52 (cited in note 12).

66 Article 2(b),(c), Convention on the Prevention and Punishment of the Crime of Genocide (cited in note 1).

67 See Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law* at 28 (with the Chinese fear of opium being the notable exception) (cited in note 7).

harms prohibited by the statute.[68] The court in *Prosecution v Akayesu*, however, has stated that rape constitutes *both* a physical and a mental harm under the Convention.[69] A court could find that Mugabe satisfied the actus reus of inflicting serious mental harm on the white farmers by allowing angry, landless squatters on their farms.

The presence of the black squatters on the land might also qualify under the "conditions of life" actus reus, although this is a harder case. The government's encouragement of the squatters was very harmful to white farmers and created a situation where it was only a matter of time before more grave events erupted. The qualifiers "deliberately" and "calculated" in Article 2(c) of the Genocide Convention, however, probably prevent this government action from satisfying the standard. There was very little deliberate calculation in allowing the squatters on the farms. In fact, it was the opposite of a deliberate calculation: it was a reckless and disorganized strategy. Thus, the actus reus of creating genocidal conditions of life is probably not satisfied.

Even if Mugabe's actions satisfy the actus reus for genocide, the mens rea is almost certainly not satisfied. Genocide requires the specific intent, or *dolus specialis*, to destroy a group because it is a national, ethnical, racial or religious group.[70] The purpose of Mugabe's policy of fast-track land reform was shoring up votes. While Mugabe gave little weight to the plight of the white farmers, no court has yet found that ambivalence is equivalent to purpose.

Likewise, Mugabe and top ZANU-PF officials could not be convicted of genocide through a theory of JCE liability because the purpose of the top party leadership for their actions was to keep their jobs, not to kill. Mugabe does not possess the requisite mens rea, so the application of JCE liability fails to fix the same weakness that a prosecution under traditional direct liability has. Thus, Mugabe and top ZANU-PF officials are almost certainly not liable for genocide under any direct theory of liability.

B. ACCOMPLICE LIABILITY FOR ZANU-PF OFFICIALS FOR GENOCIDE

The case against President Mugabe and other top ZANU-PF officials becomes much more plausible when the principle of accomplice liability is used, especially if the majority view of mens rea is applied. Accomplice liability is a

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68 Id (citations omitted).

69 *Akayesu*, ICTR-96-4-T, Judgment at ¶ 731.

70 See *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 31st Sess (July 4, 1978), UN Doc E/Cn.4/Sub.2/416, 25, ¶¶ 96–98.

form of derivative liability that requires a guilty principal.[71] In the case of the Zimbabwe land seizures, there was probably a guilty principal. A guilty principal may consist of a single, landless, Mugabe supporter who wished to rid the world of white Zimbabweans. The Genocide Convention is so broad that an individual black supremacist that killed one or more white farmers could be convicted of genocide.[72] He or she would have committed the actus reus, a killing, and would have had the requisite mens rea, intent to destroy a protected group. Notably, the intent requirement does not require an actor to have the ability to completely destroy a protected group. As the ICTY Appeals Chamber in *Prosecutor v Krstic* stated, "The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him."[73] Thus, the consequences beyond the initial killing are irrelevant to a charge of genocide and a hate-filled, murderous Mugabe supporter would qualify under the Genocide Convention.

The actus reus for aiding and abetting is any act of "practical assistance, encouragement, or moral support to the principal."[74] Mugabe, by allowing and encouraging squatters onto the land of white farmers, and not enforcing trespassing laws certainly satisfies this requirement. In *Prosecutor v Simic*, the court held that interviewing prisoners on television gave moral support, which was enough to satisfy the actus reus for accomplice liability.[75] In *Prosecutor v Mrksic*, the court held that removing the guards that prevented angry soldiers from attacking prisoners of war satisfied the actus reus standard.[76] Mugabe's supporters would have been unable to take over the white-owned farms without his enactment of the fast-track laws, and Mugabe's public statements certainly count as encouragement. Thus, there is little doubt that Mugabe and other top ZANU-PF officials have committed the actus reus for accomplice liability.

