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Individual Criminal Responsibility for the Crime of Genocide: The Case of the Former Yugoslavia

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Abstract The atrocities committed during the Second World War intensified international efforts to establish institutions capable of prosecuting individuals for the gravest violations of international law. The Nuremberg proceedings, the adoption of the 1948 Genocide Convention, and the subsequent jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) all contributed to the development of individual criminal responsibility. The establishment of the permanent International Criminal Court (ICC) represented a further institutional development. This study examines the legal definition and constituent elements of genocide, the bases of individual and superior responsibility, available defences, and rules concerning penalties and repeated proceedings. Particular attention is given to the practice of the ICTY and its relationship with the Rome Statute framework. By distinguishing the legal regimes applicable to the ad hoc tribunals and the ICC, the study analyses how international courts attribute personal criminal responsibility while preserving the requirements of specific intent, legality, jurisdiction, and procedural fairness.

Index Terms genocide, former Yugoslavia, Rome Statute, International Criminal Court, International Criminal Tribunal for the former Yugoslavia, individual criminal responsibility

1. Introduction

In periods of prolonged political and armed conflict, the changing balance of power among the parties may expose civilians and vulnerable communities to grave atrocities. Such crimes can involve the deliberate targeting of individuals because they belong to a particular national, ethnic, racial, or religious group. When states and international institutions fail to prevent or respond effectively to these acts, the consequences for the victims and for international peace and security may be profound. The development of international criminal law reflects the recognition that responsibility for the most serious international crimes cannot be treated solely as a matter of relations between states.

The International Military Tribunal at Nuremberg was established after the Second World War to prosecute leading Nazi officials for crimes against peace, war crimes, and crimes against humanity. Although the term “genocide” appeared in the prosecution’s indictment, it was not a separate offence in the Tribunal’s Charter or judgment [1]. The subsequent recognition of genocide as a distinct crime was advanced by United Nations General Assembly Resolution 96(I) of 11 December 1946 and, decisively, by the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide on 9 December 1948 [2], [3]. The Geneva Conventions of 1949 and

the development of international humanitarian law contributed additional rules governing the protection of persons during armed conflict.

The establishment of the ICTY by the United Nations Security Council in 1993 and the ICTR in 1994 created international judicial mechanisms for prosecuting genocide and other serious violations of international humanitarian law in specific conflicts [4], [5]. Their proceedings developed important principles concerning individual culpability, superior responsibility, and the evidentiary demands of proving genocidal intent. The Rome Statute was adopted on 17 July 1998 and entered into force on 1 July 2002, thereby establishing the permanent ICC [6]. Although the ICC and the two ad hoc tribunals are legally distinct institutions, their statutes and jurisprudence can be examined together to trace the development of individual criminal responsibility for genocide. Comparative scholarship on the ICTY and ICTR places these developments in a broader doctrinal context [7]. The judgments arising from the former Yugoslavia are particularly significant because they clarified the criminal significance of the Srebrenica atrocities and the responsibility of persons who planned, committed, or assisted in international crimes [8], [9].

II. Definition of the Crime of Genocide and International Documents

The crime of genocide concerns certain prohibited acts committed with the specific intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such. The word “genocide” combines the Greek word *genos*, referring to a group or race, with the Latin-derived suffix *-cide*, referring to killing. The term was introduced by Raphael Lemkin in the twentieth century and acquired its specific international legal definition through the Genocide Convention [3], [10].

International law criminalizes genocide to protect the continued existence of national, ethnical, racial, and religious groups. Some earlier treaties, including arrangements associated with the Peace of Westphalia, addressed religious co-existence and protections for certain religious communities. However, such historical arrangements did not define or criminalize genocide in its modern legal sense. The emergence of a distinct international prohibition must instead be traced through twentieth-century legal developments, including the Nuremberg proceedings, the United Nations General Assembly’s recognition of genocide as an international crime, and the 1948 Genocide Convention [2], [3], [11]. It is therefore important to distinguish historical forms of minority protection from the later, precisely formulated elements of the crime of genocide.

During the twentieth century, state authorities and other organized actors perpetrated mass atrocities directed against national, ethnic, racial, and religious communities. The Nazi persecution and extermination of European Jews and other victim groups provided a central historical impetus for the development of the modern law of genocide. At Nuremberg, prosecutors used the expression “genocide” when describing certain atrocities, but the Tribunal’s legal findings were framed under the offences established by its Charter, including crimes against humanity [1]. A separate, treaty-based definition of genocide followed in the Convention adopted in 1948 [3].

One of the first express international recognitions of genocide as a crime was United Nations General Assembly Resolution 96(I), adopted on 11 December 1946, which affirmed that genocide constituted a crime under international law and called for measures to prevent and punish it [2]. This resolution was not itself the 1948 Genocide Convention and did not enter into force as a treaty in 1951. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted on 9 December 1948 and entered into force on 12 January 1951 [3]. Its preamble recognizes genocide as a crime contrary to the spirit and aims of the United Nations, while Article I confirms the undertaking of contracting parties to prevent and punish the crime in times of peace or war. Under Article II, genocide consists of any of five specified acts when committed with the requisite intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended

to prevent births within the group; or forcibly transferring children of the group to another group. Article III further provides for punishment of genocide itself, conspiracy to commit genocide, direct and public incitement, attempts, and complicity. The Convention is therefore important not merely because it condemns mass killing, but because it defines a particular offence with a protected-group requirement, specified underlying acts, and a distinctive mental element [3], [11]. This legal structure makes genocide distinguishable from other international crimes that may involve equally serious violence but do not require an intent to destroy a protected group as such.

