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In what circumstances can “consciousness of guilt” be used as evidence in international criminal law?

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

ISSUE: IN WHAT CIRCUMSTANCES CAN "CONSCIOUSNESS OF GUILT" BE USED AS EVIDENCE IN INTERNATIONAL CRIMINAL LAW?

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55. Christopher B. Kiehl, Memorandum for the Office of the Prosecutor of the ICTR, ISSUE: Procedural Rules Relating to the Admissibility of Evidence of A Consistent Pattern of Conduct in Criminal Trials, Fall 2003, *at* http://www.law.case.edu/war-crimes-research-portal.

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue[*]

This memorandum examines the potential use of "consciousness of guilt" evidence in the International Criminal Tribunal for Rwanda, ("ICTR"), as circumstantial evidence of criminal intent. Section II demonstrates the use of "consciousness of guilt" evidence through the trial of Nazi War Criminal Adolf Eichmann in the wake of the Holocaust in comparison to its potential application to the Rwanda Genocide as analyzed through the trials of Catholic Priest Athanese Seromba and former Prosecutor Simeon Nchamihigo. Section III defines "consciousness of guilt," sets it in the proper context, and examines its applicability to the various levels of individual criminal responsibility and specific crimes set forth in international criminal law and the statute of the ICTR. Section IV examines the admissibility of "consciousness of guilt" evidence to the ICTR as determined by the rules of procedure and evidence for the ICTR and other international tribunals, the domestic courts of Rwanda, and international norms. Section V considers the possible negative and positive consequences of the use of "consciousness of guilt" evidence that should factor into any policy decision.

B. Summary of Conclusions

1. The massive impact of the atrocities, the schematic motive behind them, the percentage of the population victimized, and the perspectives of the accused render the Nazi War Crimes analogous to the Rwanda Genocide in terms of culpability and therefore subject to the same theories of individual criminal responsibility.

2. Because "consciousness of guilt" belongs to the larger category of circumstantial evidence, whether it can be used to establish *mens rea* in international criminal law will be governed not by

[*] ISSUE: consciousness of guilt as evidence of criminal intent: In what circumstances can "consciousness of guilt" (inferred from attempts to "cover one's tracks") be used as evidence (mostly of *mens rea*) in international criminal law? Relevant cases include Seromba, judgment due in October (Rwandan priest with false passport and ID living in Italy after genocide); Nchamihigo, trial starting in September (investigator at ICTR arrested with false identity); compare to Eichmann's using false ID in Argentina.

separate rules on the use of "consciousness of guilt" evidence, but on the rules governing the use of circumstantial evidence.

3. While the use of "consciousness" of guilt evidence may be procedurally similar for domestic and international trials, mass atrocities committed by numerous perpetrators against numerous victims may lead to social acceptability and blamelessness, leaving little reliable trace of guilt on the defendant's mind.

4. While there are several tests offered for the admissibility of evidence of "consciousness of guilt," the core requirement is relevance, which requires a nexus between the conduct and the crime.

5. While "consciousness of guilt" evidence will not be applicable to crimes involving a standard lower than knowledge, it could be an aggravating factor in determining the *mens rea* of a defendant who is already known to have committed the crime.

6. In determining whether to use "consciousness of guilt" evidence, the best social policy is to balance concerns regarding the integrity and efficiency of the tribunal and the rights of the accused against the need for the victim to receive retributive justice and the likely consequences in the affected society.

II. FACTUAL BACKGROUND

Though war crimes and crimes against humanity existed prior to WWII, individuals were seldom held criminally responsible for them until the Nuremberg trials set a new precedent.[1] The Nuremberg trials were also the first to treat crimes against humanity as separate from war crimes.[2] After Nuremberg, there was a long break in war crimes trials until a United Nations resolution formed the International Criminal Tribunal of Yugoslavia (ICTY) in 1993. One year later, the International Criminal Tribunal for Rwanda (ICTR) was formed under similar circumstances and its statute largely mirrored that of the ICTY. Consequently, ICTY decisions serve as helpful precedent for the ICTR. In the time in between Nuremberg and the ICTY/R,

[1] Shoshana Felman, *Judgment in the Shadow of the Holocaust: Section 3: Arendt on Eichmann: a Reappraisal: Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust*, 1 THEORETICAL INQ. L. 465, 504 (2000). [reproduced in accompanying notebook at tab 41]

[2] VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (Transnational Publishers, Inc., 1998). [reproduced in accompanying notebook at tab 35].

war criminals were sometimes tried by individual nations, as in the case of Adolf Eichmann who was tried in Israel.

A. The Adolf Eichmann Trial

1. Background - Nazi Germany - The Final Solution:

Following their tendency to use "euphemistic language to disguise the true nature of their crimes, " the Nazis referred to their comprehensive plan to exterminate the Jewish population in Europe as the "Final Solution."[3] They implemented the Final Solution by "gassing, shooting, and other means" and killed "approximately six million Jewish men, women, and children," which represented about two-thirds of the pre-World War II Jewish population in Europe.[4] Initially, they justified these killings as acts of state intended to prevent the Jewish population from taking over Europe.

The section below will lay out the bare facts and legal findings of the case of Adolf Eichmann, who was an integral part of the Final Solution scheme.

2. Events of Adolf Eichmann's Trial:

As former Chief of the Jewish Affairs Section of the Reich Security,[5] Adolf Eichmann fled to Austria at the end of World War II and escaped to Argentina within a few years where he lived under the assumed name Ricardo Klement,[6] until Israeli security agents abducted him in

[3] United States Memorial Museum. "The Final Solution." Holocaust Encyclopedia. http://www.ushmm.org/wlc/en/index.php?lang=en&ModuleId=10005143. (accessed April 2, 2007). [reproduced in the accompanying notebook at tab 54].

[4] *Id.*

[5] Kristina D. Rutledge, *Giving the Devil His Due: The Pursuit & Capture of Nazi War Criminals – A Call for Retributive Justice in International Criminal Law*, 3 REGENT J. INT'L L. 27 (2005), 43. [reproduced in the accompanying notebook at tab 47].

[6] *Id.* at 44.

late 1960 and put him on trial in Jerusalem for war crimes and crimes against humanity.[7] Like other Nazi war criminals, in his trial Adolf Eichmann tried to claim that even where it could be established that he had committed the *actus reus* of the crimes in question, he did not have the requisite criminal intent because he was acting in obedience to orders, as called to do in his position (out of a sense of duty and loyalty to his country). He claimed in trial and again on appeal that without the *mens rea* he should not be found guilty of the crimes in question. Neither court accepted this argument, however. The trial court stated that a person who committed such a crime must know that it is a criminal act because "the expulsions of the Jews, the object of which was the death of the deportees, were a continuous crime committed by the principal planners and executants, something of which all other executants should have been conscious, for it cannot be admitted that they were not aware of the basic principles on which human society is based, and which are the common legacy of all civilized nations."[8] With this in mind, the court proceeded to show that Adolf Eichmann possessed an awareness, or knowledge, that his conduct was a part of a comprehensive plan to destroy the Jewish People. The court held that where the facts established that his conduct was sufficient to establish the *actus reus* of the crime, his knowledge of the plan was sufficient to establish the *mens rea* of the crime since the Nazis as a whole were aware of the criminality of their acts.

3. Criticism of Adolf Eichmann's Trial:

The most prominent criticisms of the Adolf Eichmann trial have been voiced by Hannah Arendt, a writer who was sent by the New Yorker to cover the trials and subsequently published

[7] Pinina Lahav, *The Eichmann Trial, the Jewish Question, and the American-Jewish Intelligentsia*, 72 B.U.L. REV. 555 (1992), 558. [reproduced in accompanying notebook at tab 42].

[8] Cr.C (Jm.) 40/61, Prosecutor v. Eichmann,1960-1962, Judgment at 19, *available at* http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment. [reproduced in the accompanying notebook at tab 17].

a related book.[9] Arendt raised three primary criticisms of the trial. First, Arendt stated that because the trial was not held in an international tribunal with neutral countries, there were injust biases against the defendant -- for instance, no defense witnesses were admitted.[10] Second, Arendt believed that the court should have insisted on categorizing Eichmann's conduct as a crime against humanity that harmed the civilization of mankind as a whole, not just the relevant ethnic populations.[11] Third, and most relevant to this paper, Arendt insisted that the Nazis should be recognized as a new category of criminals who lacked *mens rea* because rather than being malicious individuals they were caught up in circumstances that left them unaware that what they were doing was wrong.[12] Rather than acquit those defendants who lack a *mens rea*, Arendt insisted that they should form a new category of criminals. The following quote by Hannah Arendt more clearly demonstrates the philosophy behind the creation of a new criminal category:

> Perhaps what is behind it all is that individual human beings did not kill other individual human beings for human reasons, but that an organized attempt was made to eradicate the concept of the human being.[13]

B. Potential Relevance of Adolf Eichmann's Trial to the ICTR

1. The Rwanda Genocide:

In the 1990s ethnic Hutus implemented a widespread campaign of genocide against ethnic Tutsis in Rwanda, devastating the Rwandan population and as Hannah Arendt would

[9] The book is: HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

[10] *See supra* footnote 7, The Eichmann Trial, at 570. [reproduced in accompanying notebook at tab 42].