The more contentious issue is whether Mugabe had the requisite mens rea for accomplice liability. This determination depends on which standard for liability is used. Mugabe is liable under the majority view, while under the minority view he is not. The majority view, as noted in *Blagojevic,* requires that the

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71 Actual conviction of the principal is not required.

72 It is unclear what the threshold quantity of killings for a genocide is, but most authorities suggest a single killing with genocidal intent is enough. See Schabas, *Genocide in International Law* at 230–40 (cited in note 11). See also Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law* at 37 (cited in note 7). But see Quigley, *The Genocide Convention: An International Law Analysis* at 100 (cited in note 12) (citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Counter-Claims, 1997 ICJ Rep, 242, 282).

73 *Prosecutor v Krstic*, IT-98-33-A, Judgment, ¶ 13 (ICTY Apr 19, 2004).

74 *Blagojevic*, IT-02-60-T, Judgment at ¶ 726.

75 *Prosecutor v Simic*, Case No IT-95-9-T, Judgment, ¶ 1016 (ICTY Oct 17, 2003).

76 *Prosecutor v Mrksic*, Case No IT-95-13/1-T, Judgment, ¶ 621 (ICTY Sept 27, 2007).

defendant (1) has *knowledge* that his or her actions would contribute to the actions of the principal, and (2) *knew* that the principal had the requisite specific intent.[77] Notably, there is no requirement that the accomplice know the specific identity of the principal. In *Prosecutor v Vasiljevic*, the defendant was found guilty for accomplice liability despite his, and the court's, ignorance of the identity of the principal.[78] All that is required is knowledge that a guilty principal exists. Mugabe's racially tinged speeches show that he was acutely aware of the racial tensions present in the country, most notably the hate felt by landless blacks against whites. This awareness constitutes knowledge that a few blacks would, given the chance, attempt to drive out or kill all white Zimbabweans. While more detailed evidence would be required to prove knowledge at a trial, Mugabe's intimate knowledge of the racial tensions present in the country likely proves that he had knowledge of the principals' specific intent to commit genocide.

Mugabe was also aware his actions would help the principal commit genocide. Mugabe was likely knowledgeable that allowing large numbers of his landless black supporters to camp lawlessly on white farms would contribute to the killing of the whites who owned those farms. Therefore, he was aware that his actions would "contribute to the actions of the principal" as required under the majority mens rea test.[79] In defense, Mugabe might argue that his mental state did not amount to knowledge, but was a step short, at recklessness or gross negligence. He would argue that because he was only aware of a large chance, he did not possess knowledge. Recklessness, as defined by the American Model Penal Code, is "the conscious disregard of an objectively substantial and unjustifiable risk."[80] But the argument that Mugabe was reckless and not knowledgeable is unlikely to prevail because, in the jurisprudence of the ad hoc tribunals at least, the courts do not slice mens rea that thin.[81] In the jurisprudence of the tribunals, the divide between intentional and unintentional is that "the death should not be an accidental consequence of the acts of the accused."[82] Further, even in legal systems that more finely grade mens rea—systems that differentiate conduct into more categories—creating a high probability satisfies a knowledge requirement.[83] Mugabe creating a situation of

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77 *Blagojevic*, Case No IT-02-60-T, Judgment at ¶ 782 (emphasis added).

78 *Prosecutor v Vasiljevic*, Case No IT-98-32-A, Judgment, ¶ 143 (ICTY Feb 25, 2004).

79 *Blagojevic*, IT-02-60-T, Judgment at ¶ 782.

80 Model Penal Code § 2.02(c) (ALI 1980).

81 *Delalij*, IT-96-21-T, Judgment at ¶ 433.

82 Id, ¶ 433.

83 See, for example, *Commonwealth v Malone*, 47 A2d 445 (PA 1946) (ruling that a killing during a "game" of Russian roulette was intentional).

lawlessness on white farms in a country with very severe racial tensions creates that large chance. Thus, under the majority view, a court could probably convict Mugabe and senior ZANU-PF leadership of accomplice liability for genocide.