Although attacks motivated by racism, religious hostility, or extremist ideology may produce extensive human suffering and threaten social coexistence, such violence must be assessed under the distinct legal elements of genocide, crimes against humanity, terrorism-related offences, or domestic criminal law, as appropriate. The perpetrator’s ideological motivation alone does not establish genocide. In particular, the protected-group requirement and the specific intent required by the Genocide Convention must be demonstrated by admissible evidence. This distinction prevents the moral gravity of an atrocity from being confused with its precise legal classification [3], [8].

Article 6 of the Rome Statute incorporates substantially the same definition of genocide as Article II of the 1948 Genocide Convention [3], [6]. It does not simply incorporate Articles 2 and 3 of the 1949 Geneva Conventions, which concern a different body of international humanitarian law. The Rome Statute addresses genocide in Article 6, crimes against humanity in Article 7, and war crimes in Article 8. Understanding these separate provisions is essential when analysing the legal elements of each crime and the personal responsibility of those accused before the ICC.

Another important instrument is the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted in 1968. The Convention expressly addresses genocide, as defined in the 1948 Genocide Convention, among the crimes to which statutory limitations do not apply [12]. Its provisions reflect the international community’s concern that the passage of time should not automatically protect perpetrators of the gravest international crimes from prosecution. The temporal jurisdiction of an international criminal tribunal must nevertheless be considered separately from the non-applicability of limitation periods.

III. International Criminal Courts

The International Military Tribunal at Nuremberg was created under the London Agreement of 8 August 1945 and its annexed Charter to bring leading representatives of the defeated Nazi regime to trial. It exercised jurisdiction over crimes against peace, war crimes, and crimes against humanity. The Tribunal was historically significant because it demonstrated that individuals, including holders of high public office, could incur international criminal responsibility for conduct committed in connection with state authority [1], [13]. The pro-

ceedings provided an important foundation for the subsequent development of international criminal justice, although they did not themselves create the modern treaty offence of genocide. The later Genocide Convention, ICTY and ICTR statutes, and Rome Statute must therefore be examined as distinct stages of legal development.

The ICTY was established by United Nations Security Council Resolution 827 of 25 May 1993 to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 [4]. Its substantive jurisdiction, organization, and procedures derived from its founding Statute and its Rules of Procedure and Evidence, not from the Dayton Peace Agreement. The ICTR was separately established by Security Council Resolution 955 of 8 November 1994 to address atrocities committed in Rwanda and, under the specified conditions, neighbouring states in 1994 [5]. The establishment of the permanent ICC followed the adoption of the Rome Statute in 1998 and its entry into force in 2002 [6]. Unlike the ad hoc tribunals created by Security Council decisions, the ICC rests upon a multilateral treaty and exercises complementary jurisdiction subject to the conditions laid down in that treaty. The tribunals thus share the objective of ensuring accountability but differ materially in their jurisdictional foundations and applicable legal instruments.

Article 25 of the Rome Statute establishes the ICC's jurisdiction over natural persons and their individual criminal responsibility for crimes within the Court's jurisdiction [6]. State responsibility under international law and the criminal responsibility of particular officials are legally distinct, and one does not automatically exclude the other. An individual may incur responsibility by personally committing an international crime, ordering or inducing its commission, or participating through one of the other modes specified in Article 25. The Statute also provides for responsibility of commanders and other superiors under Article 28. A conviction may result in imprisonment and, where authorized, fines, forfeiture, and reparations under the applicable statutory provisions. The precise remedies and enforcement arrangements of the ICC must not be confused with the different sentencing arrangements of the ICTY [4], [6].

Violence directed against civilians can take different legal forms, and the gravity of terrorist acts does not in itself resolve their classification as genocide or another international crime. For the purposes of individual responsibility, legal analysis must focus on the relevant conduct, the protected persons or groups, the required mental element, and the jurisdiction of the tribunal hearing the case. The following discussion therefore concentrates on the armed conflicts in the former Yugoslavia and the institutions established to adjudicate crimes arising from those events [3], [4].

IV. The Establishment of the International Criminal Tribunal for the Former Yugoslavia

The disintegration of the Socialist Federal Republic of Yugoslavia began amid escalating political, national, and ter-

ritorial tensions in the early 1990s. Croatia and Slovenia declared independence in 1991, and Bosnia and Herzegovina subsequently pursued its own independence. Serbia and Montenegro remained in the Federal Republic of Yugoslavia, established in 1992. Competing territorial claims and projects of ethnic control contributed to the outbreak of armed conflict, particularly in Bosnia and Herzegovina [14]. The country's population included Bosniaks, Serbs, Croats, and other communities, and the combination of ethnic diversity, competing nationalist objectives, and external military and political intervention contributed to a complex conflict [13], [15].

