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Purpose-based or knowledge-based intention for collective wrongdoing in international criminal law?

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Abstract

Due to the distinct nature of international crimes such as genocide and crimes against humanity originating out of and contributing to the pervasive collective character of mass atrocity, the appropriate mens rea *for individual commission of these crimes is difficult to pin down. The* mens rea *for these international crimes has been deliberated, disputed and inconsistently applied, leaving what it means for individuals to intend to commit crimes of mass atrocity mired in confusion. This paper explores the meaning of intentional commission of collective crime, and demonstrates that from both philosophical and legal perspectives, acting intentionally in the context of mass atrocity can be interpreted in different ways, resulting in a condition of international criminal law which is at risk of unpredictability and expressive uncertainty. The paper endorses purpose-based, rather than knowledge-based, intent as the appropriate standard in the context of international crimes by arguing that mere knowledge of outcomes is insufficient.*

Introduction

Under traditional criminal law, the guilt of a person depends on the determination that he or she committed an act and that he or she intended to commit the crime.[2] These two elements, the unlawful act (*actus reus*) and proof of a guilty state of mind (*mens rea*), comprise the basic accepted foundation for most criminal responsibility, both equally significant to establishing legal guilt. And yet, because of the distinct nature of international crimes such as genocide and crimes against humanity originating out of and contributing to the pervasive collective character of mass atrocity, the appropriate *mens rea* for individual commission of these crimes is difficult to pin down. The *mens rea* for these international crimes has been deliberated, disputed and inconsistently applied, leaving what it means for an individual to intend to commit a crime of mass atrocity mired in confusion and debate. This paper explores the meaning of intentional commission of a collective crime, and demonstrates that from both philosophical and legal perspectives, acting intentionally in the context of mass atrocity can be interpreted in different ways, therefore resulting in a condition of international criminal law (ICL) which is at risk of unpredictability and expressive uncertainty.

This conceptual ambiguity in what constitutes criminal intent in collective wrongdoing is, although generally recognised, a significant practical problem. The difficulties inherent in conceptualising roles of individual agency and responsibility in collective wrongdoing are, not unreasonably, reflected in the vague language of the statutes and interpretations of them. This paper first outlines the difficulties in identifying an individual's distinct, meaningful and intentional role in collective wrongdoing. That the criminal acts were committed as part of a

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2 This is true for the most part. There are some strict liability crimes.

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collective enterprise alters the way in which the mental element of the perpetrators' actions can be evaluated. Perpetrators who contribute to mass atrocity are often not acting antisocially, in a deviant manner associated with most criminal behaviour, and may even have no real invested interest in the objective of the collective enterprise of mass wrongdoing beyond their part in contributing to the social project of their community. Under the conditions of collectively committed wrongdoing, it may be difficult to attribute to particular individuals specific intent for an international crime such as genocide or crime against humanity. However, as stated, a central tenet of ICL is that intent to commit the crime must be proven for legal responsibility and guilt to attach. Therefore, holding individuals responsible for their contribution to mass atrocity demands demonstrating that these individuals intentionally committed actions in furtherance of crimes they independently could not reasonably expect to achieve, for which the intention can be seen as reflective of societal attitudes, and for which they intended not only their own particular contribution but also the ultimate goal of the mass atrocity.

The second section of this paper demonstrates how international criminal statutes struggle to comprehensively identify individualised intention, falling victim to ambiguity in relation to defining the mental element of these crimes. Without settling on what intention to commit an international crime such as genocide or crime against humanity really means, the statutes are open to inconsistent application of the law. This section struggles to make sense of the element of intent necessary for conviction for contribution to atrocity. The questions this paper aims to explore, then, are twofold: the first is to what extent the perpetrator ought to personally intend the objectives of the mass atrocity scheme to be guilty of perpetrating genocide or a crime against humanity. The second is how should intent, the *mens rea* element, be determined in assessing criminal responsibility for individuals who contribute in various ways to mass atrocities such as genocide and crimes against humanity. In answer to the first, this paper endorses purpose-based intent, rather than knowledge-based intent, as the appropriate standard in the context of mass crimes. In answer to the second, we must answer whether knowledge is sufficient to demonstrate purpose-based intent. This paper suggests that mere knowledge of outcomes is insufficient to demonstrate such intent.

Intention and collective action

Philosophically, understanding one individual's purposeful involvement in mass atrocity is a challenging endeavour. International crimes such as genocide and crimes against humanity cannot, for the most part, be committed by only one person acting alone. These crimes require the combined effort of many people, contributing to the collective endeavour for combinations of reasons unique to each of them. That these crimes are committed by many is not, though, for the purposes of this paper, the most significant point to be made about collective action. What is more important is that the general state of the collective and the context have a considerable effect on the frame of mind of the individuals who comprise the collective and act to further its objectives.

