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**FROM ILLEGALITY TO CRIMINALITY:**

**DEVELOPING 'RULES' OF ATTRIBUTION FOR 'COMPLEX' CRIMES UNDER  
INTERNATIONAL LAW**

Composition for Master of Jurisprudence (MJur)

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22 April 2008

13 NOV 2008



## TABLE OF ABBREVIATIONS

ACHR	<i>American Convention on Human Rights</i>
AJ	Appeal Judgment
AJIL	<i>American Journal of International Law</i>
AO	Advisory Opinion
API	<i>Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)</i>
AYBIL	<i>Australian Yearbook of International Law</i>
BJC	<i>British Journal of Criminology</i>
BYIL	<i>British Yearbook of International Law</i>
Cal LR	<i>California Law Review</i>
Colum LR	<i>Columbia Law Review</i>
Crim LR	<i>Criminal Law Review</i>
CHRY	<i>Canadian Human Rights Yearbook</i>
CILJ	<i>Cornell International Law Journal</i>
CJIL	<i>Chinese Journal of International Law</i>
CJTL	<i>Columbia Journal of Transnational Law</i>
CLP	<i>Current Legal Problems</i>
CYIL	<i>Canadian Yearbook of International Law</i>
DJIL	<i>Dickinson Journal of International Law</i>
DPLR	<i>DePaul Law Review</i>
ECHR	<i>European Convention on Human Rights</i>
ECJ	European Court of Justice
EComHR	European Commission for Human Rights
ECtHR	European Court of Human Rights
EJIL	<i>European Journal of International Law</i>
GYIL	<i>German Yearbook of International Law</i>
HILJ	<i>Harvard International Law Journal</i>
HLR	<i>Harvard Law Review</i>
HRQ	<i>Human Rights Quarterly</i>

IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	<i>International Convention on Civil and Political Rights</i>
ICJ	International Court of Justice
ICL	International Criminal Law
ICLQ	<i>International and Comparative Law Quarterly</i>
ICLR	<i>International Criminal Law Review</i>
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IJIL	<i>Indian Journal of International Law</i>
ILC	International Law Commission
ILQ	<i>International Law Quarterly</i>
ILR	<i>International Law Reports</i>
IMT	International Military Tribunal (Nuremberg)
IRRC	<i>International Review of the Red Cross</i>
JACL	<i>Journal of Armed Conflict Law</i>
JCE	Joint Criminal Enterprise
JCEth	<i>Journal of Contemporary Ethnography</i>
JCSL	<i>Journal of Conflict and Security Law</i>
JICJ	<i>Journal of International Criminal Justice</i>
LJIL	<i>Leiden Journal of International Law</i>
LRTWC	<i>Law Reports of Trials of War Criminals</i> (selected by UN War Crimes Commission, HMSO)
LSI	<i>Law and Social Inquiry</i>
LT	<i>Legal Theory</i>
MJIL	<i>Michigan Journal of International Law</i>
Mil LR	<i>Military Law Review</i>
NELR	<i>New England Law Review</i>
NILR	<i>Netherlands International Law Review</i>
NMT	United States Military Tribunal (Nuremberg)
NYIL	<i>Netherlands Yearbook of International Law</i>
NYULR	<i>New York University Law Review</i>
OJLS	<i>Oxford Journal of Legal Studies</i>

PCIJ	Permanent Court of International Justice
RCADI	<i>Recueil des Cours de l'Académie de Droit International</i>
RGDIP	<i>Revue Générale de Droit International Public</i>
RIAA	<i>Reports of International Arbitral Awards</i>
RPE	Rules of Procedure and Evidence
SC	UN Security Council
SCSL	Special Court for Sierra Leone
SJIL	<i>Stanford Journal of International Law</i>
TJ	Trial Judgment
TLCP	<i>Transnational Law and Contemporary Problems</i>
TWCNMT	<i>Trials of the War Criminals before the Nuremberg Military Tribunal under Control Council Law No. 10</i>
UCLALR	<i>UCLA Law Review</i>
UN	United Nations
USSC	United States Supreme Court
VCLT	<i>Vienna Convention on the Law of Treaties</i>
VJIL	<i>Virginia Journal of International Law</i>
YILC	<i>Yearbook of the International Law Commission</i>
YJIL	<i>Yale Journal of International Law</i>
YLJ	<i>Yale Law Journal</i>

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## INTRODUCTION<sup>1</sup>

The past fifteen years have seen international criminal law (“ICL”) develop in an astonishing way.

ICL has metamorphosed from a backwater of public international law related to the criminal process (concerning jurisdiction, extradition, and—as a “small and not very significant category”—the development of a *corpus* of ‘international crimes’<sup>2</sup>) into a robust field in its own right. Its contribution to the elucidation and entrenchment of substantive international human rights and humanitarian law is self-evident.<sup>3</sup> It provides a valuable contribution to the further elucidation and strengthening of fair trial rights, modelling (mostly) good practice and extending the application of such rights beyond the direct scope of the international treaties.<sup>4</sup> It also manifests the early development of an international approach to criminal procedure and prosecutions, and the law of evidence. In short, it is making the transition, although by no means yet complete,<sup>5</sup> into a legal *system* rather than a convenient heading for a body of law, or field of academic study.

The ICTY/R have undoubtedly been the engine of modern ICL.<sup>6</sup> Closely related in their constitutions, legitimacy, and jurisprudence,

[they] have uncovered literally dozens of rules, principles, criminal offences, and forms of liability which they said are now part of customary international law and therefore of potentially universal

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<sup>1</sup> With thanks to K.Ambos, W.J.Fenrick, D.K.Piragoff, D.Robinson, and O.Triffterer for advanced copies of their work. Personal respect and gratitude to LB, AJ, and many others.

<sup>2</sup> *The Changing Structure of International Law*, FRIEDMANN, W., 1964, pp.167–169.

<sup>3</sup> *Principles of [ICL]*, WERLE, G., 2005, p.42; *The UN International Criminal Tribunals: the former Yugoslavia, Rwanda, and Sierra Leone*, SCHABAS, W., 2006, p.73.

<sup>4</sup> *Human Rights in International Criminal Proceedings*, ZAPPALÀ, S., 2003, p.13; also ‘The ECHR and international law,’ WILDHABER, L., 2007, pp.230–231; ‘International criminal proceedings and the protection of human rights,’ SLUITER, G., 2003, p.935. The system is not perfect: ‘Introduction and Overview,’ BOHLANDER, M., in *Defense in International Criminal Proceedings: Cases, Materials and Commentary*, BOHLANDER, M., BOED, R., & WILSON, R.J. (eds.), 2006, p.5; ‘International criminal courts and fair trials: difficulties and prospects,’ COGAN, J.K., 2002, pp.116–119; *c.f.* ‘Rights of suspects and accused,’ WLADIMIROFF, M., in *Substantive and Procedural Aspects of ICL: the Experience of International and National Courts*, Vol. I: Commentary, KIRK McDONALD, G., & SWAAK-GOLDMAN, O. (eds.), 2000, p.450.

<sup>5</sup> *C.f. An Introduction to [ICL] and Procedure*, CRYER, R., ET AL, 2007, p.451.

<sup>6</sup> In assessing the development of contemporary practice, this study largely confines itself to that of the ICTY/R and ICC. The proliferation of criminal tribunals in the late 1990s has, with the exception of the SCSL, not resulted in a similar proliferation of judgments touching on the topic considered here.



application... [T]he Tribunals have taken stock of the numerous developments that have taken place in the field over the past sixty years and have promoted a more human-oriented reading of international humanitarian law, hardening in passing many quasi-legal norms standards [sic.] into clear legal prohibitions. While Nuremberg might have been the cradle of the law of international crimes as we know it today, the *ad hoc* Tribunals may be lauded for getting it out of the Museum...<sup>7</sup>

The ICC will consolidate and develop this work. The relationship between the law of the ICTY/R and the ICC will be one of the defining aspects of ICL in the years to come; the extent to which this relationship will be a sympathetic one is an important theme in this study.

Bassiouni observed that the international illegality of certain types of conduct does not necessarily entail its criminality.<sup>8</sup> Beyond the definition of substantive offences, criminality emanates—at least in part—from the doctrines by which responsibility for that conduct is attributed,<sup>9</sup> as an expression of the notion of personal culpability. ICL was born in the historic statement that “[c]rimes against international law are committed by [individuals], not by abstract entities...”<sup>10</sup> This notion is the foundation of modern prosecutions, as defined by the ICTY: “[b]y trying individuals on the basis of their *personal* responsibility, be it direct or indirect, the ICTY *personalizes* guilt.”<sup>11</sup> The mechanism of this process is the subject of this study.<sup>12</sup>

It is the author’s position that perhaps the most significant contribution of the ICTY/R has been the development of an enumerated doctrine of individual responsibility, truly making the unlawful ‘criminal’. It has achieved this by the use of ‘modes of liability’, a body of doctrines by which the acts of an accused may be related to a wider criminal consequence

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<sup>7</sup> *International Crimes and the Ad Hoc Tribunals*, METTRAUX, G., 2005, pp.364–365.

<sup>8</sup> *Crimes against Humanity in [ICL]*, BASSIOUNI, M.C., 1999, p.113. Also, ‘Will the judgment in the Nuremberg Trial constitute a precedent in international law?’ KELSEN, H., 1947, p.156.

<sup>9</sup> ‘Bridging the conceptual chasm: superior responsibility as the missing link between state and individual responsibility under international law,’ REID, N.L., 2005, pp.807–808.

<sup>10</sup> *Goering*, IMT, p.41. Also, *International Law and Human Rights*, LAUTERPACHT, H., 1968, p.40.

<sup>11</sup> ‘Bringing justice to the Former Yugoslavia: the Tribunal’s core achievements,’ *ICTY at a Glance*, available at <http://www.un.org/icty/glance-e/index.htm>.

<sup>12</sup> As such, it is not a study of individual responsibility as a whole, but only its attribution. Following Eser’s logic, related but distinct concepts such as attempt and abandonment are not considered: ‘Individual criminal responsibility,’ ESER, A., in *The Rome Statute of the [ICC]: a Commentary*, CASSESE, A., GAETA, P., & JONES, J.R.W.D. (eds.), 2002, p.771; c.f. ‘Article 25: individual criminal responsibility,’ AMBOS, K., in *Commentary on the Rome Statute of the International Criminal Court*, TRIFFTERER, O. (ed.), 2008 forthcoming, mn.3.



(the substantive offence, often 'committed' by another actor). The influence which the ICTY/R's practice will have in general international law is the subject of this study; the answer likely depends on the extent to which the various devices manifest the related qualities of precision, determinacy and legality—in Pellet's terms, the characteristics of a 'rule'.<sup>13</sup> Relatively speaking, questions concerning the general legal force of these devices, and their relationship with one another, have not received the degree of academic examination they deserve.<sup>14</sup>

This thesis seeks to contribute to this process by:

- a.) evaluating the true demands of the principle of legality in international law, the demands of which any rule of attribution must meet;
- b.) presenting the existing practice in attributing responsibility in a coherent way, with a view to assessing the ICTY/R's role in creating a body of 'rules';
- c.) identifying key areas of consonance and contention in present practice, as a tentative guide for the ICC.

This is an ambitious agenda for a study of this size. However, such ambition is important: much of the criticism of this area of the law is focused on the legitimacy of its development; any proper consideration of it must thus be grounded in the cardinal doctrines of criminal and international law. It is no coincidence that Eser places legality at the centre of his discussion of individual responsibility.<sup>15</sup>

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<sup>13</sup> 'Applicable law,' PELLET, A., in CASSESE ET AL.(2002).op.cit., p.1072; 'Codification and development of international law,' LAUTERPACHT, H., 1955, p.17. *C.f.* the *Gentini* case, 10 *RIAA* 551, in which the Italian-Venezuelan Mixed Claims Commission contrasted rules and principles: "a principle expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence."

<sup>14</sup> 'General principles of liability in ICL,' CRYER, R., in *The Permanent International Criminal Court: Legal and Policy Issues*, MCGOLDRICK, D., ROWE, P., & DONNELLY, E. (eds.), 2004, p.233; *Prosecuting International Crimes: Selectivity and the ICL Regime*, CRYER, R., 2005, pp.308–309, 325. For two notable exceptions, see: in English, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, VAN SLIEDREGT, E., 2003; in German, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung* ['The 'General Part' of ICL—Towards a Dogmatic System of Rules of Attribution'], AMBOS, K., 2001. The emphasis on JCE in the 2007 *JICJ* may also suggest that academic interest is moving in this direction.

<sup>15</sup> ESER.(2002).op.cit., p.771.

Correspondingly, insofar as it is feasible, a loosely inductive—rather than deductive—analytical approach is applied. The deductive approach has long lent itself to the ICL project, and for understandable reasons. However, standing as we do at the threshold between the ICTY/R's and ICC's dominance of ICL, it is a good time to examine more closely the origin and meaning of those propositions which have come to be generally accepted. This process is a necessary prerequisite to considering the existence (or otherwise) of general international 'rules'.<sup>16</sup>

Finally, before beginning, a brief comment on the context in which ICL operates is vital to understand the great stress placed on responsibility doctrines. This thesis is concerned with legal technicality—but it is foolish to ignore the considerable pressures within which those technicalities must be moulded.

### **The challenge of 'complex crimes'**

'Complexity' is an over-used term,<sup>17</sup> yet it is ventured that it has a particular relevance to the present topic: it relates to "parts or elements not simply co-ordinated, but some of them involved in various degrees of subordination; complicated, involved, intricate; not easily analysed or disentangled." The crimes with which ICL is primarily concerned have both their means and malignancy bound up in their complexity<sup>18</sup>—and hence place particular demands on any doctrine which seeks to attribute individual responsibility.

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<sup>16</sup> See 'The inductive approach to international law,' SCHWARZENBERGER, G., 1947, especially pp.566–569.

<sup>17</sup> E.g., *Fairness in International Law and Institutions*, FRANCK, T.M., 1995, p.5 (describing the international community); *The Common Law of Mankind*, JENKS, C.W., 1958, p.8 (describing the international community); *International Law in Theory and Practice*, SCHACHTER, O., 1991, p. 4 (describing the relationship between 'rules' and behaviour); 'The sources and content of [ICL]: a theoretical framework,' BASSIOUNI, M.C., in *The New [ICL]*, KOUFA, K. (ed.), 2003, p.29 *et seq* (describing the relationship between ICL and its sources); 'The Rome Conference on the establishment of [the ICC]: a fundamental step in the strengthening of [ICL],' LEANZA, U., in *Essays on the Rome Statute of the International Criminal Court*, LATTANZI, F., & SCHABAS, W. (eds.), 1999, p.10 (describing ICL enforcement mechanisms); 'Applicable law,' CARACCILO, I., in LATTANZI & SCHABAS.(1999).op.cit., p.211 (describing ICL enforcement mechanisms). There are *many* more examples.

<sup>18</sup> *Erdemović.AJ, per Judges McDonald and Vohrah, para.2.*

ICL “deals with the categories of crime frequently associated with the collective moral guilt of nations”<sup>19</sup>—national or regional influences normally too remote to be causally relevant to criminal adjudication possess a unique significance to the ‘system’-type crimes<sup>20</sup> with which ICL is primarily concerned.<sup>21</sup>

The connotations of central authority and state involvement in Röling’s definition of system crime prevent the term from being entirely apt—the state is central to one manifestation of the phenomenon but recent decades have illustrated others. The key quality is that these crimes are committed largely through *social* activity, an aggregation of shouts, whispers, self-interest, and unthinking compliance, a succession of incremental steps that gain momentum and violence. Not only hard to prove, much of this process is legally intangible. It is this abuse, functionally and symbolically, of the community that locates these crimes in a “different dimension from ordinary criminality”<sup>22</sup> and makes them a threat to international peace and security.

Even small multi-actor crimes are necessarily more complex in their evolution and execution than their single-actor counterparts.<sup>23</sup> Truly ‘complex’ crimes, however, may depend heavily—if counter-intuitively—on the low-level contributions of the many rather than the bloody excesses of a notable few.<sup>24</sup> Mere ‘accomplices’ to the crime may play far

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<sup>19</sup> ‘Reclaiming fundamental principles of criminal law in the Darfur case,’ FLETCHER, G.P., & OHLIN, J.D., 2005, p.547. See further ‘Liberals and romantics at war: the problem of collective guilt,’ FLETCHER, G.P., 2002, p.1514 *et seq.*

<sup>20</sup> ‘Aspects of the criminal responsibility for violations of the laws of war,’ RÖLING, B.V.A., in *The New Humanitarian Law of Armed Conflict*, CASSESE, A. (ed.), Vol. I, 1979, pp.203–204. Other commentators have used the term “crimes of state” in this context: e.g., ‘The normative framework of International Humanitarian Law: overlaps, gaps and ambiguities,’ BASSIOUNI, M.C., 1998, pp.202–203. This term is unhelpful for the confusion it provokes with state responsibility: both individual and state responsibility may at times reflect an event but their bases are quite distinct. See generally REID.(2005).*op.cit.*; ‘Issues of complexity, complicity and complementarity: from the Nuremberg trials to the dawn of the International Criminal Court,’ CLAPHAM, A, in *From Nuremberg to the Hague: the future of international criminal justice*, SANDS, P. (ed.), 2002, pp.33–34; ‘Concurrence between individual responsibility and state responsibility in international law,’ NOLLKAEMPER, A., 2003, pp.618–620. See further *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)*, Judgment (ICJ), 2007, paras.171–174, 181–182.

<sup>21</sup> WERLE.(2005).*op.cit.*, pp.27–29; ‘The United Nations system: a place for criminal courts,’ WARBRICK, C, 1995, pp.260–261.

<sup>22</sup> *Crimes Against Humanity: the Struggle for Global Justice*, ROBERTSON, G., 2002, pp.258–259.

<sup>23</sup> ‘Three conceptual problems within the doctrine of [JCE],’ OHLIN, J.D., 2007, pp.69–70;

‘The general principles of [ICL]: the viewpoint of a national criminal lawyer,’ MANTOVANI, F., 2003, p.31.

<sup>24</sup> Generally, *Modernity and the Holocaust*, BAUMAN, Z., 1989.

more important roles than those who would ordinarily be considered ‘perpetrators’.<sup>25</sup> The social and organisational structures which define system crime are thus crucial to its practical consummation, as well as camouflaging those most responsible. Wider social involvement is important both for functional/logistical reasons, and to ‘neutralise’<sup>26</sup> individuals’ perceptions of their actions.<sup>27</sup> Insulation from the end result, and the fostering of a community which redefines the nature of normal and acceptable conduct (normative distortion), is vital in ‘reframing’ atrocities.<sup>28</sup> Even where an individual has plainly made a significant personal contribution to the most horrific acts, this process plays a significant conditioning role: Eichmann’s greatest crime, in Arendt’s words, lay not in “any monstrous evil intentions, but in his incapacity to think; it resided literally in the thoughtlessness with which he could, with a stroke of his pen, condemn thousands to death.”<sup>29</sup>

As a consequence, the legal task is also complex, particularly in the paramount (yet paradoxical) need to develop a meaningful rationale to make responsibility for such crimes “personal”,<sup>30</sup> clearly grounded in an individual’s conduct rather than their status or affiliation. Not only does the fact of a just conviction matter,<sup>31</sup> sentencing should also be “a ritual of manifest moral significance”.<sup>32</sup> As Sloane notes, this goal accordingly requires a rational scheme which accounts for the defendant’s individual circumstances and role within any collective entity implicated.<sup>33</sup> Doing otherwise, especially internationally, fosters only further hatred and ill-will.<sup>34</sup> This challenge is enhanced by the greater risk inherent in the use of innovative models of prosecution.<sup>35</sup>

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<sup>25</sup> ‘Enforcing international humanitarian law: catching the accomplices,’ SCHABAS, W., 2001, p.440.

<sup>26</sup> ‘How can it happen that horrendous state crimes are perpetrated?’ NEUBACHER, F., 2006, pp.792–796.

<sup>27</sup> *Furundžija.TJ*, para.253.

<sup>28</sup> ‘Becoming a hit man: neutralization in a very deviant career,’ LEVI, K., 1981, pp.61–62; further *Frame Analysis: an Essay on the Organization of Experience*, GOFFMAN, E., 1974.

<sup>29</sup> See ‘Possible islands of predictability: the legal thought of Hannah Arendt,’ KLABBERS, J., 2007, pp.12-15.

<sup>30</sup> Alun Jones Q.C. to the House of Lords, *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No.3)* (UK), 2000, p.152; *Krupp* (NMT), p.1448. Also, ‘The judgment of the ICTY Appeals Chamber on the merits in the *Tadić* case,’ SASSÖLI, M., & OLSON, L.M., 2000, p.9.

<sup>31</sup> Necessary “to defend the honour or the authority of him who was hurt by the offence so that the failure to punish may not cause his degradation”. *Eichmann in Jerusalem: a report on the banality of evil*, ARENDT, H., 2006, p.287. Further, e.g., DARCY.(2007).op.cit., pp.395–402; ‘Reflections on the trial of Paul Touvier for Crimes against Humanity in France,’ SADAT WEXLER, L., 1995, pp.191, 213.

<sup>32</sup> *Fear of Judging: Sentencing Guidelines and the Federal Courts*, STITH, K., & CABRANES, J.A., 1998, p.81.

<sup>33</sup> ‘The expressive capacity of international punishment: the limits of the national law analogy and the potential of [ICL],’ SLOANE, R.D., 2007, p.89.

<sup>34</sup> *In re Yamashita* (US), 1946, pp.28–29.

<sup>35</sup> E.g., ‘The prosecutor’s toolbox: investigating and prosecuting organized crime in the United States,’ NARDINI, W.J., 2006, pp.535–536; ‘The crime of being a criminal,’ LYNCH, G.E., 1987, pp.955–961.

Many of the traditional aims of international criminal justice (whatever one may consider them<sup>36</sup>) place further pressure on this balance. Particularly, ICL may often be required to model the best of due process while manifesting a sufficient conviction rate to restore the normative distortion<sup>37</sup> inherent to the social crisis which precipitated the criminality in the first place.

Finally, it must also be recalled that the just ‘personalization’ of *any* crime, whatever its type, may be regarded as a “hidden fundamental question of virtually monumental proportions.”<sup>38</sup> Indeed, some critics—albeit from a rather narrow theoretical perspective—would argue that social forces so overcome the law’s core assumption of a rational/intentional/voluntary actor that it places the ostensible values of the whole project in question.<sup>39</sup> Even doubting this counsel of despair, it is true that the question of responsibility—no matter how advanced the legal system—inevitably touches on uncomfortable and difficult political, social, moral and legal questions. In the international context, questions of responsibility necessarily foreground the different approaches taken by the various legal traditions.<sup>40</sup>

For all these reasons, it is unsurprising that any doctrine of attribution is racked by a certain degree of uncertainty and conflict. There is a significant political and moral imperative to target for prosecution only those who reach a certain threshold of responsibility<sup>41</sup> but these figures are frequently not proximate to the practical, visceral conclusion of the crime. There is no escaping, therefore, the need for sophisticated principles of liability—a necessity

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<sup>36</sup> E.g., ‘Restraining the barbarians: can [ICL] help?’ FARER, T.J., 2000, pp.91–92; further ‘Imputed criminal liability and the goals of international justice,’ DARCY, S., 2007, p.403; ‘The banality of good: aligning incentives against mass atrocity,’ OSIEL, M., 2005, p.1751 *et seq*; ‘From indifference to engagement: bystanders and international criminal justice,’ FLETCHER, L.E., 2005, especially pp.1092–1095; FLETCHER.(2002).op.cit., pp.1542–1544, 1572–1573; *Transitional Justice*, TEITEL, R.G., 2000, pp.44–46, 66–67.

<sup>37</sup> SLOANE.(2007).op.cit., pp. 41–42; also NEUBACHER.(2006).op.cit., p.789. *C.f. Kvočka.TJ*, para.310.

<sup>38</sup> ‘Establishing a basis for criminal responsibility of collective entities,’ ALWART, H, in *Criminal Responsibility of Legal and Collective Entities*, ESER, A, HEINE, G, & HUBER, B (eds.), 1999, p.145.