[11] *Id.*

[12] *Id.*

[13] *See supra* footnote 1, *Arendt on Eichmann*, *quoting* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963). [reproduced in the accompanying binder at tab 41].

argue, humanity as a whole.[14] It is estimated that nearly 1 in 4 Rwandan citizens either participated in the genocidal conduct or were victims of it (with a population between 7 and 8 million, approximately 1 in 9 committed genocide and 1 in 7 were victims of it).[15] Much like the Nazis who justified the implementation of their plan as a prevention of Jewish power, Hutu leaders justified this conduct as necessary preemptive action to prevent Hutus from staging an uprising in collaboration with Belgian troops and overpowering Tutsi leaders.[16] Because the perpetrators were acting on direct orders from the government as mandated by law at the time, they not only believed they were doing nothing wrong but that they were doing their civic duty for their country and to make the world a better place.[17] As a result, if a new category of criminals with no *mens rea* had been established, most of the accused in the Rwanda genocide would fit into this.[18] It is, however, very difficult to deal with legal issues of intent under existing law.[19]

With this in mind, and because like the Nazi plan to exterminate the Jewish Populations the Rwanda Genocide was conducted not on an individual basis but as a part of a grander plan, it would be appropriate for the ICTR to take lessons from the Nazi War Crimes trials and relevant criticisms; more specifically, ICTR proceedings very susceptible to the same type of criticisms that Hannah Arendt directed towards the Eichmann trial.

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[14] Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U.L. REV. 1221, 1252 (2000). [reproduced in the accompanying notebook at tab 40].

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

The next two sections will set forth the factual and legal findings in the case of Catholic Priest Athanese Seromba, as well as allegations and potential findings in the case of former Prosecutor Simeon Nchimihago.

2. Athanese Seromba:

In the trial of Athanese Seromba, the trial Chamber held that the following facts have been established beyond a reasonable doubt. On April 10, 1994 Athanese Seromba, in his capacity as parish Priest, participated in a meeting of the parish council. On April 11, 1994 a security meeting was held and participants decided to requisition gendarmes to assemble all Tutsi civilians in the Nyange church to exterminate them (but it has not been determined that Athanese Seromba attended);[20] these gendarmes arrived the same day.[21] On April 12, 1994, militiamen surrounded the refugees and prevented them from leaving.[22] Around April 14, 1994, when refugees were weakening due to lack of food Athanese Seromba ordered gendarmes to shoot any who attempted to eat from the banana plantation,[23] and when the outside situation was particularly dangerous for unprotected Tutsis, he chased away four employees who sought refuge in the church, including one who was badly wounded.[24] April 15, 1994 Interahamwe, militiamen, gendarmes, and communal policemen launched an attack against the Tutsi refugees, and after the refugees resisted strongly, the attackers used grenades against them resulting in several casualties. Following this, the attackers tried to burn down the Nyange church with the

[20] Prosecutor v. Seromba, ICTR-01-66-T, Decision of 26 June 2006, at 5, lines 9-12. [reproduced in the accompanying notebook at tab 11].

[21] *Id.* at 6, lines 6-8.

[22] *Id.*

[23] *Id.* at 8, lines 1-3.

[24] *Id*. at 8, lines 8-10.

blessing of Athanese Seromba.[25] During these dates Athanese Seromba also turned over to authorities several Tutsis who sought refuge in the church, resulting in their deaths.[26] When the incidents at Nyange church were complete, Athanese Seromba fled to Italy under an assumed name where a little less than 8 years later, he turned himself over to the authorities, and pleaded not guilty to all charges against him. At trial, the court found Athanese Seromba guilty of aiding and abetting genocide for the above named actions.[27]

Once the above factual allegations were established, the court addressed the issue of *mens rea* for each established fact, so that if both actus rea and *mens rea* were satisfied Athanese Seromba would be guilty of the relevant crime. In each instance, the chamber found that Athanese Seromba "must have known" the intent of the attackers and could not have been ignorant of the consequences that his actions would have for the victims.[28]

3. Simeon Nchamihigo:

Simeon Nchamihigo is charged with committing, in his capacity as Substitut du Procureur in the Office of the Prosecutor of the Republic in Cyangugu[29], genocide and crimes against humanity including murder, extermination, and other inhumane acts, in violation of ICTR Articles 2(3)(a); 3(a), (b), and (i); and 6(1).[30] He is accused of knowingly and willfully planning, preparing, and executing these crimes or ordering those under his authority to commit them, instigating them, or otherwise aiding and abetting those not under his authority with the

[25] *Id*. at 12, lines 7-9.

[26] *Id.* at 12, line 16.

[27] *Id.* at 15, lines 8-10.

[28] *Id.* at 16, Lines 9-24

[29] Simeon Nchamihigo, Case No. ICTR-2001-63-1, Second Revised Amended Indictment of 11 December 2006 (In Conformity with Trial Chamber III Decision dated 07 December 2006), at 1, paragraph 2. [reproduced in the accompanying notebook at tab 10].

[30] *Id*. at 1, paragraph 1, counts 1-4.

intent to fulfill the common purpose (in joint criminal enterprise), as indicated by the foreseeable, natural consequences of the criminal acts.[31]

Simeon Nchimihago's case has several aggravating factors that while they help to establish *mens rea* cannot be properly classified as "consciousness of guilt" evidence. There is no indication of "consciousness of guilt" related to identity, because the only mention of using false documents is the use of a forged diploma to obtain his job[32] and the issuance of counterfeit warrants to arrest Tutsis.[33] These acts were either before the crimes or in furtherance of them, but not post-offense in an effort to cover his tracks. While his forged credentials do not strengthen the Prosecution's case in this regard, they do help establish some of the aggravating factors related to character and identity, as do the gravity of the crimes, all of which may lead to a lengthened sentence.

Additional aggravating factors include the gravity of Nchamihigo's crimes. He is charged with (either directly or indirectly) killing 1500 supposed Tutsi refugee men, women, children, and aged people[34] and is also charged with inhumane acts including burning an entire family inside their vehicle and hitting another on the head with a club and then leaving him to die. In both of the latter instances, the victims allegedly suffered great pain. The most gruesome aggravating allegation is that during the attack on 15 Tutsis, he is criminally responsible for

[31] *Id.* at 4, paragraphs 14-17.

[32] *Id.* at 2, paragraph 3. While the issue I have been asked to answer indicates that Simeon Nchimihago had been living under a false identity, I have not found any factual support for this; any such factual information would aid this analysis.

[33] *Id.* at 2, paragraph 4-5.

[34] *Id.* at 9, paragraph 33.

removing the genitalia of two and the heart of another, before the 15 were killed and thrown into a latrine.[35]

III. SUBSTANTIVE LEGAL DISCUSSION

A. Defining "consciousness of guilt" and Related Terms

1. "consciousness of guilt":

In a criminal prosecution, "consciousness of guilt" is not its own form of evidence, but is a type of circumstantial evidence,[36] which comprises its probative value on the theory that, whether deliberately or accidentally discovered, the conduct of the accused (usually after the crime) provides "a rich vein of inculpatory data" that can be a factual base upon which to infer the guilty mind of the accused.[37] Common examples of "consciousness of guilt" evidence include: "lies, flight"[38] (from the scene or in a broader context from the jurisdiction), "escape from custody, resistance to arrest, concealment (of body or weapon, for example), assumption of a false name."[39] While the United States recognizes that "four categories of conduct have been historically admissible as circumstantial evidence of the *mens rea* of the accused: "disposing of the evidence, giving false exculpatory statements, flight, and evidence of the accused's demeanor,"[40] it is also the case that "subjective evidence may be found in any human gesture,

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[35] *Id.*

[36] The Honorable Mr. Justice John Winneke AC, RFD, President Court of Appeal, Supreme Court of Victoria, *'consciousness of guilt'*, a Paper Delivered at a Forum on Understanding consciousness of guilt for the Judicial College of Victoria, 25 February 2005, page 1, paragraph 3. [reproduced in the accompanying notebook at tab 53].

[37] H. Richard Uviller, *Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1137 (1987). [reproduced in the accompanying notebook at tab 51].

[38] *See supra* footnote 36, *'consciousness of guilt'*, at 1, paragraph 3. [reproduced in the accompanying notebook at tab 53].

[39] State v. Hand, 107 Ohio St.3d 378 (2006). [reproduced in the accompanying notebook at tab 22].

[40] Dan E. Stigall, *Prosecuting Raskolnikov: A Literary and Legal Look at "consciousness of guilt" Evidence*, 27 ARMY LAW. 54, 56 (2005). [reproduced at tab 50].

vocal or other, that betrays an awareness of guilt, a culpable purpose or criminal design, or the guilty knowledge of inculpatory facts."[41]

Such evidence is usually coupled with other evidence and used to infer the *mens rea* of the crime, from which the guilt of the crime itself is sometimes then inferred.[42] If the factual allegations of the case are not in question, the only inference needed from the conduct would be the *mens rea*.

2. Circumstantial Evidence:

As has been mentioned above, "consciousness of guilt" belongs to the broader category of circumstantial evidence. Circumstantial evidence is indirect evidence that is regularly admitted by domestic and international courts and tribunals[43] when the facts are not available to directly prove responsibility and the courts must make inferences of fact[44] from mere circumstances.[45] Because circumstantial evidence is inconclusive as a sole unit of evidence, it must be weighed in connection with other proof.[46]

3. Mens Rea:

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[41] *See supra* footnote 37, *Evidence From the Mind of the Criminal Suspect,* at 1142. [reproduced in the accompanying notebook at tab 51].

[42] Andrew Palmer, *"Guilt and the consciousness of guilt": the Use of Lies, Flight and Other 'Guilty Behaviour' in the Investigation and Prosecution of Crime,* 21 UNIV. MELBOURNE L. REV. 95, 97 (1997). [reproduced in the accompanying notebook at tab 46].

[43] George Dobry, *The Use of Circumstantial Evidence to Establish International Responsibility*, Transactions of the Grotius Society, Vol. 44, Problems of Public and Private International Law, Transactions for the Year 1958-59, 63-76, 67 (1958), *citing* the Judgment of the Corfu Channel Case [reproduced at tab 38]; *see also* Corfu Channel Case (Ireland v. Albania), 1949 I.C.J. (April 9th) (majority judgment and separate opinion of Judge Azeveds) *available at* http://www.icj.org [reproduced at tab 16].