Bosnia and Herzegovina held a referendum on independence in late February and early March 1992. The referendum was boycotted by many Bosnian Serbs, while an overwhelming majority of those participating supported independence. Following the outbreak of war, competing political and military formations, with differing forms of external assistance, fought for territory and control. Civilians experienced mass displacement, detention, sexual violence, and other grave violations. Contemporary United Nations accounts estimate that more than 100,000 people were killed during the 1992–1995 war and that approximately two million people were displaced [15]. These figures are more consistent with the established historical record than the earlier, unqualified estimate of over 250,000 deaths. In July 1995, Bosnian Serb forces killed more than 8,000 Bosniak men and boys in connection with the fall of Srebrenica, atrocities that the ICTY subsequently established constituted genocide [8], [9]. The distinction between the broader wartime atrocities and the specific judicial finding of genocide at Srebrenica is crucial to an accurate presentation of the Tribunal's case law.

The international community responded to the escalating conflict through diplomatic initiatives, Security Council measures, sanctions, humanitarian operations, and eventually international criminal proceedings. Security Council Resolution 713, adopted on 25 September 1991, imposed an arms embargo on Yugoslavia; it was not adopted on 25 April 1991 [16]. The embargo had significant and contested consequences for parties entering the conflict with unequal access to armaments. As the war progressed, military operations, international negotiations, and NATO air strikes contributed to changing circumstances on the ground. The General Framework Agreement for Peace in Bosnia and Herzegovina was initialled in Dayton, Ohio, on 21 November 1995 and formally signed in Paris on 14 December 1995 [17]. The resulting peace settlement addressed the political and constitutional organization of Bosnia and Herzegovina, whereas the criminal tribunal's authority had already been created separately by the Security Council.

The Security Council adopted a series of resolutions in response to violations of international humanitarian law in the territory of the former Yugoslavia. Resolution 713 of 25 September 1991 imposed an arms embargo, while subsequent resolutions condemned abuses and emphasized the responsibility of persons who committed grave violations. By Resolution 808 of 22 February 1993, the Council decided that an international tribunal should be established. The decisive

constitutive act followed on 25 May 1993, when Resolution 827 established the ICTY and approved its Statute [4], [16], [18]. These decisions should not be described as creating the permanent ICC, which was a later treaty-based institution. Rather, the ICTY represented a specifically mandated international tribunal whose temporal, territorial, and subject-matter jurisdiction was defined in connection with crimes committed in the former Yugoslavia.

V. Jurisdiction Over the Crime of Genocide

The two judicial systems discussed here must be distinguished. The ICTY's jurisdiction extended to natural persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991, as provided in Articles 1, 6, and related provisions of its Statute [4]. Its territorial jurisdiction included Kosovo as part of the territory of the former Yugoslavia. The ICTY followed its own Rules of Procedure and Evidence, adopted pursuant to Article 15 of its Statute. By contrast, the ICC exercises treaty-based jurisdiction under the Rome Statute, subject to temporal, territorial, nationality, referral, and admissibility requirements, and follows the Rome Statute and its separate procedural instruments [6]. Conflating those two courts can result in incorrect statements about both their authority and the applicable procedural provisions.

The gravity of genocide has also generated important discussion about universal jurisdiction and the duty of states to prevent and punish the offence. Nevertheless, universal jurisdiction exercised by national courts is not identical to the ICC's jurisdiction [19]. The Rome Statute does not confer unrestricted authority to prosecute every instance of genocide wherever it occurs. Instead, Articles 11–13 identify the relevant temporal and jurisdictional conditions, including territorial or nationality links, acceptance of jurisdiction, and referral by the United Nations Security Council [6]. The ICC's jurisdiction is also complementary to national proceedings, as reflected in Article 17. These limitations do not lessen the international prohibition of genocide; rather, they clarify the legal avenues by which accountability may be pursued.

In relation to substantive jurisdiction and applicable law, the ICTY Statute identified several categories of offences. Article 2 concerned grave breaches of the Geneva Conventions of 1949; Article 3 concerned violations of the laws or customs of war; Article 4 expressly provided for genocide; and Article 5 addressed crimes against humanity [4]. These provisions apply to the ad hoc tribunal and should not be attributed to the Rome Statute. The ICC's corresponding subject-matter jurisdiction is set out principally in Article 5 of the Rome Statute, with genocide defined in Article 6, crimes against humanity in Article 7, war crimes in Article 8, and the crime of aggression governed by the Statute's amended provisions [6]. Furthermore, Article 21 of the Rome Statute establishes the sources of applicable law for the ICC, including the Statute itself, the Elements of Crimes, and its Rules of Procedure and Evidence, followed in appropriate circumstances by applicable treaties and principles of international law. The fact that

the former Yugoslavia was party to the Geneva Conventions also matters for the legal characterization of wartime conduct, but the distinction between international and non-international armed conflict must be assessed in accordance with the relevant treaty provisions and customary law [20]. Common Article 3 establishes minimum protections in armed conflicts not of an international character. Accordingly, accurate analysis requires careful identification of the court, the alleged offence, the applicable law, and the factual circumstances of the armed conflict.