<sup>39</sup> ‘Criminal law,’ NORRIE, A., in *The Critical Lawyer’s Handbook*, GRIGG-SPALL, I., & IRELAND, P. (eds.), 1992, pp.76–78, 82.

<sup>40</sup> ‘Symposium. Guilty by association: [JCE] on trial—Foreword,’ SLUITER, G., 2007, pp.67–68.

<sup>41</sup> ‘Prosecuting the individuals bearing the highest level of responsibility,’ DEL PONTE, C., 2004, p.517. Also ‘Reflections on the prosecution of war crimes by international tribunals,’ MERON, T., 2006, p.563; *The International Criminal Tribunal for the Former Yugoslavia: an Exercise in Law, Politics and Diplomacy*, KERR, R., 2004, pp.70–72, 175–177, 179–185, 189, 208, 213; *Resolution 1503 (2003)*, UN SC, 2003.

which appears to have the unfortunate consequence of making the prosecution of system offences as complex as the crimes themselves.

Clapham put it best, when he wrote:

[W]e are faced with the myriad of connections that obscure the relationship between the [...] actor and the [...] victim... This complexity has generated demands to ‘lift the lid’ and ‘pierce the veil’ to highlight the responsibilities of those who assist others to commit human rights violations. Part of the response to this complicated situation has been to develop legal responsibility through charges of complicity—and it is worth recalling that the etymology of complicity can be traced to the Latin word *complicare*, and, as noted in the *Oxford English Dictionary*, the second listed meaning for complicity is: ‘state of being complex.’<sup>42</sup>

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<sup>42</sup> *Human Rights Obligations of Non-State Actors*, CLAPHAM, A., 2006, p.563.

## PART I: THE LEGALITY OF A 'JURISPRUDENCE OF DOUBT'

### A JURISPRUDENCE OF DOUBT

"[L]iberty finds no refuge in a jurisprudence of doubt",<sup>43</sup> wrote Justice O'Connor.

The use of jurisprudence in developing the law has long been treated with suspicion. Almost two centuries ago, Robert Rantoul described the common law as a "sublimated perversion of reason" which "bewilders and perplexes" and which permits a judge creatively to extort "from precedents something which they do not contain".<sup>44</sup> Although the separation of powers issue may be less apposite,<sup>45</sup> Rantoul's criticism has considerable modern resonance to ICL. Various commentators have noted the challenges of judicially-developed law in general, and voiced concerns<sup>46</sup> about the uncertain and self-referential origins of many attribution doctrines in particular.<sup>47</sup>

At the same time, the essential role of jurisprudence in developing ICL is well-recognised. Until the advent of the *ICC Statute*, the law governing international criminal prosecutions was—unusually<sup>48</sup>—almost entirely a creature of the courts themselves.<sup>49</sup> The ICTY/R *Statutes* have formed elegant skeletons but ones upon which the judges have placed

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<sup>43</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey* (US), 1991, p.844.

<sup>44</sup> Cited in *American Legal History: Cases and Materials*, HALL, K.L., 1991, pp.317-318.

<sup>45</sup> Although not entirely so: 'Third world approaches to international law and individual responsibility in internal conflicts,' ANGHIE, A., & CHIMNI, B.S., 2003, pp.93, 95; *Galić.AJ*, per Judge Schomburg, para.21.

<sup>46</sup> E.g., OHLIN.(2007).op.cit., p.70; *Prosecuting International Crimes: Selectivity and the ICL Regime*, CRYER, R., 2005, p.312; METTRAUX.(2005).op.cit., pp.16, 18; 'Article 21: applicable law,' MCAULIFFE DEGUZMAN, M., in TRIFFTERER.(1999).op.cit., pp.436-439.

<sup>47</sup> This is not a problem originating solely from a common law approach: although civil and common law traditions reflect a different emphasis, it is wrong to suggest that one is necessarily more prone to bouts of 'judicial creativity' than the other. *Pragmatism and Theory in English Law*, ATIYAH, P., 1987, pp.3, 17–18, 27–28, 32–33, 44, 50, 68, 90–92; 'Conceptualism, pragmatism and courage: a common lawyer looks at some judgments of the German Federal Court,' MARKESINIS, B, in *Essays in Memory of Professor F.H. Lawson*, WALLINGTON, P., & MERKIN, R.M. (eds.), 1986, pp.62, 68-69; 'It is wise not to take the Civil Codes too seriously,' TUNC, A., in WALLINGTON & MERKIN *ibid.*, pp.71–85; *Essays in Jurisprudence and Philosophy*, HART, H.L.A., 1983, pp.127–131; 'Utopias of rationality in the development of the idea of codification,' VARGA, C., in *Law and the Future of Society*, HUTLEY, F.C., ET AL (eds.), 1979, pp.27–41; *The Common Law*, HOLMES, O.W., 1881, p.1.

<sup>48</sup> *The [ICC] and the Transformation of International Law: Justice for the New Millennium*, SADAT, L N, 2002, p.173; *c.f. Case concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, Judgment (Second Phase) (ICJ), per Judge Fitzmaurice, 1970, p.64.

<sup>49</sup> *Furundžija.TJ*, para.227.

considerable flesh, in whatever light it is regarded.<sup>50</sup> Jurisprudence under the *ICC Statute*, although an instrument far less skeletal,<sup>51</sup> may not mark a significant departure from this approach.<sup>52</sup> It is true to say that the majority of the very characteristics which make modern ICL a system, rather than an object of study, have originated in or been developed by the professional reasoning of judges.

The very characteristics which make jurisprudence such an effective tool for the progressive development of the law in the politically-charged international context (independence, evolutionary reasoning, scholarship) are those which render it prone to uncertainty of content and direction.<sup>53</sup> As such, in order to assess the legality of the various attribution doctrines, the true nature of a 'jurisprudence of doubt' must be examined. This tension cannot be resolved by a purely pragmatic approach—legitimacy is something more than mere expediency<sup>54</sup>—yet the law must be realistic in its aspirations.<sup>55</sup> In Allott's terms, even if the origins of ICL are something of a myth, it must be asked whether it is a "bad myth".<sup>56</sup>

As a "double-structured" field,<sup>57</sup> ICL is shaped by both influences evident in its title, the 'international' and the 'criminal'.<sup>58</sup> Much of the technical aspect of this thesis requires close attention to the former. However, systematic adherence to the protections and principles embodied in criminal law (as a "foundational"<sup>59</sup> field of law) should be the very cornerstone of ICL's legitimacy,<sup>60</sup> as well as a source of legally enforceable individual rights and thus a

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<sup>50</sup> 'The Statute of the [ICC]: some preliminary reflections,' CASSESE, A., 1999, p.148.

<sup>51</sup> *An Introduction to the International Criminal Court*, SCHABAS, W.A., 2004, p.25.

<sup>52</sup> 'Judicial policy-making at the International Criminal Court: an institutional guide to analyzing international adjudication,' WESSEL, J., 2005, pp.450–451. *C.f.* PELLET.(2002).op.cit., pp.1053, 1084.

<sup>53</sup> *Evolution and the Common Law*, HUTCHINSON, A.C., 2005, pp.275-276. Also *In re Yamashita (US)*, 1946, p.43.

<sup>54</sup> 'The legacy of the ICTY: the [ICC],' SADAT, L.N., 2003, p.1076. Expediency is, however, a relevant consideration.

<sup>55</sup> 'International criminal courts and fair trial,' WARBRICK, C., 1998, p.62. Further *Bruton v. United States (US)*, 1968, p.135; *Delaware v. Van Arsdall (US)*, 1986, p.681: a criminal defendant is entitled to "a fair trial, not a perfect one".

<sup>56</sup> 'Language, method, and the nature of international law,' ALLOTT, P., 1971, pp.128–129.

<sup>57</sup> *An Introduction to ICL and Procedure*, CRYER, R., FRIMAN, H., ROBINSON, D., & WILMSHURST, E., 2007, p.12.

<sup>58</sup> 'Foreword,' ARBOUR, L, in KIRK McDONALD & SWAAK-GOLDMAN.(2000).op. cit., p.x.

<sup>59</sup> 'Constitutional dignity and criminal law,' BAKER, J.E., 2002, pp.127-128, 131.

<sup>60</sup> *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para.45. For the comment of other courts, e.g., *Slobodan Milošević v. the Netherlands*, Admissibility Decision (ECtHR), 2002; *Slobodan Milošević v. the Netherlands*, (Netherlands), 2001, para.3.4; *Mladen Naletilić v. Croatia*, Admissibility Decision (ECtHR), 2000. On the Security Council's intent, *Rutaganda.AJ*, per Judge Pocar, 2003, p.2. Also AMBOS.(2006).op.cit., p.669; FLETCHER/OHLIN.(2005).op.cit., pp.540-541;



guarantee of fairness.<sup>61</sup> These notions are bound up in the rule of law,<sup>62</sup> a “meta-legal doctrine”<sup>63</sup> which comprises “the values to which the law should aspire”<sup>64</sup> and guarantees the consistency and generality of a legal system.<sup>65</sup>

### THE PRINCIPLE OF LEGALITY

In the criminal context, the most common encapsulation of the rule of law is the principle of legality,<sup>66</sup> known also by the maxim *nullum crimen sine lege*.<sup>67</sup> Widely entrenched in modern international and national legal systems,<sup>68</sup> it is frequently conceived as a prohibition of the retroactive application of the law. However, it also extends to

...the principle that only the law can define a crime and prescribe a penalty... and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make [them] liable.<sup>69</sup>

The principle may be interpreted to connote a “*legislative* duty to provide fair warning of punishable conduct”,<sup>70</sup> including a duty upon judges to “tamper neither with the categories of exculpation nor with the categories of inculcation.”<sup>71</sup> Reconciling the principle of legality with a vigorous and evolutionary jurisprudence on the attribution of criminal

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WERLE.(2005).op.cit., pp.24, 32; ‘Applicable law,’ CARACCILO, I, in LATTANZI & SCHABAS.(1999).op.cit., p.230; ‘Evidence in the ICC Statute,’ BRADY, H., in LATTANZI & SCHABAS.(1999).op.cit., p.282.

<sup>61</sup> Questions of ‘fairness’ and ‘legitimacy’, although closely related in their application to individuals, are nonetheless conceptually distinct in public international law: e.g., *The Power of Legitimacy Among Nations*, FRANCK, T.M., 1990, pp.208–210. Modern customary law may now include a general fair trial requirement: e.g., *Aleksovski.AJ*, para.113; *Semanza*, [Appellate] Decision, 31 May 2000, per Judge Shahabuddeen, para.21.

<sup>62</sup> *Practice Statement of the House of Lords* (UK), 1966.

<sup>63</sup> *The Constitution of Liberty*, VON HAYEK, F.A., 1976, p.206.

<sup>64</sup> *Criminal Law: Theory and Doctrine*, SIMESTER, A.P., & SULLIVAN, G.R., 2003, p.37.

<sup>65</sup> HART.(1983).op.cit., p.81.

<sup>66</sup> *Puhk v. Estonia* (ECtHR), 2004, para.24.

<sup>67</sup> In civil law jurisdictions, it is commonly conceptualised four-fold: *lex praevia*, *lex certa*, *lex stricta*, *lex scripta*. However, the extent to which all of these elements truly inform the practice of ICL is uncertain, even under the *ICC Statute*: AMBOS (2006) op.cit., pp.670–671.

<sup>68</sup> E.g., *ICC Statute*, Arts.22–24; *ECHR*, Art.7(1); *ICCPR*, Art.15(1); *ACHR*, Art.9; *US Constitution*, Art.1; *Basic Law for the Federal Republic of Germany*, Art.103 Abs.II.GG; *French Criminal Code*, Arts.111–113.

<sup>69</sup> *Kokkinakis v. Greece* (ECtHR), 1993, para.52.

<sup>70</sup> *Rethinking Criminal Law*, FLETCHER, G.P., 2000, p.629, emphasis added.

<sup>71</sup> *Ibid.*, p.569.

responsibility—and a dearth of legislation—is thus a significant challenge. On the other hand, the precise meaning of the principle is not necessarily as it seems.

One of the core ideas apparently embodied within the principle is “certainty”.<sup>72</sup> However, such a goal can be little more than a general aspiration: the law cannot live or die solely by its achievement. Indeed, a measure of uncertainty is endemic to the law itself, and this applies to the principle of legality as much as any other norm.<sup>73</sup> As a consequence, the principle of legality is better understood as a requirement only for “sufficient clarity”<sup>74</sup>—which in turn necessitates an assessment of ‘sufficiency’, informed by meta-legal notions of ‘fairness’. Underlining this point, at least four factors can briefly be listed to illustrate the extent to which any notion of legal certainty (and, indeed, any unbending notion of a ‘rule’) represents a hidden compromise.

The law is not, and can never be, entirely precise. Even with the most exhaustive criminal code, there is always a margin of ambiguity, either with regard to what the drafters ‘intended’ (itself a relative concept<sup>75</sup>) or the precise way in which that intention is communicated. This is not just a function of ‘analogue’ human nature but a necessary consequence of the open texture of language.<sup>76</sup> This problem of indeterminacy should not be exaggerated but neither can it be in good conscience ignored.<sup>77</sup>

Second, the application of the principle of legality differs not only between types of legal system (civil law systems tend to adopt an apparently stricter approach),<sup>78</sup> but also within them. For example, although the common law of both the United Kingdom<sup>79</sup> and the United States is united in requiring non-retroactivity and clarity sufficient for ‘fair warning’,<sup>80</sup> contemporary jurisprudence differs with regard to the extent that judicial construction may

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<sup>72</sup> ‘Does the principle of legality stand in the way of progressive development of the law?’ SHAHABUDDIN, M., 2004, p.1008.

<sup>73</sup> ‘Retroactive criminal liability and international human rights law,’ JURATOWICH, B., 2004, p.337.

<sup>74</sup> *Vasiljević. TJ*, para.201.

<sup>75</sup> Generally ‘The forum of principle,’ DWORKIN, R., 1981, especially pp.476–500.

<sup>76</sup> ‘The codification of the criminal law,’ DE BÜRCA, G., & GARDNER, S., 1990, p.560; ‘Codification of the criminal law—Part 4: restatement or reform?’ WELLS, C., 1986, pp.320–321.

<sup>77</sup> HART.(1994).op.cit., pp.130–131.

<sup>78</sup> Fn.67 *supra*; also WERLE.(2005).op.cit., p.33; CASSESE.(2003).op.cit., pp.141–142.

<sup>79</sup> As a comparison of common law interpretations, it should be noted that this point does not, however, take into account the recent incorporation of the ECHR via the *Human Rights Act 1998*.

<sup>80</sup> E.g., *United States v. Harriss* (US), p.617.

permissibly amplify statutory language.<sup>81</sup> This reflects the fact that consideration of the principle of legality involves striking a balance between competing interests. In the context of international criminal procedure, although the legal origin of a given principle is not itself significant,<sup>82</sup> the fact that ostensibly the same norm is applied in differing ways across multiple traditions is important, at the very least in highlighting the degree of judicial care required in approaching the issue.

Third, the way in which the principle can be applied in the specific context of international law may be different from some or all national law.<sup>83</sup> This is not to detract from the importance of the rule of law itself, or the need for the progressive elucidation and clarification of international law,<sup>84</sup> but to highlight the fact that careful account needs to be taken of the nature of international law in assessing the appropriate standards of legality.<sup>85</sup> Jescheck reaches the same conclusion, considering that the traditional understanding of the principle of specificity is only satisfied fully in conventional international law: for law derived from the other formal sources, “the principle can only serve as a guiding doctrine, to be observed when interpreting the rules produced by these sources of law.”<sup>86</sup> This does not mandate the conclusion drawn by one commentator that “[c]ustomary rules cannot, as a matter of principle, be a direct basis of incrimination”.<sup>87</sup>

Fourth, the principle of legality is a key theoretical battleground between (broadly speaking) ‘positive’ and ‘natural’ lawyers.<sup>88</sup> Given the paradox within which the principle is inevitably called upon to operate,<sup>89</sup> it would not be surprising if judicial outcomes are

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<sup>81</sup> *Shaw v. DPP* (UK), 1962, p.267; *c.f. Bouie v. City of Columbia* (US), 1964, p.352. See also *R. v. R* (UK), 1992, p.599.

<sup>82</sup> ‘International criminal procedure: ‘adversarial’, ‘inquisitorial’ or mixed?’ AMBOS, K., 2003, pp.34–35. E.g., *Delalić.AJ*, para.611.

<sup>83</sup> ‘Crimes against humanity: the need for a specialized convention,’ BASSIOUNI, M.C., 1994, pp.468–471.

<sup>84</sup> *Ibid.*, p.472 *et seq.*

<sup>85</sup> See further ‘The adequacies of contemporary theories of international law—gaps in legal thinking,’ FALK, R.A., 1964, p.233.

<sup>86</sup> ‘The general principles of [ICL] set out in Nuremberg, as mirrored in the ICC Statute,’ JESCHECK, H., 2004, p.41.

<sup>87</sup> ‘On the sources of ICL,’ DJURO-DEGAN, V., 2005, p.67. *C.f.* CRYER ET AL.(2007).op.cit., p.14; PELLET.(2002).op.cit., pp.1055–1056, 1071–1072; *c.f.* LAMB.(2002).op.cit., pp.734, 749; and especially ICCPR, Art.15(2). *C.f.* ‘Applicable law,’ CARACCILO, I, in LATTANZI & SCHABAS.(1999).op.cit., p.229.

<sup>88</sup> See, e.g., ‘Positivism and the separation of law and morals,’ HART, H.L.A., 1958, p.593; ‘Positivism and fidelity to law—a reply to Professor Hart,’ FULLER, L.L., 1958, p.630.

<sup>89</sup> Fn.159 *infra*.

swayed as much by the general jurisprudential outlook of the judge as any ‘right’ answer.<sup>90</sup> Given the practical focus of this study,<sup>91</sup> no great attention will be paid to the more theoretical jurisprudential debate, other than to recognise the significance of its existence.

Beyond these natural limitations, it is also true to note that certainty is not even always an aspiration. The well-established *lex mitior* exception, mandating the retrospective application of a more lenient penal law,<sup>92</sup> is a good example of a circumstance in which a competing objective (recognition of a new, more ‘progressive’ law) outweighs the need for certainty. A similar balance is commonly struck with regard to procedural law.<sup>93</sup> There is thus an implicit balance in the principle of legality between certainty and flexibility; the relative weight given to each varying in the light of the particular context.

In formulating the demands of the principle of legality, a number of commentators have reached similar conclusions. Writing extra-judicially, Justice O’Connor has expressly declared what has been hinted above: the rule of law requires primarily that “legal rules be publicly known”.<sup>94</sup> Boot, more precisely, concludes that the principle of legality has two, mutually sustaining purposes: to ensure that an individual may foresee the consequences of their actions, and to ensure that no person is subject to arbitrary prosecution.<sup>95</sup> Simester and Sullivan agree.<sup>96</sup> Legal certainty, and thus legal legitimacy, thus seems to be founded on the notion of *ex ante* guidance. At the same time, even this modest goal is subject to various practical limits. As noted at the Supreme Court of Canada,

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<sup>90</sup> E.g., ‘Recognition in theory and practice,’ BROWNLIE, I., 1982, p.197. *C.f. Pragmatism and Theory in English Law*, ATIYAH, P., 1987, p.143; *The Common Law of Mankind*, JENKS, C.W., 1958, p.413.

<sup>91</sup> For himself, the author declares membership of the ‘English tradition’. ‘The theory of international law: is there an English contribution?’ WARBRICK, C., in *Theory and International Law: an Introduction*, ALLOTT, P., ET AL, 1991, p.61

<sup>92</sup> E.g., *Deronjić Sentencing.AJ*, paras.93–99; *Dragan Nikolić Sentencing.AJ*, paras.77–86; ICCPR, Art.15 (1); ACHR, Art.9. *C.f.* ‘The uncertain scope of Article 15(1) of the [ICCPR],’ OPSAHL, T., & DE ZAYAS, A., 1983, pp.243–253.

<sup>93</sup> TRESCHEL.(2005).op.cit., pp.110–111; *Coëme v. Belgium* (ECtHR), 2000, paras.102–103; *Tadić*, Interlocutory Appeal on Jurisdiction, *per* Judge Sidhwa, para.11.

<sup>94</sup> ‘Vindicating the rule of law: the role of the judiciary,’ O’CONNOR, S.D., 2003, p.1.

<sup>95</sup> *Genocide, Crimes Against Humanity, War Crimes: Nullem Crimen Sine Lege and the Subject Matter Jurisdiction of the [ICC]*, BOOT, M., 2002, pp.176, 611, 616. Further, e.g., *Grayned v. City of Rockford* (US), 1972, pp.108-109.

<sup>96</sup> SIMESTER/SULLIVAN.(2003).op.cit., p.40; further *Principles of Criminal Law*, ASHWORTH, A., 1999, p.67; *The Authority of Law*, RAZ, J., 1979, pp.214–215.

Absolute precision in the law exists rarely, if at all. The question is whether [there is] an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies.<sup>97</sup>

Subjective knowledge/understanding of the relevant law thus cannot be presumed. In any event, from a common law perspective, ‘ignorance of the law is no excuse’—it need not be shown that an individual was acquainted with the precise legal mechanism relevant to their conduct. As reasoned by Justice Gonthier,<sup>98</sup> what must be shown however is the “core concept of notice”:

...a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society.<sup>99</sup>

Only when this core notice is missing—for example, with regulatory offences—must steps be taken to foster actual notice by the public. The test for unconstitutional vagueness under the Canadian *Charter*—and thus lack of notice to the accused—depends, therefore, on a relatively high test: whether the law “so lacks in precision as not to give sufficient guidance for legal debate”. As the Justice shrewdly commented,

Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.<sup>100</sup>

On closer examination, therefore, it appears that the principle of legality in the common law tradition is interlaced with a profound recognition of the ambiguities and difficulties in prescribing the law for hypothetical cases. Even when *ex ante* guidance is acknowledged to

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<sup>97</sup> *Irwin Toy Ltd. v. Quebec (Attorney-General)* (Canada), 1989, p.983. Further, *United Nurses of Alberta v. Alberta (Attorney-General)*, per McLachlin, J. (Canada), 1992, p.930.; *R. v. Jobidon*, per Gonthier, J. (Canada), 1991, p.714.

<sup>98</sup> *R. v. Nova Scotia Pharmaceutical Society*, per Gonthier, J. (Canada), 1992, pp. 639-643.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

be one of the principal goals underlying the legality principle, the degree of notice or clarity actually required is nonetheless minimal. It must be asked whether this apparent discrepancy is merely a creature of the Anglophone tradition, or a wider trend.

### **...as an international human right**

The principle of legality has been considered by a number of the significant international and regional human rights bodies. Nonetheless, given the general importance of the concept, it has been litigated less than might be expected. Consideration by the Inter-American Court of Human Rights, for example, has been very straightforward.<sup>101</sup> Although it upholds quite a strict interpretation of the principle of legality, the simplicity of the definition seems to presuppose a purely legislative development of the law, rather than recognising the balance that ICL and other fields must strike between flexibility and fairness.

In the leading cases of *S.W.* and *C.R.*, the ECtHR had opportunity to consider more precisely this question, in the context of the common law. It held:

However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention states, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 [...] of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.<sup>102</sup>

In rejecting the petition, the Court noted that

The decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development... [T]here was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial

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<sup>101</sup> *Castillo Petruzzi et al* (IACtHR), 1999, para.121.

<sup>102</sup> *S.W. v. UK* (ECtHR), 1995, para.36; *C.R. v. UK* (ECtHR), 1995, para.34. Also *Streletz, Kessler & Krenz v. Germany* (“*Streletz v. Germany*”) (ECtHR), 2001, para.82.

interpretation... This evolution had reached a stage where judicial recognition of the [relevant law] had become a reasonably foreseeable development...<sup>103</sup>

In a nod to natural law/moral notions, the Court also added that “[t]he essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords [...] cannot be said to be at variance with the object and purpose of Article 7”.<sup>104</sup> Such an approach contradicts the ‘strict’ approach to legality—Boot observes that “arbitrary punishment cannot be atoned by moral judgment about the conduct concerned, as the principle of *nullum crimen sine lege* exactly protects against such weighing of interests”<sup>105</sup>—yet, as will be demonstrated, it is a common resort for courts faced with hard cases. It is also true that Boot’s criticism does not answer the point that a widespread and common moral understanding might provide the requisite warning of the wrongfulness of conduct—thus the likelihood of criminal sanction—and so may not be truly arbitrary in the first place.