[44] *Id.* at 65.

[45] *See supra* footnote 40, Prosecuting Raskolnikov, at 56. [reproduced at tab 50].

[46] *Id.*

Though an individual who committed a wrong may be guilty[47] of a crime, guilt[48] alone is generally not enough to convict an individual of a crime because in addition to commission of the act, the prosecutor must prove that a defendant had the state of mind legally required, by statute or at common law, to convict for the crime; such state of mind is commonly referred to as *mens rea*.[49] William Schabas, Professor of Human Rights Law at the National University of Ireland in Galway and Director of the Irish Centre for Human Rights, offers the following explanation of *mens rea*:

> *Mens rea* is derived from a maxim of legal Latin used to refer to the mental (or moral or psychological) element of crime: actus non facit reum nisi mens sit rea. Literally, it is said to mean "guilty mind."[50]

It is a commonly held belief that "the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."[51] The belief that to attach criminal liability it is necessary to find the requisite *mens rea* is based on the theory that "punishment should depend upon moral guilt and evil-doing."[52] The modern trend in *mens rea* is a shift towards meaning "an intention which unduly endangers social or public interests."[53]

As criminal convictions are based on the accused physically commiting acts while

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[47] In terms of criminal law, Black's Law Dictionary defines guilty as "Having committed a crime; responsible for a crime." BLACK'S LAW DICTIONARY, 727 (Bryan A. Garner, ed., Thomson West 8th ed. 2004). [reproduced in the accompanying notebook at tab 31].

[48] As defined by Black's Law Dictionary, guilt is "the fact or state of having committed a wrong, especially a crime." *Id.*

[49] *Id*. at 1006, defining *mens rea*.

[50] William A. Schabas, *Mens Rea and the International Criminal Court for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1015 (2003). [reproduced in the accompanying notebook at tab 49].

[51] *Id. quoting* Brend v. Wood, 175 L.T.R. 306, 307 (1946) and Harding v. Price, 1 All E.R. 283, 284 (1948).

[52] Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 988 (1932). [reproduced in the accompanying notebook at tab 48].

[53] *See supra* footnote 50, *Mens rea* and the International Criminal Court for the Former Yugoslavia, at 1017. [reproduced in the accompanying notebook at tab 49].

intending or knowing the criminal consequences, *mens rea* has become a presumed requirement in both domestic and international criminal law and criminal law does not, generally, consider wrongful actions that are accidental or involve vicarious liability blameworthy.[54] An exception to this, however, is strict or absolute liability, "where a person may be convicted of a serious offence absent any proof of intent or *mens rea*."[55]

The level of culpability the accused possesses is dependent upon his state of mind.[56] The main categories of mental state include intent, knowledge, recklessness and negligence, which can be either gross (culpable) or simple (inadvertent).[57] While intent and knowledge are usually considered two separate levels of *mens rea* in the common law system, they often unite as one in the civil law system.

a. Intent[58]

According to Black's Law Dictionary, criminal intent and specific intent are synonymous with each other, and to possess either,[59] the state of mind that an accused must have is the mental resolution to "commit an *actus reus*,"[60] and "accomplish the precise criminal act that one is later charged with,"[61] "without any justification, excuse or other defense."[62] Antonio Cassesse,

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[54] *Id.*

[55] *Id.* at 1015.

[56] Cherif M. Bassiouni, Crimes Against Humanity in International Criminal Law 394 (Kluwer Academic Publishers, 1999); [reproduced in the accompanying notebook at tab 29].

[57] *Id.*

[58] Black's law dictionary, 825, defines intent as "the state of mind accompanying an act, especially a forbidden act," or "the mental resolution" to commit that act. *See supra* footnote 47, Black's Law Dictionary at 825. [reproduced in the accompanying notebook at tab 31].

[59] *See supra* footnote 47, Black's Law Dictionary, at 825-6, commentary on defining intent. [reproduced in the accompanying notebook at tab 31].

[60] *Id.* defining criminal intent.

[61] *Id.* defining specific intent.

former Judge and President of the UN International Criminal Tribunal for the Former Yugoslavia, offers a simpler definition, "the will to bring about a certain result" and provides the example that if "I use a gun to shoot at a person because I want to kill him" this means I intended it.[63]

The definitions given by Black's Law Dictionary and Cassesse work very well for common law systems. As mentioned above, however, in the civil law system, intent is often united with the *mens rea* of knowledge; consequently, the above definitions do not adequately describe the civil law understanding of intent. A more adequate definition of intent is found in the Model Penal Code of the American system, (MPC), which refers to intent as meaning "purposely" and not only includes the meaning as understood in the above definitions by Black's Law Dictionary and Cassesse, but includes an alternative category. The alternative definition provides that the accused acts with intent "if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes they exist."[64] While in the common law system, the primary definition of intent mentioned above is preferred, the use of the alternative definition of intent in the MPC may imply that we are moving towards a lesser standard of intent more similar to that found in the civil law system, though the codes of other states do not necessarily reflect this notion.[65]

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[62] *Id.*defining criminal intent.

[63] ANTONIO CASSESSE, INTERNATIONAL CRIMINAL LAW 161 (Oxford University Press 2003). [reproduced in the accompanying notebook at tab 32].

[64] ALI Model Penal Code, § 2.02, defining purposely (Proposed Official Draft 1962), *available at* http://www1.law.umkc.edu/suni/CrimLaw/MPC_Provisions/model_penal_code_default_rules.htm [reproduced in the accompanying notebook at tab 4].

[65] *See for example*, New York Penal Law § 15.05.3, defining intent, *available at* http://wings.buffalo.edu/law/bclc/web/NewYork/ny1-2.htm. [reproduced in the accompanying notebook at tab 5].

Of relevance to the question of how "consciousness of guilt" evidence may be used as circumstantial evidence of *mens rea*, Black's Law Dictionary refers to implied intent as an individual's "state of mind that can be inferred from speech or conduct, or from language used in an instrument to which the person is a party."[66] Though it does not provide further details or examples, this definition recognizes the possible importance of "consciousness of guilt" evidence in proving intent.

b. Knowledge

Knowledge is simultaneous with awareness and is very similar to the second definition of intent given by the MPC, as discussed above. The New York Penal Law nicely summarizes this concept, stating that, "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that is conduct is of such a nature or that such circumstances exist."[67]

The MPC, however, distinguishes between knowledge of the nature of the conduct of an accused or the attendant circumstances, and knowledge of the result of his conduct.[68] An accused has knowledge of the attendant circumstances or nature of his conduct if "he is aware that his conduct is of that nature or that such circumstances exist."[69] He has knowledge of the result of his conduct if "he is aware that it is practically certain that his conduct will cause such a result."[70] This distinguishing factor points out that to be convicted of a crime on the basis of the

[66] *See supra* footnote 47, Black's Law dictionary, at 826, defining implied intent. [reproduced in the accompanying notebook at tab 31].

[67] *See supra* footnote 65, New York Penal Law, § 15.05.3, defining knowledge. [reproduced in the accompanying notebook at tab 5].

[68] *See supra* footnote 64, MPC § 2.02, defining knowledge. [reproduced in the accompanying notebook at tab 4].

[69] *Id.*

[70] *Id.*

mens rea of knowledge, in combination with the act, it is not always necessary for an accused to know both the nature of the conduct or circumstances and the results.

Further, to convict an accused of knowledge of attendant circumstances or nature of his consequences is less burdensome than to convict him of knowledge of the results, given that knowledge of results requires "practical certainty." Again, as discussed above, in most cases in the civil law system, unless it is a crime that calls for specific intent (such as genocide), this understanding of knowledge can be seen as sufficient to establish intent that results in conviction. The civil law use of knowledge consists of a broader definition, as contained in the MPC.

Unlike intent, which has its own category for implied intent in Black's Law Dictionary that provides for an inference of intent, the only mention of inferred knowledge in Black's Law Dictionary is in regard to the Uniform Commercial Code's, (UCC) related definition of "notice", meaning "having received information from which one could infer the existence of the relevant fact."[71] While the codes and definitions of knowledge are somewhat limited, at common law, cases have held that, amongst other things, an accused has knowledge "when he has notice of facts which would put one on inquiry to the existence of that fact."[72] So, while the UCC is an American commercial model that is not properly applied to international criminal law, its definition of notice in correlation with the common law cases helps explain when knowledge can be inferred and therefore when "consciousness of guilt" evidence may be used. The very definitions of knowledge, though, including awareness of "attendant circumstances" makes more

[71] *See supra* footnote 47, Black's Law Dictionary, at 888, defining knowledge. [reproduced in the accompanying notebook at tab 31].

[72] BARBARA E. BERGMAN & NANCY HOLLANDER, 1 WHARTON'S CRIMINAL EVIDENCE §§1:8, 3:20, 4:5, 4:31, 4:32, 4:33, 4:34, (West Group,15th ed. 1997). [reproduced in the accompanying notebook at tab 30].

explanation of this unnecessary, because showing knowledge may be very reliant on circumstantial evidence of the conduct of the accused.

c. Recklessness

"Recklessness is the conscious disregard of an objectively substantial and unjustifiable risk."[73] Recklessness is not uniformly applied, but some jurisdictions say that for this *mens rea* to attach, the disregard of such risk must be "a gross deviation from the standard of conduct that a reasonable person would observe in the situation."[74] Because recklessness is a lower standard than knowledge or intent, it is only sufficient for conviction of a crime under certain given exceptions, one of which we will see below.

d. Negligence

The MPC states that: "A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct."[75] While negligence can be either gross or simple, to constitute the *mens rea* for a crime, it generally has to be gross and as a result, the MPC goes on to describe the requirements of gross negligence without specifying it as "gross." Those requirements are set forth below.