It is partly for this reason that it is difficult to decipher the intentions of individuals in respect of the collective action. The contextual elements of an action can have a considerable effect on the mental elements (*mens rea*) of the crime. Being a member of a collective arouses ideas, intentions and actions in individuals who would otherwise not possess or act on them (Harbour, 2003, p. 78). Under these conditions, it is often also difficult to determine genuine intent for the scheme beyond purposeful commission of particular actions. And yet, those actions can be viewed as much worse than the actions taken alone, if they contribute to the broader wrongdoing (Isaacs, 2006). Therefore, the collective nature of events is significant because it is often the case that we cannot make sense of the particular wrongness of actions of an individual without referring to and viewing those actions within the wider context of the collective.

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Additionally, the average actor contributing to atrocity is acting in accordance with new social norms; his or her actions, motivations and will are not deviant in the same way as similar actions committed against the domestic context of relative peace and order where the action can be seen as aberrant and defiant (Chinapen and Vernon, 2006; Drumbl, 2007; Sloane, 2007; Fisher, 2010). Individual action exercised in a vacuum, in an environment absent of pressure or displays of criminal action, is quite different from action performed in a criminal atmosphere. Think of Rwanda during the summer of 1994. The radio broadcasts endorsed atrocity, the streets were dangerous and exhibited fear and hatred and death, and not acting according to the new rules of behaviour put persons of the non-targeted Hutu group also at risk. There was also a scheme of indoctrination to ingrain in the general Hutu population hatred and fear of Tutsis. Persons living in, and trying to survive and make sense of, this type of environment respond to the actions of others around them. Under these conditions, the majority of individuals who become involved in the criminal enterprise are not so much acting defiantly as they are conforming to their new social environment.

Of course, motivation and intention are different concepts. An intention is a plan, an aim that guides actions. Motivation, on the other hand, is the reason certain actions or outcomes are pursued; it is the incentive to act in a particular way. Both the motivations to act and the intentions of those acting within this new social environment are influenced by the new context. The actors are influenced by their knowledge of the new objectives of their social group, are motivated to protect their own lives and membership-in-good-standing, and often aim to conform to the group's new purpose. How then are their intentions in regards to the objectives of the greater criminal enterprise to be understood?

In understanding actions of individuals as part of a collective scheme, careful attention must be made not to err on the side of holding individuals liable beyond their own purposeful involvement. H. D. Lewis notably made a claim with which it would seem all other moral philosophers could agree: 'If I were asked to put forward an ethical principle which I considered to be especially certain, it would be that no one can be responsible, in the properly ethical sense, for the conduct of another' (Lewis, 1948, p. 3). However, in cases of attributing responsibility for genocide or crimes against humanity, the aim is to attribute culpability to particular individuals who then shoulder the burden of guilt for harms that could not be achieved by only one person, and it is possible that in this attribution of responsibility, the intentions of the group might be attributed to an individual for whom the objectives of the group were nothing more than simply 'the objectives of the group' of which the individual was a member.

When determining intentionality for a collective crime, is it enough that an individual intends to blindly further the aims of the group (whatever they are) or must he or she intend the specific objectives such as the genocidal policy of destruction of a particular protected group? Is it enough that he or she intends to commit the act of murder or torture only, as long as this act does, in fact, contribute to the collective wrongdoing? How is the intention to commit the international crime, genocide or crime against humanity, isolated from other motivations and interests? Or, are such distinctions even significant? These are the types of question that, unanswered, lead to the type of inconsistency in interpreting the statutes found in the judgments of the ad hoc tribunals. This is where questions concerning knowledge-based and purpose-based intention arise. Is it enough that the perpetrator simply had knowledge of the larger criminal project? Is it enough that he or she knew that his or her actions contributed to the greater scheme? Or, must it be proven for conviction of these crimes that the perpetrator has specific purpose-based intention, that is, intention for his or her actions to contribute to the goals of genocide or widespread or systematic attack on a civilian population?

As I have argued elsewhere, the condition of very broadly delineating particular crimes within collective wrongdoing renders the expressive value of conviction for atrocity crimes at risk of

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being less than clear regarding for what exactly the conviction expresses condemnation (Fisher, 2012, chapter 5). This is problematic if we are to understand this system of law as at least partly justified for its expressive power of disapproval for certain actions and reassertion of particular values (May, 2005; Drumbl, 2007; Sloane, 2007; Fisher, 2012).