In a similar vein, the European Commission had noted some years earlier that:

[The] constituent elements of an offence such as, e.g., the particular form of culpability required for its completion may not be essentially changed, at least not to the detriment of the accused, by the caselaw of the courts. On the other hand, it is not objectionable that the existing elements of the offence are clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence.<sup>106</sup>

The ECtHR has an established jurisprudence on the “quality of law”. It has recognised that, in light of “the need to avoid excessive rigidity and to keep pace with changing circumstances[,] many laws are inevitably couched in terms which, to a greater or lesser extent, are vague.”<sup>107</sup> The law must be “accessible to the persons concerned and formulated with sufficient precision to enable them—if need be, with appropriate legal advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given

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<sup>103</sup> *S.W. v. UK*, para.43.

<sup>104</sup> *Ibid*, para.44.

<sup>105</sup> *BOOT*, (2002).op.cit., p.177.

<sup>106</sup> *X Ltd. & Y v. UK* (EComHR), 1982, para.9

<sup>107</sup> *Cantoni v. France* (ECtHR), 1996, para.31.

action may entail.”<sup>108</sup> However, the standard of foreseeability and accessibility is related to the legal context, depending “to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed.”<sup>109</sup>

The Human Rights Committee has been far more enigmatic. Retroactive criminal law is plainly prohibited by Article 15(1) of the *ICCPR*,<sup>110</sup> and there is good cause to believe that the prohibition of excessive vagueness incorporated within the principle of legality should be read in to the provision.<sup>111</sup> Indeed, the HRC has recently described Article 15 as “the principle of legality, i.e., the requirement [that] criminal liability [is] limited to clear and precise provisions in the law”.<sup>112</sup> However, when confronted with such issues in individual communications, it appears to have gone to some lengths to avoid express, formal consideration of the point.

In 1992, the HRC was presented with a communication in which the author had been charged under relevant domestic legislation with holding a “public meeting” without prior notification. The author’s submissions turned to a great extent on the “unacceptably broad” nature of this term. The Committee upheld violations of Articles 19 (freedom of expression) and 21 (peaceful assembly) but dismissed the Article 15 claims on the basis that “no issues under this provision arise in the present case”, even though they had previously been ruled admissible.<sup>113</sup> Dissenting to the decision on the merits, one Committee member drew attention to this “surprising” measure. Even so, despite rejecting the retroactivity argument on the merits, he failed to address the vagueness point.<sup>114</sup>

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<sup>108</sup> *Tolstoy Miloslavsky v. UK* (ECtHR), 1995, para.37; *Margareta and Roger Andersson v. Sweden* (ECtHR), 1992, para.75.

<sup>109</sup> *Groppera Radio AG and Others v. Switzerland* (ECtHR), 1990, para.68.

<sup>110</sup> *Weinberger Weisz v. Uruguay* (HRC), 1980, para.16.

<sup>111</sup> E.g., *CCPR Commentary*, NOWAK, M., 1993, p.276; *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, JOSEPH, S., SCHULTZ, J., & CASTAN, M., 2004, pp.462, 475. See further *Concluding Observations: Portugal (Macao)* (HRC), 1999, para.12: “The Committee is concerned at certain aspects of [the] law [...], namely the creation of a vague and insufficiently defined (or “abstract”) offence...”; also *Concluding Observations: Israel* (HRC), 2003, para.14; *Concluding Observations: Estonia* (HRC), 2003, para.8.

<sup>112</sup> *General Comment No. 29: States of Emergency (Article 4)* (HRC), 2001, para.7.

<sup>113</sup> *Kivenmaa v. Finland* (HRC), 1994, paras.2.1, 6.2, 8.3–8.4, 9.4, 10.

<sup>114</sup> *Kivenmaa v. Finland, per Mr. Kurt Herndl* (HRC), 1994, paras.4.1–4.2.



As Opsahl and de Zayas note, the HRC pronounces its views in an “economical” fashion, considering legal issues only to the extent demanded by the facts.<sup>115</sup> The extension of this general policy—“it is not its task to decide in the abstract whether or not a provision of national law is compatible with the Covenant”<sup>116</sup>—seems to be in tension with a full reading of Article 15, which requires broad consideration as to the necessary quality of law. The outworking of this dilemma seems evident in a case from 1996, in which the Committee declined to admit a communication which argued that a criminal provision was unforeseeably broad. It stated:

...interpretation of domestic legislation is essentially a matter for the [domestic] courts. Since... the law in the present case was not interpreted [...] arbitrarily... the Committee considers that the communication is inadmissible.<sup>117</sup>

It is clear that the concept of “‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.”<sup>118</sup> By resorting to a notion of arbitrary interpretation, the HRC was able to avoid the necessity of examining the clarity of the particular law while maintaining the formal principle that the law must be sufficiently certain for the guidance of a particular person’s conduct. However, in reality, this is a very different issue from the question of whether the law itself is legitimate within the context of the principle of legality.

This brief review of international (quasi-)judicial consideration of the principle of legality suggests that the tension inherent in ICL has received serious consideration only from the ECtHR. Further, the Court’s reference to the importance of context in assessing reasonable foreseeability and accessibility—and especially the nod towards questions of ‘moral notice’—suggests that the approach of international human rights bodies to the principle of legality is in some respects looser than may be supposed.

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<sup>115</sup> OPSAHL & DE ZAYAS.(1983).op.cit., p.242.

<sup>116</sup> E.g., *MacIsaac v. Canada* (HRC), 1982, para.10.

<sup>117</sup> *Kruyt-Amesz et al v. the Netherlands* (HRC), 1996, para.4.2; *Maroufidou v. Sweden* (HRC), 1981, para.10.1.

<sup>118</sup> *Van Alphen v. the Netherlands* (HRC), 1990, para.5.8. Also *General Comment No. 16: the Right to Respect of Privacy (Article 17)* (HRC), 1988, para.4.

The GDR border guards (or “*Mauerschützen*”) cases offer an interesting range of perspectives on these issues. In the 1990s, various individuals from the former East Germany were indicted by the authorities of the unified Germany for offences pertaining to the shooting of approximately 600<sup>119</sup> GDR citizens trying to cross into the West. Prosecutions were conducted by FRG courts,<sup>120</sup> applying the substantive law of the GDR insofar as it was compatible with the Basic Law (*Grundgesetz*).<sup>121</sup> *Inter alia*, the *Grundgesetz* commits the FRG to the rule of law, which includes the prohibition of legal vagueness and retroactivity.<sup>122</sup> The general defence was raised by the accused that their acts were not unlawful—in the GDR—at the time they were committed. This was arguable, both under municipal<sup>123</sup> and international law.<sup>124</sup> The German courts were thus presented with a new version of the Nuremberg dilemma: an apparent inconsistency between recognised international standards and enforceable national law, upon which the criminal responsibility of individuals depended.<sup>125</sup>

Although international law was tangentially relevant in substantiating the courts’ approach, the question was resolved domestically on the basis of German constitutional doctrine. Article 20 of the *Grundgesetz* provides that “[l]egislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice”. The Federal Constitutional Court (BVerfG) has interpreted the provision to mean that

[t]he generally prevailing view implies the rejection of a narrow reliance upon [formally] enacted laws... Justice is not identical with the aggregate of the written laws. Under certain circumstances, law can exist beyond the positive norms which the state enacts—law which has its source in the

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<sup>119</sup> ‘After the wall: the legal ramifications of the East German Border Guard trials in unified Germany,’ GOODMAN, M., 1996, pp.728, 733. *C.f.* ‘Rejecting Radbruch: the [ECtHR] and the crimes of the East German leadership,’ MILLER, R., 2001, p.655, fn.6.

<sup>120</sup> GOODMAN.(1996).op.cit., pp.756–765.

<sup>121</sup> *Federal Republic of Germany—German Democratic Republic: Treaty on the Establishment of German Unity*, 1990, Art.9. *C.f.* ‘What is just? The rule of law and natural law in the trials of former East German border guards,’ ADAMS, K.A., 1993, p.294.

<sup>122</sup> ADAMS.(1993).op.cit., p.280. *See also Grundgesetz*, Arts.20, 103(2).

<sup>123</sup> ‘Coming to terms with the East German border guards cases,’ GABRIEL, M.J., 2000, pp.390–391; GOODMAN.(1996).op.cit., pp.745–749; ADAMS.(1993).op.cit., pp.291–293. Further, ‘Freedom of movement,’ BRUNNER, G., in *Before Reforms: Human Rights in the Warsaw Pact States 1971–1988*, BRUNNER, G., ET AL (eds.), 1990, p.217, cited in ADAMS.(1993).op.cit., p.285, fn.60.

<sup>124</sup> ADAMS.(1993).op.cit., pp.284–285. It is arguable that the shootings amounted to a violation of obligations under the *ICCPR* (Art.12(2)) but such violations do not automatically entail individual criminal responsibility.

<sup>125</sup> GOODMAN.(1996).op.cit., pp.742–744; ‘Unjust laws, human rights, and the German Constitution: Germany’s recent confrontation with the past,’ HERDEGEN, M., 1995, pp.591–592.

constitutional legal order as a meaningful, all-embracing system, and which functions as a corrective of the written norms...<sup>126</sup>

The general preference for legal certainty limits this doctrine to “gross and evident violations of elementary justice”.<sup>127</sup> The most notable formulation was struck by Radbruch, who suggested that an “unjust law” cannot be upheld where the conflict with justice is so intolerable as to make its invalidity necessary.<sup>128</sup> The approach is inescapably subjective,<sup>129</sup> but is characterised more as a doctrine of “natural injustice (*Unrecht*)” rather than “natural law (*Recht*)” proper.<sup>130</sup> Nonetheless, such reasoning has been described as the self-destruction of legal positivism.<sup>131</sup>

In a number of guises (express and implicit),<sup>132</sup> this formula was used by the German courts to uphold the convictions of relevant individuals.<sup>133</sup> In a leading case, the Federal Court of Justice (BGH) found itself able to apply the GDR law but only on a narrow basis, drastically limiting the apparent justification for the relevant shoot-to-kill incidents.<sup>134</sup> In so doing, as Herdegen notes,

...the Court invoked the international commitments of the GDR and resorted to a rather strained understanding of the East German constitution. These considerations weighed more heavily in the Court’s reasoning than did the normative reality of the East German regime. In short, it seems fair to call the Federal Court’s judgment an example of natural law jurisprudence disguised as enlightened positivism.<sup>135</sup>

Although an instinctively laudable approach in moral terms, it seems difficult to reconcile with a strict application of the principle of legality. Nonetheless, it was upheld by the BVerfG, which reasoned that the German conception of the rule of law (which, as noted

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<sup>126</sup> ADAMS.(1993).op.cit., pp.299–300.

<sup>127</sup> HERDEGEN.(1995).op.cit., p.599.

<sup>128</sup> ‘Gesetzliches Recht und übergesetzliches Unrecht,’ RADBRUCH, G., 1946, p.107, cited *ibid*.

<sup>129</sup> HERDEGEN.(1995).op.cit., p.600.

<sup>130</sup> GABRIEL.(2000).op.cit., p.406.

<sup>131</sup> ‘The self-destruction of legal positivism,’ GOLDSWORTHY, J.D., 1990, pp.485–486.

<sup>132</sup> MILLER.(2001).op.cit., pp.657–658.

<sup>133</sup> See, e.g., ADAMS.(1993).op.cit., pp.297–298, 314. For an alternative general summary of the *Landgericht*, BGH and BVerfG decisions, see *Streletz v. Germany*, paras.65, 19–20, 22.

<sup>134</sup> GABRIEL.(2000).op.cit., pp.394–395; HERDEGEN.(1995).op.cit., pp.600–602.

<sup>135</sup> HERDEGEN.(1995).op.cit., p.602. See also ‘The German border guard cases and international human rights,’ GEIGER, R., 1998, pp.544–545.

above, embodies the concept of substantive justice) presupposes a democratic and substantially just society. In the GDR, this was not the case: its law as traditionally interpreted thus created a conflict between the positive laws of the FRG (which sought to apply it) and the notion of justice itself. Accordingly, a novel reading of the law to uphold convictions was in fact a *vindication* of the rule of law, not an attack upon it.<sup>136</sup> The echo of the IMT's reasoning almost fifty years before ("so far from it being unjust to punish [...], it would be unjust if [the] wrong were allowed to go unpunished"<sup>137</sup>) is unmistakable.

This strand of litigation illustrates, therefore, a number of themes. From the silence of the various courts on the subject, it must be assumed that they saw a natural law conception of *ex ante* guidance, rather than a positive law one, as entirely sufficient, or at least that the two are complementary. Although the interpretation of the GDR law may have been legally defensible, it could hardly have been predicted at the time the shootings took place.

In 2001, the ECtHR Grand Chamber upheld the legality of the border guards convictions, but supposedly on the basis of a "different approach".<sup>138</sup> It has been suggested that this rather studied distinction was based more on an awareness of the "broader socio-political implications of the case"<sup>139</sup> than legal factors—although, if that is correct, it is passing strange that the ECtHR was more concerned on these lines than the German courts themselves.

The Court (rightly) took care to emphasise the relevance of its holding in *S.W.*: in examining the compatibility of the German decisions with *ECHR* Article 7(1), its mission was to consider whether the "applicants' acts, at the [relevant] time [...], constituted offences defined with sufficient accessibility and foreseeability by the law of the GDR or international law."<sup>140</sup> The case thus represents an unparalleled opportunity to measure the Court's approach to the application of the *S.W.* standard.

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<sup>136</sup> E.g., GABRIEL.(2000).op.cit., pp.409–411.

<sup>137</sup> *Goering* (IMT), p.39.

<sup>138</sup> *Streletz v. Germany*, para.65.

<sup>139</sup> MILLER.(2001).op.cit., pp.661–663.

<sup>140</sup> *Streletz v. Germany*, paras.50–52.

Undertaking a close scrutiny of GDR law, the Court discerned a requirement for the proportional use of force.<sup>141</sup> Even accepting this finding *arguendo*, it seems hard to escape Rudolf's conclusion that "[t]he Court's approach involved not just a simple change in the interpretation of GDR law, but rather the creation of new law."<sup>142</sup> Noting that border shootings were not prosecuted under the GDR, the Court nonetheless emphasised that the controlling question was the degree to which the criminal nature of the *offence*—not the fact of prosecution—was foreseeable to the applicants, who were all senior members of the National Defence Council. The Court rejected the applicants' argument for unforeseeability on the basis that "[t]he broad divide between the GDR's legislation and its practice was to a great extent the work of the applicants themselves":<sup>143</sup> "according to the general principles of law, defendants are not entitled to justify the conduct which has given rise to their conviction simply by showing that such conduct did in fact take place and therefore formed a practice."<sup>144</sup> It continued:

The Court, accordingly, takes the view that the applicants, who, as leaders of the GDR, had created the appearance of legality emanating from the GDR's legal system but then implemented or continued a practice which flagrantly disregarded the very principles of that system, cannot plead the protection of Article 7(1) of the Convention.<sup>145</sup>

The judgment hardly settles the issue, however. In basing its ruling on the fact that the appellants could not rely upon the un-foreseeability of prosecutions which they themselves were preventing (an elegant side-step), it does not explain how prosecution *was* foreseeable for the 85 or so other individuals (primarily of junior rank) who were also convicted (admittedly with light sentences). The law, *as perceived by them*, was derived as much from experience as statute, and they played no part in the policy of non-prosecution. The Court was, of course, not mandated to consider this implication—the other convicts were not parties to the ECtHR application—but it remains nonetheless.

The foreseeability point for low-ranking individuals was considered in the companion judgment in *K-H.W. v. Germany*. Applying identical reasoning with regard to the

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<sup>141</sup> *Ibid.*, paras.56–64.

<sup>142</sup> 'International decisions,' RUDOLF, B., 2001, p.909.

<sup>143</sup> *Streletz v. Germany*, para.78.

<sup>144</sup> *Ibid.*, para.74.

<sup>145</sup> *Ibid.*, para.88.

substantive content of GDR criminal law,<sup>146</sup> the Court acknowledged that the applicant's capacity to foresee the risk that he was committing a criminal conviction was at least sufficiently in doubt to merit full consideration. It noted his youth, his indoctrination, his orders, and the risk of military prosecution or investigation if individuals succeeded in crossing the border on his watch.<sup>147</sup> Nonetheless, it upheld his conviction by the German courts. This finding seems to have been based primarily on the fact that the relevant, written criminal provisions were published and publicly accessible, and that "even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only the GDR's own legal principles but also internationally recognised human rights".<sup>148</sup> The first of these arguments does not seem sound—although the relevant legal provisions were published, the broad interpretation placed on the relevant justification for border shootings was also well known. Given the ECtHR's own jurisprudence that the evolutionary development of the written law is in principle permissible, it seems wrong to require the applicant to have come to an independent assessment of the merits of the law as applied (or, more precisely, as not applied) in the face of what seemed a decisive interpretation, albeit executive rather than judicial. Judges Barreto,<sup>149</sup> Pellonpää and Zupančič,<sup>150</sup> dissenting, upheld a violation of Article 7(1) on this basis. Judges Bratza and Vajić also seemed to share these misgivings (as did the BVerfG); they concurred with the majority with regard only to the second argument.<sup>151</sup> In the BVerfG's words "the killing [was] such a dreadful and wholly unjustifiable act that it must have been immediately apparent and obvious even to an indoctrinated person that it breached the principle of proportionality and the elementary prohibition on the taking of human life." In essence, therefore, despite the different outward manifestation of its reasoning, the ECtHR too could only find a sustainable solution via a natural law approach.

It should be noted that, in both cases, the ECtHR had also considered whether, at the relevant time, the applicants' acts constituted offences defined with sufficient accessibility

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<sup>146</sup> *K.-H.W. v. Germany* (ECtHR), 2001, paras.44–67.

<sup>147</sup> *Ibid.*, para.71.

<sup>148</sup> *Ibid.*, paras.73, 75–79. The Court's observation (para.74) that in voluntarily enlisting, he "ran the risk" of committing an unlawful shooting seems to be off point: that argument only stands if it could be otherwise shown that the criminal offence was foreseeable.

<sup>149</sup> *Ibid.*, per Judge Barreto.

<sup>150</sup> *Ibid.*, per Judges Pellonpää & Zupančič.

<sup>151</sup> *Ibid.*, per Judges Bratza & Vajić.

and foreseeability “under *international law*, particularly the rules of international law on the protection of human rights”.<sup>152</sup> Citing to the *UDHR*, *ICCPR*, and one bilateral treaty,<sup>153</sup> the Court considered that a violation of international law sufficient for state responsibility was proven. It found that these provisions sufficiently defined an offence for which an individual may be held responsible on the simple basis that:

Even supposing that such responsibility cannot be inferred from the above-mentioned international instruments on the protection of human rights, it may be deduced from those instruments when they are read together with Article 95 of the GDR’s Criminal Code, which explicitly provided... that individual criminal responsibility was to be borne by those who violated the GDR’s international obligations or human rights and fundamental freedoms.<sup>154</sup>

If this finding was genuinely intended, as the sub-title and introduction suggested, to establish a crime under international law, the Court applied a markedly relaxed approach.<sup>155</sup> Further, if—as the judgments purport—it was such a simple matter to establish criminality under GDR law in this manner, it seems hard to understand why this argument was not accorded greater priority. The minimal consideration given to subjective foreseeability in this context—the junior ranking soldiers, after all, were not necessarily more likely to have thought along these lines than they were to have so interpreted domestic law—leaves open the possibility that the ECtHR construe the *S.W.* standards even more loosely for crimes under ICL than domestic law.

In 2003, the HRC was also required to consider the approach taken by the BGH *et al.* In a typically concise opinion, it did not engage directly with the mechanics of the domestic decisions but upheld the (effectively retroactive) reading of the proportionality requirement into GDR law in the context of the GDR’s international obligations. As the *Border Act* was itself legally established at the relevant time, it dismissed the petitioner’s application under *ICCPR* Article 15.<sup>156</sup> It further hedged its bets by finding that the “disproportionate use of

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<sup>152</sup> *Streletz v. Germany*, para.91, emphasis added; *K-H.W. v. Germany*, para.93.

<sup>153</sup> *Streletz v. Germany*, paras.92–103; *K-H.W. v. Germany*, paras.94–101.

<sup>154</sup> *Streletz v. Germany*, para.104; *K-H.W. v. Germany*, para.103.

<sup>155</sup> FLETCHER/OHLIN.(2005).op.cit., pp.543–544. In both *Streletz* and *K-H.W.*, Judge Loucaides acknowledged the ambiguity in the majority opinion, and argued that the policy operative in the GDR amounted to murder as a crime against humanity, as defined in orthodox ICL. Also *Streletz v. Germany*, per Judge Levits.

<sup>156</sup> *Baumgarten v. Germany* (HRC), 2003, para.9.5.

lethal force” was in fact criminal under the law of nations at the relevant time,<sup>157</sup> paving the way (although superfluously) for reliance on the exception in Article 15(2).<sup>158</sup>

This line of decisions illustrates the tensions that remain in measuring the principle of legality in cases of this nature. Although the German courts, the ECtHR, and the HRC all upheld the importance and relevance of the principle, the decisions reflect the degree to which practical solutions represent compromises. Outwardly different in their reasoning, the core conclusions of all three bodies are the same: either, that there is an exception to the principle of legality for prosecutions brought under ICL (which, it is suggested, should be doubted, if only for policy reasons), or that ‘moral notice’ of criminality in fact satisfies the principle of legality, even when the entire panoply of the state suggests otherwise. Even if one fundamentally disagrees with both these conclusions, the fact that none of these prestigious bodies could come up with better is telling.

The Hungarian Constitutional Court, when presented with an analogous issue, demonstrated that there is a school of thought still committed to a strict interpretation of legality, even for the most emotive crimes. Nonetheless, it recognised what may be termed the “paradox of the ‘revolution of the rule of law’” (the basic principle of law is certainty, yet the principle of substantive justice is the law’s *raison d’être*):<sup>159</sup> in reality, weighing the principle of legality in the context of ICL is as much a policy choice as a legal one.

This observation—and the Hungarian and German decisions themselves—perhaps reflects the extent to which decisions of this nature are socially and politically situated. The two countries have taken different approaches to the transition from periods of state-perpetrated crime: criminal prosecution has formed the principal element of the latter’s approach whereas it forms a subsidiary part of the former’s. The fact that the approaches adopted by the German and Hungarian courts reflect these broader social trends may be no coincidence. That said, the Hungarian court’s strict adherence to the principle of legality cannot be explained solely on the basis of the country’s general inclination to make a break with the

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<sup>157</sup> *Ibid.*, para.9.4.

<sup>158</sup> Pp.30-31 *infra*.

<sup>159</sup> ‘Paradoxes in the revolution of the rule of law,’ TEITEL, R., 1994, p.240.



past: the same forces were marked in Poland and the Czech Republic, yet their Constitutional Courts reached the opposite conclusion.<sup>160</sup>

In sum, although the foreseeability/core notice principle is well established, even those bodies charged with protecting human rights have found the tensions raised in ICL prosecutions difficult to resolve. In their tacit reliance on the concept of 'moral notice', they seem to have reached a similar conclusion to Justice Gonthier but by stealth, rather than with his commendable straightforwardness.

### ...as applied in ICL

At whatever level it is applied, there is even some doubt about whether the principle applies to ICL at all or, if it does, applies in the same way. *ICCPR* Article 15 and *ECHR* Article 7 are typically interpreted as establishing the absolute nature of the rule in the initial paragraph, and supplementing it in the second paragraph (perhaps superfluously) with an exclusion of the *lex scripta* principle.<sup>161</sup> However, there is a rival view.