The second major category in the ICTY's subject-matter jurisdiction was violations of the laws or customs of war under Article 3 of its Statute. This provision included offences recognized under customary international humanitarian law and drew upon rules reflected in the Hague Conventions and Regulations of 1907 [4]. Relevant prohibitions include treacherous killing or wounding, the unlawful destruction or seizure of property, attacks against undefended places, and other conduct violating established rules of warfare. These provisions must be interpreted alongside the applicable Geneva Conventions and the Tribunal's jurisprudence. They should not be presented as the content of Article 3 of the Rome Statute, which addresses general principles relating to the ICC's relationship with the United Nations and does not itself create the ICTY's offence category.

The third relevant category under the ICTY Statute was genocide, defined in Article 4 in terms closely following the Genocide Convention of 1948. A conviction requires proof of one of the enumerated acts, together with the specific intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such [3], [4]. The same essential definition appears in Article 6 of the Rome Statute, thereby connecting the substantive law of the ad hoc tribunal to the permanent ICC. Genocide may include killing, causing serious bodily or mental harm, deliberately inflicting destructive conditions of life, imposing measures to prevent births, or forcibly transferring children of the group to another group. These alternatives should not be conflated with the broader range of acts that may constitute crimes against humanity.

Finally, Article 5 of the ICTY Statute provided jurisdiction over crimes against humanity committed within the conditions specified by that Statute, while Article 7 of the Rome Statute separately defines crimes against humanity for the ICC [4], [6]. The listed offences include, subject to their respective contextual requirements, murder, extermination, enslavement, imprisonment, torture, rape, persecution, and other specified inhumane acts. The distinction between the statutes matters because their jurisdictional contexts and formulations are not identical. In particular, genocide requires a special intent to destroy a protected group, whereas crimes against humanity are governed by a different set of contextual and mental elements.

VI. Elements of the Crime of Genocide

A. Material element

The material element of an offence refers to the conduct and, where required by the applicable definition, its consequences and relevant circumstances. For genocide, the prohibited conduct is specifically enumerated in Article II of the Genocide Convention and Article 4 of the ICTY Statute [3], [4]. The prosecution must prove that at least one qualifying act occurred and that the requisite connection to a protected group is established. As recognized in general criminal law theory, the external and mental elements require separate examination [21]. The material element alone is not sufficient for conviction: it must be considered together with the crime's distinctive intent requirement, as demonstrated in the judgments of the ICTY and ICTR [8], [22].

Article II of the Genocide Convention identifies five alternative underlying acts: killing members of a protected group; causing serious bodily or mental harm to its members; deliberately imposing conditions of life calculated to bring about the group's physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group [3]. The intentional destruction of a group must concern one of the four groups expressly protected by the Convention, namely a national, ethnical, racial, or religious group. Political groups are not included in this exhaustive treaty definition. The ICTY and ICTR have examined the character of prohibited acts, including patterns of killing, the treatment of detained civilians, sexual violence, and deprivation of essential conditions of life, in determining whether the conduct and surrounding circumstances satisfy the material requirements [8], [22]. Forcible displacement does not automatically constitute genocide, but evidence concerning displacement can be relevant to the assessment of the wider conduct and the accused's intent. In particular, decisions arising from the former Yugoslavia demonstrate that the physical acts and the mental purpose behind them must be examined together rather than inferred from a generalized description of wartime atrocities.

International tribunal jurisprudence recognizes that "serious bodily or mental harm" may encompass substantial physical injuries, sexual violence, and severe forms of psychological injury, including the consequences of threats and detention in circumstances of extreme fear. The harm need not necessarily be permanent or irreversible, but it must reach a serious level and satisfy the statutory context [22], [23]. The deliberate infliction of destructive conditions of life can include deprivation of food, essential medical care, or shelter where the facts show that those conditions were calculated to bring about physical destruction of the protected group. These examples do not eliminate the requirement to demonstrate specific genocidal intent. Courts must assess not only the harshness of the conduct, but also the intention with which the conduct was carried out, drawing upon the relevant judgments and the entire evidentiary record [3], [8], [22].

B. Mental element

The mental element of international criminal offences concerns the accused's state of mind in relation to the prohibited conduct and, where necessary, its consequences. Article 30 of the Rome Statute sets out a general rule concerning intent and knowledge unless otherwise provided [6]. Genocide is distinctive because it also requires a specific intent, commonly described as *dolus specialis*, to destroy a protected group in whole or in part. That additional requirement cannot be displaced by proof that the accused knew of a wider conflict, harboured discriminatory prejudice, or committed serious violence without the required destructive purpose.

Genocidal intent refers to the purpose of destroying, in whole or in part, a national, ethnical, racial, or religious group as such. The prohibited act may take any of the five forms listed in Article II of the 1948 Convention, but it must be performed with that specific purpose [3]. Accordingly, the commission of an underlying act and proof of the accused's mental element remain separate questions. An individual may commit murder or participate in persecution without necessarily possessing the special intent required for genocide, although the same conduct may support convictions for other international crimes if their elements are established. The ICTY's jurisprudence on Srebrenica illustrates that the intended destruction of a substantial part of a protected group can fulfil this requirement, taking into account the group's size, prominence, and the effect of the targeted destruction upon the group [8], [9].