Interpreting intention in the statutes

While it might seem that aspects such as the elements of crimes have been worked out in detail, it is rather the case that the mental elements remain ill-defined in some respects. Uncertainty about how to fairly judge intentional participation in the greater atrocity scheme is reflected in ICL statutes. Each of the statutes for the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC)[3] vaguely lays out the mental elements of genocide and crimes against humanity without any conclusive directions concerning the interpretation of intentionality to satisfy the *mens rea* of these crimes. Let us first look at the descriptions of these two crimes, genocide and crime against humanity, as they are offered in the statutes, looking at how they could be and have been interpreted. Ultimately, the question seems to come down to whether simply knowing that he or she is playing a part in a great atrocity is enough to suggest intent of the accused for the most heinous of crimes. As suggested in the above section, there is something unique about environments of collective wrongdoing that inspire in persons actions they would not otherwise pursue. That these actions are morally wrong, illegal and deserving of punishment is not at issue; what is at issue is how the boundaries of the particularly heinous crimes ought to be understood.

This section has two goals. The first is a warning that caution be taken in the assumptions one could make about how clearly outlined the elements of the crimes are in the international criminal codes. Much of the philosophical literature concerning ICL focuses on the politics, the possible lack of objectivity of the courts or universality of the principles, or on definitions of the crimes themselves (for examples see: Drumbl, 2007; May, 2007; May and Hoskins, 2010). However, as others before have pointed out, there are also very serious concerns regarding the ambiguity of the element of intent and the difficulties left by the statutes' text for identifying intent (May, 2005). The second goal offers a position on the question of interpreting intent, positing that it seems reasonable that charges of genocide or crimes against humanity ought to be limited to cases in which specific, purpose-based intent can be proven. Since there is something powerful in labelling a particular action an act of genocide or crime against humanity (Fisher, 2012, chapter 5), it seems right that these labels be reserved for the worst actors in a climate of pervasive wrongdoing in which many ordinary individuals get drawn into bad behaviour.

Genocide

The crime of genocide, as expressed by the Genocide Convention and replicated in the statutes of the ICTY, ICTR, and the ICC, includes an element of intent in the *chapeau*, claiming that 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' (emphasis added).[4] For a person to be convicted of this crime, a very specific manner of intent must be proven. It is the special intent to destroy a particular group of people that makes genocide a distinct international crime. This crime, then, includes a specific intent (*dolus specialis*) as a distinguishing mental element of the crime. It demands an element of

3 Rome Statute of the International Criminal Court, adopted 17 July 1998, UN Doc. A/CONF.183/9, UNTS No. 38544, in force 1 July 2002.

4 ICTY Statute, art. 4; ICTR Statute, art. 2; Rome Statute, art 6.

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intent which is additional, on top of the basic intent required for most criminal offences which is simply the intent to commit the act comprising the offence or to intend the consequences of that act. The crime of genocide requires a special intent to destroy (or contribute to the destruction of) a national, ethnical, racial or religious group by the particular actions committed. However, how to interpret this intent, the degree of that specific intent, is not spelt out explicitly in the relevant treaties, and the lack of clarity has caused confusion.

Of course it would be challenging for an individual to intend to destroy a national or racial group alone, and so his action must be recognised as part of a larger scheme, the goals of which this individual also intends. But how should these actions demonstrate the special intent needed to prove genocide? The only help provided in the Rome Statute of the ICC for interpreting the mental elements of this crime, as well as crimes against humanity, is to be found in Article 30, entitled Mental Element, which claims that,

> '1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
> 2. For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.'

This definition demands intent and knowledge, implying at first glance – but not conclusively claiming – that perhaps intent ought to be interpreted as 'purpose-based' intent. It further defines intent as meaningful action and *either* intention or awareness that the consequence of the action will occur.

Since no judgments concerning genocide have yet emanated from the ICC, we can only look to the judgments from the ad hoc tribunals for possible interpretation. There has been some inconsistency concerning the interpretation of the term 'intent' by the ad hoc tribunals (Cryer, Friman, Robinson, and Wilmshurst, 2007, pp. 179–185). There has been no uniform use of either a knowledge-based or purpose-based understanding of intent. Knowledge-based intent only requires that the perpetrator knew that his actions were contributing to a wider genocidal plan. Purpose-based intent requires demonstration that the outcome of the genocidal scheme was anticipated and *willed* by the perpetrator.

The case of the *Prosecutor v. Goran Jelisic* proves the problem. The ICTY Trial Chamber, employing a purpose-based interpretation of intent, found that Jelisic did not have the requisite intent to commit genocide, claiming that,

> 'the behaviour of the accused appears to indicate that, although he obviously singled out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group. The Trial Chamber therefore concludes that it has not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide.'[5]

5 *The Prosecutor v. Goran Jelisić*, ICTY TC I, 14 December 1999 (case no. IT-95-10-A), para. 108.