Juratowich suggests that the provisions establish

only a *prima facie* prohibition on retroactive criminal liability [...], whereby the conviction must accord with national or international law at the time of commission, but subject to an exception [...] that 'nothing [shall] prevent' a conviction which accords with recognized general principles of law, whether or not the law on which the conviction is founded is retroactive or not.<sup>162</sup>

By 'general principle of law', he means not just the formal source specified in Article 38(1)(c) of the *ICJ Statute* but also customary international law.<sup>163</sup> He suggests that this view is preferable interpretatively and normatively. In this regard, it is interesting to note

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<sup>160</sup> *Criminal Law in Reaction to State Crime—Comparative Insights into Transitional Processes: A Project Report*, ESER, A., ARNOLD, J., & KREICKER, H., trans. SILVERMAN, E., 2002, pp.6–7, 14–15.

<sup>161</sup> NOWAK.(1993).op.cit., pp.276–281.

<sup>162</sup> JURATOWICH.(2004).op.cit., pp.340–341. Further BOOT.(2002).op.cit., pp.177–178; 'Crimes against the peace and security of mankind and the recalcitrant third state,' TOMUSCHAT, C., in *War Crimes in International Law*, DINSTEN, Y., & TABORY, M. (EDS.), 1996, p.52; 'Nulla poena sine lege in English criminal law,' SPENCER, J.R., in *The Cambridge-Tilburg Law Lectures*, MARKESINIS, B.S., & WILLEMS, J.H.M. (eds.), Vol. 3, 1980, p.35.

<sup>163</sup> JURATOWICH.(2004).op.cit., p.339.

that Geiger considered the German courts' reasoning in the border guards cases to be compatible with these provisions.<sup>164</sup> Mantovani also seems to believe that the *ICCPR/ECHR* standards are weak, suggesting that Article 22 of the *ICC Statute* establishes a higher standard of protection.<sup>165</sup>

In this context, it is interesting to note the statement in the UK *Manual on the Law of Armed Conflict* that “[i]gnorance of the law is no excuse, but if the law is unclear or controversial, an accused should be given the benefit of that lack of clarity by the award of a lesser or nominal punishment.”<sup>166</sup> Going rather beyond the ambit of the relevant international rule (which provides only for the exclusion of responsibility in certain circumstances<sup>167</sup>), this clearly illustrates that the UK, at least, accepts a degree of uncertainty in the evolution of international humanitarian law, and does not regard it as an absolute bar to liability.

It is nonetheless clear, whatever its origin, that a commitment to the principle of legality has evolved in ICL. Cassese identifies two distinct legal traditions (“substantive justice”, placing the principle of legality in tension with social values, and “strict legality”, privileging the principle of legality) in the evolution of the law. Placing most modern democracies in the latter category, he suggests that ICL has only been able to adopt a similar approach in its more fully-systematised, post-1993 renaissance.<sup>168</sup> Although the broad trend he discerns in consideration of the principle of legality may be correct, it is suggested that the distinction between the two traditions remains far murkier,<sup>169</sup> both in ICL and in domestic jurisdictions.<sup>170</sup>

For the past 60 years, defendants have relied heavily on the principle of legality to contest the jurisdiction of various tribunals.<sup>171</sup> However, for much of this period, the argument has

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<sup>164</sup> GEIGER.(1999).op.cit., pp.548–549.

<sup>165</sup> MANTOVANI.(2003).op.cit., p.30. He seems to ignore the possible effect of Article 22(3) in saving the law which forms the exception in Article 15(2): CARACCILO.(1999).op.cit., pp.231-232. *C.f.*

FLETCHER/OHLIN.(2005).op.cit., p.552.

<sup>166</sup> *Manual on the Law of Armed Conflict*, UK MINISTRY OF DEFENCE, 2005, p.443.

<sup>167</sup> *ICC Statute*, Art.32; WERLE.(2005).op.cit., pp.151–152

<sup>168</sup> CASSESE.(2003).op.cit., pp.139–145.

<sup>169</sup> E.g., “Unless otherwise provided”: Article 30 of the *ICC Statute* and the mental element of crimes under [ICL],’ WERLE, G., & JESSBERGER, F., 2005, p.46; PELLET.(2002).op.cit., p.1058.

<sup>170</sup> *C.f.* FLETCHER/OHLIN.(2005).op.cit., p.552.

<sup>171</sup> E.g., *inter alia*, *Eck* (UK), 1945, pp.4, 8, 10, 12, 15; *Klinge* (Norway), 1946, pp.2–4, 6–11, 13–14; *Buck* (UK), 1946, p.44; *Goering* (IMT); *Flick* (NMT), pp.32–39; *Araki* (IMTFE), 1948; *Rauter* (Netherlands), 1949,

been avoided rather than confronted;<sup>172</sup> the general trend of judicial responses has been to deny that any legal uncertainty existed, or even to deny the relevance in the circumstances of the legality principle at all. Decisions which have explored the true extent of the guarantee of legal ‘certainty’, and then assessed their own practice in that context, have been few and far between.

As early as 1944, Lauterpacht acknowledged the legality argument but rapidly dismissed it: the very fact that a prosecution arose from international law was sufficient to immunize it from a charge of “vindictive retroactivity”.<sup>173</sup> The IMT, considering “that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice”, stressed that “in [the] circumstances the attacker must [have] know[n] that he [wa]s doing wrong”.<sup>174</sup> The NMT took a broadly similar approach,<sup>175</sup> although also hinting that—by its largely customary and uncodified nature—international law is in any event exempt from the strict principle.<sup>176</sup> It is striking that these two basic arguments continue to underpin, expressly or tacitly, almost all subsequent examinations of the issue.

Similarly, the German Supreme Court in the British Occupied Zone, anticipating the reasoning of the *Mauerschützen* cases fifty years later, held that:

Retroactive punishment is unjust when the action, at the time of its commission, falls foul not only of a positive rule of criminal law, but also of the moral law. This is not the case for crimes against humanity. In the view of any morally-oriented person, serious injustice was perpetrated, the punishment of which would have been a legal obligation of the State. The subsequent cure of such dereliction of a duty through retroactive punishment is in keeping with justice. This... does not

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pp.118–123; *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras.139–141; *Tadić*.TJ, paras.557, 623; *Aleksovski*.AJ, paras.126–127; *Delalić*.AJ, paras.157–158, 174, 179; *Kordić*.AJ, paras.44, 46, 117, 296–305, 310–313; *Stakić*.AJ, paras.99–103, 302, 313–317, 322, 396, 398.

<sup>172</sup> ‘*Nullum crimen, nulla poena sine lege* in ICL,’ LAMB, S., in CASSESE ET AL.(2002).op.cit., p.739.

<sup>173</sup> ‘The law of nations and the punishment of war crimes,’ LAUTERPACHT, H., [1944] 11 *BYIL* 58, 65–67.

<sup>174</sup> *Goering* (IMT), pp.38–39.

<sup>175</sup> *Altstoetter* (NMT), pp.974–979; *Ohlendorf* (NMT), p.459. It should be noted, however, that the NMT—at least in some decisions—directed itself to an appropriate (even progressive) formulation of the legality principle: *von Leeb* (NMT), p.510.

<sup>176</sup> In *Altstoetter*, the NMT considered it “sheer absurdity” to apply the legality principle to international law, a field so heavily dependent on custom. However, this view was consciously predicated on the (now incorrect) assumption that it similarly does not apply to the common law: see generally *Altstoetter* (NMT), pp.974–975; *Ohlendorf* (NMT), p.458; *Flick* (NMT), p.1189; *Krupp* (NMT), p.1331.

entail any violation of legal security but rather the re-establishment of its basis and presuppositions.<sup>177</sup>

These decisions did not receive critical consideration in the post-war years. Indeed, they tended to be further entrenched by the actions of a number of national courts (and legislatures) who chose to apply retroactive legislation on the further justification of the “extraordinary” nature of Nazi crimes. For example, justifying the retroactive *Nazis and Nazi Collaborators (Punishment) Law*, which it acknowledged to be “fundamentally different in its characteristics, in the legal and moral principles underlying it, and in its spirit”, the Supreme Court of Israel, sitting as the Court of Criminal Appeals, stated:

What is the reason for all this? Only one answer is possible: the circumstances in which the crimes were committed were extraordinary, and therefore it was only right and proper that this Law, its application, employment, and the purpose which the State had in mind in enacting it—that these too should be extraordinary.<sup>178</sup>

Some years later, the Israeli courts had further opportunity to recall the comparatively sounder argument that, since the prohibited acts were “crimes under the law of all civilised nations”, the statute did not impermissibly create new crimes but merely gave “reality to the dictates of elementary justice”.<sup>179</sup> The U.S. District Court took the same view in *Demjanjuk*.<sup>180</sup> Australia was among other countries to take steps,<sup>181</sup> as Green minimally describes it, “to introduce a new nomenclature for long recognized offences”<sup>182</sup>

In *Finta*,<sup>183</sup> a 4-3 decision of the Supreme Court of Canada, both minority and majority concurred that crimes against humanity were not themselves retroactive in 1944 or impermissibly vague. Although the minority opinion articulated what might be the best view against retroactivity (that crimes against humanity were unlawful by virtue of the

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<sup>177</sup> ‘Case against Bl.’, Judgment, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen* (1950), Vol. 1, p. 5, unofficial translation cited in LAMB.(2004).op.cit., p.738.

<sup>178</sup> *Honigman v. Attorney-General* (Israel), p.543.

<sup>179</sup> See *Eichmann v. Attorney-General* (Israel), 36 *ILR* 5, pp.22–23; 36 *ILR* 277, p.281. Also ‘The maxim *nullum crimen sine lege* and the Eichmann trial,’ GREEN, L.C., 1962, pp.461, 471.

<sup>180</sup> *In the matter of the Extradition of John Demjanjuk* (US), 1985, p.567.

<sup>181</sup> *War Crimes Act 1945* (Australia), as amended; *Polyukhovich v. Commonwealth of Australia and Another* (Australia), 1991.

<sup>182</sup> GREEN.(1962).op.cit., p.461.

<sup>183</sup> *R. v. Finta* [1994] 1 S.C.R. 701.

'general principles of law' common to the nations), it continued to note that the prohibited conduct "is considered so obviously morally culpable that it verges on being *malum in se*".

By and large, although there is a line of these early decisions evidencing a 'substantive justice' approach, there is also a strong line of jurisprudence which acknowledges the principle of legality but considers its demands met by natural law or 'moral notice'.<sup>184</sup> It is notable that even committed positivists had occasion to fall back to something akin to this approach.<sup>185</sup>

References to the principle of legality, including a prohibition of vagueness in some measure,<sup>186</sup> certainly litter the jurisprudence of the ICTY/R: it cannot be doubted that the tribunals are committed—in formal terms—to compliance. Indeed, the *Delalić* Trial Chamber recognised the principle of legality as "fundamental" to the notion of "criminality".<sup>187</sup> However, it acknowledged that the extent to which the principle operates in international legal practice is uncertain, and suggested that a *sui generis* approach must be adopted, distinctive for the balance it strikes "between the preservation of justice and fairness to the accused and... the preservation of world order". In mapping the contours of the relevant approach, the Chamber held that regard should be had, *inter alia*, to the nature of international law and the absence of international legislation.<sup>188</sup> It then went on to set out rules of strict construction and non-retroactivity in the interpretation of criminal statutes or other written instruments.<sup>189</sup> Interestingly, other Chambers have drawn their own conclusions as to the appropriate outworking of these principles. In *Stakić*, for example, the Chamber noted merely that it would "interpret any relevant convention in conformity with the general rules of interpretation of treaties set out in Articles 31 and 32 of the [VCLT]",<sup>190</sup> an approach not necessarily so strict.

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<sup>184</sup> ADAMS.(1993).op.cit., p.279.

<sup>185</sup> 'Will the judgment in the Nuremberg trial constitute a precedent in international law?' KELSEN, H., 1947, p.165. Further 'Kelsen's contribution to ICL,' GATTINI, A., 2004, pp.797, 800–801, 808.

<sup>186</sup> BOOT.(2002).op.cit., pp.176, 305.

<sup>187</sup> *Delalić.TJ*, para.402.

<sup>188</sup> *Delalić.TJ*, paras.403, 405.

<sup>189</sup> *Delalić.TJ*, paras.408–418.

<sup>190</sup> *Stakić.TJ*, para.411.

In *Aleksovski*, the Appeals Chamber established that the principle of legality does not preclude the evolution of the elements of a crime through a process of interpretation/clarification.<sup>191</sup> Similarly, in applying the law, the approach of the ICTY/R judges may be characterised as an examination not of whether a particular set of circumstances was ever concretely recognized by the existing law, but whether those circumstances fall reasonably within the law's scope.<sup>192</sup> In Judge Shahabuddeen's words, since an interpretation of the law is not an extension of that law but a statement of what that law has always meant, no question arises of any violation of [...] *nullum crimen sine lege*." For himself, he suggests that the principle protects only those who reasonably believed their conduct lawful, not as a shield from latter legal formulations for those who nonetheless knew at the time that they committed some sort of crime.<sup>193</sup>

Nonetheless, in *Vasiljević*, the Trial Chamber had applied the jurisprudence of the ECtHR to require that:

...the Trial Chamber must further satisfy itself that the criminal conduct in question was sufficiently defined and was sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the criminal heading chosen by the Prosecution... From the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.<sup>194</sup>

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<sup>191</sup> *Aleksovski*. AJ, para.127.

<sup>192</sup> *Stakić*. AJ, per Judge Shahabuddeen, paras.35–36, 39; *Karemera*, Decision on Jurisdictional Appeals—Joint Criminal Enterprise (hereinafter "*Karemera JCE Decision*"), para.15; *Karemera*, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 2004, paras.15, 37, 43-44; *Hadžihasanović/Kubura*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility ("*Hadžihasanović Command Responsibility Appeal*"), para.12. C.f. 'Revival of customary humanitarian law,' MERON, T., 2005, pp.824–826; METTRAUX.(2005).op.cit., p.18; 'Présentation de la IIème partie,' CONDORELLI, L., in *Droit international pénal*, ASCENSIO, H., DECAUX, E., & PELLET, A. (eds.), 2000, p.246.

<sup>193</sup> *Stakić*. AJ, per Judge Shahabuddeen, paras.67–68. Also *Semanza*, [Appellate] Decision, per Judge Shahabuddeen, para.21. Further MANTOVANI.(2003).op.cit., pp.28-29.

<sup>194</sup> *Vasiljević*. TJ, para.193.

Under no circumstances, it continued, “may the court create new criminal offences after the act charged... by giving a definition to a crime which had none so far”<sup>195</sup> In assessing whether an offence is defined with sufficient clarity under international law, it examined the extent to which its “general nature, its criminal character and its approximate gravity” were foreseeable.<sup>196</sup>

On the facts, however, the decision was as much illustrative of what *not* to do. Given the narrow view it took of the relevant state practice, the Chamber acquitted the defendants from the charge of doing “violence to life and person” but convicted them (for the same conduct) of “inhumane acts”, an offence which it regarded as better established in law. As Judge Cassese has separately observed, this reasoning reflected a preoccupation with the legal nomenclature of the offence rather than the nature of the *conduct* actually prohibited under the law. This had the ironic result that a less apposite conviction was in fact entered<sup>197</sup> and may have contributed to the decision’s limited following.

Indeed, the ICTY has not been entirely averse to the development of criminal offences through unwritten sources of law. The Appeals Chamber did precisely this in *Vujin* when it confirmed the existence of a general offence of ‘contempt’ to give effect to its “inherent jurisdiction” to safeguard its judicial functions.<sup>198</sup> Although the RPE provided notice that certain conduct was punishable as ‘contempt’,<sup>199</sup> the Appeals Chamber upheld a much broader “inherent power... to [punish] those who knowingly and wilfully interfere with [the] administration of justice”.<sup>200</sup> This formulation, arguably uncertain in its scope, was only introduced shortly after the commencement of the period in which the alleged misconduct occurred.<sup>201</sup> It was correctly stressed that the RPE are not a statutory enactment, and thus not the source of obligation, as the judges who adopted them possess no legislative power.<sup>202</sup> Thus, not only was the substantive law drawn from more or less inaccessible

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<sup>195</sup> *Vasiljević TJ*, para.196.

<sup>196</sup> *Vasiljević TJ*, para.201. See also *Galić TJ*, per Judge Nieto-Navia, para.111.

<sup>197</sup> ‘Black letter lawyering v. constructive interpretation,’ CASSESE, A., 2004, pp.272–273.

<sup>198</sup> *Tadić*, Vujin Contempt Judgment, paras.12–15.

<sup>199</sup> *Ibid.*, paras.19–23.

<sup>200</sup> *Ibid.*, paras.27–29.

<sup>201</sup> *Ibid.*, para.20.

<sup>202</sup> *Ibid.*, para.24.

sources, there was arguably not even core notice in the *Statute* of the Tribunal's jurisdiction to punish such conduct.

In *Furundžija*, a relatively relaxed approach was also taken. Confronted with the need to give a legal classification to the act of enforced oral sex, the Trial Chamber relied on general principles of law<sup>203</sup> to conclude that it fell within the definition of rape. It relied on two assertions of principle to forestall any claim that this finding violated the principle of legality.<sup>204</sup> First, it found that as the act in question was necessarily criminal under any of the possible classifications, the accused did not lack notice that their intended conduct violated criminal law. Although they may have failed to appreciate the stigma of the particular offence for which they were to be convicted, the Chamber clearly assumed that the basic criminal nature of the conduct was far more significant than its legal classification. Rather clumsily, the Chamber also sought to apply the “fundamental principle of human dignity”—whether this was a justification for acknowledged retroactivity (the substantive justice argument) or a recognition of moral turpitude (the core notice argument) is unclear.

In its *Ojdanić* decision, the Appeals Chamber expressly applied the reasoning in *S.W.* to a challenge to the legality of the JCE doctrine.<sup>205</sup> However, it refrained from engaging too closely with the high-water mark of *Vasiljević*: in considering the *indicia* of foreseeability, like many of the courts discussed above, it required only that the accused was reasonably on notice of the *risk* of violating the law,<sup>206</sup> and placed heavy emphasis on the role of moral notice.<sup>207</sup> Similarly, in the *Hadžihasanović* decisions, it was emphasised that an individual need only recognise the potential criminality of their conduct, not appreciate its legal quality or relative culpability.<sup>208</sup>

The approach of the ICTY/R is thus neatly summed up in the words of Judge Shahabuddeen: in matters concerning the principle of legality, it is the “very essence” of the

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<sup>203</sup> *Furundžija*, T.J, paras.177-178.

<sup>204</sup> *Ibid.*, para.184. C.f. FLETCHER/OHLIN.(2005).op. cit., p.551.

<sup>205</sup> *Ojdanić JCE Decision*, paras.37-39.

<sup>206</sup> *Ibid.*, para.41.

<sup>207</sup> *Ibid.*, para.42. C.f. *Fofana*, Decision, per Judge Robertson, 2004, para.3.

<sup>208</sup> *Hadžihasanović Command Responsibility Appeal*, para.34; *Hadžihasanović*, Decision on Joint Challenge to Jurisdiction, 2002, para.62; also *Delalić.AJ*, paras.179–180; *Delalić.TJ*, para.313.



offence which governs.<sup>209</sup> Providing that the accused had core notice of that essence—which may very often be satisfied in the Tribunals’ opinion by the fundamental nature of the norms allegedly breached—the principle of legality is likely to be considered to be met. This conclusion raises the question whether the principle of legality must apply to attribution doctrines at all. After all, it could be reasoned that—provided the accused was aware that their conduct was sufficiently associated with the commission of the criminal ‘essence’—the mechanism by which their liability is assessed is one of those legal details which has been held irrelevant.

### **...as applied to the attribution of responsibility**

It has been clearly stated that the principle of legality applies not just to the definition of a substantive offence, but to all the (inculpatory and exculpatory) elements that determine liability.<sup>210</sup> The ICTR Appeals Chamber has held that “it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not been clearly defined in [ICL]”<sup>211</sup> and the ICTY Appeals Chamber expressly predicates its jurisdiction over a mode of liability on the particular doctrine’s foreseeability and accessibility.<sup>212</sup> On the other hand, in addition to the *dicta* previously discussed (particularly from *Hadžihasanović*) specifying that legal detail is not required to satisfy the principle of legality,<sup>213</sup> it is also striking that when the ICTY rejected the *Stakić* co-perpetration doctrine, it was not done on the basis of the principle of legality but on criticism of the law itself.<sup>214</sup> The application of the principle of legality thus seems to depend upon the extent to which attribution doctrines genuinely represent an interface between the individual and their awareness of the criminal ‘essence’.

To this end, Boot concludes that ICL, at least as applied by the ICTY/R, “does not always” meet the criterion of foreseeability required by the principle of legality. Although he acknowledges the argument that ‘core notice’ of international crimes has been hard to deny

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<sup>209</sup> SHAHABUDEEN.(2004).op.cit., p.1017.

<sup>210</sup> FLETCHER.(2000).op.cit., p.529.

<sup>211</sup> *Bagilishema.AJ*, para.34; also *Fofana/Kondewa.TJ*, para.202.

<sup>212</sup> *Ojdanić JCE Decision*, para.21.

<sup>213</sup> Also JURATOWICH.(2004).op.cit., p.339.

<sup>214</sup> *Stakić.AJ*, para.62.

for some decades,<sup>215</sup> he highlights the role of the various attribution doctrines in obscuring the legal consequences of their actions from individuals.<sup>216</sup> Such a view indicates his belief that these doctrines should thus be regulated by the legality principle, as they materially alter an individual's core notice of potential criminality.

Interestingly, however, Boot reasons that Article 22 of the *ICC Statute* does not straightforwardly extend to Article 25, the provision concerning modes of liability. He writes, slightly ambiguously,

The Statutory provision in Article 22, containing *nullem crimen sine lege*, does not concern Article 25 containing provisions on individual criminal responsibility. Article 25 only comes into play after it has been established that the "conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." These requirements do not include an element of criminal responsibility or liability.

Furthermore, Article 22(2), containing a rule of strict construction and prohibition of analogous application, only applies to "the definition of a crime," and does not apply to provisions on individual criminal responsibility. This latter observation would indicate that provisions on individual criminal responsibility may be extensively construed. However, the *nullum crimen sine lege* principle also applies to this provision. This means that Article 25 has to be construed strictly as well. This means that, for instance, the concept of "direct and public incitement," included in Article 25(3)(e) Rome Statute, only applies to the crime of genocide.<sup>217</sup>

In other words, although he suggests that Article 22 does not govern Article 25 directly, he argues that the general principle of *nullum crimen sine lege* serves to 'read up' the relevant passages of the *Statute*. Thus, in theory, with regard to the extent to which the principle of legality regulates the judicial elaboration of responsibility doctrines, the ICC is subject to precisely the same regime as the ICTY/R. Van Sliedregt relies on Boot's analysis with respect to the limited effect of Article 22 to advocate a looser interpretation of the word "commits";<sup>218</sup> it is difficult to determine, however, whether this is the result of a misinterpretation of his caveat about the application of the general *nullum crimen* principle,

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<sup>215</sup> E.g., 'Perverse effects of the *nulla poena* principle: national practice and the *ad hoc* tribunals,' SCHABAS, W., 2000, p.538.

<sup>216</sup> BOOT.(2002).op.cit., pp.305–306.

<sup>217</sup> BOOT.(2002).op.cit., p.395.

<sup>218</sup> VAN SLIEDREGT.(2003).op.cit., p.66. Also '[JCE] as a pathway to convicting individuals for genocide,' VAN SLIEDREGT, E., 2007, p.207.

or the outcome of her belief that the restriction in general international law is in fact *de minimis*.

The approach of the ICC Pre-Trial Chamber in *Dyilo* seems to support this latter view. Certainly, in the context of the Defence submission that a threshold determination must be made of the defendant's foresight of the criminal nature of his acts, the Chamber made a finding as to the legality of the substantive offence in question yet remained silent as to the modes of liability charged.<sup>219</sup>

Arguments as to the applicability of the legality principle to modes of liability seem to be balanced roughly equally. However, given the principle's relatively limited scope in practice and yet its considerable import, it seems inappropriate to exclude attribution doctrines from its ambit. In practical terms, most attribution doctrines will in any event satisfy the test: arguably, only those doctrines which have such a long reach that they violate the principle of culpability will also sufficiently cloud the actor's appreciation of their own risk of criminality so as to fall foul of the principle of legality. Accordingly, even before progressing to a substantive analysis of judicial practice on the attribution of responsibility, it can tentatively be suggested that its development does not violate the principle of legality.