Proving a defendant's specific intent is frequently difficult because direct admissions are uncommon. International tribunals therefore examine circumstantial evidence, including the scale and pattern of atrocities, the systematic selection of victims, statements by the accused, the method of operation, and the surrounding historical and military context. Nevertheless, these factors do not establish genocidal intent automatically; the inference must meet the applicable criminal standard of proof. The ICTY's decision in *Prosecutor v. Jelisić* illustrates this distinction: although killings were established, the accused was acquitted of genocide because his specific intent to destroy the protected group had not been proven beyond reasonable doubt [24]. By contrast, the ICTY's Srebrenica jurisprudence established that genocidal intent could be inferred from the coordinated killing of Bosniak men and boys and the broader circumstances affecting the survival of the community [8], [9]. The ICTR likewise discussed the relevance of contextual evidence and patterns of targeted violence when assessing intent in *Prosecutor v. Akayesu* [22]. Such decisions show that genocide analysis requires careful evidentiary reasoning and should not equate every instance of discriminatory violence with the specific offence of genocide.

C. Perpetrators and victims of the crime of genocide

Perpetrators of genocide may be military personnel, political leaders, public officials, or civilians. Neither the Genocide Convention nor the Rome Statute restricts direct criminal

responsibility to those holding military or governmental positions. The protected groups are national, ethnical, racial, and religious groups, and individual victims are harmed because of their membership in such a group [3], [6]. Responsibility may attach to direct perpetrators and, under applicable statutory provisions, persons who order, induce, aid, abet, or otherwise participate in the commission of the offence. The distinction between the responsibility of the individual and responsibility arising from a superior's failure to prevent or repress crimes is especially important.

VII. Individual Criminal Responsibility According to the International Criminal Court

A. Individual Criminal Responsibility

The Rome Statute makes individual criminal responsibility an express foundation of the ICC's jurisdiction. Article 25 provides that the Court exercises jurisdiction over natural persons and identifies different modes by which a person may incur liability for crimes within its jurisdiction [6]. These include committing a crime individually, jointly, or through another person; ordering, soliciting, or inducing its commission; and other forms of participation specified in Article 25(3). Individual culpability must be demonstrated by evidence establishing the elements of the applicable offence and mode of liability. The Court may impose sanctions authorized by the Statute, and reparations may also be ordered under Article 75. It is therefore more precise to describe personal responsibility by reference to the relevant statutory mode of participation than to suggest that every official associated with a criminal event incurs the same liability [6], [25].

Article 25(3)(f) of the Rome Statute addresses attempts to commit crimes within the ICC's jurisdiction. An attempt involves commencing execution by a substantial step toward the commission of the crime, where completion does not occur because of circumstances independent of the person's intentions [6]. A person who abandons the effort to commit the crime or otherwise prevents its completion may avoid liability for an attempt if the abandonment is complete and voluntary. This is distinct from the situation in which a person merely fails to achieve the intended criminal outcome despite continuing to pursue it. In the case of attempted genocide, the prosecution must still establish the mental element applicable to genocide; an incomplete act cannot be treated as an attempt without examining the requisite intent and the statutory elements of attempted commission.

Article 26 of the Rome Statute excludes persons who were under 18 years of age at the time of the alleged commission of a crime from the ICC's jurisdiction [6], [26]. This jurisdictional limitation does not amount to a finding that such conduct cannot be criminal under national law. Rather, it identifies the personal jurisdiction of the ICC as established by the States Parties. The provision also reflects wider concerns within international law about the position of children in situations of armed conflict and the distinct treatment of juvenile offenders. The applicable age must be determined at the time

of the alleged conduct, not at the time of investigation, arrest, or trial.

B. Responsibility of senior commanders

Article 28 of the Rome Statute regulates the responsibility of commanders and other superiors for crimes committed by forces or subordinates under their effective command, authority, or control [6]. This is a separate legal basis of responsibility and should not be confused with direct commission, ordering, or participation under Article 25. For military commanders, Article 28(a) concerns the commander's knowledge or the information that should have made the commander aware of the crimes, together with a failure to take all necessary and reasonable measures within the commander's power to prevent or repress the commission of the offences or to submit the matter to competent authorities. For other superiors, Article 28(b) establishes its own requirements concerning actual knowledge or conscious disregard of clearly indicating information, effective authority and control, and the relationship between the offences and the superior's responsibilities. The elements differ, and courts must apply the appropriate statutory standard to each category of superior.

The doctrine of command responsibility is concerned with effective control and the duty to take reasonable and necessary measures. Under Article 28(a), a military commander may be responsible where forces under effective command and control commit crimes, and the commander knew or, owing to the circumstances at the time, should have known of those crimes but failed to respond as required [6]. The expression "should have known" does not authorize liability without proof of the other statutory conditions, including the relationship between the commander's failure and the offences in question. Knowledge may be inferred from reports, the frequency and notoriety of abuses, or other relevant information, but an inference must be supported by the evidence. A superior's subsequent failure to report known offences may be relevant where the statute requires preventive, repressive, or referral measures, yet responsibility must still be assessed through the applicable elements rather than a presumption that all commanders are automatically guilty of crimes committed by subordinates.