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And yet, the Appeals Chamber took issue with this decision, arguing that the Trial Chamber may have been led to incorrect assessment of evidence, implying perhaps that the Appeals Chamber favoured a knowledge-based interpretation.[6] However, the Appeals Chamber ruled that it would not remit the case for further proceedings since a retrial would only deal with the question of genocidal intent.[7] This case, then, demonstrates a disagreement regarding how to interpret evidence in determining genocidal intent, but offers no real resolution to the discord.

A similar disagreement between the Trial Chamber and the Appeals Chamber on the interpretation of intent appears in the Krstic trial. Seemingly, according to the Krstic Judgment issued by the Trial Chambers, knowledge-based intent is sufficient to be held responsible for the crime of genocide. The Trial Chamber claimed that knowledge of the consequence of actions and the lasting impact of those actions upon a group was sufficient to demonstrate genocidal intent. The ICTY Trial Chamber's Krstic Judgment pronounced that although there was no evidence that Krstic was personally present at any of the execution sites, or was directly involved in the reburial activity, and it was not established that the Drina Corps (of which Krstic was Commander) was involved in devising the plan to execute the military-aged Bosnian Muslim men of Srebrenica, or even that the VRS Drina Corps was involved in the execution that happened on 13 July 1995, 'given his position as Deputy Commander/Chief-of-Staff of the VRS Drina Corps . . . Radislav Krstic *must have known* the VRS military activities against Srebrenica were calculated to trigger a humanitarian crisis, eventually leading to the elimination of [persons displaced to Srebrenica]' (emphasis added).[8] The Trial Chamber found that Krstic participated in the criminal plans to ethnically cleanse Srebrenica of all Muslim civilians and to kill the military-aged men of Srebrenica. He was found guilty by the Trial Chamber of murder, persecutions and genocide.[9]

His genocide conviction was based on the concept of co-perpetrator in a joint criminal enterprise.

> 'The court ultimately decided Krstic's behavior fitted the criminal enterprise mold best; he planned and implemented the events that caused the refugees to flee to Potocari and actively participated in their subsequent forcible transfer out of the region. As of July 13th, the original Mladic plan to ethnically cleanse Srebrenica of Muslims had apparently escalated to a plan to kill military-aged men. By the evening of July 13th, when he became Commander of the Drina Corps, Krstic must have known executions were taking place. From July 14 on, he effectively participated in the executions by rendering "tangible and substantial assistance and technical support." "General Krstic," the court said, "may not have devised the killing plan or participated in the initial decision to escalate the objective of the criminal enterprise from forcible transfer to destruction of Srebrenica's Bosnian Muslim military-aged male community, but there can be no doubt that, from the point he learned of the widespread and systematic killings and became clearly involved in their perpetration, he shared the genocidal intent to kill the men."' (Wald, 2003, p. 11)

The Trial Chamber, finding that Krstic knew that Drina corps personnel and resources were employed to support the executions of the Bosnian Muslims and that he did not attempt to punish his subordinates for their involvement, inferred from these facts genocidal intent 'from his

6 *The Prosecutor v. Goran Jelisić*, ICTY AC, 5 July 2001 (Case no. IT-95-10-A), para. 72.

7 *The Prosecutor v. Goran Jelisić*, ICTY AC, 5 July 2001 (Case no. IT-95-10-A), para. 74.

8 *The Prosecutor v. Krstic* (IT-98-33) UN Case Information Sheet, online: ‹http://www.un.org/icty/glance/krstic.htm›.

9 On 2 August 2001, the Trial Chambers convicted the accused, Krstic, to forty-six years' imprisonment.

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knowledge of the executions and his knowledge of the use of personnel and resources under his command to assist in those executions' (Sautenet, 2004, p. 261).

The ICTY Appeals Chambers, however, argued that mere knowledge of the consequences of actions is insufficient to demonstrate genocidal intent: 'Knowledge on his part alone cannot support an inference of genocidal intent.'[10] The Appeals Chamber denied that a knowledge-based interpretation of intent is justified for a conviction for genocide. According to this judgment, the perpetrator must himself have the intent to contribute to the genocide and desire the destruction of the targeted group. Built into the elements of the crime is the intention on the part of the perpetrator to destroy a group; this intent has been interpreted, by the ICTY Appeals Chamber in this case at least, to require demonstrated purpose-based general intent. The Appeals Chamber, however, found that 'knowledge on the part of Radislav Krstic, without more, is insufficient to support the further inference of genocidal intent on his part'. It recalled that genocide is 'one of the worst crimes known to mankind [of which its] gravity is reflected in the stringent requirement of specific intent'. It found that Radislav Krstic was not a supporter of the VRS Main Staff's plan to execute the Bosnian Muslims and that he could not be found guilty of genocide as a principal perpetrator (Sautenet, 2004, p. 261).