1. Gross Negligence[76]

For negligence to be considered gross, the American Law Institute suggests that **"**The risk must be of such a nature and degree that the actor's failure to perceive it, considering the

[73] *See supra* footnote 64, MPC § 2.02. [reproduced in the accompanying notebook at tab 4].

[74] *See supra* footnote 65, New York Penal Law § 15.05.3. [reproduced in the accompanying notebook at tab 5].

[75] *See supra* footnote 64, MPC § 2.02, defining knowledge. [reproduced in the accompanying notebook at tab 4].

[76] While there are several views available on each of the *mens rea*, they are generally clear and in tune with each other. In the subject of gross negligence, however, there is a lot of uncertainty and conflicting discourse, which is why I decided to give this section more treatment than the others.

nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."[77] In contrast, Antonio Cassesse describes gross negligence as "failure to pay sufficient attention to or to comply with certain generally accepted standards of conduct thereby causing harm to another person when the actor believes that the harmful consequences of his action will not come about, thanks to the measures he has taken or is about to take."[78] While the definition Cassesse gave seems to be in the same vein as that of the MPC,[79] there are a few differences between the two descriptions.

First, while in the MPC definition the actor does not perceive that the harmful consequence will happen the actor Cassesse describes affirmatively believes the consequence will not occur. This is not synonymous in terms of mental state. For example, assume an individual driver who is in a great rush to get to work on time in the morning rushes through a marked school zone with a speed limit of 20 miles per hour at a raging speed of 60 miles per hour at 8:25, knowing that the school houses children ranging in ages from 3-10 and school begins at 8:30.

Under the MPC, this would seem to constitute gross negligence because the risk that he could hit a child is of such a nature and degree that his failure to perceive it knowing the circumstances and given his conduct involves a gross deviation from the standard of care that a reasonable person would observe in his situation. Presumably, a reasonable person would understand that if the marked speed is 20 miles per hour, 60 miles per hour far exceeds the constructs of safety and that if a little child crossed the street in front of him, as is most likely

[77] *See supra* footnote 64, MPC § 2.02, defining knowledge. [reproduced in the accompanying notebook at tab 4].

[78] *See supra* footnote 63, International Criminal Law, at 176. [reproduced in the accompanying notebook at tab 32].

[79] *Id.*

just before school begins, he would not be able to stop quickly enough and would likely hit that child. His purpose of being to work on time does not justify or excuse this.

Under the description given by Cassesse, however, while the driver has clearly failed to pay sufficient attention to or to comply with certain generally accepted standards of conduct (driving near the posted limit), he would not possess the *mens rea* of gross negligence unless he actually hit a child or another person in the street and he had taken or prepared to take measures that, though insufficient, he believed would prevent him from hitting the individual. It therefore seems that in the MPC the guilt attaches simply by taking the risk whereas in the description given by Cassesse the guilt attaches only by taking the risk and causing the result.

Further, while under the MPC the driver's failure to perceive the risk is sufficient whether or not he took any measures to prevent it, under the description given by Cassesse instead of merely failing to perceive the risk the driver would have to take an insufficient measure to prevent it and believe this was enough. So, for example, the driver would meet the description given by Cassesse if under the same fact pattern he put on glasses and then believed that he could not hit a child or other individual because he would now see so sharply that he would be able to stop quickly if needed to, and he subsequently was not able to stop quickly enough and hit a child with his car.

The inconsistency in defining gross negligence is problematic when it comes to application in the international tribunals because the two standards could have very different results. There are two concepts that may be carried over from both definitions.

First, though under the MPC a person may be deemed reckless even if they have not taken any measures, while the definition given by Cassesse suggests that to be deemed reckless a person must have taken measures that make him feel his conduct will be safe enough, these two

definitions are not necessarily incompatible with each other in this regard. It is possible to interpret the MPC definition as if the accused was not required to take measures because he may not be aware that they were needed – perhaps the first important concept is that in both cases the accused acted believing that his conduct was safe.

Second, while there is a difference between the definition given by Cassesse that requires the actor to believe the consequences will not occur and the MPC actor not perceiving that the consequences will occur, as discussed above, both could conceivably be grouped into a larger category – the converse of believing the consequences will occur – in other words, neither actor believes that the consequences will occur.

More problematic is whether the consequences actually must result. It seems that this is determined based on the particular crime. Many policy considerations involve balancing the rights of the victims to seek retributive justice against the need to preserve the integrity of the tribunal by ensuring a fair trial for the accused. Where the consequence has not occurred, it seems the balance would naturally weigh towards the accused. It is more important in terms of the policy of preserving the integrity of the tribunal that to attach guilt the consequence must have actually occurred. When, however, a court uses an objective test to determine the mental state of the accused, simple negligence is the applicable standard.[80]

2. Simple Negligence

To commit simple negligence, an actor simply fails to act as a reasonable person and to foresee the natural consequences of his conduct.[81] As mentioned above, criminal culpability

[80] WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., 1 SUBSTANTIVE CRIMINAL LAW §§ 5.1(b), 5.1(c), 5.2, 5.4, & 5.5, at 5.4(a), 368 (West Publishing Co. 1986). [reproduced in the accompanying notebook at tab 33].

[81] *See supra* footnote 50, *Mens Rea and the International Criminal Court for the Former Yugoslavia*, at 1033. [reproduced in the accompanying notebook at tab 49].

does not usually attach to this *mens rea*, but "under narrow circumstances, the international criminal tribunals have found negligence to justify conviction of a crime against humanity."[82]

For the MPC, simple negligence basically differs from gross negligence in terms of degree alone. For example, under the MPC, the same driver who was in a rush to get to work in the morning and driving through a school zone may be guilty of only negligence rather than gross negligence if he is driving 30 miles per hour under the circumstances instead of 60.

B. Applying "consciousness of guilt" to the Eichmann Trial and the ICTR

1. Potential Use of "consciousness of guilt" in the Eichmann Trial

Though Eichmann had fled the country and used a false identity and this could have been used as evidence of "consciousness of guilt," the Israeli court only discussed his false identity in terms of jurisdictional issues and not in terms of circumstantial evidence of the requisite *mens rea*. However, the court did point to the use of "consciousness of guilt" evidence in regard to the Nazi implementation of the final solution, stating:

> The extensive measures taken by the Nazis to efface the traces of their crimes, such as the disinterment of the dead bodies of the murdered and their cremation into ashes, or the destruction of the Gestapo archives before the collapse of the Reich, clearly prove that the Nazis knew well the criminal character of their enormities.[83]

2. Use of "consciousness of guilt" in the ICTR

a. Potential Use of "consciousness of guilt" in the Seromba Trial

Though the Prosecutor argued in the closing argument that Athanese Seromba's assumption of a false identity provided circumstantial evidence that he possessed the *mens rea* of knowledge,[84] the Tribunal referred to this fact only in the limited sense of being an aggravating

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[82] *Id.*

[83] *See supra* footnote 8, Prosecutover v. Eichmann, at 4. [reproduced in the accompanying notebook at tab 17].

[84] *See supra* footnote 20, Prosecutor v. Seromba. [reproduced in the accompanying notebook at tab 11].

circumstance[85] for purposes of sentencing.[86] The aggravating and mitigating circumstances they pointed to, however, do seem to have a link to both identity and character, and the strength of the *mens rea* the individual possessed, as the Tribunal states that in considering the practices of Rwanda to determine sentencing it "finds that life imprisonment is usually reserved for those who held positions of authority and planned and ordered atrocities to be committed – or, for crimes to be committed with particular zeal and sadism."[87] For example, Seromba's status as a respected Catholic priest, whom the Tutsis, though undeserved, trusted enough to seek refuge with is an aggravating circumstance. His flight and assumption of false identity were counted as aggravating circumstances as well, the court noting that other priests who were present did not follow the same course.[88]

While the court only explicitly mentioned Seromba's false identity as evidence of "consciousness of guilt," there were other facts established that could have provided circumstantial evidence of *mens rea* as conduct exhibiting "consciousness of guilt." The following paragraphs below identify conduct taken by Athanese Seromba that the court acknowledges as fact but does not refer to as evidence of *mens rea* based on "consciousness of guilt" and attempts to complete the reference. Incidentally, there were also a few mitigating factors, and one seemed to demonstrate a decreased "consciousness of guilt" – that he turned himself in voluntarily.[89]

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[85] *Id*. at line 28-30.

[86] *Id.* at line 12.

[87] *Id.* at lines 18-21.

[88] *Id*. at lines 25-30.

[89] *Id.* at lines 33-34.

(1) The first potential example of "consciousness of guilt" is that Athanese Seromba removed sacred objects from the church that were required for the celebration of mass, supposedly with a view to respecting the holy sacrament, and refused to celebrate mass in the church during the incidents.[90] Because Catholics should participate in sacraments only when they are free from sin either by having only committed only pure actions or by being forgiven after a confession and a proper act of contrition, the removal of such items and the refusal to celebrate mass could be very indicative of a "consciousness of guilt" to the extent that it occurred after the commission of the crimes or with the knowledge that the crimes would be committed.

(2) The second potential example of "consciousness of guilt" is that during the above described events of April 15, 1994, Athanese Seromba asked the assailants to stop the killings to pick up the bodies that littered the church premises, but then allowed the killings to proceed.[91] Athanese Seromba's concern that the bodies be removed could also demonstrate "consciousness of guilt" in that it may have been an attempt to cover up the acts.

(3) The third potential example of "consciousness of guilt" is that there was a bulldozer at the church to pick up bodies,[92] and after meeting with some communal authorities, Athanese Seromba verbally encouraged the bulldozer operator to destroy the church, even giving him instructions as to "the weak points of Nyange church."[93] The destruction of the church led to the death of about 1,500 people who had sought refuge inside.[94] Urging the destruction of the church may show some "consciousness of guilt" either in regard to Athanese Seromba's feelings

[90] *Id.* at 8, lines 13-18.