Non-military superiors, such as civilian administrators and political leaders, are governed by the distinct criteria in Article 28(b) of the Rome Statute [6]. The provision requires, among other conditions, that the superior knew or consciously disregarded information clearly indicating that subordinates were committing or about to commit crimes, that the crimes concerned activities within the superior's effective responsibility and control, and that necessary and reasonable preventive, repressive, or referral measures were not taken. The difference between the military and civilian standards is significant and should not be obscured by describing both as a general duty to know. Legal assessment must consider authority in practice, the information available, the superior's capacity to act, and the connection between the omission and the commission of the offences. These distinctions help ensure that responsibil-

ity is individualized rather than attributed solely by rank or official title.

VIII. Circumstances Affecting Criminal Responsibility

The Rome Statute distinguishes grounds for excluding criminal responsibility in Article 31, mistakes of fact and law in Article 32, and superior orders and prescriptions of law in Article 33 [6]. Each ground has specific requirements and must be considered in the context of the offence charged. The availability of a defence cannot be presumed merely because the accused was a soldier, acted during an armed conflict, or was subject to an order. Likewise, the presence of an exceptional circumstance does not displace the prosecution's duty to establish the elements of a crime beyond reasonable doubt.

A. Superior orders

As examined in analyses of Articles 31 and 33 of the Rome Statute [27], a superior's order does not automatically relieve a subordinate of criminal responsibility. The Nuremberg Charter rejected superior orders as a complete defence while recognizing their possible relevance to mitigation in appropriate circumstances [1]. Similarly, the ICTY Statute specified in Article 7(4) that acting pursuant to an order of a government or superior did not relieve an accused of criminal responsibility, although it could be considered in mitigation if the interests of justice required [4]. The Rome Statute adopts its own formulation in Article 33 and must be analyzed separately. In particular, the distinction between an order that is unlawful and one that is manifestly unlawful is important when assessing the Statute's limited exception.

Article 33(1) of the Rome Statute provides a limited exception for certain conduct committed in compliance with orders from a government or superior. The accused must have been under a legal obligation to obey the order, must not have known the order was unlawful, and the order must not have been manifestly unlawful [6]. All of those conditions must be satisfied. Article 33(2), however, expressly provides that orders to commit genocide or crimes against humanity are manifestly unlawful. Consequently, the exception cannot be used to justify participation in genocide on the ground that an accused was merely obeying a superior's instruction. This rule must be distinguished from other potential arguments concerning the accused's mental state or coercion, which are assessed under separate provisions.

B. Mistake

Article 32 of the Rome Statute addresses mistakes of fact and law. A mistake of fact may exclude criminal responsibility only if it negates the mental element required by the crime, while a mistake of law ordinarily does not exclude responsibility merely because the accused misunderstood whether conduct was criminal [6]. For example, a commander who incorrectly believes that a building is a lawful military objective may raise a mistake-of-fact argument if the mistake truly negates an element required for the charged offence. The court

must evaluate the factual circumstances and applicable mental elements; the discovery that a target was in fact a hospital does not itself establish the defence. The precise distinction between factual and legal mistakes is particularly important for genocide, where the prosecution must establish specific intent to destroy a protected group.

C. Legitimate defense (self-defense)

Article 31(1)(c) of the Rome Statute recognizes self-defence and defence of another person under narrowly specified conditions [6]. The response must concern an imminent and unlawful use of force and be reasonable and proportionate to the danger faced. In the case of war crimes, the provision also refers to certain property essential for the survival of persons or for accomplishing a military mission, subject to the statutory conditions. Importantly, the mere fact that an individual took part in a defensive military operation does not automatically exclude criminal responsibility. A person claiming self-defence must satisfy the relevant elements, and the claim cannot be treated as a general justification for conduct directed toward destroying a protected group.

D. Force and threat

Article 31(1)(d) addresses the exclusion of criminal responsibility where conduct is caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against the accused or another person [6]. The Statute specifies that the person must act necessarily and reasonably to avoid the threat and must not intend to cause a greater harm than the one sought to be avoided. The source of duress may be other persons or circumstances beyond the person's control. The existence of fear or pressure alone is insufficient; the precise legal requirements of the provision must be examined in relation to the evidence and the nature of the crime charged.

A duress argument consequently requires analysis of both the threatened harm and the response undertaken by the accused. The court must consider whether the danger was of the kind specified in Article 31(1)(d), whether the response was necessary and reasonable to avoid it, and whether the accused intended to cause greater harm than that avoided [6]. A remote, speculative, or already concluded threat cannot simply be treated as a continuing justification for criminal conduct. Nor is it sufficient for a defendant to state that the conduct occurred under orders or pressure without demonstrating the relevant circumstances. The proportionality-related requirement must be applied as expressed in the Statute, without assuming that every offence committed in circumstances of fear automatically satisfies the defence.