The Appeals Chamber set aside the conviction for genocide and found Krstic guilty of aiding and abetting genocide, which demands a lesser degree of intent.

In both examples, there is disagreement over the proper interpretation of intent both between the judges presiding over the Trial Chambers and between the Trial Chambers judges and those in the Appeals Chamber. While these debates are being played out, real lives of defendants are affected as the law is inconsistently applied.

More recently, the ICTY's 2010 judgment of Vujadin Popović offers another considered example of genocidal intent. The judgment affirms, as other judgments have done, that by its nature, intent is not usually susceptible to direct proof because only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent.[11] 'Absent direct evidence, the intent to destroy may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts.'[12] The Trial Chamber considered the existence of a plan or policy as an important factor in inferring genocidal intent, along with acts and conduct of the accused being carried out in accordance with an existing plan or policy to commit genocide; 'such knowledge [of the plan] constitutes further evidence supporting an inference of intent'.[13] The Trial Chamber judged that the Prosecution satisfactorily proved that Popović was fully engaged in the organisation of the killing operation carried out in the Zvornik area and that he participated in the Joint Criminal Enterprise (JCE) with persecutory intent. In this case, the Trial Chamber was satisfied that the accused had been party to the planning as well as active at the sites of killing.[14] Such language and uncertainty regarding intentionality also causes theoretical, if not practical, confusion in the related issue of

10 *The Prosecutor v. Radislav Krstic*, ICTY AC, 2004 (case no. IT-98-33-A), para. 134.

11 *The Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević*. ICTY. Trial Chamber Judgment Summary for Popović *et al.* (Case no: IT-05-88-T) 10 June 2010. para. 823.

12 *Ibid.*

13 *Ibid.*, para. 830.

14 *The Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević*. ICTY. Trial Chamber Judgment Summary for Popović *et al.* (Case no: IT-05-88-T) 10 June 2010.

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what it might mean to attempt to commit genocide. If parallels to domestic law are used, then it would seem that an attempt to commit genocide is an offence in which the intended result, that of genocide, is foiled in some way. However, as Jens David Ohlin explains, the crime of genocide already has an 'attempted' nature to it in that the crime does not require that there be successful destruction 'in whole or in part' of the group. 'Indeed, the crime of genocide simply requires the *intent* to destroy a protected group and the *actus reus* of the offence does not require the actual destruction of the group. In one sense, this suggests that all crimes of genocide are better characterized as attempt to commit genocide' (Ohlin, 2009, p. 174). However, he goes on to point out that the statutory definitions of the crime do not make this clear and that the theoretical unease has lead to confusion among scholars, but that it might make little practical difference as 'there have been no direct prosecutions for attempt to commit genocide, thus escaping the judicial need to directly clarify this confusion. Nor is there likely to be one in the foreseeable future' (2009, p. 175). While Ohlin is correct in his assessment of the charge, what is needed to bring coherence is unclear. Likely, if the solution were to apply categories of 'genocide' and 'attempted genocide', other problems would arise, such that 'genocide' would only be prosecutable if the group was destroyed, and this seems not to capture what the Genocide Convention is meant to accomplish, and 'attempted genocide' would likely result in lower penalties.

And so, we see that at least in reference to the case of genocide, the statutes' vague language leaves to the judges the very difficult task of determining what constitutes appropriate intention to commit this crime, or even to attempt to commit it. Such an undertaking is expected of judges more in common law than civil law jurisdictions, but even in common-law spheres, a question of such fundamental significance should be addressed by those assigned the duty of drafting the laws. Interestingly, although the ICTY faced such uncertainty and disagreement, the drafters of the Rome Statute (ICC) adopted the same language, and provided little supplementary help for interpretation. It can only be assumed that unless pre-emptive definitional work is done, the ICC will run into the same problems as the ad hoc tribunals when it attempts to prosecute its first genocide cases, likely beginning with Sudanese President Omar Hassan al Bashir, who was indicted by the Court in 2009 as an indirect (co-)perpetrator for five counts of crimes against humanity (murder, extermination, forcible transfer, torture, rape) and two counts of war crimes (direct attacks on civilians and pillaging),[15] and again in 2010 for three counts of genocide.[16]

Crimes against humanity

The definition of crimes against humanity, in contrast to the crime of genocide, does not expressly include any element of specific intention. For the purposes of determining appropriate intent, then, it might seem that the elements of crimes against humanity are more clearly evident in the statutes. However, one must question to what extent a lax interpretation of intent coincides with the expectations of the drafters. According to the Rome Statute, crime against humanity 'means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack'.[17] So, where does the *mens rea* element of the crime fall? The element of intent must arise out of the 'knowledge of the attack' aspect of the definition. However, it seems suspect that the drafters of this crime wanted to suggest that only a knowledge-based intent is necessary for conviction.