#### A NOTE ON SOURCES

Judge Meron comments, extrajudicially, that any meaningful notion of 'notice' in the law is largely a legal fiction,<sup>220</sup> suggesting instead that the principle of legality is better preserved by a cautious judicial attitude to the origin of alleged norms in the formal sources of law.<sup>221</sup> Although his comment cannot be wholeheartedly accepted—legality should not solely be guaranteed by the judiciary—he is entirely right about the importance of the question of

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<sup>219</sup> *Dyilo*, Decision on the Confirmation of Charges (hereinafter "*Dyilo Charges Decision*"), paras.294, 297, 301–302.

<sup>220</sup> MERON.(2005).op.cit., pp.818, 821.

<sup>221</sup> This is a significant challenge: *c.f. Problems and Process: International Law and How We Use It*, HIGGINS, R., 1994, pp.37-38; also 'The [ICJ] and the sources of international law,' MENDELSON, M., in *Fifty Years of the [ICJ]: Essays in Honour of Sir Robert Jennings*, LOWE, V., & FITZMAURICE, M. (eds.), 1996, pp.63–64; generally *International Customary Law and Codification*, THIRLWAY, H., 1972.

sources,<sup>222</sup> which is fundamental to an understanding of the true legal quality of established norms.<sup>223</sup>

The commitment to customary law evident in his remarks, however, underlines a persistent ambiguity in the practice of the ICTY/R. A whole paper can be written on this subject alone but, very briefly, it is suggested that the ICTY/R's determination, originating from the fear of allegations of judicial creativity, to purport to root every aspect of the law in customary international law has led to the very criticism they sought to avoid when this could not be done altogether convincingly.<sup>224</sup> For the reasons briefly referenced here, this failure is not culpable (indeed, perhaps even inevitable), although it cannot be denied that the rigour with which the test for custom has been applied has varied considerably with circumstance.<sup>225</sup>

Very simply, any attempt to apply customary law in circumstances outside its classic, state-based context is likely to court discussion. The true meaning and test for custom remains much more controversial than is popularly assumed. Although ICL scholars tend to treat it with great concision,<sup>226</sup> almost every aspect of it remains the subject of debate and competing opinion.<sup>227</sup>

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<sup>222</sup> For definition, SHAW.(2003).op.cit., p.66.

<sup>223</sup> ALLOTT.(1971).op.cit., p.105. A proper grounding in the formal sources may also be an aspect of the right to a reasoned judgment: *ICTY Statute*, Art.23(2); *ICTR Statute*, Art.22(2); *ICC Statute*, Art.74(5); *Kvočka.AJ*, paras.23–24; *Kunarac.AJ*, paras.41–42; *Kupreškić.AJ*, para.39; *Furundžija.AJ*, para.69; *Ruiz Torija v. Spain* (ECtHR), 1994, para.29; *Van de Hurk v. the Netherlands* (ECtHR), 1994, para.61. Also TRESCHERL.(2005).op.cit., p.103; METTRAUX.(2005).op.cit., pp.14–15.

<sup>224</sup> E.g., CRYER ET AL.(2007).op.cit., p.111; 'Criminal international law and customary international law,' VON HEINEGG, W.H., in *ICL and the Current Development of Public International Law: Proceedings of an International Symposium of the Kiel Walter Schücking Institute of International Law*, ZIMMERMANN, A., & HEINZ, U.E. (eds.), 2003, pp.43–44, 46–47; 'On the sources of ICL,' DJURO-DEGAN, V., 2005, p.75. *C.f.* SHAHABUDEEN.(2004).op.cit., p.1017.

<sup>225</sup> Contrast, e.g., *Simić.AJ*, per Judge Schomburg, para.14, fn.20; *Galić.AJ*, per Judge Schomburg, paras.6–19.

<sup>226</sup> CRYER ET AL.(2007).op.cit., pp.7–8; WERLE.(2005).op.cit., pp.46–47; CASSESE.(2003).op.cit., pp.28–30.

<sup>227</sup> E.g., 'Selected problems in the theory of customary international law,' KOLB, R., 2003, pp.119, 150; 'Traditional and modern approaches to customary international law: a reconciliation,' ROBERTS, A.E., 2001, p.758; MENDELSON.(1996).op.cit., p.67; 'The subjective element in customary international law,' MENDELSON, M., 1995, pp.177–178, 181; 'Universal international law,' CHARNEY, J.I., 1993, pp.538, 543–545; 'Obligations arising for states without or against their will,' TOMUSCHAT, C., 1993, p.309; 'Some persistent controversies regarding customary international law,' WOLFKE, K., 1993, pp.2, 15–16; 'The sources of human rights law: custom, *jus cogens*, and general principles,' SIMMA, B., & ALSTON, P., 1989, pp.88–90; 'The normative dilemma: will and consent in international law-making,' PELLET, A., 1989, p.22 *et seq.*; 'The identification of international law,' JENNINGS, R.Y., in *International Law, Teaching and Practice*, CHENG, B. (ed.), 1982, p.5; 'Custom as a source of international law,' AKEHURST, M., 1974, p.1; *La Guerre-Crime et les criminels de guerre: réflexions sur la justice pénale internationale*, PELLA, V., 1949, p.82.

Secondly, the paradox peculiar to dynamic areas of the law like ICL—while the international community largely depends on judicial decisions for the authoritative development and clarification of the law,<sup>228</sup> that process simultaneously distances the resulting law from the core elements of mutual consent and state practice to which it must supposedly relate<sup>229</sup>—means that it is almost impossible for ICL tribunals to apply customary law in the classic, uncontroversial sense. The problem is further exacerbated by the fact that most instances of state practice relevant to ICL occur in “juridical outer space and out of sight”.<sup>230</sup> Although it is true to say that the customary method is acknowledged to vary, at least in part, according to the circumstances in which it is applied,<sup>231</sup> this dictum will rarely be sufficient to assuage most criticisms.

As a result of these difficulties, even when claiming to be applying customary law, it is possible that courts may in fact be applying other sources, most notably ‘general principles’ within the meaning of the *ICJ Statute*, Article 38(1)(c).<sup>232</sup>

Assuming *arguendo* that this process applies equally to the ICTY/R, it can be demonstrated that this does not in fact threaten the legality of its decisions. Indeed, questions about the basis of the law articulated by the ICTY/R are important not so much for the protection of the rights of the accused, but the professional esteem in which a given decision or doctrine is held (which largely depends on the quality of the method applied<sup>233</sup>), and thus its ability to transcend the confines of a particular institution and be applied as general international law.<sup>234</sup> Given the historic purpose served by the ICTY/R as “living laboratories”<sup>235</sup> of the

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<sup>228</sup> ‘Hersch Lauterpacht—the scholar as judge,’ FITZMAURICE, G., 1961, p.19. Also *New Jersey v. Delaware* (US), 1934, p.383.

<sup>229</sup> *International Law in Theory and Practice*, SCHACHTER, O., 1991, pp.39–40; *The Basis of Obligation in International Law*, BRIERLY, J.L., 1958, p.98. Further *The Nature and Sources of the Law*, GRAY, J.C., 1931, p.297, cited in METTRAUX.(2005)op.cit., p.15, fn.9.

<sup>230</sup> METTRAUX.(2005).op.cit., p.13.

<sup>231</sup> WOLFKE.(1993).op.cit., p.15; *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment (ICJ), per Judge Tanaka, 1969, pp.175, 177.

<sup>232</sup> E.g., ‘The inherent powers of international courts and tribunals,’ BROWN, C., 2005, pp.203–204; WERLE.(2005).op.cit., p.48; *International Criminal Law*, Vol. I, BASSIOUNI, M.C., 1999, p.4.

<sup>233</sup> METTRAUX.(2005).op.cit., p.14.

<sup>234</sup> CRYER ET AL.(2007).op.cit., p.451; METTRAUX.(2005).op.cit., pp.12, 15, 366; BOOT.(2002).op.cit., p.393; MENDELSON.(1996).op.cit., p.82. This idea is fully conveyed by the maxim *non exemplis, sed legibus iudicantur est: Kupreškić.TJ*, para.540.

<sup>235</sup> *The UN International Criminal Tribunals: the former Yugoslavia, Rwanda and Sierra Leone*, SCHABAS, W., 2006, p.76.

law, and the demands of the ‘community of courts’<sup>236</sup> (particularly in the criminal context<sup>237</sup>), this is a significant problem. It is thus worth identifying here, even in passing, as a spur to further debate and study.

Challenging the requirement for a customary basis of the ICTY/R’s law has become so unthinkable that the matter is considered trite.<sup>238</sup> However, risking exposure as a ‘stranger in the house’,<sup>239</sup> it must be said that the origin of this requirement is doubtful. First articulated by the Secretary-General in 1993, a strict reading of the relevant passage demonstrates that it was primarily concerned with the issue—which proved moot—of the applicability of certain international conventions.<sup>240</sup> The sole reference to customary law—rather than customary law and general principles, which have an established relationship to ICL<sup>241</sup>—appears to have been the result merely of poor drafting. Nonetheless, as a result, the ICTY/R have consistently framed the vast majority of their discussion of modes of liability in the context of customary law,<sup>242</sup> viewing this both as a positive requirement<sup>243</sup> and “fundamental mission”.<sup>244</sup> As demonstrated in one of the lengthier passages of reasoning, this requirement remained essentially groundless, however:

In order to come within the Tribunal’s jurisdiction *ratione personae*, any form of liability must satisfy [four] pre-conditions:

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<sup>236</sup> NOLLKAEMPER.(2006).op.cit., p.302. Further, e.g., ‘A community of courts: towards a system of international criminal law enforcement,’ BURKE-WHITE, W.W., 2002; ‘Judicial globalization,’ SLAUGHTER, A., 2000; ‘Towards a theory of effective supranational adjudication,’ HELFER, L., & SLAUGHTER, A., 1997.

<sup>237</sup> ‘The proliferation of international tribunals: a chink in the armor,’ SPELLISCY, S., 2001, p.143 *et seq*; MILLER.(2002).op.cit., pp.483–486.

<sup>238</sup> *Hadžihasanović Command Responsibility Appeal*, per Judge Shahabuddeen, para.39. More remarkably, ‘The Statute’s rules on crimes and existing or developing international law,’ BENNOUNA, M., in CASSESE ET AL.(2002).op.cit., p.1105.

<sup>239</sup> ‘The shadow side of command responsibility,’ DAMAŠKA, M., 2001, p.484.

<sup>240</sup> *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808* (“Secretary-General’s Report”), 1993, para.34; also *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, 2000, para.12. Further CRYER.(2005).op.cit., pp.235–236.

<sup>241</sup> ICCPR, Art.15(2); ECHR, Art.7(2); also FRIEDMANN.(1964).op.cit., p.168.

<sup>242</sup> *Brđanin.AJ*, paras.363, 373, 405, 410, 415, 431; *Simić.AJ*, per Judge Schomburg, para.14, fn.740; *Stakić.AJ*, paras.62, 100–101; *Vasiljević.AJ*, para.95; *Rwamakuba*, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 2004, paras.13–15, 31; *Krnojelac.AJ*, para.29; *Tadić.AJ*, paras.220, 226; *Mrksić.TJ*, para.544; *Martić.TJ*, paras.126, 435; *Krajišnik.TJ*, paras.878, 886; *Orić.TJ*, para.268; *Milutinović*, Decision on Ojdanić’s Motion Challenging Jurisdiction: Indirect Co-Perpetration (“*Ojdanić Indirect Co-Perpetration Decision*”), paras.22, 40–41; *Galić.TJ*, per Judge Nieto-Navia, paras.111, 113; *Kvočka.TJ*, para.265; *Kordić/Čerkez.TJ*, paras.373–375; *Furundžija.TJ*, paras.226–227, 234; *Aleksovski.TJ*, paras.60, 62; *Delalić.TJ*, paras.321, 325; *Tadić.TJ*, paras.666, 669.

<sup>243</sup> *Tadić.AJ*, para.194.

<sup>244</sup> *Semanza*, [Appellate] Decision, per Judge Shahabuddeen, paras.20, 29, 31.

- (i) it must be provided for in the Statute, explicitly or implicitly;
- (ii) it must have existed under customary international law at the relevant time;
- (iii) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; and
- (iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.<sup>245</sup>

Pre-conditions (i), (iii) and (iv) are, respectively, a jurisdictional pre-requisite<sup>246</sup> and conventional understandings of the requirement of the principle of legality. Alone, they fully satisfy the Chamber's earlier assessment of the necessary standards for the assertion of jurisdiction *ratione personae*.<sup>247</sup> Pre-condition (ii) therefore, repeating the need for an attribution doctrine to have existed under customary international law, is apparently superfluous. It can only be assumed that it was the product of an assumption that only customary law could satisfy the requirements of the principle of legality.<sup>248</sup> This assumption is questionable, and has recently been disapproved.<sup>249</sup>

Consistent with this finding, there is some established authority for reliance on general principles of law in founding attribution doctrines, or aspects thereof.<sup>250</sup> Although the Appeals Chamber has expressed concern with the use of general principles on the basis that it might require, at least, the major legal systems of the world to agree on the putative norm,<sup>251</sup> a similar *impasse* can be reached in principle with regard to customary law.<sup>252</sup> It is clear, in fact, that customary law and general principles both have strengths, weaknesses, and controversies<sup>253</sup> and reliance on both sources may be to the advantage of the

<sup>245</sup> *Ojdanić JCE Decision*, para.21.

<sup>246</sup> 'The proper limits of individual responsibility under the [JCE doctrine],' CASSESE, A., 2007, p.114; METTRAUX.(2005).op.cit., p.270.

<sup>247</sup> *Ibid.*, para.9.

<sup>248</sup> *Kordić.AJ*, paras.44–46; *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras.94, 143; also perhaps *Simić.AJ*, per Judge Schomburg, para.3.

<sup>249</sup> *Galić.AJ*, para.85. *C.f.* 'Reflections on the treatment of the notions of control of the crime and [JCE] in the *Stakić [AJ]*,' OLÁSULO, H., 2007, p.152.

<sup>250</sup> *Tadić*, Vujin Contempt Judgment, paras.13-25; *Ojdanić Indirect Co-Perpetration Decision*, per Judge Bonomy, para.27, citing to *Blaškić.AJ*, paras.34–42; *Blaškić.TJ*, para.264; *Vasiljević.TJ*, para.199; *Delalić.TJ*, para.321. Also *von Leeb* (NMT), p.510. Further, VAN SLIEDREGT.(2007).op.cit., p.207; MANTOVANI.(2003).op.cit., p.37; DAMAŠKA.(2001).op.cit., p.489; *Secretary-General's Report*, para.58.

<sup>251</sup> *Tadić.AJ*, para.225; *Ojdanić Indirect Co-Perpetration Decision*, paras.7, 31, 39. *C.f.* *Ojdanić Indirect Co-Perpetration Decision*, per Judge Bonomy, para.27; *Kunarac.TJ*, para.439; *Furundžija.TJ*, paras.177, 182

<sup>252</sup> *Gacumbitsi.AJ*, per Judge Shahabuddeen, para.51.

<sup>253</sup> With regard to general principles, see generally in this context: CRYER ET AL.(2007).op.cit., p.8; AMBOS.(2006).op.cit., p.662; KOLB.(2004).op.cit., pp.274-276; *Crimes against Humanity in [ICL]*,

international courts and tribunals. For the purposes of this paper, however, it suffices to confirm that neither customary law nor general principles, properly applied, necessarily violate the principle of legality, and to comment that the articulation of the law on attributing responsibility may not be as straightforwardly based on classic 'state-derived' customary norms as some sources may suggest. To that end, a very conservative approach is adopted to classifying law as 'customary', recognising judicial elucidation as a process rather than an end result.

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BASSIOUNI, M.C., 1999, pp.283, 367; '*Res judicata*, precedent and the International Court: a preliminary sketch,' SCOBIE, I., 1999, p.300; 'The [ICC]: some procedural and evidential issues,' SHAW, M.N., 1998, pp.68–69; WEIL.(1998).op.cit., pp.111, 114; JENNINGS/WATTS.(1992).op.cit., pp.39-40; BASSIOUNI.(1990).op.cit., pp.768–770; FRIEDMANN.(1963).op.cit., pp.287–299; 'General course on Public International Law,' WALDOCK, H., 1962, p.58 *et seq.*, cited in *Furundžija.AJ*, per Judge Shahabuddeen, para.256, fn.2; 'The general principles of law recognized by civilized nations,' MCNAIR, A., 1957, pp.1, 15; 'Research on the general principles of law recognized by civilized nations,' SCHLESINGER, R.B., 1957, p.736; *General Principles of Law as Applied by International Courts and Tribunals*, CHENG, B., 1953, pp.xi, 24; *Private Law Sources and Analogies of International Law*, LAUTERPACHT, H., 1927, pp.69–70, 86, 298–303.



## PART II: 'ONE AND A HALF' RULES OF ATTRIBUTION

This section sets out the doctrines of attribution that exist in general international law, having particular regard to the areas of consonance and conflict between the conventional law of the *ICC Statute* and the international practice articulated by the ICTY/R. Although Ambos is correct that ICL does not yet have a truly “comprehensive” concept of individual responsibility,<sup>254</sup> the general degree of doctrinal coherence is nonetheless impressive for such a youthful system faced with such a challenging task.

Given the substantial attempt at codification made by the *ICC Statute*, and its “advanced expression” of the general part of ICL,<sup>255</sup> a number of authors have chosen expressly to explore the doctrines of attribution within the structure of Article 25.<sup>256</sup> This paper departs from that practice for two reasons.

First, it is feared that in placing the structure and wording of Article 25 at the centre of this study, the impression will be left that the *ICC Statute* is as revolutionary in the substantive law it applies as it is in its procedure. This is not the case.<sup>257</sup> Although the general influence of the *Statute* is undeniable,<sup>258</sup> it remains (at least presently) but one component in the structure of general ICL, a codification of what might be termed the “lowest common denominator”.<sup>259</sup> As Judge Shahabuddeen noted, “a codification does not necessarily exhaust the principle of customary international law sought to be codified. The fullness of the principle, with its ordinary implications, can continue notwithstanding any narrower

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<sup>254</sup> ‘Individual criminal responsibility in ICL: a jurisprudential analysis—from Nuremberg to the Hague,’ AMBOS, K, in KIRK MCDONALD & SWAAK-GOLDMAN.(2000).op.cit., pp.28-30.

<sup>255</sup> AMBOS.(2006).op.cit., pp.661–662. *C.f. ICL in Germany: Case Law and Legislation*, Presentation to *Combating International Crimes Domestically* (3<sup>rd</sup> Annual War Crimes Conference, Ottawa), WIRTH, S., 2002, pp.9–10, fns.41–44.

<sup>256</sup> E.g., WERLE.(2005).op.cit., pp.119–128; VAN SLIEDREGT.(2003).op.cit., p.65.

<sup>257</sup> OHLIN.(2006).op.cit., p.70; ESER.(2002).op.cit., p.768; CASSESE.(1999).op.cit., p.170; ‘Article 10,’ TRIFFTERER, O, in *Commentary on the Rome Statute of the International Criminal Court*, TRIFFTERER, O, 1999, p.316. *C.f. SADAT*.(2003).op.cit., pp.1077, 1079; ‘Custom, codification and some thoughts about the relationship between the two: Article 10 of the ICC Statute,’ SADAT, L.N., 2000, pp.919, 923.

<sup>258</sup> SCHABAS.(2006).op.cit., p.291; *Tadić.AJ*, para.223; *Furundžija.TJ*, para.227.

<sup>259</sup> SADAT.(2000).op.cit., pp.916, 919; also.AMBOS.(2006).op.cit., p.669. Given this status, some commentators make gloomy forecasts of the risk of the ICC inducing stagnation in the law: e.g., PELLET.(2002).op.cit., pp.1083–1084.

scope suggested by the codification.”<sup>260</sup> Indeed, as an ‘unsafe’ law enforcement mechanism, the risk that the ICC negotiators were less willing to adopt as broad an approach to the attribution of responsibility as ‘safe’ institutions such as the *ad hoc* tribunals is, at the very least, a real one.<sup>261</sup>

Despite the rhetoric of its ‘completeness’,<sup>262</sup> the *ICC Statute* specifically contemplates the possibility that certain doctrines were not laid down in the treaty but nonetheless exist in general ICL. It takes care to allow ICC judges to refer, “where appropriate”, to “the principles and rules of international law”<sup>263</sup> outside its text—which includes the law as interpreted by the ICTY/R<sup>264</sup>—and protects this law against attack on the basis of Article 22 (*nullum crimen sine lege*).<sup>265</sup> As Pellet notes, even without express permission, the ICC should have such jurisdiction.<sup>266</sup> The extent to which the *ICC Statute* grants authority to depart summarily from substantive customary international law is itself questionable.<sup>267</sup> Although it is highly probable that the ICC can do so where the conflict is manifest (even if this represents a retrograde step<sup>268</sup>), it should otherwise attempt to pursue interpretations which are consonant with existing law.<sup>269</sup> It is particularly likely that reference to law beyond the *Statute* will have to be made with regard to individual responsibility,<sup>270</sup> if only to interpret the terms employed in Article 25.

Further, the *Statute* does not necessarily eliminate or supplant existing law:<sup>271</sup> Article 10 provides that “[n]othing in [Part 2, which elucidates *inter alia* the applicable (substantive)

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<sup>260</sup> *Hadžihasanović Command Responsibility Appeal*, per Judge Shahabuddeen, para.38.

<sup>261</sup> CRYER.(2001).op.cit., pp.4, 9–10, 23–24, 30–31; ‘International humanitarian law and war crimes tribunals: recent developments and perspectives,’ BOTHE, M., in *International Law: Theory and Practice—Essays in Honour of Eric Suy*, WELLENS, K. (ed.), 1998, pp.581, 593.

<sup>262</sup> E.g., *Ojdanić JCE Decision*, para.18.

<sup>263</sup> *ICC Statute*, Art.21(1)(b); DEGUZMAN.(1999).op.cit., p.442; CARACCILO.(1999).op.cit., p.225. *Cf.* FLETCHER/OHLIN (2005) op.cit., p.559. Ambos also raises questions about the extent to which extra-statutory law may be used for inculpatory or penal purposes, although the interplay between Articles 21–23 at least permits this as a possibility: AMBOS.(2006).op.cit., p.671.

<sup>264</sup> BOOT.(2002).op.cit., pp.392–393.

<sup>265</sup> *ICC Statute*, Art.22(3); LAMB.(2002).op.cit., p.754; CASSESE.(1999).op.cit., p.157.

<sup>266</sup> PELLET.(2002).op.cit., p.1072.

<sup>267</sup> VAN SLIEDREGT.(2007).op.cit., p.193.

<sup>268</sup> ‘The defence of superior orders: the [ICC Statute] versus customary international law,’ GAETA, P., 1999, p.172 *et seq.*

<sup>269</sup> *See VCLT*, Art.31, especially Art.31(3)(c); also WERLE.(2005).op.cit., p.45;

WERLE/JESSBERGER.(2005).op.cit., p.46.

<sup>270</sup> VAN SLIEDREGT.(2003).op.cit., p.9. Also CARACCILO.(1999).op.cit., pp.231–232.

<sup>271</sup> BOOT.(2002).op.cit., pp.624–626.

law] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law”. Although the rules on attributing responsibility are in fact located in Part 3, it is submitted that they are better conceived as also falling within the scope of Article 10. Bennouna recalls the “negotiators’ feeling that in enunciating the general principles of criminal law [in Part 3], it was possible to find a compromise between the world’s major legal systems”<sup>272</sup> and thus create a new, ‘synthetic’ (in Hegelian terms) body of law. However, in the light of the established international practice and wide divergence of national views, he expressly excepts Article 28 (relating to superior responsibility) from this observation and, by implication, from Part 3 altogether.<sup>273</sup> For the same reasons,<sup>274</sup> this approach is also advocated for Article 25.