The application of duress under the Rome Statute is therefore conditional rather than absolute. Even where the accused faces imminent death or serious bodily harm, the court must determine whether the conduct was a necessary and reasonable response and whether the accused intended greater harm than the threatened harm [6]. In cases involving genocide, the specific intent to destroy a protected group remains an

independent element of the offence. The legal analysis must distinguish lack of genocidal intent, which may preclude proof of the charged crime, from an affirmative ground for excluding responsibility after the elements of the offence have otherwise been established.

E. Accident

An accident or unintended consequence may be relevant to criminal responsibility, but the Rome Statute does not enumerate a general, independent “accident defence” in Article 31 [6]. Instead, the issue ordinarily concerns whether the prosecution has proved the conduct and the required mental element, or whether a mistake of fact under Article 32 negates that element. In contemporary military operations, the use of surveillance systems, radar, intelligence tools, and remote technologies can be relevant to the assessment of knowledge and intent, but their availability does not automatically establish culpability. The question remains whether the legally required mental state has been proved in the specific circumstances of the alleged offence.

F. Acts of persons with immunity

The official status of an accused does not, in itself, provide a defence before an international criminal tribunal. The Nuremberg Charter and subsequent international instruments rejected the proposition that state office automatically exempted a person from international criminal responsibility [1]. Article 7(2) of the ICTY Statute similarly states that the official position of an accused, including as head of state or government, does not relieve that person of criminal responsibility or mitigate punishment [4]. The Rome Statute contains its own rule concerning the irrelevance of official capacity in Article 27. Questions concerning personal responsibility and official capacity must nevertheless be distinguished from particular issues relating to interstate cooperation and the operation of immunities in specified procedural contexts.

Article 27 of the Rome Statute provides that the Statute applies equally to all persons without distinction based on official capacity. A head of state, head of government, minister, elected official, or other public representative cannot claim that official status alone exempts them from criminal responsibility, and that status does not independently reduce a sentence [6]. Article 27 also addresses the effect of immunities and special procedural rules on the Court’s exercise of jurisdiction. However, the relationship between that provision, the cooperation obligations of States Parties, and Article 98 has generated further legal questions. For this reason, it is more accurate to distinguish the substantive irrelevance of office to individual responsibility from the separate procedural questions that may arise in particular situations.

G. Compliance defense with domestic law

Compliance with domestic law does not automatically preclude individual responsibility for conduct that amounts to a crime under applicable international criminal law. International offences are defined by their own constituent elements,

and national authorization cannot by itself neutralize the prohibition of genocide. Article 33 of the Rome Statute deals specifically with superior orders and prescriptions of law, while Articles 22–24 regulate legality and non-retroactivity [6]. Any argument based on domestic law must therefore be assessed under the appropriate international provisions, rather than assuming that either national authorization or the absence of a domestic conviction determines the outcome of international proceedings.

H. Other circumstances in the statute that impact criminal responsibility

Article 31 of the Rome Statute also addresses mental disease or defect and intoxication under carefully defined conditions [6]. Under Article 31(1)(a), a mental disease or defect can exclude responsibility where it destroys the person’s capacity to appreciate the unlawfulness or nature of the conduct or to control the conduct in conformity with the law. Under Article 31(1)(b), intoxication is treated differently, and the provision includes an important qualification where a person became voluntarily intoxicated in circumstances in which they knew, or disregarded the risk, that they were likely to engage in conduct constituting an ICC crime. These provisions are not general exemptions for anyone experiencing psychological difficulty or having consumed an intoxicating substance. Rather, they require a focused inquiry into the legally specified effects on capacity, the circumstances of intoxication, and the accused’s mental state at the relevant time.

IX. Possible Punishments and Execution of Sentences

The punishment of international crimes illustrates an important distinction between the ICTY Statute and the Rome Statute. Article 24 of the ICTY Statute provided that penalties imposed by the Tribunal were limited to imprisonment, with regard to the general practice concerning imprisonment in the courts of the former Yugoslavia. The ICTY could also order the return of property and proceeds acquired by criminal conduct to their rightful owners [4]. Those provisions cannot be attributed to the ICC. Under Article 77 of the Rome Statute, the ICC may impose imprisonment for a specified term of up to 30 years or, where the extreme gravity of the crime and the individual circumstances justify it, life imprisonment. It may additionally order a fine and forfeiture of proceeds, property, and assets under the relevant conditions [6]. Article 75 separately governs reparations for victims. Neither the ICTY nor the ICC is authorized under these statutory sentencing schemes to impose the death penalty. The distinction is legally significant because the substantive offences may overlap while the sentencing powers and enforcement provisions differ between the two institutions.

The enforcement of imprisonment also depends upon which tribunal imposed the sentence. Under Article 27 of the ICTY Statute, sentences were served in a state designated by the Tribunal from among states that had indicated their willingness to accept convicted persons, subject to Tribunal supervision [4]. For the ICC, the corresponding arrangements are estab-

lished principally in Articles 103–111 of the Rome Statute. Article 103 provides for imprisonment in a state designated by the Court from a list of willing states, while Article 106 concerns supervision of enforcement, and Article 110 governs the Court's authority over any reduction of sentence [6]. These arrangements should not be confused with the sentencing provisions of Article 27 of the Rome Statute, which addresses official capacity, or with the ICTY's separate procedures for pardon and commutation.