15 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*. ICC. Pre-Trial Chamber I. (Case no. ICC-02/05-01/09-01) 4 March 2009.

16 T*he Prosecutor v. Omar Hassan Ahmad Al Bashir*. ICC. Pre-Trial Chamber I. (Case no. ICC-02/05-01/09-95) 12 July 2010.

17 Rome Statute, art. 7.

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As with the crime of genocide, Article 30, the Mental Element, applies. As you will remember, it claims that 'unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge' and that 'a person has intent where: (a) in relation to conduct, that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events'.[18] There are perhaps two points on which this assistance is less than helpful: first, corresponding to a person meaning to 'engage in the conduct', it is unclear to what this refers in the case of crimes against humanity, other than the material element of the constituent act of murder or torture, etc.; second, it does not differentiate between knowledge-based or purpose-based intent in relation to the consequence of action.

Some further guidance for interpreting intention can be found in the ICC's Elements of Crimes document, although it is unclear to what extent this document can really guide interpretation. It was only years after its drafting that the ICC Pre-Trial Chamber (PTC) touched 'upon a methodological issue that has long divided interpreters of the ICC Statute. The PTC implicitly confirmed the status of the Elements of Crimes (EC or Elements) as "law" to be applied by the Court, with a rank equal to the Statute itself' (Weigend, 2008, p. 472). Interpreted by the ICTY's Appeals Chamber in the Krstic case, however, 'the ICC Elements of Crimes "are not binding rules, but only auxiliary means of interpretation" of the Statute'.[19] The Rome Statute, itself somewhat ambiguous on the legal status of the Elements, seemingly positions the Elements as a subsidiary document prepared to 'assist the Court in the interpretation and application of crimes as listed in Articles 6, 7 and 8' of the Statute.[20] According to the Elements, general knowledge-based intention is required for each prohibited crime against humanity; it stipulates that the prosecutor must prove beyond a reasonable doubt that 'the perpetrator *knew* that the conduct was part of *or* intended the conduct to be part of a widespread or systematic attack directed against a civilian population' (emphasis added).[21] But, is that enough?

Let us examine this closely. There are two mental requirements for conviction for crimes against humanity: both the *mens rea* for the prohibited acts and intent for the crime against humanity must be proven. For the first, the prosecutor must prove *mens rea* for the prohibited act, such as the murder which is the element of the crime against humanity. He or she must prove that there was intention by the accused to kill or cause the death of the victim. For the second, the general intent for the crime against humanity is demonstrated by the perpetrator knowing that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population. So, conviction requires proof that the accused intended (demonstrated *mens rea*) the material elements,[22] including, for example, the murder, enslavement, torture, or rape. However, depending on interpretation, the accused must only have had knowledge of the widespread or systematic attack or that his or her actions were part of this larger scheme. So, as long as the particular act (e. g. murder) is committed with purpose-based intent, and there is knowledge that the conduct was part of the widespread or systematic attack directed against a civilian population, then the act constitutes a crime against humanity.

18 Rome Statute, art. 30.

19 *The Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević*. ICTY. Trial Chamber Judgment Summary for Popović *et al.* (Case no: IT-05-88-T) 10 June 2010. para. 829.

20 Rome Statute, art 9 (1).

21 ICC Elements of Crime. ICC-ASP/1/3.

22 Rome Statute, art 30.

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The requirement that general intent for a crime against humanity arises from the perpetrator knowing that the conduct is part of a wider attack is perhaps, though, too weak to stigmatise an action as among the most heinous of crimes. The wording of the crime seems misleading and lacking of the necessary intent to commit such a heinous crime. Purpose-based intent to contribute to the widespread and systematic attack seems necessary. Therefore, that 'the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population' seems to capture both knowledge-based (knew) and purpose-based (intended) only if the Article is reworded to require that the perpetrator knew *and* intended the conduct to be part of a widespread and systematic attack. The inclusion of the word 'or' does not, in fact, deliver, necessarily, as perhaps it should, purpose-based intent.