Although Article 10 only preserves existing or developing law “for purposes other than this Statute”, it must be assumed in the light of Articles 21 and 22 that even proceedings at the ICC will preserve customary law unless a provision of the Statute conflicts with it in plain terms. Of course, these comments are not intended to exaggerate the role of Article 10: the *ICC Statute* must necessarily have a bearing on the evolution of customary law,<sup>275</sup> particularly in its expansive rather than restrictive elements.<sup>276</sup> However, neither does it, black hole-like, exert an irresistible gravitational force. Even where the *Statute* does reflect or codify existing international law, those apparently identical norms retain a separate existence in both customary and conventional law.<sup>277</sup>

Second, Article 25—quite properly—attributes the different responsibility doctrines equal formal status under the *Statute*. Each mode of liability specified is independently legitimate.

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<sup>272</sup> BENNOUNA.(2002).op.cit., p.1101.

<sup>273</sup> *Ibid.*, fn.1.

<sup>274</sup> SADAT.(2002).op.cit., p.193. Also ‘[ICL] principles,’ SALAND, P, in *The [ICC]: the Making of the Rome Statute*, LEE, R.S. (ed.), 1999, pp.198-200; CRYER.(2004).op.cit., pp.261-262. It is true that passage through the stage of disagreement is often an essential part of the *political* process of legal codification and may not necessarily prejudice the resulting code (LAUTERPACHT.(1955).op.cit., p.32); however, the *ICC Statute* shows the difficulty of ironing this disagreement out: CASSESE.(1999).op.cit., p.145; also 170-171.

<sup>275</sup> WERLE.(2005).op.cit., pp.45-46; *Furundžija*.TJ, para.227.

<sup>276</sup> SADAT.(2000).op.cit., pp.918, 920.

<sup>277</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the USA)*, Judgment (ICJ), 1986, p.95; also WOLFKE.(1993).op.cit., pp.10-11, fn.40; *c.f.* CZAPLINSKI.(1989).op.cit., pp.164-165. It is interesting to note in this regard that conventional and customary law are subject to different interpretative processes: the impact this may have on the future development of ICL by the ICC may be considerable. *Human Rights and Humanitarian Norms as Customary Law*, MERON, T., 1989, p.8.

Adopting the structure and wording of Article 25 here would imply a similar position in general international law.

It is the contention of this paper, however, that if the modes of liability established in non-conventional ICL (*i.e.*, articulated in international judicial practice) have achieved this status of independent legitimacy, they may only have done so recently, with the benefit of at least some of the ICTY/R jurisprudence. In other words, specific doctrines such as ‘common purpose’ liability or ‘procurement’ liability—indeed, any ‘rules’ other than the most basic—can only be said to have crystallised themselves in customary law at some (unknown) point in the period 1998-2008. It may have been very recent indeed.

Thus, in the early 1990s, it is suggested that only ‘one and a half’ rules of attribution were clearly established in customary law. This structure is borrowed for the organisation of this study, in order to highlight the true origin of the various doctrines and their developmental nature. The ICTY/R’s development of an enumerated doctrine of complicity is more accurately construed, at least initially, as a process of interpretation and clarification within the ‘essence’ of these limited rules.<sup>278</sup> Concerns as to the principle of legality can thus still be laid aside—the unenumerated complicity concept in customary law provided sufficient core notice to the accused. Such a view, admittedly conservative, also preserves the doctrine of formal sources from distortion: it is both accurate to emphasise the general suitability of customary law for one or two fundamental norms rather than an ‘instant’ body of detailed rules,<sup>279</sup> and permits the recognition that further norms can evolve slowly through an admixture of interpretation and reliance on general principles without infringing the legality principle. The logic-based and self-referential nature of the majority of the ICTY/R’s reasoning on modes of liability, demonstrated below, illustrates this truth. In short, therefore, it is suggested that the ICTY/R did not discover a customary enumerated doctrine of complicity, fully-formed, but have themselves been midwives to it.

This paper chooses to present the various modes of liability in the context of ‘one and a half’ rules of attribution in 1993 customary international law. It does this to underline both

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<sup>278</sup> METTRAUX.(2005).op.cit., p.14.

<sup>279</sup> *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment (ICJ), 1984, p.299.

the pre-eminence of the unenumerated complicity concept in the law to that point, and the continuing ambiguity as to whether the rule on superior responsibility is or is not of distinct origins.<sup>280</sup> As will be demonstrated, that debate continues today.

### **RULE 1: LIABILITY FOR ‘COMPLICITY’ IN A CRIME**

[C]riminal liability is not incurred solely by individuals who physically commit a crime, but may also extend to those who participate and contribute to a crime in various ways, when such participation is sufficiently connected to the crime, following principles of accomplice liability.<sup>281</sup>

This principle was correctly discerned both in “general principles of criminal law and customary international law”.<sup>282</sup> As early as 1949, the relevant UN Commission commented that “[t]he possible range of persons who may be held guilty of war crimes or crimes against humanity is not limited to those who physically performed the illegal deed. Many others have been held to be sufficiently connected with an offence to be held criminally liable...”<sup>283</sup> It is suggested here that the very general notion of liability for parties ‘sufficiently connected’ to the crime, termed the unenumerated doctrine of complicity, was for a long time the only rule on complicity established in customary law. In the following pages, the reasoning behind this view, and its implications, are set out.

It is worth making a preliminary semantic point. “Accomplice liability” (or complicity) is an overarching, general phrase to indicate multiple involvement in a crime.<sup>284</sup> It includes both perpetrators and other participants: the rule on complicity has been interpreted to discern

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<sup>280</sup> CRYER.(2001).op.cit., p.24. Superior responsibility has an independent basis in customary international law; it is no coincidence that the Statutes of all the international criminal tribunals draw a clear line between the two: *ICTY Statute*, Art.7; *ICTR Statute*, Art.6; *SCSL Statute*, Art.6; *ICC Statute*, Arts.25, 28. Both van Sliedregt and Mettraux’s works reflect a similar division: METTRAUX.(2005).op.cit., pp.269, 279, 296; VAN SLIEDREGT.(2003).op.cit., pp.10, 59–60, 118. Further p.102.*infra et seq.* As Cryer et al note, “ordering”—which is at least in practical, if not legal, terms a related concept—also represents something of an exception to the principle articulated here in having something of an independent pedigree as a ground for liability: CRYER ET AL.(2007).op.cit., p.312.

<sup>281</sup> *Kayishema/Ruzindana.AJ*, para.185; also *Tadić.AJ*, paras.188–192; *Haradinaj.TJ*, para.141;

*Kordić/Čerkez.TJ*, para.373; *Kajelijeli.TJ*, para.757; *Akayesu.TJ*, paras.471–475; *Tadić.TJ*, paras.663–669.

<sup>282</sup> *Blaškić.TJ*, para.264; also *Delalić.TJ*, para.321; *Tadić.TJ*, para.669.

<sup>283</sup> [1949] 15 *LRTWC*, 49.

<sup>284</sup> *Osborn’s Concise Law Dictionary*, BONE, S. (ed.), 2001; FLETCHER.(2000).op.cit., p.637.

multiple modes of liability.<sup>285</sup> As such, identifying an individual as “complicit” in a crime is in no way determinative of the degree of their culpability<sup>286</sup> (even though it seems—unfortunately—to have become a term of art to connote secondary responsibility in genocide<sup>287</sup>). The broad scope of the term has been confirmed by the ICTY Appeals Chamber.<sup>288</sup> Accordingly, classifying various perpetrator doctrines as interpretations of the rule on complicity for the purpose of this paper does not amount to an argument for a “unitary” (as opposed to “differentia[ted]”) model of perpetration/participation. The distinction between perpetrator and derivative liabilities<sup>289</sup> remains significant, as it does for both the ICTY/R<sup>290</sup> and probably the ICC,<sup>291</sup> in the context of sentencing.<sup>292</sup>

The tendency of the ICTY/R to assert more or less automatically that a given mode of liability has an independent basis in customary law has already been discussed.<sup>293</sup> Such assertions are not always infallible.<sup>294</sup> Viewed objectively, however, their findings may be

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<sup>285</sup> *Krstić.AJ*, para.139; *Krnojelac.AJ*, para.70; *Tadić.AJ*, para.223.

<sup>286</sup> *Ojdanić JCE Decision*, per Judge Shahabuddeen, paras.7–12, and per Judge Hunt, para.29; *Tadić.AJ*, para.191.

<sup>287</sup> *Brđanin.TJ*, paras.725–728; *Krstić.TJ*, para.643. *C.f.* *Blagojević/Jokić.TJ*, paras.776–780. Further “‘Complicity in genocide’ versus ‘aiding and abetting genocide’,’ EBOE-OSUJI, C., 2005, p.56 *et seq.*

<sup>288</sup> *Krstić.AJ*, para.139; *Krnojelac.AJ*, paras.67–74. It has remained a source of confusion, however: e.g., *Stakić.TJ*, para.432.

<sup>289</sup> FLETCHER.(2000).op.cit., p.634 *et seq.*; VAN SLIEDREGT.(2003).op.cit., pp.57–60; ‘Complicity, cause and blame: a study in the interpretation of doctrine,’ KADISH, S.H., 1985, pp.337–340.

<sup>290</sup> CASSESE.(2007).op.cit., p.122; CRYER ET AL.(2007).op.cit., pp.310, 313; SCHABAS.(2006).op.cit., p.297; also perhaps *Semanza.TJ*, para.563. *C.f.* AMBOS.(forthcoming).op.cit., mn.2; ESER.(2002).op.cit., pp.781–782, 786–788; also *Ojdanić JCE Decision*, para.31. Although both Ambos and Eser suggest that the ICTY/R *Statutes* reflect a unitary approach, they mistake the relevant provisions as substantive law, when in fact they are determinative solely of jurisdiction. In sentencing practice, a differentiated model may be discerned (e.g., in the context of aiding and abetting: *Simić.AJ*, para.265; *Kvočka.AJ*, para.92; *Vasiljević.AJ*, para.102; *Orić.TJ*, para.281; *Brđanin.TJ*, para.274; *Vasiljević.TJ*, para.71), a fact which Eser acknowledges; the fact that this is less clear for procurement liability is, in Eser’s terms, largely the result of “crossover” factors (e.g., *Brđanin.TJ*, para.1093; *Niyitegeka.TJ*, para.486) common even in systems applying a differentiated model. Also OHLIN.(2007).op.cit., pp.83–84, 87–88; FLETCHER.(2000).op.cit., pp.640–641.

<sup>291</sup> *Prosecutor v. Dyilo*, Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Annex 1 (“*Dyilo Arrest Warrant Decision*”), para.78; *c.f.* MANTOVANI.(2003).op.cit., p.35.

<sup>292</sup> FLETCHER.(2000).op.cit., pp.645, 649–652.

<sup>293</sup> Pp.40–45 *supra*.

<sup>294</sup> Judges McDonald and Vohrah (*Erdemović.AJ*, per Judges McDonald and Vohrah, para.51) were willing to concede the existence of “conspiracy” in customary law. However, at least as an inchoate offence, complete when the common agreement is reached and not requiring subsequent participation in the agreement’s execution, this is incorrect. ‘The *Hamdan* case and conspiracy as a war crime,’ FLETCHER, G.P., 2006, pp.445–446; METTRAUX.(2005).op.cit., pp.253, 291; *Ojdanić JCE Decision*, per Judge Hunt, para.23; FLETCHER.(2000).op.cit., p.647. Some authorities of the 1990s did, however, illustrate confusion about the meaning of conspiracy: CHANEY.(1995).op.cit., p.91. The particular inchoate offence of ‘conspiracy to commit genocide’ remains, at least in customary law: ‘[JCE]: possibilities and limitations,’ VAN DER WILT, H., 2007, p.95; ‘Genocide,’ CASSESE, A., in CASSESE ET AL.(2002).op.cit., p.347; also *Seromba.AJ*, para.218.

read equally happily as interpretations of the single-rule model articulated here. Indeed, this very approach was manifest in one of the ICTY's earliest decisions.<sup>295</sup>

The present argument depends on two premises. First, the authorities cited by the Tribunals are insufficient to demonstrate, of themselves, the existence of an independent norm of customary law establishing a particular mode of liability. This is evident both from the decisions themselves and critical comment. It seems likely, as illustrated by some of the more recent conventional law, that these doctrines have only just begun to mature into independent customary norms. Second, the authorities cited by the Tribunals *do* evidence a norm of customary law establishing a general rule of liability for complicitous conduct.<sup>296</sup> This view places more appropriate demands on those authorities, recognising their shortcomings as evidence of independent norms of customary law but their strengths as precedents for the interpretation of complicity.

### **The pre-1993 authorities do not establish multiple, independent customary norms of liability**

Of the six complicity-based modes of liability applied by the ICTY/R, their jurisprudence has only expressly sought to provide independent authority for two: common purpose and aiding and abetting. With regard to direct perpetration, ordering, planning and instigating, the courts have been content to accept the express inclusion of the concepts in the Statutes, despite the principle otherwise articulated that the Statutes only establish jurisdiction, not the substantive doctrines themselves.<sup>297</sup> It must be assumed, therefore, that the Tribunals presumed them to be implicit in some broader acknowledged principle.

The authorities that have been provided are relatively sparse. With regard to basic JCE, the *Tadić* Appeals Chamber referred directly to six cases allegedly based on common purpose liability (four British, one Canadian, one American),<sup>298</sup> and in passing to nine Italian and German authorities on co-perpetration (but did not make clear the extent to which these in

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<sup>295</sup> *Tadić. TJ*, paras.673–674.

<sup>296</sup> A similar broad-brush approach was evident in some of the early analyses of the developing law: e.g., SCHABAS.(2001).op.cit., pp.442–446.

<sup>297</sup> Fn.246.*supra*.

<sup>298</sup> *Tadić. AJ*, paras.197–200.

fact were relevant).<sup>299</sup> Systemic JCE was grounded on three cases (one British, one American, one German).<sup>300</sup> Extended JCE was grounded on eight cases (one British, one American, six Italian).<sup>301</sup> In respect of aiding and abetting, the *Furundžija* Trial Chamber referenced nine cases (three British, four German, two American).<sup>302</sup> The only other notable references were to the *ICC Statute* (not then in force) and the ILC's (non-binding) 1996 *Draft Code*.<sup>303</sup> Even assuming all these authorities to be entirely consistent, they do not seem to indicate the breadth of state practice normally required to evidence norms of customary law, let alone *opinio juris*.<sup>304</sup>

The degree to which these various authorities supported the relevant proposition was largely a matter of inference rather than necessary implication.<sup>305</sup> Indeed, an authority for one mode of liability was sometimes used to elucidate an element of another.<sup>306</sup> In Judge Shahabuddeen's words, the courts have developed "a judicial construct [from] analysis of scattered principles of law gathered together for the purpose of administering ICL."<sup>307</sup> The attempt to use these authorities to show the existence of discrete, ready-made modes of liability has been aptly likened to comparing apples with oranges.<sup>308</sup>

The judgments at Nuremberg were perhaps "the most impressive *moral* advance emanating from World War II"<sup>309</sup> but, to the extent it is suggested that they established "crucial norms of responsibility",<sup>310</sup> their importance is certainly not to be exaggerated.<sup>311</sup> As Damaška wryly observes, "[i]t does not require deep immersion into [the post-WWII decisions] to realize that they are not the most obvious well-spring from which one would expect the demiurges of modern international law to drink for inspiration."<sup>312</sup> Even at publication, it was acknowledged that the post-WWII cases "do not lay down rules of law in an

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<sup>299</sup> *Ibid.*, para.201. Further SASSÒLI/OLSON.(2000).op.cit., p.6.

<sup>300</sup> *Tadić.AJ*, para.202.

<sup>301</sup> *Ibid.*, paras.205–219.

<sup>302</sup> *Furundžija.TJ*, paras.200–225.

<sup>303</sup> *Ibid.*, paras.227–231.

<sup>304</sup> *C.f.* MERON.(2005).op.cit., p.829.

<sup>305</sup> E.g., *Furundžija.TJ*, para.201.

<sup>306</sup> E.g., *Furundžija.TJ*, paras.205–206.

<sup>307</sup> *Gacumbitsi.AJ*, per Judge Shahabuddeen, para.40.

<sup>308</sup> SASSÒLI/OLSON.(2000).op.cit., p.6.

<sup>309</sup> 'The judgments and legacy of Nuremberg,' KING JR., H.T., 1997, p.218, emphasis added.

<sup>310</sup> 'Telford Taylor and the legacy of Nuremberg,' FALK, R., 1999, p.697.

<sup>311</sup> SCHABAS.(2006).op.cit., p.291.

<sup>312</sup> DAMAŠKA.(2001).op.cit., p.486; also OHLIN.(2007).op.cit., pp.75–76.



authoritative way, [although] they are declaratory of the state of the law and illustrative of actual State practice.”<sup>313</sup> Their value as a material source is not denied but, even if perfect, they are not conclusive. As it is, the nature of the documents themselves represents a significant qualification to their utility. The vast majority of decisions are very concisely reported, and the reasoning upon which they depend—and, indeed, the underlying evidence—is generally only a matter of inference from the text. A relatively small number of terms was used to cover a wide variety of concepts. At least 1,911 separate prosecutions were conducted, but only a tiny fraction (about 5%) is available for general consultation.<sup>314</sup> Analogy with municipal law (in semantics and substance) was interwoven with international law.<sup>315</sup> Even in the immediate aftermath, some commentators considered that there was good reason “to make a lawyer wish to forget all about them at the earliest possible moment.”<sup>316</sup> Subsequently, states have had almost no reason to consider the decisions closely and, even if they did, there is certainly no guarantee of uniform interpretation. Any published state consideration that exists is scarce, to say the least. For all these reasons, these authorities should be treated with great caution.<sup>317</sup>

Closer scrutiny of the key decisions illustrates the problem further.

Post-war British jurisprudence under the charge of being “concerned in” the commission of an offence has formed the basis for much of the ICTY/R’s reasoning with respect to common purpose and aiding and abetting.<sup>318</sup> The concept was used, however, in such a wide context that it connotes little more than a general sense of complicity.<sup>319</sup> Indeed, this was precisely the approach stated by the Judge-Advocate in *Golkel et al* (“[i]t is for the members of the Court to decide what participation is fairly within th[e] words of the charge”).<sup>320</sup> In *Feurstein*, the Judge-Advocate set out the following definition:

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<sup>313</sup> *Annex 1: British Law concerning trials of war criminals by military courts*, 1 LRTWC 105, 110; see also 121–122.

<sup>314</sup> E.g., *Foreword*, 15 LRTWC xvi.

<sup>315</sup> CRYER ET AL.(2007).op.cit., p.305, fn.36; *Ojdanić JCE Decision, per Judge Hunt*, para.17.

<sup>316</sup> DAMAŠKA.(2001).op.cit., p.487, citing to ‘The problem of [ICL],’ SCHWARZENBERGER, G., 1950, p.30 *et seq.*

<sup>317</sup> DAMAŠKA.(2001).op.cit., pp.488–489.

<sup>318</sup> E.g., *Tadić.AJ*, paras.197–199, 202, 207–209; *Furundžija.TJ*, paras.200–204.

<sup>319</sup> VAN SLIEDREGT.(2003).op.cit., pp.26–31, 88, 96.

<sup>320</sup> *Golkel* (UK), 1946, p.53.

[T]o be concerned in the commission of a criminal offence, gentlemen, does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation, that is to say, a person can be concerned in the commission of a criminal offence, who, without being present at the place where the offence was committed, took such a part in the preparation for this offence as to further its object; in other words, he must be the [sic.] cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means, and the person who so furthers an object, the result of which is the commission of a criminal offence, can be guilty of that offence not only by an act of commission but also by an act of omission. In other words, a person is guilty not only if he does a positive act but he is also guilty if he does nothing in a case where there is a legal duty upon him to do something...

[W]hether you think that this execution or these executions might have taken place even in their absence, that of course does not free them from guilt if you think that they can be said to have been concerned in these executions... [I]n each case where you are of opinion that a person was concerned in the commission of a criminal offence, you must also be satisfied that when he did take part in it he knew the intended purpose of it.<sup>321</sup>

In *Killinger et al*, the charge was similarly interpreted as requiring, at minimum, that “the person concerned must have had some knowledge of what was going on” and must have taken some deliberate action.<sup>322</sup> Accordingly, the loose notion of being “concerned in...” would seem most reminiscent of modern aiding and abetting. At the same time, those convicted under the charge could clearly be treated as co-perpetrators.<sup>323</sup> Variations in responsibility were reflected in the sentence handed down, not the particular charge. On this basis, it is almost impossible to derive a particular legal rule—other than the general prohibition of complicity—from this line of authorities. The courts’ responses to varying factual circumstances make the cases useful precedents for the various forms that complicity liability may take but they only establish a minimal rule. The following cases illustrate the breadth of the “concerned in...” doctrine.

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<sup>321</sup> *Fewstein* (UK), 1948, pp.6–7, reproduced in [2007] 5 *JICJ* 238, 239–240. Also *Rohde* (UK), 1946, p.56.

<sup>322</sup> *Killinger* (UK), 1945, p.69.

<sup>323</sup> *Jepsen* (UK), 1946, p.240, reproduced in [2007] 5 *JICJ* 228, 229.

In the *Buck*,<sup>324</sup> *Wielen*,<sup>325</sup> *Amberger*,<sup>326</sup> *Renoth*<sup>327</sup> and *Kramer*<sup>328</sup> cases it is possible to perceive a notion of common purpose more or less consonant with the modern one. In *Schonfeld*, the court seemed also to apply a common purpose doctrine, but one in which the requirement for individual participation was read down to a vanishingly small level.<sup>329</sup> *Sandroch*, on the other hand, also purports to apply something like common purpose, but with only a knowledge-based *mens rea*.<sup>330</sup> Ironically, the charge in this case was merely that the accused 'killed' the victims.

In *Eck*, at least one conviction was based on ordering.<sup>331</sup> *Rohde* featured a range of potential liabilities, including command responsibility, aiding and abetting, and common purpose.<sup>332</sup> *Gerike*, a case significant for depending almost entirely on omissions to act,<sup>333</sup> apparently applied liabilities for common purpose and aiding and abetting.<sup>334</sup> *Heyer* is extremely difficult to interpret as the case was tried without the benefit of a Judge-Advocate, but seems to disclose liabilities for acting with a common purpose and instigating.<sup>335</sup> Similarly, the evidence in *Rauer* is so briefly considered that the basis for conviction is more or less indeterminate: it conceivably includes command responsibility, instigating, aiding and abetting.<sup>336</sup> The Prosecution in *Oenning and Nix* contemplated liability on the basis both of instigation and common purpose.<sup>337</sup> In *von Mackensen and Maelzer*, the 'concerned in' charge was used as a basis for liability for ordering the commission of a crime,<sup>338</sup> as in *von Falkenhorst*.<sup>339</sup> Similarly, in *Kesselring*, it seems to have founded liability for instigation and ordering.<sup>340</sup>

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<sup>324</sup> *Buck* (UK), 1946, pp.39–41.

<sup>325</sup> *Wielen* (UK), 1947, pp.34–35, 39, 45.

<sup>326</sup> *Amberger* (UK), 1946, pp.82–83

<sup>327</sup> *Renoth* (UK), 1946, p.76.

<sup>328</sup> *Kramer* (UK), 1945, pp.118, 120, 139.

<sup>329</sup> *Schonfeld*(UK), 1946, pp.66–71.

<sup>330</sup> *Sandroch* (UK), 1945, p.40.

<sup>331</sup> *Eck* (UK), 1945, pp.3–5, 12.

<sup>332</sup> *Rohde* (UK), 1946, pp.54–59.

<sup>333</sup> On which, also *Mackensen* (UK), 1946, p.81.

<sup>334</sup> *Gerike* (UK), 1946, pp.76–77.

<sup>335</sup> *Heyer* (UK), 1945, pp.89–90.

<sup>336</sup> *Rauer* (UK), 1946, pp.116–117.

<sup>337</sup> *Oenning/Nix* (UK), 1945, p.74.

<sup>338</sup> *Von Mackensen/Maelzer* (UK), 1945, p.2.

<sup>339</sup> *Von Falkenhorst* (UK), 1946, pp.18–20, 22–23.

<sup>340</sup> *Kesselring* (UK), 1947, pp.10–12.