The minority view leads to an opposite conclusion. Under the view of accomplice liability held by the court in *Jelisic*, the mens rea requirement is the same for both the principal and the accomplice.[84] Thus, Mugabe would need the specific intent to commit genocide to be liable as an accomplice. In other words, the purpose of the fast-track land reform program must have been to assist or encourage his supporters to commit genocide. The purpose of assisting genocide was almost certainly lacking. By initiating the fast-track land reform, Mugabe wanted to both reward his political supporters and punish his political enemies.[85] He definitely did not intend to destroy white Zimbabweans "in whole or in part." Evidence would likely indicate that he did not wish this to happen at all. The deaths and mayhem that resulted from the policy led to international condemnation and a huge decline in the Zimbabwean economy. Mugabe wanted a quick, easy, and painless transfer of property. Thus, under the minority view, a court would probably not find Mugabe and other top ZANU-PF supporters liable for genocide.

C. COMMAND RESPONSIBILITY FOR ZANU-PF OFFICIALS FOR GENOCIDE

Mugabe and top ZANU-PF leadership are also unlikely to be guilty of genocide under a command theory of liability. The doctrine of command responsibility applies mainly to military commanders and political officials.[86] It subjects the commander to criminal liability for the crimes of his or her subordinates that the commander was or should have been aware of.[87] The most obvious situation subjecting the superior to liability for the crimes of a subordinate is when the superior has given a specific order, although a court may also hold a superior criminally liable despite the absence of a formal command:

> [T]he mental element necessary when the commander has not given the offending order is (a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the

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84 *Jelisic*, IT-95-10-T, Judgment at ¶ 86.

85 Or, in his words, right the wrongs of colonialism.

86 *Final Report*, Commission of Experts (1994) UN Doc S/1994/674, ¶ 57.

87 Id, ¶ 52.

> facts and circumstances of the particular case, must have known of the offenses charged and acquiesced therein.[88]

When the theory of command responsibility is applied to Mugabe's fast-track land reform policy, it appears that the mens rea requirement is satisfied for the reasons discussed in Section IV.B. However the actus reus requirement is not met. Mugabe and top ZANU-PF officials do not have a superior-subordinate relationship with their landless supporters. A politician, no matter how powerful, is not a commander of his or her supporters. While a political leader has a responsibility to prevent and punish the actions of his or her constituents, this relationship does not look like a military command relationship. Mugabe did not "exercise a military-like degree of control" over his supporters.[89] Thus, Mugabe and top ZANU-PF officials are probably not liable for genocide under a theory of command responsibility.

V. ANALYSIS OF THE THREE METHODS OF LIABILITY FOR GENOCIDE AND THEIR EFFECT ON THE MENS REA FOR ACCOMPLICE LIABILITY

The reasoning behind the majority perspective is probably due to its basis in states' criminal law. In many common law countries, the mens rea for an accomplice is knowledge for more serious crimes and purpose for less serious crimes.[90] Under this logic, courts should hold accomplices to genocide, the "crime of all crimes," to a knowledge standard. This logic fails, however, because genocide is different from most crimes, due to its relevance to government actions and its role in international law. These reasons favor a purpose mens rea standard.

The split between the majority and minority view on the mens rea requirement for genocide must be viewed under the overall scheme of enforcement of the Genocide Convention, the Genocide Convention's provisions regarding top government officials, the role the Genocide Convention plays in the international community, and the preference in international criminal law for limited discretion. When viewed against these factors, the minority view's purpose requirement for accomplice liability is a more appropriate standard to achieve the goals of the Genocide Convention.

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88 Id, ¶ 58.

89 See Vetter, 25 Yale J Intl L at 117 (cited in note 41).

90 See *United States v Fountain*, 768 F2d 790, 798 (7th Cir 1985) (noting that a shopkeeper selling a dress to a prostitute must have purpose for liability, but a gun dealer selling a gun to a murderer only requires knowledge of the principal's intent).