Making sense of purpose-based intent

So in answer to the question of whether knowledge-based intent is sufficient to trigger conviction for either genocide or a crime against humanity: it seems evident that mere knowledge should not be sufficient to satisfy the *mens rea* element of the crime. As Oliver Wendell Holmes famously claimed, 'even a dog distinguishes between being stumbled over and being kicked' (Holmes, 1881, p. 3). There is an ethical distinction to be made between actions that pursue a particular objective and ones that are pursued despite the fact that the actor, who does not specifically will the consequences, knows that they will lead to the same ends. There is a distinction to be drawn between the actions of a man who wilfully kicks the dog and the actions of a man who obediently obeys orders to walk forward knowing that his stride will make contact with the dog. Both actions are wrong and deserving of condemnation. They are not, however, the same action, nor (arguably) morally equivalent. The specific malicious intent adds something to the wrongdoing.

Jung and Levine reveal a similar concern with the use of a knowledge-based interpretation of intention in tort law.

> 'According to the Restatement (Second) of Torts, one may be said to "intend" a result if she knows her acts are substantially certain to cause that result. Pressed to its logical extreme, however, this definition has startling implications. One who fires an employee, fails to perform a contract, or offers a customer a better deal than her competitor knows with substantial certainty that her acts will harm others. If knowledge that a particular result will occur is "intent", and if harm to economic interests is a legally cognizable injury, all of these common occurrences begin to look like intentional torts.' (Jung and Levine, 1986, p. 551)

They offer another example: "The music lover who turns her stereo to full volume, honestly regretting that it will awaken her neighbour, may be accused of negligence or nuisance, rather than intentionally disturbing the neighbor's sleep' (Jung and Levine, 1986, p. 583). Although the results are the same, the intent is different, and therefore the criminal act is essentially distinct.

Ultimately, then, the more difficult burden of proving purpose-based intent seems reasonable and necessary in order to convict a person of what is considered the worst of atrocities. As argued elsewhere, it is not those lesser perpetrators who commit wrongful actions in accordance with their new social environment or who are following orders who demand the most stringent condemnation (Zaid, 1997; May, 2005; Fisher, 2010). The primary concern of international criminal law is, and ought to be, those leaders who inspire atrocity schemes, motivating action around exacerbated discriminatory divisions and exploiting resources.

Demanding purpose-based intent, more difficult to prove than knowledge, makes the burden of proof in an already complex task even trickier. How can such intention be discerned? How can it be proven that an individual had such determination, that a particular result or effect was intended or desired? Knowledge is easier to prove. The purpose of limiting the understanding of intent to

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purpose-based intent is not, however, to render successful prosecution of these crimes almost impossible. And this difficulty introduces the next question: If we accept that only purpose-based intent is sufficient to support a conviction for genocide or a crime against humanity, then how is such intention distinguished? Perhaps it is possible that knowledge, rather than be sufficient itself for intent, be adequate as evidence to demonstrate purpose-based intent. Could a certain amount of knowledge of events and outcomes of actions be sufficient evidence that an individual willed the results of the mass atrocity to which his actions contributed?

Perhaps, in fact, it could be argued that this was the line of thought followed by the Krstic Trial Chamber and what seemed obviously support for a knowledge-based intent interpretation of the statute was rather something more robust. It might be possible to read the debate between the Krstic Trial Chamber and Appeals Chamber judgments as a debate not necessarily between endorsements of knowledge-based and purpose-based intent, but as a debate concerning the means by which purpose-based intent is determined. It might be possible to read the Trial Chamber judgment as arguing that knowledge of the consequences of actions and the lasting impact of those actions was sufficient to demonstrate purpose-based intent.

Seemingly, purpose-based intent was also inferred from the knowledge to which the accused had access by the ICTR Trial Chamber judgment in the Musema case, drawing from the ICTR Akayesu judgment, which proposes that:

> '[I]ntent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, *his intent can be inferred from a certain number of presumptions of fact*. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, *can enable the Chamber to infer the genocidal intent of a particular act*. (emphasis added)[23]

Rather than understanding intent as it applies to genocide as nothing more than knowledge-based intent, such inferences, and possibly those also made by the Trial Chamber in the Krstic case, might be seen to regard knowledge as evidence of the more robust purpose-based intent.

However, such inference seems a risky leap. This is especially the case if we want to reserve the charge of genocide or crimes against humanity for the worst of the worst. These are the leaders and engineers of the atrocity. Proving purpose-based intent should be the goal of the prosecutor's case. To make the case, there should be a very limited reliance on knowledge as evidence of such intent, and the implication of acting on such knowledge must be very strong. A much stronger case, and one for which the prosecutor should strive, derives from first-hand support of the indictee's purpose-based intent, from his own written or spoken words or other direct evidence. It is not always the case that linking leaders to order or policy is difficult; nor should it always be difficult to attribute certain broad intention to particular actions.