Other national tribunals also illustrate the difficulties in inferring specific legal rules from the jurisprudence of the era. Under *Control Council Law No. 10*, the NMT applied a complicity charge as wide as that of the British courts: “the essential elements to prove a defendant guilty under the indictment in this case are that [they] had knowledge of an offense charged in the indictment and established by the evidence, and that he was connected with the commission of that offense”.<sup>341</sup> This formed the basis for decisions like *Sawada*, where the liability of some of the accused seems particularly opaque.<sup>342</sup> On the other hand, liability in *Klein*<sup>343</sup> was clearly based on something like common purpose doctrine, and on its systemic variant in *Weiss*.<sup>344</sup> In *Afuldisch*, on the other hand, the Military Commission inferred the *mens rea* of the accused on the sole basis of their membership in a criminal organisation,<sup>345</sup> an approach the ICTY/R has clearly deprecated.<sup>346</sup> Similarly, a passage from the *Einsatzgruppen* case,<sup>347</sup> cited by the ICTY Appeals Chamber as “precedent for conviction of a person who gave his contribution to a large-scale common criminal purpose, accepting the foreseeable consequence that crimes would be committed by others” (JCE III liability<sup>348</sup>), may just as easily found the inference that the accused’s membership of a criminal organization (for which he was convicted) inexorably led to his responsibility for its acts, a model of liability which inappropriately underplays the significance of contributory fault.<sup>349</sup>

The Supreme National Tribunal of Poland had imposed liability on the basis of membership in a criminal organisation in a number of cases.<sup>350</sup> In *Motomura*, the Dutch Court-Martial

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<sup>341</sup> *Altstoetter* (NMT), pp.1093, 1081, 1143; *Pohl*, Supplemental Judgment (NMT), pp.1173–1174.

<sup>342</sup> *Sawada* (US), 1946, p.7. Also *Isayama* (US), 1946, pp.63–64; *Hisakasu* (US), 1946, pp.66–70. *C.f. Hans* (Norway), 1947, pp.90–92.

<sup>343</sup> *Klein* (US), 1945, pp.47–52. Also *Masuda* (US), 1945, pp.73, 76.

<sup>344</sup> *Weiss* (US), 1945, pp.12–14.

<sup>345</sup> *Afuldisch* (US), 1946, unreported, cited at 11 LRTWC 15. Also *Altstoetter* (NMT), p.1030.

<sup>346</sup> E.g., *Rwamakuba*, Decision on Interlocutory Appeal regarding Application of [JCE] to the Crime of Genocide (hereinafter “*Rwamakuba Interlocutory Appeal*”), para.19, fn.45.

<sup>347</sup> *Ohlendorf* (NMT), p.526: “Despite the finding that Vorkommando Moscow formed part of Einsatzgruppe B and despite the finding that Six was aware of the criminal purposes of Einsatzgruppe B, the Tribunal cannot conclude with scientific certitude that Six took an active part in the murder program of that organization. It is evident, however, that Six formed part of an organization engaged in atrocities, offenses, and inhumane acts against civilian populations. The Tribunal finds the defendant guilty...”

<sup>348</sup> P.80 *infra*.

<sup>349</sup> VAN DER WILT.(2007).op.cit., pp.94–95.

<sup>350</sup> *Hoess* (Poland), 1947, pp.20–24; also perhaps *Goeth* (Poland), 1946, p.1 *et seq.* *C.f. Buhler* (Poland), 1948, pp.35–38.

went even further, entering a conviction while stressing that it was “not concerned with the accused as individuals but as a group”.<sup>351</sup>

French tribunals tended to charge the accused simply with “complicity”, a concept within which the bones of common purpose doctrine, co-perpetration, ordering, and aiding and abetting might be discerned.<sup>352</sup> The notion of “instigation” applied in *Holstein*, despite the term, might in fact more properly be considered as ordering, or even a variant of command responsibility.<sup>353</sup> Similarly, in *Motosuke*, the term “incitement” was used to connote a form of liability which could potentially be construed as ordering, participation in a common purpose, or aiding and abetting.<sup>354</sup>

Only a relative few cases (relating to direct perpetration,<sup>355</sup> instigating,<sup>356</sup> ordering<sup>357</sup> and aiding and abetting<sup>358</sup>) appear to be straightforward analogues to the modern approach, and they reflect the relative simplicity of the underlying facts.

Taking all these authorities together, and the many others not specifically cited, it is hard to avoid the conclusion that any attempt to discern discrete customary rules on this basis would be inevitably selective and partial. The same legal charge too often resulted in the application of a variety of legal elements at ambiguous standards; the authorities reflect no degree of legal specificity. Given that the distinction between modes of liability largely depends on subtle gradations between mental or actual standards, this is a significant problem. In the light of the relatively brief period of litigation, there was no possibility for competing legal approaches to be tested against one another and resolved. Thus, the approach to common purpose which requires personal participation to be proven and the approach to common purpose which permits personal participation to be inferred merely

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<sup>351</sup> *Motomura* (Netherlands), 1947, pp.141–142.

<sup>352</sup> *Wagner* (France), 1946, pp.30–33; *Bauer* (France), 1945, pp.15–16; *Becker* (France), 1947, pp.70–71; *Szabados* (France), 1946, p.60.

<sup>353</sup> *Holstein* (France), 1947, pp.26, 32.

<sup>354</sup> *Motosuke* (Netherlands), 1948, pp.126–127.

<sup>355</sup> *Back* (US), 1945, p.60; *Chusaburo* (UK), 1946, p.76; *Chuichi* (Australia), 1946, p.62; *Heering* (UK), 1946, p.79; *Wagner* (France), 1946, p.118; *Gerbsch* (Netherlands), 1948, p.131.

<sup>356</sup> *Meyer* (Canada), 1945, pp.100, 107, 109.

<sup>357</sup> *Dostler* (US), 1945, pp.22–23, 29; *Thiele/Steinert* (US), 1945, p.56; *Kato* (Australia), 1946, p.37; *Flensch* (Norway), 1946, pp.111–112; *Awochi* (Netherlands), 1946, p.125; *Moehle* (UK), 1946, pp.75–78, 80–81; *Meyer* *ibid.*

<sup>358</sup> *Tesch* (UK), 1946, p.93.

from membership of a criminal organization remained, in the context of the supporting authorities, equally viable.

All of the authorities agree, however, that individuals may be held liable for complicitous conduct that is sufficiently connected to the criminal consequence, even though they differ slightly as to how that connection should be established. They also identify limited forms of behaviour which are likely to result in criminal responsibility, although again they differ as to the reasons why.

### **There is a general norm of customary law providing for liability by complicity**

Beyond the authorities considered above, there is further evidence of both state practice and *opinio juris* relating to the existence of a customary norm of complicity.

The IMT's *Charter* itself declared: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan."<sup>359</sup> Although the IMT chose to apply the inchoate notion of "conspiracy" only in respect of crimes against peace, broader ideas of complicity are evident in its judgment.<sup>360</sup> The broad principles of the *Charter* were affirmed by the General Assembly.<sup>361</sup> The *Nuremberg Principles*, probably declaratory of customary international law,<sup>362</sup> recognised the potential for the application of this type of concept more widely: "[c]omplicity in the commission of an [international crime] is a crime under international law."<sup>363</sup>

More explicitly, the relevant provision of *Control Council Law No. 10* had stated:

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<sup>359</sup> Art.6.

<sup>360</sup> *Goering* (IMT), pp.43–44. Also VAN DER WILT.(2007).op.cit., p.93.

<sup>361</sup> *Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal*, UN GA Res. 95 (I), 1946.

<sup>362</sup> *C.f.* ADAMS.(1993).op.cit., pp.283–284.

<sup>363</sup> 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal Adopted by the International Law Commission of the United Nations, with commentaries,' 1950, pp.377–378.

Any person... is deemed to have committed a crime... if he was (a) a principal or (b) was [sic.] an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission...<sup>364</sup>

*Control Council Law No. 10*, along with the *IMT Charter* and *IMT Judgment*, was held to constitute “authoritative recognition of principles of individual penal responsibility in international affairs which... had been developing for many years.”<sup>365</sup> The 1946 Norwegian *Law on the Punishment of Foreign War Criminals* also made provision for the punishment of individuals complicit in a core offence,<sup>366</sup> as did Dutch law.<sup>367</sup>

The *Genocide Convention* punishes direct perpetration of the core offence, as well as those who conspire to commit it, directly and publicly incite it, or are otherwise complicit.<sup>368</sup> The *Apartheid Convention* makes similar provision.<sup>369</sup> Although not necessarily a part of the system of ICL discussed here, the international conventions providing for the domestic criminalization of certain acts are also illustrative. They evidence both a long-established understanding by the majority of states that modes of liability other than direct perpetration exist in law, and that the definition of these modes is evolving. They reflect a widely-ratified evolution from liability for any person who “participates as an accomplice”<sup>370</sup> to anyone who “abets... or is otherwise an accomplice”<sup>371</sup> to, recently, any who:

- a. participates as an accomplice in a [specified offence]; or
- b. organizes or directs others to commit a [specified offence]; or

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<sup>364</sup> *Control Council Law No. 10*, Article II(2).

<sup>365</sup> *Altstoetter* (NMT), pp.968, 977–978.

<sup>366</sup> *Law on the Punishment of Foreign War Criminals*, (No. 14) 1946, Art.4, cited in *Annex 1: Norwegian law concerning trials of war criminals*, 3 LRTWC 81, 85.

<sup>367</sup> *Extraordinary Penal Law Decree*, 22 December 1943, as amended, Arts.12, 15, cited in *Annex: Netherlands law concerning trials of war criminals*, 11 LRTWC 86, 97–98.

<sup>368</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, Art.3. [In force 1951; 140 parties.]

<sup>369</sup> *International Convention on the Suppression and Punishment of the Crime of Apartheid*, Art.3. [In force 1976; 107 parties.]

<sup>370</sup> *Convention Against Torture*, Art.4(1) [in force 1987; 145 parties]; *International Convention against the Taking of Hostages*, Art.1(2) [in force 1983; 164 parties]; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, Art.2(1)(e) [in force 1977; 166 parties]; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, Art.1(2) [in force 1973; 185 parties].

<sup>371</sup> *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, Art.3(2) [in force 1992; 146 parties]; *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, Art.2(2) [in force 1992; 135 parties].

- c. in any other way contributes to the commission of [a specified offence] by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group...<sup>372</sup>

The drafting history of this provision is related to that of relevant portions of Article 25 of the *ICC Statute*,<sup>373</sup> itself drawing upon the ILC's 1996 *Draft Code*.<sup>374</sup> The ICTY/R *Statutes*, duplicated by the SCSL, also provide in relevant part:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation of execution of a crime... shall be individually responsible for the crime.

Taken together, it is clear from these sources that the vast majority of states (certainly, well over 50%) have manifested their recognition that individuals complicit in a crime also partake of criminal responsibility. It might be argued moreover that they suggest a customary basis for a limited enumerated complicity doctrine: Cryer, for example, referring to the basic agreement of state comments in reviewing the relevant drafts and the widespread acceptance they have subsequently received, considers the basic structure of the participation provisions in the ICTY/R *Statutes* to be established in customary law.<sup>375</sup> This view is perhaps sustainable, although it resurrects the earlier debate as to the proper circumstances in which one might discern custom. It might be better to suggest that the provisions reflect general principles of law, which may or may not have subsequently crystallised into custom. As such, in the conservative manner adopted here, it is preferable to be cautious.

For all the above reasons, therefore, it can only be certain that an unenumerated doctrine of complicity was established in customary law before the operation of the ICTY/R. No systematic attempt had been made to identify and confirm the meaning of the various

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<sup>372</sup> *International Convention for the Suppression of Acts of Nuclear Terrorism*, Art.2(4) [in force 2007; 29 parties, 115 signatories]; *International Convention for the Suppression of the Financing of Terrorism*, Art.2(5) [in force 2002; 160 parties]; *International Convention for the Suppression of Terrorist Bombings*, Art.2(3) [in force 2001; 153 parties.]

<sup>373</sup> CRYER ET AL.(2007).op.cit., p.309; SCHABAS.(2004).op.cit., p.103.

<sup>374</sup> *Draft Code of Crimes Against the Peace and Security of Mankind*, Report of the [ILC] to the General Assembly, 1996, Art.2(3).

<sup>375</sup> 'The boundaries of liability in [ICL], or "Selectivity by Stealth",' CRYER, R., 2001, p.21.



concepts and applications to which reference had been made; there was no basis for the international community to reach an informed consensus. Since 1998, however, the ICTY/R and ICC have engaged in precisely this task. From their work, the following doctrines have emerged. Although the institutions diverge in some respects, these doctrines represent a sound basis for the crystallisation of customary law and a more developed body of ‘rules’ of attribution. Indeed, the nature of the relationship between their jurisprudence will largely be shaped by the ICC judges’ careful consideration—beyond the scope of this study—as to when this crystallisation occurred.

### **A.) Coincidence between individual conduct and the criminal consequence**

In principle, any mode of liability may apply to any substantive crime.<sup>376</sup> It is necessary, however, that the particular conduct manifests a sufficient connection between the conduct of the accused and the core offence charged, both materially and mentally.<sup>377</sup> This is a natural consequence of the principles of autonomy<sup>378</sup> and culpability,<sup>379</sup> reflected in Article 25(2) of the *ICC Statute* and which may certainly be considered law common to the nations.<sup>380</sup>

The requirements of a particular mode of liability do not formally alter or replace the material and mental elements of the substantive crimes themselves, including any specific intent,<sup>381</sup> although they may vary the standard by which those elements are considered to be met.<sup>382</sup> Thus, although the definition of each offence is framed by reference to the material

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<sup>376</sup> E.g., *Rwamakuba Interlocutory Appeal*, para.31; *Tadić.AJ*, para.188; *Kajelijeli.TJ*, para.756. This statement is necessarily contingent on certain assumptions (for example, the role of intent/knowledge, the enumeration of all modes of liability, etc): it is possible to conceive of circumstances where this may not be the case, although such a contingency is judged unlikely: e.g., ‘The concept of a [JCE] and domestic modes of liability for parties to a crime: a comparison of German and English law,’ HAMDORF, K., 2007, p.212; VAN SLIEDREGT.(2007).op.cit., pp.190–191, 195.

<sup>377</sup> *Delalić.TJ*, para.424.

<sup>378</sup> VAN SLIEDREGT.(2003).op.cit., p.58.

<sup>379</sup> *Tadić.AJ*, para.186; *In re Yamashita (US)*, 1946, pp.28–29. Also AMBOS.(2006).op.cit., p.671; TRESCHL.(2005).op.cit., pp.158, 171; JESCHECK.(2004).op.cit., p.44.

<sup>380</sup> *Delalić.TJ*, para.424; also VAN SLIEDREGT.(2003).op.cit., pp.42–43.

<sup>381</sup> *Stakić.TJ*, paras.437, 442. Further fn.376 *supra*.

<sup>382</sup> Fn.397 *infra*.

and mental elements adapted to the relevant circumstances,<sup>383</sup> it is also possible to speak of more general material and mental standards (usually in the context of intent/knowledge and causation) which define modes of liability. It is submitted that there are minimum standards which any mode of liability must meet in order to preserve the culpability principle.<sup>384</sup> These are, of course, minimum standards only—it remains true to say that certain modes of liability may require a higher standard in order to reflect the requisite degree of culpability.

The existence of the general *mens rea* provision in the *ICC Statute* illustrates this concept.<sup>385</sup> Although in express terms it lays down a default, rather than a minimum, requirement,<sup>386</sup> the *Statute* makes substantial departure from it only in respect of superior responsibility (Article 28).<sup>387</sup> Even then, at least with regard to the practice of the ICTY/R, it might be argued that the mental requirement for superior responsibility is compatible with the general standard, or very nearly so.<sup>388</sup> Even so, for the taxonomy advanced in this paper, superior responsibility remains something of a ‘special case’ and thus outside the general scope of the minimum standards which are otherwise argued to prevail.

As Dupuy notes, “intentionality” (in the broad sense: *actus non facit reum nisi mens sit rea*) is the decisive criterion upon which individual responsibility rests.<sup>389</sup> Accordingly, in contemporary discussion of the general part of ICL, emphasis tends to be placed on the

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<sup>383</sup> E.g., SCHABAS.(2003).op.cit., pp.1020–1025; ‘Addendum, Part II: Elements of Crimes,’ *Report of the Preparatory Commission for the [ICC]* (hereinafter “*Elements of Crimes*”).

<sup>384</sup> Also SCHABAS.(2001).op.cit., p.446.

<sup>385</sup> PIRAGOFF/ROBINSON.(forthcoming).op.cit., mn.5; WERLE/JESSBERGER.(2005).op.cit., p.35; ‘Mental elements—mistake of fact and mistake of law,’ ESER, A., in CASSESE ET AL.(2002).op.cit., p.902. *C.f.* SCHABAS.(2003).op.cit., p.1025.

<sup>386</sup> *ICC Statute*, Art.30(1): “Unless otherwise provided...”

<sup>387</sup> PIRAGOFF/ROBINSON.(forthcoming).op.cit., mn. 14; WERLE/JESSBERGER.(2005).op.cit., p.47; ESER.(2002).op.cit., pp.898–899. For other minor departures, *ICC Statute & Elements of Crimes*: Arts.8(2)(a)(iv), 8(2)(b)(vii) *et al*, 8(2)(b)(xxvi). In the former example, the case for its departure from Art.30, hinging on one definition of “wantonly”, is not altogether convincing: ESER.(2002).op.cit., p.899 ; *c.f.* CRYER.(2001).op.cit., p.24. With respect to the second example, the use of a “knew or should have known” standard is the outcome of Art.32. Only with respect to the latter does the lower mental standard go to the heart of the offence: its meaning, however, has not yet been elaborated. Given the practical context of this offence, a ‘wilful blindness’ approach might be the most practicable, and is itself consistent with Art.30: fn.858 *infra*. *C.f. Dyllo Charges Decision*, paras.356–359.

<sup>388</sup> E.g., Schabas’ assertion of the gap between the ‘knowledge’ standard required for complicity at the ICTY/R and the ‘constructive knowledge’ standard required for superior responsibility may be less defensible in the light of the *Blaškić* appeal: ‘*Mens rea* and the [ICTY],’ SCHABAS, W.A., 2003, pp.1026, 1028. Further pp.114–115 *infra*.

<sup>389</sup> ‘International criminal responsibility of the individual and international responsibility of the state,’ DUPUY, P., in CASSESE ET AL.(2002).op.cit., pp.1092, 1095. The requirement for a ‘guilty mind’ may be a general principle of law: SCHABAS.(2003).op.cit., 1015–1017. Also *Kordić.TJ*, para.219.

mental rather than the material element of the nexus between the individual and the criminal consequence. This may at least partially account for the fact that the drafters of the *ICC Statute* were content to include a general provision controlling the minimum *mens rea* standard (Article 30) but not the *actus reus*.<sup>390</sup> However, as Ambos notes with regard to aiding and abetting—a comment, it is submitted, that may be sustained more generally—a clarification of the *actus reus* standard would be both feasible and beneficial.<sup>391</sup>

Although the case can be made that there should be no general, minimum objective standard (or that any existing standard is vanishingly low), it should not be warmly regarded. The very principle behind the use of modes of liability (rather than applying inchoate crimes such as conspiracy) is to demonstrate the individual's engagement with the core substantive offence. It is self-defeating, therefore, to deny the existence of a minimum objective standard.

The Trial Chamber in *Delalić* considered that:

The requisite *actus reus* for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have “a direct and substantial effect on the commission of the illegal act”. The corresponding intent, or *mens rea*, is indicated by the requirement that the act of participation be performed with knowledge that it will assist [...] in the commission of the criminal act. Thus, there must be “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”.<sup>392</sup>

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<sup>390</sup> A provision along these lines was included in an earlier draft: *Report of the Preparatory Committee on the Establishment of an [ICC]*, Addendum, 1998, Art.28(3), pp.54–55. Its subsequent loss may be largely attributed to its association with crimes of omission, upon which no consensus could be satisfactorily established: ‘Individual criminal responsibility,’ ESER, A., in CASSESE ET AL.(2002).op.cit., p.819; AMBOS.(forthcoming).op.cit., mn.51. Less convincingly, Ambos also highlights the possible relevance of the fact that, in contrast to domestic criminal contexts, the individual's own contribution to the harmful result is not always apparent: mn.3. Werle suggests, rather tenuously, that an objective requirement (causation) remains implicit in Article 30: WERLE.(2005).op.cit., p.98.

<sup>391</sup> AMBOS.(forthcoming).op.cit., mn.21.

<sup>392</sup> *Delalić.TJ*, para.326. Also *Kordić/Čerkez.AJ*, paras.29–32; *Aleksovski.TJ*, para.61; *Akayesu.TJ*, paras.477–479; *Tadić.TJ*, para.674; c.f. *Seromba.TJ*, para.306. For earlier propositions of the mental element, see ESER.(2002b).op.cit., pp.893–895.

The *actus reus* standard is better considered merely as the rendering of a “substantial” contribution: depending on the mode of liability in question, and the prevailing circumstances, there may be occasions when an individual’s conduct may have a substantial effect on the commission of the core crime but not a direct one.<sup>393</sup> “Substantial” should be understood in the qualitative sense of “material” rather than the quantitative sense of “significant”.<sup>394</sup> Articulating this general standard may appear to be rather bold. As the discussion of the individual modes of liability illustrates, however, it is not without foundation. The recent decision in *Haradinaj* reflects similar reasoning.<sup>395</sup>

Accordingly, *Delalić* suggests it must invariably be shown that:

- the accused intended their conduct (*i.e.*, it was not done involuntarily);
- their conduct in fact had a substantial effect upon the criminal consequence; and
- the accused ‘knew’ their conduct served to promote the criminal consequence.

Beyond the minimal *mens rea* requirement laid down in *Tadić* and *Delalić*, it is suggested that a higher standard has in fact been applied. Distinguishing the mental element of a mode of liability from that of the substantive offence can be difficult: whereas the general material standard for responsibility (a causal link, however minimal) is often easily distinguished from the material elements of the specific offence (proscribed acts), the language of *mens rea* is the same (intent, knowledge<sup>396</sup>). As van Sliedregt emphasises:

Participatory liability almost by definition combines mental elements that exist on different levels. In trying to solve this incompatibility, the mental elements should be seen as distinct. Participatory

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<sup>393</sup> *Orić.TJ*, paras.276, 285; *Furundžija.TJ*, para.232.

<sup>394</sup> *C.f.* SCHABAS.(2001).op.cit., pp.447–448, 450. Further pp.75-77.*infra*.

<sup>395</sup> *Haradinaj.TJ*, para.141.

<sup>396</sup> The jurisprudence of the tribunals is littered with confused and confusing references to the terms “knowledge” and “intent”, sometimes used synonymously, sometimes in a nuanced fashion. As Fletcher observes, it is often “anomalous” to consider an accomplice to “intend” an offence, even if they are fully knowing: *Rethinking Criminal Law*, FLETCHER, G.P., 2000, p.635; also ‘Parochial versus universal criminal law,’ FLETCHER, G.P., 2005, p.33. For the present purposes, when the term “intent” is used, it generally conveys the *mens rea* of a perpetrator only; knowledge of intent, which may still convey a sufficiently ‘guilty’ mind is more apposite for other parties in a crime: *see*, e.g., VAN SLIEDREGT.(2007).op.cit., pp.195–196.

liability has its own mental element *through* which the mental element of the underlying crime is established.<sup>397</sup>

The mental standard articulated by the *Blaškić* Appeals Chamber in the context of “ordering” (acting in the “awareness of the substantial likelihood that a crime will be committed”<sup>398</sup>) would seem to be compatible with all the modes of liability.<sup>399</sup> Indeed, it has also been expressly applied in the context of “committing”, “instigating” and “planning”.<sup>400</sup> It requires “awareness of a higher likelihood of risk and a volitional element”—the latter element makes it a slightly higher test than mere knowledge and includes an aspect of intent. At the same time, it recognises that not all accomplices act with certainty but sometimes with indifference. As such, it falls (in common law terms) somewhere between “indirect intent” and recklessness;<sup>401</sup> in civil law terms,<sup>402</sup> it is approximate to *dolus eventualis*.<sup>403</sup>

The only mode of liability to which the application of this standard is in doubt is aiding and abetting. The *Vasiljević* mental standard recalled in *Blaškić*<sup>404</sup> (“knowledge that [the] acts assist the commission of the offen[c]e”) could be interpreted as more stringent than *dolus eventualis*, more akin to second-degree *dolus directus*. However, the *Blaškić* Chamber also went out of its way to approve an alternative formulation from *Furundžija* (“aware[ness] that one of a number of crimes will probably be committed, and one of those crimes is in fact committed”),<sup>405</sup> which left the door open for general application of its *dolus eventualis* approach. This inference has been imperilled by the recent decision in *Blagojević*, which answered a Prosecution appeal on the *mens rea* of aiding and abetting premised on a very

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<sup>397</sup> VAN SLIEDREGT.(2007).op.cit., p.204; see further *Brđanin*, Decision on Interlocutory Appeal (hereinafter, “*Brđanin Interlocutory Appeal*”), per Judge Shahabuddeen, paras.2, 4–5; also ‘Article 30: mental element,’ PIRAGOFF, D.K., & ROBINSON, D., in TRIFFTERER.(2008 forthcoming).op.cit., mn.8.