A. ARTICLE IV OF THE GENOCIDE CONVENTION CREATES GOVERNMENT LIABILITY UNLIKE ORDINARY CRIMES

The lack of sovereign immunity as a defense to prosecution under the Genocide Convention makes knowledge an unsuitable standard when applied to governmental officials and certain actions they might take in their official capacity. Article IV of the Genocide Convention reads: "[p]ersons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[91] This provision provides that sovereign immunity is not an effective defense to charges of genocide, and that government officials, even acting in their official capacities, may be liable for genocide. This provision, combined with an expansive definition of accomplice liability, criminalizes a huge host of government actions as genocide. Government activities have large effects on society and can influence a variety of people in a variety of ways. Even good government programs often have negative repercussions. For example, there is a risk of death from the smallpox vaccine and large-scale vaccination inevitably results in deaths.[92] Without official immunity, a mens rea requirement of knowledge could result in a conviction for manslaughter for officials authorizing a smallpox vaccination program. Yet eradicating smallpox is likely a legitimate government purpose, even if it is not costless to do so. A mens rea requirement that ties criminal culpability to negative effects based on mere knowledge of those effects can make many government programs criminal. This is an absurd and counterproductive result. Governmental officials need the freedom to make difficult choices in full knowledge of inevitable bad effects. They need this freedom to promote programs where the benefits actually outweigh the costs or because the official's ex ante calculation of the benefits outweigh the costs. As a result, government programs requiring the smallpox vaccine are not criminal. An exception to this principle for genocide is arbitrary and counterproductive to many beneficial goals. A mens rea requirement of purpose allows governments to make these choices without the help of official immunity.

B. THE THREE AVENUES OF CULPABILITY FOR GENOCIDE

A stricter mens rea requirement of purpose fits into the overall enforcement scheme of the Genocide Convention better than does a

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91 Art 4, Convention on the Prevention and Punishment of the Crime of Genocide.

92 See Center for Disease Control, *Smallpox Fact Sheet*, 3 (Center for Disease Control Mar 31, 2003), available online at <http://www.bt.cdc.gov/agent/smallpox/vaccination/pdf/vaccine-overview.pdf> (visited Apr 17, 2009).

requirement of knowledge. A well-functioning enforcement scheme connects the mens rea requirement to the association between the accomplice and the principal. There should be a broader mens rea requirement for principals and accomplices with a close relationship, and a narrower mens rea requirement for principals and accomplices with little to no relationship.

Traditional criminal-law definitions of accomplice liability are not effective in governing situations where a single accomplice affects a large number of potential principals. Accomplice liability works effectively in situations where a getaway driver assists in a bank robbery because there is an easily viewable, ex ante limit to the responsibility of the driver. But this system breaks down when the accomplice is the president who passes legislation allowing cars and paving roads. The president knows that he is helping bank robberies, but he does not have that purpose. Bank robberies are not the president's main concern, nor even a material one.

The command responsibility theory of liability solves this problem. It allows for knowledge to serve as the basis for liability, but limits the principals for whom the government official is liable to those under his or her effective control. When command responsibility and the minority view of accomplice liability are used in conjunction with each other, a well-functioning system of culpability is established. The government official has more liability the closer the relationship is, but the official remains responsible for widespread genocidal activities he or she purposely intends to occur. A system creating a constructive knowledge standard for closely associated principals, but a purpose standard for more distant principals, creates a quasi-official immunity system. A government official benefits from a stricter mens rea standard for actions taken as a policymaker than for actions taken in other roles, as the official is unlikely to have a command relationship with potential principals in large government initiatives. There is still liability for the official if he or she acts purposefully, however, and there is, potentially, a broader liability standard when the official acts in a non-policymaking role. Thus, an accomplice liability standard of purpose creates a system that makes a distinction between a government official acting in an official or personal capacity, and exculpates officials enacting good faith government policies.