[91] *Id.* at 11, lines 22-25.

[92] *Id.* at 12, lines 27-28.

[93] *Id.* at 14, lines 21-23.

[94] *Id*. at 14, lines 35-36.

about purifying himself from the incidents that had occurred there or covering the tracks of himself and the other perpetrators. Finally, that the bodies were buried in mass graves is a clearer indication of "consciousness of guilt"; however, this could not be used against Seromba to determine *mens rea* as it has not been determined that Seromba ordered the burial.[95]

b. Potential Use of "consciousness of guilt" in the Nchamihigo Trial

Without considering evidence of Nchimihago's "consciousness of guilt" to establish *mens rea*, the court could choose to do as the Israeli court did in the Eichmann trial where the "consciousness of guilt" of the Nazis was sufficient and followed by little analysis of Eichmann's own "consciousness of guilt." Nchimihago's membership in the Tuvindimwe is analogous to Eichmann's membership in the Nazi party. The indictment indicates that the Tuvindimwe is a "clandestine group" of radical Hutus whose main purpose was to support the militant pro-republic political parties, such as the CDR (coalition for the defense of the Republic).[96] The extent to which missions and conduct of this group were actually hidden could point to "consciousness of guilt" that has a sufficient nexus to the crimes in question to provide circumstantial evidence of *mens rea* for all members. Because Arendt's "new form of criminal without *mens rea*" has not been accepted, however, inferring Nchamihago's guilt from his membership in the group would lead to the perception of an unfair trial and while Nchimihago's association with the Tuvindimwe should not be ignored, it should be coupled with evidence of his own "consciousness of guilt" as such evidence is available. If factually established, the following allegations could be used as circumstantial evidence of "consciousness of guilt" that points to *mens rea*:

[95] *Id.* at 15, lines 9-11.

[96] *See supra* footnote 29, Simeon Nchamihigo, Second Revised Amended Indictment, at page 2, paragraph 6. [reproduced in the accompanying notebook at tab 10].

(1) The first possible evidence of Nchamihigo's "consciousness of guilt" is the allegation that Simeon Nchamihigo rewarded killers with beer[97] and food.[98] This post-crime conduct shows a sense of camaraderie and approval for the conduct of the killers soon after the crime, from which his approval before and during the conduct could be inferred. Such approval is highly indicative of *mens rea*.

(2) The second possible evidence of Nchamihigo's "consciousness of guilt" is that after more than 22 people were killed on Nchamihigo's orders, they were thrown either into the Gataranga River or into mass graves,[99] and after 15 Tutsi were killed following Simeon Nchamihigo's orders, their bodies were thrown into a latrine in Gapfumu's compound.[100] Because these repeated occurrences of post-crime conduct could indicate that Nchamihigo was attempting to get rid of the bodies and therefore cover the criminal conduct of himself and his subordinates, the evidence can be used circumstantially to infer that he knew the conduct was criminal and wrong.

(3) The third possible evidence of Nchamihigo's "consciousness of guilt" is the allegation that after ordering 13 FAR soldiers removed from jail and killed, Nchamihigo ordered their bodies removed and buried.[101] This conduct, while similar to the last evidence, is stronger because instead of his subordinates merely dumping the bodies after carrying out his orders to kill the victims, this episode includes a more substantial and direct order to clear the scene and hide the bodies. Because this seems to be the strongest piece of circumstantial evidence in terms

[97] *Id.* at page 9, paragraph 35.

[98] *Id.* at page 10, paragraph 37.

[99] *Id.* at page 11, paragraph 43.

[100] *Id.* at paragraph 42.

[101] *Id.* at page 18 paragraph 68-70.

of "consciousness of guilt" related to Nchimihago's case, an inference of *mens rea* on this basis should have stronger weight than the other pieces of evidence.

C. "Consciousness of guilt" applied to Criminal Responsibility under the ICTR

1. Levels of Individual Criminal Responsibility Under the ICTR

a. Individual Criminal Responsibility as Principal

In the ICTR, the principal is held criminally responsible under Article 6(1),[102] which defines the most straightforward level of criminal responsibility. Beyond principal responsibility, there are several other levels of criminal responsibility, including command responsibility, joint criminal enterprise, and aiding and abetting. "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime…shall be individually responsible."[103] For individual criminal responsibility to attach, 'there is an element of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime' as well as conduct that constitutes participation in an illegal act.'[104] This satisfies intent as knowledge.[105] The application of individual criminal responsibility to Command Responsibility and Joint Criminal Enterprise call this standard into question.

b. Individual Criminal Responsibility for Aiding and abetting

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[102] Statute of the International Tribunal for Rwanda, adopted by Security Council on 8 November 1994, Article 6(1) U.N. Doc. S/RES/955 (1994), *available at* http://69.94.11.53/ENGLISH/basicdocs/statute.html [reproduced in the accompanying notebook at tab 1].

[103] *Id.*

[104] Book Chapter: Yusuf Aksar, "Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court," Routledge Taylor & Francis Group, London and New York, chapter , 84-112, 86. [reproduced in the accompanying notebook at tab 28].

[105] *Id.*

Another level of individual criminal responsibility is aiding and abetting. "Aiding indicates giving assistance to someone, while abetting may involve facilitating the commission of an act by being sympathetic to it," and either conduct is sufficient to establish this level of individual criminal responsibility.[106] One can be responsible for aiding, abetting, or being an accessory to any of these things if one has given moral support, somehow encouraged, have knowledge of the crime before or after and one gave advice, contributive actions, or financial support.[107] The actual *mens rea* for aiding and abetting is knowledge that one's conduct is assisting or facilitating the relevant illegal conduct[108]

c. Individual Criminal Responsibility for Command Responsibility

Command responsibility is prosecuted under ICTR Statute Article 6(3).[109] Command responsibility can be either direct if there are documents indicating that the superior actually ordered the violations,[110] or indirect if there is no evidence that the superior ordered the violations but that he exercised effective control over the subordinate who committed the crimes and failed to prevent, halt or punish the criminal conduct.[111] Courts have rejected a strict liability standard time and again, saying that the requisite *mens rea* is knowledge[112] – either they knew or should have known, had information that should have led to an investigation resulting in

[106] Prosecutor v. Akayesu, ICTR-96-4-T, Judgment of 2 September 1998, 6.2 para. 242, 243. [reproduced in the accompanying notebook at tab 8].

[107] *See supra* footnote 104, Implementing International Humanitarian Law, at 90. [reproduced in the accompanying notebook at tab 28].

[108] *Id.*

[109] *Id.* at 97.

[110] *See supra* footnote 102, Statute of the ICTR, Article 6(3), [reproduced in the accompanying notebook at tab 1].

[111] *See supra* footnote 104, Implementing International Humanitarian Law, at 90. [reproduced in the accompanying notebook at tab 28].

[112] Prosecutor v. Bagilishema, ICTR-95-1, Judgment of 7 June 2001, Chapter III. Applicable Law. [reproduced in the accompanying notebook at tab 9].

knowledge, or must have known judging from the surrounding circumstances.[113] Where the crime is genocide, command responsibility is treated as sufficient to result in criminal responsibility only if the commander had specific intent and should have known that the conduct was occurring.[114]

d. Individual Criminal Responsibility for Joint Criminal Enterprise

The final level of individual criminal responsibility is Joint Criminal Enterprise (JCE). JCE has three required elements: plurality of persons, existence of a common criminal plan, and participation of the accused in the plan.[115] There are 3 types. Basic JCE consists of all co-perpetrators acting together.[116] Systemic JCE involves providing any support to a system that has a criminal purpose.[117] Extended JCE occurs when a violation which is outside the plan but foreseeable as a result of the plan is committed by a co-perpetrator all others may be responsible if they hold the requisite *mens rea* of "advertant recklessness."[118]

2. Actus Reus of Punishable Crimes Under the ICTR

As noted above, individual criminal responsibility cannot attach to the accused unless he possessed intent, as demonstrated through knowledge. Further, to be convicted of a crime, it is necessary that there is sufficient evidence that the accused has committed the *actus reus* of a

[113] *See supra* footnote 102, Statute of the ICTR, Article 6. [reproduced in the accompanying notebook at tab 1].

[114] Prosecutor v. Tadic, IT-94-1-A, Judgment of 15 July 1999, at 227. [reproduced in the accompanying notebook at tab 15].

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] David L. Nersessian, *Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes*, 30 FLETCHER F. WORLD AFF. 81, 87 (2006). [reproduced in the accompanying notebook at tab 44].

punishable crime. For the most part, each of the crimes involves a requirement of the *mens rea* of knowledge, though the type of knowledge differs slightly.

Because both the ICTY and ICTR are prosecuting crimes which occurred in the context of internal conflicts, prohibited conduct is not based on war crimes in terms of an international armed conflict. Rather, prohibited conduct but is based on Article III of the Geneva Convention in regard to an armed conflict, and Article IV of the Additional Protocol II that treats war crimes in the context of an internal conflict, as well as crimes against humanity and genocide.[119] Genocide is defined as killing, serious bodily harm, deliberately inflicting actions against a group to destroy that group, prevent births, and forcibly transfer children from one group or another.[120] To be convicted of genocide, the accused must have specific intent to destroy the group because of their identity as well as committing the *actus reus* of the underlying crimes mentioned above.[121] Crimes against humanity entails deliberately planned widespread systematic attacks against people, including murder, torture, rape, and more, as directed against civilian populations[122] and the accused must have knowledge of the plan.[123]

3. "Consciousness of guilt" applied to the actus reus and mens rea of the ICTR

In most cases, to attach individual criminal responsibility to an accused in the ICTR based on the different levels of criminal responsibility and the requisite *actus reus*, the prosecution could attempt to use circumstantial evidence of "consciousness of guilt" to infer the

[119] *See supra* footnote 102, Statute of the ICTR, [reproduced in the accompanying notebook at tab 1].