X. Ne Bis In Idem

The principle of *ne bis in idem* protects against repeated criminal proceedings for conduct that has already been adjudicated in circumstances covered by the applicable legal rule. Article 10 of the ICTY Statute and Article 20 of the Rome Statute contain related but distinct formulations [4], [6]. Article 20 generally prohibits the ICC from retrying a person for conduct forming the basis of crimes for which the Court has already convicted or acquitted that person. It also addresses the circumstances in which a person previously tried by another court may nevertheless face ICC proceedings, including where the prior proceedings were intended to shield the person from criminal responsibility or were otherwise not conducted independently or impartially in accordance with due process and an intent to bring the person to justice. The precise scope of the rule depends upon the legal proceedings involved and should not be described as an unrestricted right of any tribunal to reopen any national case.

An ICC case following domestic proceedings may appear to affect the ordinary authority of national courts, but the Rome Statute establishes a system of complementarity rather than routine substitution of international proceedings for national criminal justice [6]. The admissibility rules in Article 17 and the safeguards in Article 20 are designed to address genuine national investigations and prosecutions while preventing proceedings used improperly to shield persons from responsibility. The relevant provisions therefore balance accountability with protections against repeated trials and respect for national judicial processes. An assessment of a prior prosecution must be based on the statutory criteria and the specific evidentiary record.

XI. Conclusion

Individual criminal responsibility for genocide is grounded in personal culpability and the particular modes of participation recognized by international criminal law. A person may incur liability for committing genocide, ordering or inducing the offence, attempting it, or contributing through other forms of participation, provided that the applicable statutory elements and the required mental state are proved. The principle does not permit responsibility to be imposed solely on the basis of ethnicity, nationality, political position, or formal association with another accused individual [4], [6].

Under Article 25 of the Rome Statute, the ICC may prosecute natural persons responsible for crimes within its jurisdiction, including genocide. Individual responsibility is separate

from state responsibility, and a conviction must be grounded in a recognized legal mode of participation and proof of the required mental elements [6]. The Statute also establishes superior responsibility under Article 28, subject to different conditions for military commanders and civilian superiors. Command or political position alone is not enough: effective control, the applicable knowledge standard, and the failure to undertake reasonable and necessary measures must be established. Where individual culpability is proved, the ICC may impose authorized penalties, and it may make reparations orders in appropriate circumstances. These provisions underscore the importance of distinguishing direct participation, liability by omission under the superior-responsibility regime, and the separate legal responsibility of states.

The ICTY and ICTR jurisprudence confirms that genocide requires both an underlying prohibited act and the specific intent to destroy, in whole or in part, a protected national, ethnical, racial, or religious group as such [8], [22]. Its material element may take the form of killing, causing serious bodily or mental harm, deliberately inflicting destructive conditions of life, preventing births, or forcibly transferring children to another group. Political groups do not form a separate protected category under Article II of the Genocide Convention [3]. Both civilian and military perpetrators can be responsible where the legal elements are demonstrated. The distinction between genocide and other atrocities depends not simply on the seriousness of violence but on the required connection between conduct, protected group, and destructive intent.

The mental element is particularly important because genocidal intent gives the offence its distinctive character. A person may participate in grave violence without necessarily having the specific purpose of destroying the protected group. A genocide conviction therefore requires proof beyond reasonable doubt that the accused possessed the requisite intent, while other modes of responsibility, including aiding and abetting, must be assessed under their own legal elements. The ICTY's appellate judgment in *Krstić* illustrates the need to distinguish the perpetration of genocide from responsibility for assisting genocide when knowledge and intent differ [9].

To determine whether the required intent has been proved, courts consider the context of the violence, the nature and scale of the attacks, the identification and treatment of victims, statements and conduct of perpetrators, and other evidence capable of supporting an inference of the destructive purpose [8], [22]. The phrase "in part" requires careful analysis of the intended destruction of a substantial part of a protected group. The ICTY's judgments concerning Srebrenica contribute to this inquiry by considering the targeted part of the Bosnian Muslim population and the significance of that community within the wider protected group [9]. Such reasoning preserves the balance between effective prosecution of genocide and the rigorous criminal standard applicable to each accused person.

The Rome Statute establishes a permanent international criminal court whose exercise of jurisdiction is complementary to national criminal jurisdictions. The duty to prevent and

punish genocide also arises from the 1948 Convention, but the jurisdiction of particular national courts and of the ICC must be determined according to their respective legal bases [3], [6]. It is therefore incorrect to assume that the Rome Statute, without more, obliges every state, including every non-party state, to investigate or prosecute each crime listed in the Statute, or that the ICC has unrestricted universal jurisdiction. In practice, accountability can arise through domestic prosecutions, international cooperation, treaty-based jurisdiction, and Security Council referrals where the relevant legal conditions are met. The experience of the former Yugoslavia demonstrates both the importance of international institutions and the necessity of identifying clearly the elements, modes of responsibility, and procedural safeguards applicable in each case. In this way, the legal development from Nuremberg through the ICTY and ICTR to the ICC has strengthened mechanisms of personal accountability without eliminating the basic requirements of legality, proof, and fair trial.

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No original empirical datasets were generated or analyzed in this conceptual study.

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