C. GENOCIDE'S ROLE IN THE INTERNATIONAL COMMUNITY

A separate, but still very substantial, reason for tightening the mens rea requirement for accomplice liability is the role the legal finding of genocide plays in the international community. A claim and subsequent finding of genocide has become a bellwether of international support for both international intervention

and condemnation.[93] A broader definition of genocide subverts this role. Zimbabwe is an excellent example. The catastrophe of Mugabe's fast-track land reform policy is not genocide under the ordinary understanding of the term. It was an ill-conceived plan, coupled with populist rhetoric. A court calling the policy genocide is unlikely to have an effect on international action towards the country, but would weaken the stigma that name carries with it in future cases. International observers heavily criticized the UN's International Commission of Inquiry on Darfur for refusing to use the "G" word when investigating Darfur.[94] The attention focused on this refusal, however, emphasizes the importance of the label and the corresponding importance of maintaining its integrity. A mens rea standard of knowledge leads to an over-application of the Genocide Convention, which can have the disastrous effect of weakening a tool for mobilizing the international community.

D. Effects of Acquitting Defendants with Knowledge but Not Purpose

A criticism of implementing a purpose standard for genocide is that it exculpates a large amount of bad behavior that would otherwise be punished. For example, dictators like Mugabe—who are fully aware of the consequences their actions will have—will not be dissuaded. But this fear is unfounded, as many other criminal prohibitions target similar conduct. The ICTY found the defendant in *Jelisic* not guilty of genocide, in part because of the stricter standard of accomplice liability.[95] However Mr. Jelisic was also convicted of fifteen counts of crimes against humanity and sixteen counts of violating the law of war, all of which pertained to the same conduct as his genocide acquittal.[96] He is currently serving a forty-year prison sentence.[97] The crime of genocide is only one tool in an ever-expanding international arsenal, and reserving it for the clearest cases is the most prudent decision.

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93 See generally Kelly, 40 Case W Res J Intl L at 147 (cited in note 9).

94 See Jennifer Trahan, *Why the Killing in Darfur is Genocide*, 31 Fordham Intl L J 990 (2007–2008), criticizing *Resolution 1564*, UN Security Council, 5040th mtg (Sept 18, 2004) UN Doc S/RES/1564. See also Jamie A. Mathew, *The Darfur Debate: Whether the ICC Should Determine That the Atrocities in Darfur Constitute Genocide*, 18 Fla J Intl L 517 (2006); Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 Whittier L Rev 1101 (2005).

95 See *Jelisic*, IT-95-10-T, Judgment.

96 See International Criminal Tribunal for the former Yugoslavia, *Jelisic (IT-95-10) Case Information Sheet*, (Dec 6, 2005), online at <http://www.un.org/icty/glance/jelisic.htm> (visited Apr 17, 2009).

97 Id.

E. PROSECUTORIAL DISCRETION IS NOT A MORE EFFECTIVE SOLUTION TO OVERBROAD GENOCIDE LIABILITY

A move to a purpose-based mens rea requirement is a relatively blunt tool to fix the problem of holding government officials liable for genocide despite their lack of a genocidal intent. Critics of a purpose-based mens rea might suggest that the solution to this problem is the exercise of prosecutorial discretion. This criticism is lacking because of difficulties inherent to the application of prosecutorial discretion to the international criminal law arena such as: the potential for politicization of the prosecution, overlapping jurisdiction, and the opportunity for abuse. These difficulties encourage a stricter definition of accomplice liability. Further, these difficulties display the keen need to limit overly broad applications of the Genocide Convention through limitations in the law as opposed to the administration of that law. A mens rea standard of purpose does just that.

Prosecutorial discretion is the jurisdictional equivalent of death and taxes. While the Genocide Convention is enforceable in a large number of jurisdictions[98] with a wide variety of procedures, prosecutorial discretion is present in all jurisdictions, as it is a function of both the constant constraint of limited resources and the universal need for individualized justice.[99] Proponents claim that a wide use of prosecutorial discretion would limit the potentially overbroad culpability a knowledge-based mens rea requirement creates, while allowing prosecutors to avoid the difficult evidentiary test of proving purpose for top government officials.[100] Prosecuting top government officials for genocide requires an ability to subject those officials to some sort of jurisdiction, which almost inevitably requires some sort of regime change. Regime change can be a messy affair and often leads to the purposeful and accidental destruction of evidence. The need for regime change, coupled with the fact that evidence to establish an accomplice government official's mens rea is less likely to come from eyewitness testimony than a paper record, creates large practical difficulties in prosecuting top government officials for genocide.[101]

While attractive, heavy reliance on prosecutorial discretion is impractical due to the nature of international criminal law adjudication. The chief factors

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98 Through the principle of universal jurisdiction, it is enforceable in almost all jurisdictions.