[120] Prosecutor v. Jelisic, IT-95-10-A, Judgment of 5 July 2001. [reproduced in the accompanying notebook at tab 12].

[121] *Id.*

[122] *See supra* footnote 102, Statute of the ICTR, Article 3. [reproduced in the accompanying notebook at tab 1].

[123] Prosecutor v. Zoran Kupreskic, et al., IT-95-16, Judgment of 14 January 2000, para. 556.

requisite *mens rea* of actual intent or simple knowledge, whether it be knowledge of the plan, knowledge that the crime is occurring, or knowledge that one's conduct is assisting or facilitating such a crime. The only way that such "consciousness of guilt" evidence would have probative value in convicting an accused of a crime is if the prosecution already established that the accused committed the *actus reus* and the post-crime conduct was directly related to the crime.

For example, in the case of Adolf Eichmann, flight and the use of a false identity would not be enough to convict him without other incriminating evidence regarding his conduct and involvement in the Final Solution, but with such conduct flight and the use of a false identity tends to show that he was aware that he had done something wrong. In the case of Athanese Seromba, his flight and use of false identity would also not be enough to convict him, but the other potential evidence of "consciousness of guilt" could go much further to demonstrate his knowledge. His concern with the disposal of the bodies could show his knowledge of the criminal plan that was occurring, while his refusal to practice mass could show that he was aware that his conduct was assisting and facilitating such a crime. Finally, in the case of Simeon Nchimihago, the evidence of his active membership in the clandestine group could serve as evidence that he had knowledge of the criminal plan and like Athanese Seromba his concern with the disposal of bodies could further this notion, while the demonstrated camaraderie with the killers could show that he was aware that he was assisting or providing moral support to the crime.

As mentioned above, genocide has a higher *mens rea* requirement than the other ICTR crimes, requiring specific intent in addition to knowledge, both as the principal and in command responsibility. In contrast, joint criminal enterprise requires a slightly lower *mens rea* than knowledge – advertant recklessness. As a result, the analysis for using "consciousness of guilt"

evidence differs slightly as circumstantial evidence that an accused has the requisite *mens rea* to be held criminal responsible for their conduct differs slightly for JCE and genocide.

IV. Admissibility of "consciousness of guilt" Evidence in the ICTR

A. General Rules of Admission of Evidence in the Civil and Common Law Systems

While there are more similarities than differences between the American (common law) and Continental (civil law) systems regarding the use of evidence, their differing aspects are reflected in the tribunals. In general terms, the systems of the tribunals more closely match that of the Americans.[124] In terms of the aspect of truth finding, though, the tribunals tend to be more liberal and allow more admission as does the continental system so as to have a complete record.[125]

1. Admissibility of Evidence in the Common Law System

Admissibility of evidence in the American system is determined by relevance, but according to FRE 403 relevant evidence is admissible when its probative value outweighs its prejudicial value.[126]

2. Admissibility of Evidence in the Civil Law System

The primary concern of the civil law systems is probative value.[127] This is partially because the method of witness testimony involves narratives whereas the common law uses questioning, and to get a full account of the witness's story it is imperative to keep the narrative

[124] Christopher B. Kiehl, Memorandum for the Office of the Prosecutor of the ICTR, ISSUE: Procedural Rules Relating to the Admissibility of Evidence of A Consistent Pattern of Conduct in Criminal Trials, 2-3, Fall 2003, *at* http://www.law.case.edu/war-crimes-research-portal. [reproduced in the accompanying notebook at tab 55].

[125] *Id.* at 2-3.

[126] *Id.* at 4-5.

[127] *Id.* at 18.

flowing and let the evidence in.[128] Also, because civil law systems utilize judges rather than juries as the decider of fact, there are more permissive rules of evidence; for example, hearsay is allowed because the system presumes that, unlike a jury, a judge will be able to give it proper weight.

3. **Admissibility of Evidence in the ad Hoc Tribunals**

Both International ad Hoc Tribunals (the ICTR and ICTY) use the same rules and procedures regarding the admission of evidence, with a few minor adjustments. Those adjustments will not be discussed here.

a**. The Rules of Evidence**

Rule 89 allows admission of "documents, books, papers, and other objects" seized from the accused during investigation, and statements of those witnesses who will testify at trial, if they meet three conditions: 1) relevance, 2) they are maintained in inventory, and 3) either a copy of the inventory list is served to the accused with proper notice or the evidence is reviewed by the judge in camera as permissible.[129] The rules are fairly liberal and open to interpretation, stating that the court "shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."[130] If the court feels it is necessary based on how the evidence is obtained, it may request verification of the evidence.[131] In the Tadic trial, though defense counsel pressed the Trial Chamber to follow American evidentiary rules and exclude hearsay statements where they did not provide "circumstantial guarantees of trustworthiness," the Trial Chamber instead held that

[128] *Id.*

[129] ICTR Rules of Procedure and Evidence, Rule 89, *available at* http://www.ictr.org. [reproduced in the accompanying notebook at tab 3].

[130] *Id.* at 89(b).

[131] *Id.* at 89(d).

under Rule 89(C), any evidence with probative value is admissible.[132]

Rule 90 elaborates on the testimony of witnesses, rules 90bis and 91 on issues relating to co-perpetrators, rule 92 to confessions, and rule 92bis to "Proof of Facts Other than by Oral Evidence."[133] While all of these may be pertinent in the various situations that arise in different cases, aside from rule 89, rule 92bis is of particular importance because it alludes to the admission of a written statement by a witness that provides evidence admitted to prove "a matter other than the acts and conduct of the accused as charged in the indictment."[134] This is important because the rule tends to favor admission of written "consciousness of guilt" evidence if it shows post-conduct offense without probative value of the criminal conduct of the accused, especially because the rule states the following factors favor admission: 1) the evidence is of a cumulative nature,[135] 2) relates to character issues of the accused,[136] and 3) relates to factors used in sentence determinations.[137] Such a written statement by a witness will be admissible if it is attached to a declaration, witnessed by an authorized person, that the statements are true.[138] The tribunal may find it unfavorable to admit such evidence, however, if "there is an overriding public interest in the evidence in question being presented orally", it is either unreliable or its prejudicial value outweighs its probative value, or other factors make cross-examination appropriate.[139]

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[132] *See supra* footnote 114, Prosecutor v. Tadic, paras. 555-556. [reproduced in the accompanying notebook at tab 15].

[133] *See supra* footnote 129, ICTR Rules of Procedure, at 90-92bis. [reproduced in the accompanying notebook at tab 3].

[134] *Id.* at 92bis.

[135] *Id.* at 92bis(A)(i)(a)

[136] *Id.* at 92bis(A)(i)(e)

[137] *Id.* at 92bis (A)(i)(f)

[138] *Id.* at 92bis (B).

Rule 93 governs the admissibility of evidence that is relevant to a specific pattern of conduct, basically stating that as it relates to "serious violations of international humanitarian law under the Statute," it "may be admissible in the interests of justice,"[140] and must be disclosed to the defense.[141]

Rule 95 is the ICTR's exclusionary rule of evidence, according to which evidence is inadmissible "if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage the integrity of the proceedings."[142] The rule has four key purposes: (1) discouraging human rights violations in evidence gathering; (2) excluding illegally obtained evidence, such as unreliable evidence obtained by torture; (3) keeping the judicial process pure; and (4) protecting "the fundamental interests of justice with respect to due process and the rule of law."[143] In regard to evidence gathered by national authorities and human rights organizations, the rule is less concerned with the technical requirements than "that the means used to obtain such evidence are not so shocking as to seriously damage the integrity of the proceedings."[144]

b. **Pertinent Case Law from the ad Hoc Tribunals**

While both the ICTY and the ICTR have attempted to balance rules 89 and 95 in determining the admission of evidence, the outcomes have been mixed. In Prosecutor v. Mucic, the ICTY was called upon to resolve the issue of whether the accused persons, who "were

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[139] *Id.* at 92bis (A)(ii).

[140] *Id.* at 93(A).

[141] *Id.* at 93(B).

[142] *Id.* at 95.

[143] *See supra* footnote 2, The International Criminal Tribunal for Rwanda, at 567 (1998). [reproduced in the accompanying notebook at tab 35].

[144] *Id.*

charged with perpetrating international crimes," were entitled to privacy rights regarding search and seizure.[145] In particular, after the accused named Mucic moved to Austria, "ICTY Prosecutors had requested that Austrian authorities search for evidence related to" the allegations, and when an Austrian court issued a warrant to search his apartment, the authorities did so and "seized incriminating evidence, including travel documents, which they sought to use against him at trial."[146] The tribunal found that in spite of irregularities that occurred in violation of Austrian law, the tribunal's more liberal rules regarding admission of evidence allow the judges to use judicial discretion to exclude or admit evidence, even if it was obtained in a manner contrary to human rights.[147] In the particular circumstances, the court decided to admit the evidence in adherence to rule 89(c), which, as mentioned above, allows the admission of any relevant evidence.[148] This was not to say that the accused is not entitled to privacy rights but that it is within the discretion of the court to determine when this has been violated to an extent that it requires excluding the evidence.[149]

In a similar ICTR case, Prosecutor v. Jerome Biamumpaka, the former Rwandan Minister of Foreign Affairs was arrested on charges of perpetrating massacres of Tutsi during the genocide and the authorities in Cameroon seized documents that they failed to turn over to the prosecution.[150] While Biamumpaka was entitled to a right of privacy in the search and seizure, the court found that he had waived this right, though they did not elaborate as to why or how.[151]

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[145] Prosecutor v. Mucic, Case No. IT-96-21-A*bis*, Judgment on Sentence Appeal of 8 April 2003. [reproduced in the accompanying notebook at tab 14].