Nazi Germany kept meticulous records and perpetrators were not shy about their feelings and goals; Rwandan instigators were similarly unguarded in many ways (Stanton, 2004); it is also argued that it would not be difficult to link those leaders most responsible to the torture and mistreatment of detainees in US counter-terrorism operations (Blum, Magarrell and Wierda, 2009,

23 *The Prosecutor v. Alfred Musema*, ICTR Trial Chamber, 2000 (case no. ICTR-96-13-T), para. 166.

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p. 4), and separate them from lesser perpetrators who followed orders with little interest in the greater outcome of the contribution they make. Therefore, it seems reasonable to argue that, although the task is more difficult, it is not impossible to attribute to individuals purpose-based intent, and knowledge of consequences should not be seen as a sufficient indicator from which to infer purpose-based intent, except perhaps in the most desperate and apparent of cases.

Moreover, in the Krstic case, there was in fact no obvious link to purpose-based intent. The Court found in its assessment of Krstic that he was 'a professional soldier who willingly participated in the forcible transfer of all women, children and elderly from Srebrenica, but would not likely, on his own, have embarked on a genocidal venture; however, he allowed himself, as he assumed command responsibility for the Drina Corps, to be drawn into the heinous scheme and to sanction the use of Corps assets to assist with the genocide', also claiming that Kristic 'remained largely passive in the fact of his knowledge of what was going on; he is guilty, but his guilt is palpably less than others who devised and supervised the executions'.[24] The Trial Chamber, in its rendering of his judgment of guilt for genocide, went on to remark that 'his story is one of a respected professional soldier who could not balk his superiors' insane desire to forever rid the Srebrenica area of Muslim civilians, and who, finally, participated in the unlawful realization of this hideous design'.[25]

Making this distinction between knowledge-based and purpose-based intent is not to ignore the severe wrongdoing of those who participated in the misconduct for reasons other than purpose-based intent regarding the objectives of the mass atrocity. Article 25 of the Rome Statute was written to cover a wide variety of modes of liability, including some which seem to be in contradiction to a purely purpose-based approach to intention for these crimes.[26] Variances of intentionality can lead to dissimilar attributions of responsibility and, reasonably, distinct criminal charges. For an example from common criminal law, the difference between murder and manslaughter relates to the presence of particular intent. For international crimes, determining legal responsibility relies on resolving questions of two occurrences of intent: intent for the act (of murder or torture) and intent for the bad act to contribute to the greater mass atrocity of genocide or crimes against humanity.

Conclusion

The purpose of this paper was twofold: to highlight the lack of guidance in current ICL statutes, a deficiency that leaves too much to the discretion of judges, even for a common-law tradition, and to suggest that reasonably the statutes ought to be interpreted as mentioned, claiming guilt for genocide or crimes against humanity for leaders who demonstrate purpose-based intent.

The Elements, even though they are not as clear as they ought to be, lend a certain amount of necessary direction (although not enough), and yet, as already mentioned, their standing in reference to the Court is not secured. This caused some difficulty for the first ICC case, that of Thomas Lubanga Dyilo who, although not prosecuted for genocide or crimes against humanity, was tried for the war crime of conscripting child soldiers. The question of intent became an issue for the Pre-Trial Chamber in its attempt to determine whether intention and knowledge, or simply knowledge or 'should have known' status was sufficient for charges of conscripting children under the age of fifteen (Weigend, 2008, p. 473). The Lubanga judgment also caused debate regarding the proper interpretation of intent and co-perpetration, the mode of participation for which Lubanga was tried (Heller, 2012; Ohlin, 2012). While the Lubanga case dealt with

24 *The Prosecutor v. Radislav Krstic*, ICTY Trial Chamber, 2 August 2001 (case no. IT-98-33-T), para. 724.

25 *The Prosecutor v. Radislav Krstic*, ICTY Trial Chamber, 2 August 2001 (case no. IT-98-33-T), para. 724.

26 Rome Statute, art. 25.

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different questions of intent than the ones with which this paper is concerned with respect to genocide and crimes against humanity, the predicament is the same. At numerous turns, the mental element for atrocity crimes is found to be insufficiently clear in the statutes. Intent, half of the basic foundation of a criminal offence, is much too important to be left so obscure.

The context of collectively committed wrongdoing, especially on the scale of mass atrocity, creates very difficult terrain in which to determine degrees of individual responsibility, especially when part of that determination depends on establishing particular intent. However, the ways in which theories of responsibility for mass atrocity 'are applied must be carefully monitored lest they escape legitimate limits and provide too easy an escape from the burden of proving guilt beyond a reasonable doubt in individual cases, especially in special intent crimes like genocide' (Wald, 2003, p. 12).

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