99 See Hassan B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 J Intl Crim Just 145, 145–46 (2005).

100 Purpose theoretically requires more evidence than knowledge, because purpose consists of both knowledge and desire. See American Law Institute, *Model Penal Code and Commentaries* 229–241 (1985).

101 See Dermot Groome, *Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?*, 31 Fordham Intl L J 911, 934 (2007–2008).

that make this solution impractical are: (1) the political fragility of genocide prosecutions; (2) the potential for abuse; and, most importantly, (3) the lack of a single prosecutor to exercise discretion.

1. Limiting Prosecutorial Discretion Binds a Potential Defendant to Counterbalance the Politicization and Legitimacy Problems of Genocide Prosecutions

Genocide prosecutions of top government officials are inevitably politicized affairs. For example, the UN had to walk the tightrope in the former Yugoslavia of conducting peace negotiations with the same individuals it was planning to prosecute.[102] This politicization can lead to bargaining between the accused, or potentially accused, and the forum. If prosecutorial discretion plays a large role in a forum, there are more "chips" to trade. Likewise, if prosecutorial discretion plays a small role in a forum, there are fewer chips to trade. A rule that reduces a prospective court's tradable chips supports the goals and legitimacy of the Genocide Convention. In the sorts of extreme situations in which the Genocide Convention is at issue, notions of justice require a full adjudication of the events and *all* of their actors. The requirement for comprehensive justice is the purpose behind the Genocide Convention's abandonment of sovereign immunity.[103] This purpose would be thwarted if the leaders could escape prosecution by bargaining themselves out of liability. By constraining prosecutorial discretion, a prospective forum constrains potential defendants as well, assuring that all prosecutable individuals are prosecuted in fact.

This binding of potential forums also increases the legitimacy of courts adjudicating genocide, which can have tremendous practical benefits to the administration of justice in ad hoc tribunals.[104] For example, the ICTR has had large legitimacy problems in Rwanda, which eventually led to the Rwandan government temporarily suspending cooperation with it.[105] The Rwandan government's lack of cooperation had severe negative effects on getting travel documents issued and allowing witnesses to appear.[106] The government was obstructionist despite an agreement that the prosecution was necessary.[107] By

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102 See Matthew I. Kupferberg, Note, *Balkan War Crimes Trials: Forum Selection*, 17 BC Intl & Comp L Rev 375, 399 (1994).

103 Art 4, Convention on the Prevention and Punishment of the Crime of Genocide.

104 Legitimacy issues are far less a problem when the forum is a sovereign government.

105 See Okechukwu Oko, *The Challenges of International Criminal Prosecutions in Africa*, 31 Fordham Intl L J 343, 385–86 (2007–2008).

106 See id at 386.

107 See id at 385–87.

limiting prosecutorial discretion, any international forum operating in a sovereign nation acts more as a machine, mechanically applying the law, than an institution, arbitrarily exercising discretion.[108] This difference in perception can have large effects on the perceived legitimacy of the court. A mens rea standard of purpose does not rely as heavily on prosecutorial discretion for its successful application, so it better binds potential forums. This binding both prevents potential defendants from creating immunity for themselves and increases the overall legitimacy of the forum.

2. Limiting Discretion Limits the Especially Likely Potential for Abuse of Discretion

The necessity of some sort of regime change to enable a genocide prosecution of top government officials opens up the possibility of victor's justice by the new regime. Prosecutorial discretion is not an effective tool in these situations because prosecutors are likely to abuse that discretion. While the UN or neutral third parties can be expected to evenhandedly prosecute a genocide charge, the vast scope of jurisdiction under the Genocide Convention creates a greater-than-normal risk of an abusive prosecutor. By limiting discretion, a stricter mens rea requirement would cabin potential abuse of that discretion.