[146] *Id.*

[147] *Id.* at 23.

[148] *Id.*

[149] *Id.*

While search and seizure cases such as those mentioned above will not be relevant in every instance of "consciousness of guilt" evidence, at times, they will be. The most obvious is the cases where the accused has assumed a false identity and his identity documents are to be used against him, as in the case of Athanese Seromba. The tribunal will consider the relevancy of such documents as balanced against the manner in which they were obtained to determine whether the evidence is to be admitted or excluded. Unless gross violations have occurred, it is likely that the evidence will be admitted. This is best understood in light of the four basic justifications for the tribunal system: "creating an accurate historical record; advancing international jurisprudence and the international rule of law; individualizing guilt; and doing justice."[152]

B. Admission of Circumstantial Evidence in Civil, Common, International Law

1. Admission of Circumstantial Evidence in Civil and Common Law

While both the civil law and common law systems authorize the use of circumstantial evidence, or inferences of fact, a Judge in the civil law system has complete discretion[153] whereas in the common law system there is more concern over whether the jury will give the evidence its proper weight and focus.[154] When the admission of circumstantial evidence is appropriate, it "must be certain, precise and concordant" and the facts on which the inference is formed should lead to a natural "conclusion that the incriminating act has not been committed by

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[150] *Id.*

[151] *Id.*

[152] Gregory A. McClelland, A Non-Adversary Approach to International Criminal Tribunals, 26 Sufolk Transnat'l L. Rev. 1, 30 (2002). [reproduced in the accompanying notebook at tab 43].

[153] *See supra* footnote 43, *The Use of Circumstantial Evidence to Establish International Responsibility*, at 68 [reproduced in the accompanying notebook at tab 38].

[154] *See supra* footnote 36, '*consciousness of guilt'*, at 1, paragraph 1. [reproduced in the accompanying notebook at tab 53].

any person other than the accused and that the basic facts must themselves be certain and their existence established and proved."[155] In other words, "an inference cannot be based on another inference."[156]

2. Admission of Circumstantial Evidence in the International Tribunals

Because the tribunals usually follow the path of civil law in the context of truth-finding evidence, it is natural that the tribunal would be lenient in admitting circumstantial evidence and that these decisions fall under the discretion of the judge. The following quote further demonstrates the breadth of admissibility of circumstantial, or indirect evidence, and offers a possible rationale:

> A condemnation, even to death penalty, may be well-founded on indirect evidence and may nevertheless have the same value as a judgment by a court which has founded its conviction on the evidence of witnesses. It would be going too far for an international court to insist on direct and visual evidence and to refuse to admit, after reflection, a reasonable amount of human presumptions with a view to reaching that state of moral, human certainty with which, despite the risk of occasional errors, a court of justice must be content.[157]

3. Standard of Proof for the admission of circumstantial evidence

The well-known International Court of Justice case, the Corfu Channel case, was aimed at resolving a water dispute between Albania and Ireland. Because the only real evidence in the case was circumstantial, the biggest issue in dispute was what standard of proof should be used for circumstantial evidence.[158] The majority judgment stated that: "Proof may be drawn from

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[155] *Id.*

[156] *See supra* footnote 43, *The Use of Circumstantial Evidence to Establish International Responsibility*, at 68. citing the Duplique of the Corfu Channel Case at page 326, paragraph 30 [reproduced in the accompanying notebook at tab 38].

[157] Corfu Channel Case (Ireland v. Albania), 1949 I.C.J. (April 9th), separate opinion of Judge Azeveds, at 90, *available at* http://www.icj.org [reproduced in the accompanying notebook at tab 16].

[158] *See supra* footnote 43, *The Use of Circumstantial Evidence to Establish International Responsibility*, at 71 [reproduced in the accompanying notebook at tab 38].

inferences of fact, provided that they leave no room for reasonable doubt", but then added that "circumstantial evidence must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion."[159] Therefore, while there is no reason that an international tribunal should not admit circumstantial evidence, it must be relevant and satisfy the standard of proof beyond a reasonable doubt[160] in the interest of fairness, "strictness and formality which are inseparable elements of a just trial.[161]

According to the Australian Courts, the standard of proof for circumstantial evidence is not settled except that if rather than being coupled with other evidence it is the only evidence from which an inference of guilt will be made, circumstantial evidence should be proven beyond a reasonable doubt.[162]

C. Admission of "consciousness of guilt" Evidence

1. Admission of "consciousness of guilt" Evidence in U.S. courts

Both the United States domestic and military courts have historically admitted evidence of "consciousness of guilt" as far back as 1896, when the United States Supreme Court Judgment, Hickory v. U.S. stated as follows:

> It is undoubted that acts of concealment by an accused are competent to go to the jury as tending to establish guilt, yet they are not to be considered as alone conclusive, or as creating a legal presumption of guilt; they are mere circumstances to be considered and weighed in connection with other proof with that caution and circumspection which their inconclusiveness when standing alone require.[163]

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[159] See Supra footnote 157, Corfu Channel Case, majority judgment, *available at* http://www.icj.org [reproduced in the accompanying notebook at tab 16].

[160] *See supra* footnote 43, *The Use of Circumstantial Evidence to Establish International Responsibility*, at 73 [reproduced in the accompanying notebook at tab 38].

[161] *Id.* at 75.

[162] *See supra* footnote 36, '*consciousness of guilt'*, at 5, paragraph 6, citing Edwards v. R. at 210 and R. V. Bogunovic [1999] VSCA 133 at paragraphs 35-39.[reproduced in the accompanying notebook at tab 53].

[163] Hickory v. United States, 160 U.S. 408 (1896). [reproduced in the accompanying notebook at tab 18].

Such evidence is considered under Rule 404(b) of evidence (and likewise Military Rule of Evidence 404(b)), though their interpretation has varied slightly).[164] Rule 404(b) provides a non-exhaustive list of purposes for which it is permissible to admit evidence of other crimes, wrongs, or acts for probative value of something other than character or propensity to commit the crime; while "consciousness of guilt" is not listed, because the list is non-exhaustive it is not precluded.[165] Further, the list does include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,"[166] all of which may be relevant purposes for introducing evidence of "consciousness of guilt." "Rule 404(b) provides examples rather than a list of justifications for admission of evidence of other misconduct. Other justifications, such as the tendency of such evidence to show the accused's "consciousness of guilt" of the offense charged…remain effective."[167] American domestic and military courts will admit evidence of "consciousness of guilt" only if it meets the following three requirements: 1) it supports a finding by the court that the accused actually committed the conduct in question (other crimes, wrongs, or acts); 2) it affects the probability of a probable fact; 3) its probative value substantially outweighs the danger of any unfair prejudice it presents.[168]

2. Admission of specific kinds of "consciousness of guilt" in U.S. courts

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[164] *See supra* footnote 40, Prosecuting Raskolnikov, at 55. [reproduced at tab 50].

[165] *Id*

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[166] *U.S.C.S. Fed. R. Evid. 404.* [reproduced in the accompanying notebook at tab 6].

[167] Manual For Courts-Martial, United States, Mil. R. Evid. 404(b) analysis, at A22-34 (2005), available at http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf [reproduced in the accompanying notebook at tab 7].

[168] *See supra* footnote 40, Prosecuting Raskolnikov, at 55. [reproduced in the accompanying notebook at tab 50].

Regarding specific kinds of "consciousness of guilt" evidence, federal courts have consistently held that efforts to conceal a crime or "obfuscate the facts surrounding" it provide powerful evidence that is, within the contours of Rule 404(b), admissible to show "consciousness of guilt."[169] Flight has also been long accepted as evidence of "consciousness of guilt" in the U.S. courts. The 1896 Supreme Court case, Hickory v. U.S. reiterated the following Western District of Arkansas quote:

> The law recognizes another proposition as true, and it is, that The wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it in this case. Therefore, the law says that if after a man kills another that he undertakes to fly, if he becomes a fugitive from justice, either by hiding in the jurisdiction, watching out to keep out of the way of the officers, or of going into the Osage country out of the jurisdiction, that you have a right to take that fact into consideration, because it is a fact that does not usually characterize an innocent act.[170]

While this statement was criticized by subsequent courts and commentators for its excessive strength, it echoed a general principle that still stands true today. Contemporary federal courts have consistently ruled that evidence of flight, especially when used to avoid arrest, prosecution, or confinement, is admissible as evidence of an accused's "consciousness of guilt," which can lead to an inference of guilt itself.[171] Military jurisprudence, likewise, has long recognized the applicability of such evidence at courts martial.[172] As one legal commentator has noted, while

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[169] *Id.* at 56; *see also* United States ex rel. Foster v. De Robertis, 1983 U.S. Dist. LEXIS 12971, wherein the court admitted evidence that the accused concealed the victim's body as probative of "consciousness of guilt" [reproduced in the accompanying notebook at tab 23]; *see also* United States v. Garland, 39 M.J. 618 (Army CMR 1991), wherein the court admitted evidence that a rape suspect clipped his fingernails and attempted to hide his bed linen as "consciousness of guilt" [reproduced in the accompanying notebook at tab 25]; see also United States v. Bridges, 24 M.J. 915 (Air Force CMR 1991), wherein the court admitted evidence that a man hid the knife he used to stab another man in the chest as "consciousness of guilt" [reproduced in the accompanying notebook at tab 24].

[170] *See supra* footnote 163, Hickory v. U.S. [reproduced in the accompanying notebook at tab 18].