3. Overlapping Jurisdiction Prevents a Large Role for Prosecutorial Discretion

The chief problem preventing a large role for prosecutorial discretion in the criminal adjudication of any law subject to universal jurisdiction is the lack of a sole prosecutor to exercise discretion. The UN, the International Criminal Court ("ICC"), and all states party to the Genocide Convention may prosecute genocide. While there are methods to prevent these parties from subjecting defendants to double jeopardy or *non bis in idem*,[109] there is, currently, no way for one of these parties to exercise discretion and *not prosecute* a defendant which is binding on other parties. In fact, the opposite is true. The ICC's mandate is to prosecute only when a state has been "unwilling or unable" to prosecute.[110] Thus, one prosecutor deliberately, and in good faith, choosing to abstain from prosecuting is not binding on another prosecutor. This lack of coordination requires all prosecutors to make the same decision, essentially independently,

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108 See Alexander K.A. Greenawalt, *Justice without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 NYU J Intl L & Pol 583, 650–51 (2007).

109 See generally Jennifer E. Costa, *Double Jeopardy and* Non Bis In Idem*: Principles of Fairness*, 4 UC Davis J Intl L & Pol 181 (1998).

110 Rome Statute of the International Criminal Court (1998), art 17, 37 ILM 1002.

about a given set of circumstances and creates a terrible model for prosecutorial discretion. Thus, prosecutorial discretion is not an effective means for governing an expansive notion of accomplice liability because international law does not have a reliable method to exercise that discretion.

F. A Purpose Standard Does Not Exculpate All Corporate or Other Dual-Purpose Defendants

A third criticism of following the minority approach to accomplice mens rea is that it would amount to a blanket exculpation of corporate defendants. A corporate defendant can claim for most, if not all actions, that the purpose of the conduct was profit. However, this is a mischaracterization of the purpose requirement. The manufacturers of Zyklon B, the drug the Nazis used in their gas chambers, attempted this defense.[111] But a purpose standard does not require the genocidal intent to be the primary purpose; a significant purpose will suffice. Thus, the manufacturers satisfied the purpose test because the effectiveness of their product in killing was a secondary purpose, in that it increased the demand for their product and, consequently, their profits.[112]

The secondary purpose argument is not a purpose-based "hook" for top government actions similar to Mugabe's fast-track land reform, as Mugabe did not even have a secondary desire to destroy the white farmers. The death of the white farmers created international criticism and damaged the Zimbabwean economy more than a peaceful land-seizure would have. Britain's initial acquiescence to the land reform policy, wide-scale white emigration from Zimbabwe, and the eventual downfall of the Zimbabwean economy belie this fact. Mugabe wanted mobilized, energetic, and rewarded supporters, not killers. So genocide would not even be a secondary purpose of the program.

VI. Conclusion

The relatively recent rise in the use of the Genocide Convention to prosecute atrocities throughout the world has created discrepancies in how it is administered. One of the most notable discrepancies is the mens rea requirement for accomplice liability. Courts are divided as to whether an accomplice must assist a genocide with the purpose of committing genocide or whether mere knowledge of the principal's intent suffices for prosecution. The enactment of fast-track land reform in Zimbabwe provides a good example of

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111 See Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw J Intl Hum Rts 304, 335 (2008), referencing *Trial of Bruno Tesch and Two Others*, 1 Law Reports of Trials of War Crim 93 (1947) (Brit Mil Ct, Hamburg, 1–8 Mar 1946).

112 See Cassel, 6 Nw J Intl Hum Rts at 335 (cited in note 111).

conduct that would be prohibited under the Genocide Convention under a knowledge-based approach, but would not be criminalized under a purpose-based approach. The role the Genocide Convention plays in mobilizing the international community, as well as the preference in international law for limited prosecutorial discretion, provide reasons against criminalizing such conduct, while the multiple methods of attaching liability for genocide—direct, accomplice, and command responsibility—show that exceptions like land reform would be confined to only a few scenarios.

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