[171] *See for example* Palmer v. Commonwealth, 14 Va. App. 346 (1992). [reproduced in the accompanying notebook at tab 21]; *see also* Langhorne v. Commonwealth, 13 Va. App. 97 (1991). [reproduced in the accompanying notebook at tab 20].

evidence of flight does not give rise to a presumption of guilt, it is "a circumstance which when considered together with all the facts of the case may justify the inference of the accused's guilt."[173]

3. Obtaining "consciousness of guilt" evidence

Whether the "consciousness of guilt" evidence is verbal, behavioral, or documented, it represents "manifestations of a person's cognitive processes"[174] that imply that the suspect's awareness of his own guilt,[175] and may be obtained in a variety of ways.[176] For example, such evidence may be observed by covert surveillance, "spies, informers, or other disguised agents rather than to openly identified law enforcement officers"[177] or it "may have been previously written down or otherwise recorded."[178] Where evidence has been obtained in a covert manner in the United States, issues of privacy rights under the 4th, 5th, and 6th Amendments of the United States Constitution arise.[179] While the ICTR/Y are not governed by the United States Constitution, when evidence is obtained in a covert manner, equivalent concerns may arise in the international tribunals and, as demonstrated in the above mentioned cases, the tribunals resolve privacy issues by balancing ICTR/ICTY Rules of Procedure and Evidence 89(c) and 95.

V. Policy Considerations Regarding the Use of "consciousness of guilt"

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[172] *See supra* footnote 40, Prosecuting Raskolnikov, at 62. [reproduced at tab 50].

[173] *Id.*

[174] *See supra* footnote 37, *Evidence From the Mind of the Criminal Suspect,* at 1139. [reproduced in the accompanying notebook at tab 51].

[175] *Id.* at 1142.

[176] *Id.* at 1141.

[177] *Id*. at 1143.

[178] *Id.*

[179] *Id.*

A. Potential Problems With the Use of "consciousness of guilt"

1. Careless application lowering the credibility and effectiveness of the tribunal and international law

Prosecutors in trials for mass atrocity tend to indict only those individuals in command or leadership roles for crimes that are committed by many and often committed at the behest of the state,[180] and the tribunals often need to exaggerate the culpability of the accused before they can convict; as a result, such trials are often perceived as arbitrary.[181] In cases where a crime was committed under official order, attempting to impose *mens rea* is often superficial[182] because neither those who have given the criminal orders nor those who have followed the criminal orders feel any sense of guilt.[183] Adolf Eichmann expressed this blameless sentiment during his trial[184] and it is also echoed in the words of those accused of participating in the Rwandan genocide,[185] as exemplified by Jean-Paul Akayesu in his trial at the ICTR.[186] As tribunals attempt to assign criminal responsibility, there is always a problem assigning a degree of liability equivalent to the degree of moral culpability of the accused.[187] "International institutions must be

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[180] Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U.L. REV. 539, 571 (2005). [reproduced in the accompanying notebook at tab 40].

[181] Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, COLUM. L. REV. 1751, 1765 (2005). [reproduced in the accompanying notebook at tab 45].

[182] *See supra* footnote 180, *Collective Violence and Individual Punishment*, at 570. [reproduced in the accompanying notebook at tab 40].

[183] *See supra* footnote 14, Punishment, Postgenocide, at 1256 [reproduced in the accompanying notebook at tab 40].

[184] *See supra* footnote 181, *The Banality of Good* at 1764 (2005). [reproduced in the accompanying notebook at tab 45].
Shortly before his execution, Adolf eichmann is quoted as saying, "I have the most profound conviction that I am being made to pay here for the glass that others have broken."

[185] *See supra* footnote 14, Punishment, Postgenocide, at 1290 [reproduced in the accompanying notebook at tab 40].

[186] *See supra* footnote 106, Prosecutor v. Akayesu. [reproduced in the accompanying notebook at tab 8]. At his sentencing hearing, Jean-Paul Akayesu is quoted as saying, "Although the decision of my guilt has already been taken, I am sure in my heart that I am not guilty." [reproduced in the accompanying notebook at tab 8].

sensitive to the effects of what may be perceived as technical decisions on the nations they were created to assist."[188]

In the Tadic case, the ICTY attempted to handle such problems by carefully handling evidence and the issue of Tadic's *mens rea*.[189] The tribunals set forth Tadic's intent in three steps: first they established an atmosphere of discrimination, second they showed that a widespread policy of terrorizing non-Serbs existed, and finally, they linked Tadic's actions to the policies to show that he was aware of the discriminatory policies and acted in furtherance of them.[190] Because of public perceptions that international prosecutions are arbitrary and the societal and individual feeling that those convicted are not guilty, if the ICTR prosecutors wish to utilize evidence of "consciousness of guilt" as circumstantial evidence of *mens rea*, they also need to proceed very carefully. They will need to take extra care to avoid the pitfalls of circumstantial evidence as used to exhibit *mens rea* – double inferences. They will also have to be careful how they obtain such evidence or which previously obtained evidence they use, though the tribunals will likely allow it, the international perception of illegally obtained evidence will hinder the credibility of the tribunal. They also need to be careful not to attach it too much weight.

2. Problems Illustrated by the Trial of John Demjanjuk

While in the case of Athanese Seromba, the Catholic Priest turned himself over to the

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[187] *See supra* footnote 181, *The Banality of Good*, at1772 (2005). [reproduced in the accompanying notebook at tab 45].

[188] *See supra* footnote 14, Punishment, Postgenocide, at 1285 [reproduced in the accompanying notebook at tab 40].

[189] Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2049 (1998). [reproduced in the accompanying notebook at tab 36].

[190] *Id.*

authorities and revealed his own identity, while denying guilt,[191] in the case of Adolf Eichmann, he was captured and refused to give his proper name.[192] Finally, however, he revealed his S.S. number, which matched that of Eichmann and was positively identified.[193] So, in both of these cases, the accused admitted and revealed his own identity. Such partial confessions can be used as reliable evidence of "consciousness of guilt,"[194] but in many cases identifying the accused is dependent upon various types of circumstantial evidence, including witness testimony.[195] When using false identity evidence to show "consciousness of guilt" and establish *mens rea*, since the consequences are likely a conviction for the crime, it is very important to be aware of the potential problems and take necessary precautions, such as verifying evidence, though only required if the tribunal uses its discretion to request it. The case of John Demjanjuk demonstrates this very well.

More than twenty years ago, John Demjanjuk, who had been a U.S. Citizen since 1958, was working as a mechanic in Cleveland, Ohio, when the United States Office of Special Investigations, (OSI), and Israeli investigators revealed Demjanjuk's suspicious entry into the U. S. in 1952 and "lies concerning his past and his assumed identity."[196] On the basis of this circumstantial evidence that could fall under the category of "consciousness of guilt," investigators made a conclusion that Demjanjuk was Ivan the terrible, an infamous Treblinka gas

[191] *See supra* footnote 20, Prosecutor v. Seromba. [reproduced in the accompanying notebook at tab 11].

[192] *See supra* footnote 5, *Giving the Devil His Due* at 44. [reproduced in the accompanying notebook at tab 47].

[193] *Id.*

[194] *See supra* footnote 42, "Guilt and the consciousness of guilt", at 105. [reproduced in the accompanying notebook at tab 46].

[195] *See supra* footnote 5, *Giving the Devil His Due* at 50. [reproduced in the accompanying notebook at tab 47].

[196] *Id.* at 51.

chamber operator[197] and in 1985 the U.S. extradited him to Israel for the first Israeli trial of a Nazi War Criminal since Adolf Eichmann.[198] Though Demjanjuk was initially sentenced to death, Israel later acquitted him, in 1993, after the former Soviet Union released new records that cast doubt on the accuracy of Demjanjuk's identification as Ivan the Terrible; subsequently, he returned to Ohio and was restored to the status of a U.S. citizen.[199] In 1999, however, OSI again brought charges against Demjanjuk and he was convicted of a much lower degree of participation in war crimes of a lesser gravity than Ivan the Terrible had committed; his citizenship was again revoked[200] and he was ordered deported, but since he is now 89 years of age and because no other country will accept him, authorities have determined that he will be allowed to live out the rest of his life in Ohio.[201] CONNECT!

B. Policy in Favor of Using Evidence of "consciousness of guilt"

If ICTR prosecutors take the necessary precautions in utilizing "consciousness of guilt" evidence, it can be very helpful to the ICTR, especially because the convicted individuals do not possess a feeling of guilt. While the legal strategy of using "consciousness of guilt" evidence to infer *mens rea* does not reach the point of creating "a new category of individuals without *mens rea*," it does help satisfy the requisite element of knowledge in the applicable crimes without positively inquiring into the actual state of mind of the accused. In a sense, this strategy seems to satisfy Arendt's suggestions in her criticisms of the Eichmann trial.

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[197] *See supra* footnote 5, *Giving the Devil His Due* at 51. [reproduced in the accompanying notebook at tab 47].

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] I saw this on the local news.

Where there is no direct evidence of *mens rea*, the use of "consciousness of guilt" evidence will mean the difference between conviction and acquittal. If such evidence is fairly applied, justice can be better served by convicting those who have committed the crimes assuming a retributive theory of criminal justice. Though retribution does not actually restore justice because it cannot dissolve the harm done, "it best approximates justice" since "each conviction is an additional opportunity for oppressors to face judicial consequences for their crimes."[202] Besides possibly bringing the victims a sense of fairness or satisfaction because of the consequences the oppressor faces, retribution may begin to "repair the community that he has endangered by his action,"[203] though it will not be sufficient to entirely repair a victimized community as large as Rwanda.[204]

[202] *See supra* footnote 5, *Giving the Devil His Due* at 72. [reproduced in the accompanying notebook at tab 47].

[203] *See supra* footnote 1, *Arendt on Eichmann*, at 491.

[204] For another possible suggestion as to how to repair the conflict in Rwanda, *see supra* footnote 14, Punishment, Postgenocide. [reproduced in the accompanying notebook at tab 40].
The author suggests the use of shaming the accused to establish guilt in them and hopefully induce repentance; he contrasts the accused and the victims in the Rwanda genocide from those in the Final Solution to show why this would work in Rwanda.