<sup>398</sup> *Blaškić.AJ*, para.42, emphasis added.

<sup>399</sup> ‘Joint Criminal Enterprise: criminal liability by prosecutorial ingenuity and judicial creativity,’ POWLES, S., 2004, p.611.

<sup>400</sup> *Kordić/Čerkez.AJ*, paras.29–32; *Limaj.TJ*, para.509.

<sup>401</sup> *Ojdanić Indirect Co-perpetration Decision*, para.38; SIMESTER/SULLIVAN.(2003).op.cit., pp.132–135.

<sup>402</sup> More precisely, in the civil law tradition reflected in German and Dutch law, for example. The French notion of *dol éventuel* equates more closely to inadvertent recklessness: VAN SLIEDREGT.(2003).op.cit., pp.46–47.

<sup>403</sup> For definitions, see HAMDORF.(2007).op.cit., p.214; FLETCHER/OHLIN.(2005).op.cit., p.554; VAN SLIEDREGT.(2003).op.cit., pp.45–48; ESER.(2002).op.cit., p.906; *Ojdanić JCE Decision*, per Judge Hunt, para.10, fn.44. *Dolus eventualis*, at least as applied in ICL, is *not* a negligence standard: *Stakić.AJ*, paras.99–103; *Stakić.TJ*, para.587.

<sup>404</sup> *Blaškić.AJ*, para.46.

<sup>405</sup> *Ibid.*, para.50.

similar argument to the one outlined here.<sup>406</sup> In the impugned decision, the Trial Chamber had applied the *mens rea* standard from *Vasiljević*,<sup>407</sup> which requires knowledge that the aider and abettor's acts assist in "the commission of the specific crime" by the principal, the higher of the two tests approved in *Blaškić*. The Appeals Chamber swiftly rejected the Prosecution's argument, recalling

...its position from [*Blaškić*] that there are no reasons to depart from the definition of *mens rea* of aiding and abetting found in [*Vasiljević*]. [*Blaškić*] did not extend the definition of *mens rea* [sic.] of aiding and abetting.<sup>408</sup>

This finding depends on strict linguistic parsing indeed. Although it is correct insofar as *Blaškić* did in terms uphold *Vasiljević*, it ignores the reference to the standard suggested by *Furundžija*.<sup>409</sup> As a matter of judicial discipline, this can perhaps be justified.<sup>410</sup> However, in so doing, they have wafted an unfortunately chill wind over the *Furundžija* standard, and thus the generality of the *Blaškić* approach to *mens rea*. That said, *Furundžija* itself has still not been specifically disapproved, nor substantively measured against *Vasiljević*. Thus, with relatively little judicial sleight-of-hand, both *Blaškić* and *Furundžija* could live to fight another day. Such a development would, it is submitted, be a sensible and logical step to correct a likely inadvertent consequence, standardising the law and further enhancing its clarity.

It is suggested that analogous minimum standards for modes of liability apply under the *ICC Statute*. In the absence of express provision for a minimum material standard, it is suggested that the ICC should apply the ICTY/R jurisprudence on the point, via Article 21. With regard to *mens rea*, Article 25, which sets out the relevant modes of liability, must be read with Article 30. Within the latter's general requirement for "intent and knowledge"<sup>411</sup> (*i.e.*, both a volitional and a cognitive element), the article may be reduced to stipulating that:

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<sup>406</sup> *Blagojević/Jokić.AJ*, paras.219–220.

<sup>407</sup> *Vasiljević.AJ*, para.102.

<sup>408</sup> *Blagojević/Jokić.AJ*, para.222.

<sup>409</sup> *Blaškić.AJ*, para.50.

<sup>410</sup> *Blaškić.AJ*, para.52.

<sup>411</sup> *ICC Statute*, Art.30(1); WERLE/JESSBERGER.(2005).*op.cit.*, pp.38–39. Although expressed conjunctively, the relationship between these elements is not quite as straightforward as it seems: ESER.(2002).*op.cit.*, p.916.

- the actor’s conduct is intentional;<sup>412</sup>
- the actor knows of any relevant circumstances;<sup>413</sup>
- the criminal consequence is ‘intended’,<sup>414</sup> or is foreseen as occurring “in the ordinary course of events”.<sup>415</sup>

Article 30 clearly permits liability on the basis of proof of *dolus directus*, in either first or second degrees.<sup>416</sup> In the latter case, foreseeability of the criminal consequence amounts to a virtual certainty.<sup>417</sup> It is unclear, however, whether the provision also permits the lower standard of foreseeability envisaged by *dolus eventualis*, as commonly interpreted in ICL.<sup>418</sup> If it does not, it will apply an even higher mental standard than the ICTY/R (although technically as a ‘default’ rather than a ‘minimum’).

Werle and Jessberger consider that the minimum requirement under the plain words of Article 30 is “awareness of the probable occurrence of the consequence... it is not enough for the perpetrator merely [to] anticipate the possibility”.<sup>419</sup> As such, they suggest that the provision is not directly amenable to the use of a *dolus eventualis* standard.<sup>420</sup> However, relying on a broad interpretation of the “unless otherwise provided” qualification, they advocate reference to the jurisprudence of the ICTY/R through Article 21.<sup>421</sup> They consider that “this case law also determines the subjective requirements of crimes under [the *ICC Statute*]”.<sup>422</sup> There are some difficulties with this approach. First, it seems to be predicated on the notion that the jurisprudence expands potential criminal responsibility in respect only of a few offences, in particular “killings”.<sup>423</sup> However, given that *dolus eventualis* would then suffice as the minimum *mens rea* state for almost all modes of liability (excepting only some forms of perpetration/JCE), the effect is to broaden Article 30 more dramatically even

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<sup>412</sup> *ICC Statute*, Art.30(2)(a).

<sup>413</sup> *Ibid.*, Art.30(3); further PIRAGOFF/ROBINSON.(forthcoming).op.cit., mn.6.

<sup>414</sup> PIRAGOFF/ROBINSON.(forthcoming).op.cit., mn.11.

<sup>415</sup> *Ibid.*, Arts.30(2)(b), (3).

<sup>416</sup> ESER.(2002).op.cit., pp.914–915.

<sup>417</sup> VAN SLIEDREGT.(2003).op.cit., p.46.

<sup>418</sup> PIRAGOFF/ROBINSON.(forthcoming).op.cit., fn.67.

<sup>419</sup> WERLE/JESSBERGER.(2005).op.cit., p.41. On this issue, also generally WERLE.(2005).op.cit., pp.104–110, 113–116.

<sup>420</sup> *Ibid.*, pp.42, 53. Also CRYER ET AL.(2007).op.cit., p.320; VAN SLIEDREGT.(2003).op.cit., pp.51–52;

ESER.(2002).op.cit., pp.915–916, 932–933.

<sup>421</sup> WERLE/JESSBERGER.(2005).op.cit., pp.45–46.

<sup>422</sup> *Ibid.*, p.54.

<sup>423</sup> *Ibid.*, p.48.

than Werle and Jessberger might have intended.<sup>424</sup> Secondly, their approach presupposes that the customary status of the ICTY/R rule has already crystallised. Although certainly arguable, it is an unnecessary gamble. Instead, in light of the broad resonance between the modes of liability applied by the ICTY/R and ICC—and the extent to which an apparently ‘strict’ construction of Article 30 leads to it being turned inside out—it might be preferable to infer that the ICC drafters intended to permit liability under *dolus eventualis* in the first place.

Piragoff and Robinson seem to interpret Article 30 in precisely this fashion,<sup>425</sup> although the definition of *dolus eventualis* they apply seems more reminiscent of second-degree *dolus directus*. Mantovani considers too that prosecution for ‘advertent recklessness’ (*dolus eventualis*) is permitted, excluding only inadvertent recklessness and pure negligence.<sup>426</sup> On the other hand, van der Wilt strongly implies that its use is against the spirit of the *Statute*, either under Article 30 or via Article 21.<sup>427</sup>

In considering the scope for determining the meaning of the provision, it should be recalled that the *ICC Statute* is a treaty and must be interpreted as such:<sup>428</sup> even when strictly construed, the relevant rules of interpretation are subtly different than those which prevail for domestic legislation. As such, where interpretive ambiguity exists, reference to relevant general international law is justified,<sup>429</sup> even without formal recourse through the Article 21 mechanism.

It is to be hoped that this issue has been resolved by the ICC Pre-Trial Chamber. Although choosing to leave the basis for its reasoning ambiguous, it ruled that the volitional element required by Article 30 includes all three forms of *dolus* recognised in the jurisprudence of the ICTY/R.<sup>430</sup> In discussing *dolus eventualis*, not only does it borrow the *Blaškić* language of “substantial likelihood”<sup>431</sup> but it also suggests the (novel) possibility that an actor’s clear

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<sup>424</sup> *Ibid.*, p.55.

<sup>425</sup> PIRAGOFF/ROBINSON.(forthcoming).op.cit., mn.22.

<sup>426</sup> MANTOVANI.(2003).op.cit., p.32.

<sup>427</sup> VAN DER WILT.(2007).op.cit., p.100.

<sup>428</sup> SCHABAS.(2004).op.cit., pp.93–95.

<sup>429</sup> Fn.269.*supra*.

<sup>430</sup> *Dyilo Charges Decision*, paras.351–355.

<sup>431</sup> *Ibid.*, para.353.



or express acceptance of the risk may permit the imposition of liability where the criminal consequence is even less foreseeable.<sup>432</sup> This latter step is presumably based on the reasoning that an enhanced manifestation of the volitional element can compensate for a lower cognitive element. This seems dubious, as the actor's subjective acceptance of the risk does not seem actually to be increased; rather, it is merely easier to prove.

It may be concluded, in short, that the notion of a predicate connection between an individual's conduct and the criminal consequence is established in both the law of the ICTY/R and the ICC. Although there is a measure of ambiguity in both *fora*, it is suggested that the authorities can reasonably be interpreted to prohibit liability without proof that an individual's act had a qualitatively substantial effect on the criminal consequence and that the act was committed with, at least, *dolus eventualis*.

## **B.) Prohibition of perpetration...**

### ...directly and personally

It is, of course, almost trite to cite this mode of liability. According to the ICTY/R, a person is said to have "committed"<sup>433</sup> an offence "when he or she physically perpetrates the relevant act or engenders a culpable omission in violation of a rule of criminal law".<sup>434</sup> The 'physical' nature of the act is not itself requisite; it is a term of art to connote "direct" and "personal" involvement.<sup>435</sup> Such participation must form an "integral" part of the offence as legally defined,<sup>436</sup> satisfying both the requisite material and mental elements. A number of individuals may directly perpetrate the same crime, provided that all of them fulfil the requisite elements.<sup>437</sup>

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<sup>432</sup> *Ibid.*, para.354.

<sup>433</sup> The terms "committed" and "perpetrated" may be used interchangeably: CRYER ET AL.(2007).op.cit., p.302.

<sup>434</sup> *Kayishema/Ruzindana.AJ*, para.187; *Tadić.AJ*, para.188; *Haradinaj.TJ*, para.141; *Limaj.TJ*, para.509; *Blagojević/Jokić.TJ*, para.694; *Galić.TJ*, para.168; *Kajelijeli.TJ*, para..764; *Simić.TJ*, para.137; *Stakić.TJ*, para.432; *Naletilić/Martinović.TJ*, para.62; *Vasiljević.TJ*, para.62; *Kvočka.TJ*, para.243; *Krstić.TJ*, para.601; *Kunarac.TJ*, para.390.

<sup>435</sup> *Kayishema/Ruzindana.AJ*, para.187; *Limaj.TJ*, para.509; *Simić.TJ*, para.137; *Semanza.TJ*, para.383; *Kvočka.TJ*, para.251; *Kordić/Čerkez.TJ*, para.376. *C.f.* *Gacumbitsi.TJ*, para.285; *Muhimana.TJ*, para.506.

<sup>436</sup> *Seromba.AJ*, para.161; *Gacumbitsi.AJ*, para.60.

<sup>437</sup> *Simić.TJ*, para.137; *Naletilić/Martinović.TJ*, para.62.

The accused must at least act with *dolus eventualis*.<sup>438</sup> Although the Trial Chamber in *Simić* referred only to the requirement that the accused “intended” the occurrence of a criminal offence as a consequence of their conduct,<sup>439</sup> the term should be understood in the broad sense otherwise applied by the ICTY/R.<sup>440</sup> This view was confirmed by the more laborious, composite formulation applied in *Limaj*.<sup>441</sup> Despite its express commitment to the law of the ICTY/R,<sup>442</sup> the SCSL offered a nuanced reading of this standard in *Fofana*, referring to a requirement for intent or “reasonable knowledge” that the crime would likely occur.<sup>443</sup> Given the approach in *Brima*,<sup>444</sup> it is to be assumed that the *Fofana* Trial Chamber intended to express the notion of *dolus eventualis*, however clumsily. Nonetheless, the connotations of negligence implicit in the “reasonable knowledge” terminology require that this approach is disapproved.

Assuming an expansive interpretation of Article 30, Article 25(3)(a) of the *ICC Statute* presents an identical approach to single-actor perpetration, even though its wording (in English) is not well-considered.<sup>445</sup> The *ICC Statute* does not give general consideration to the possibility of omissions as forming the basis for crimes, although this must be inferred. The ICTY/R have recognised in principle the possibility that omissions may give rise to liability, provided the accused is under a positive duty to act.<sup>446</sup>

### ...jointly or by means

The evolution of co-perpetration and common purpose liabilities has, without doubt, been one of the most controversial aspects of modern ICL. Discussion has been vigorous. Quite apart from ambiguities as to the source of this law, the debate has been characterised by a theoretical argument between those who favour a “subjective” approach to co-perpetration (the individual must intend the commission of the offence) and those who favour a “control-

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<sup>438</sup> E.g., *Kvočka.TJ*, para.251

<sup>439</sup> *Simić.TJ*, para.137; also *Seromba.AJ*, para.173.

<sup>440</sup> *Blaškić.AJ*, paras.41–42.

<sup>441</sup> *Limaj.TJ*, para.509.

<sup>442</sup> *Fofana/Kondewa.TJ*, para.205; *Brima.TJ*, para.762.

<sup>443</sup> *Fofana/Kondewa.TJ*, para.205.

<sup>444</sup> *Brima.TJ*, para.763.

<sup>445</sup> AMBOS.(forthcoming).op.cit., mn.7; ESER.(2002).op.cit., p.789.

<sup>446</sup> *Brđanin.AJ*, para.274; *Galić.AJ*, para.175; *Ntagerura.AJ*, para.334; *Blaškić.AJ*, para.663; *Tadić.AJ*, para.188.

based” approach (the individual must knowingly control the commission of the offence).<sup>447</sup> For the foreseeable future, it is likely that the two approaches will remain side-by-side in general ICL—despite the ruling of the ICTY Appeals Chamber. Certainly, the appellate decision in *Brđanin* is significant in signalling that the ICTY has not adopted a deliberate policy of retrenchment with regard to JCE,<sup>448</sup> while co-perpetration remains alive and well at the ICC. Whether these approaches will prove equally popular with prosecutors is, of course, another question.

The principal co-perpetration doctrine developed by the ICTY/R<sup>449</sup> is “joint criminal enterprise” (JCE).<sup>450</sup> Early authorities considered JCE straightforwardly as “co-perpetration”,<sup>451</sup> with all that the idea entailed, and indeed this view remains relatively current.<sup>452</sup> In formal terms, regardless of individual conduct, all JCE participants are equally responsible.<sup>453</sup> However, its nature has also always been “hotly contested”.<sup>454</sup> In its three forms (basic, systemic, and extended<sup>455</sup>), it challenges the distinction between perpetration and derivative liabilities: the culpability of those liable under the doctrine varies.<sup>456</sup>

JCE has also been a particular focus of concern about judicial creativity. In *Tadić*, the Appeals Chamber held that “common design” is a form of liability “firmly established” in

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<sup>447</sup> *Dyilo Charges Decision*, paras.326–331. Also *Gacumbitsi.AJ*, per Judge Shahabuddeen, para.45; *Vasiljević.AJ*, per Judge Shahabuddeen, para.32.

<sup>448</sup> *C.f.*, e.g., VAN DER WILT.(2007).op.cit., p.92.

<sup>449</sup> Primarily litigated at the ICTY, it also exists at the ICTR: *Ntakirutimana/Ntakirutimana.AJ*, para.468. The SCSL (e.g., *Fofana/Kondewa.TJ*, para.208) and Special Panel for Serious Crimes (East Timor) have also recognised it (e.g., *Perreira.TJ*, 2005, pp.19-20; *de Deus.TJ*, 2005, p.13; cited in AMBOS.(forthcoming).op.cit., fn.37).

<sup>450</sup> Various, it has also been known as “a common criminal plan, a common criminal purpose, a common design or purpose, a common criminal design, a common purpose, a common design, [...] a common concerted design... a criminal enterprise, a common enterprise, and a joint criminal enterprise.” *Brđanin/Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (hereinafter “*Brđanin/Talić Decision*”), para.24. Acting “in concert” may also connote JCE: *Vasiljević.TJ*, para.63. The term “JCE” is preferred: *Ojdanić JCE Decision*, para.36; per Judge Shahabuddeen, paras.3–5; per Judge Hunt, para.5; *Simić.TJ*, para.149. Further *Gacumbitsi.AJ*, per Judge Shahabuddeen, paras.30–33; VAN SLIEDREGT.(2003).op.cit., p.100.

<sup>451</sup> *Krnjelac.AJ*, para.73; *Ojdanić JCE Decision*, para.20; *Blagojević/Jokić.TJ*, paras.695–696; *Simić.TJ*, para.138; *Kupreškić.TJ*, paras.772, 782.

<sup>452</sup> E.g., *Vasiljević.AJ*, para.119, and per Judge Shahabuddeen, para.2. *C.f. Orić.TJ*, para.281.

<sup>453</sup> *Vasiljević.AJ*, para.111; *Blagojević/Jokić.TJ*, para.702; *Stakić.TJ*, para.435; *Vasiljević.TJ*, para.67; *Krnjelac.TJ*, para.82.

<sup>454</sup> VAN SLIEDREGT.(2007).op.cit., pp.189–190, 201–202; METTRAUX.(2005).op.cit., pp.287–288.

<sup>455</sup> Pp.78-80.*infra*.

<sup>456</sup> VAN SLIEDREGT.(2007).op.cit., p.205; CASSESE.(2007).op.cit., pp.120–122; OHLIN.(2007).op.cit., p.83; CRYER ET AL.(2007).op.cit., p.308; SCHABAS.(2006).op.cit., p.314; METTRAUX.(2005).op.cit., p.292; VAN SLIEDREGT.(2003).op.cit., pp.76, 103, 106. Also *Brđanin.AJ*, para.432.

customary international law.<sup>457</sup> Various commentators have disagreed, particularly with regard to the extended variant.<sup>458</sup> Even as recently as the appeal in *Brđanin*, the ICTY Association of Defence Counsel maintained that JCE does not exist in customary law.<sup>459</sup> The fact that Cassese considers JCE to have become “consolidated” in ICL “since” the *Tadić* appellate decision also underlines the role that modern judicial practice has played.<sup>460</sup>

The *actus reus* of JCE is:

- i. A plurality of persons. They need not be organised in a military, political or administrative structure...
- ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons act in unison...
- iii. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime... but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.<sup>461</sup>

In practice, this amounts to a simpler, two-element test: the existence of the JCE itself and the (intentional) participation by the accused.<sup>462</sup> Concerns about the scope of JCE (*i.e.*, the possibility that liability will over-reach culpability) have led to some attempts to interpret these elements restrictively.<sup>463</sup> However, such attempts have tended to do such violence to the purpose of JCE, or its legal and practical context, that they are better avoided. This ‘all

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<sup>457</sup> E.g., *Brđanin.AJ*, para.405; *Gacumbitsi.AJ*, per Judge Shahabuddeen, paras.40–41; *Vasiljević.AJ*, para.95; *Ojdanić JCE Decision*, para.29; *Tadić.AJ*, para.226.

<sup>458</sup> E.g., DARCY.(2007).op.cit., pp.381, 384-385; POWLES.(2004).op.cit., pp.615–617.

<sup>459</sup> *Brđanin*, Amicus Brief, fn.73, cited in *Brđanin.AJ*, para.373, fn.804.

<sup>460</sup> CASSESE.(2007).op.cit, p.110.

<sup>461</sup> *Tadić.AJ*, para.227. Also *Brđanin.AJ*, paras.364, 430; *Stakić.AJ*, para.64; *Kvočka.AJ*, para.81; *Ntakirutimana/Ntakirutimana.AJ*, para.466; *Vasiljević.AJ*, para.100; *Kayishema/Ruzindana.AJ*, para.193; *Furundžija.AJ*, para.119; *Mrksić.TJ*, para.545; *Martić.TJ*, paras.435–436; *Krajišnik.TJ*, para.883; *Limaj.TJ*, para.511; *Blagojević/Jokić.TJ*, para.698; *Brđanin.TJ*, paras.260–261; *Simić.TJ*, para.156; *Kvočka.TJ*, para.266; *Krstić.TJ*, para.611; *Kordić/Čerkez.TJ*, para.397; *Kupreškić.TJ*, para.772.

<sup>462</sup> *Delalić.AJ*, para.366; *Stakić.TJ*, para.435; *Vasiljević.TJ*, para.65; *Krnojelac.TJ*, para.79. Greater consideration of the ‘plurality’ requirement may offer, however, an as yet unexplored avenue for ensuring the compliance of JCE with the culpability principle: ‘[JCE] and *Brđanin*: misguided over-correction,’ O’ROURKE, A., 2006, p.325.

<sup>463</sup> VAN SLIEDREGT.(2007).op.cit., 188–189; O’ROURKE.(2006).op.cit., p.315.

or nothing' quality may have been a significant contributor to the 'stand-off' that has developed with other co-perpetration doctrines.

The 'common plan' may be understood as "an understanding or arrangement amounting to an agreement"<sup>464</sup> although, as it may develop tacitly and extemporaneously,<sup>465</sup> it need have no formal trappings: the parties themselves may not subjectively recognise it as a 'plan'.<sup>466</sup> Any requirement for "express agreement" was recently disapproved.<sup>467</sup> In the practical context of international crimes, the reasoning behind this decision is sound<sup>468</sup> (providing that a unifying purpose is made out to the criminal standard, its express or implicit nature is beside the point<sup>469</sup>) but it leads to the odd conclusion that this aspect of the *actus reus* requirement becomes very difficult to identify in abstract terms, being more or less subsumed in the *mens rea* requirement of shared intent. The nuance offered by the *Krajišnik* Trial Chamber, linking the identification of the common objective with co-ordinated action by the parties,<sup>470</sup> may be a helpful way forward, offering a more practical test while not unduly impeding the efficacy of the doctrine.

The fact that the common plan is hard to define does not necessarily mean that the link between JCE members is attenuated, although it is a danger:<sup>471</sup> it should thus be identified on the facts strictly.<sup>472</sup> The common plan must be susceptible to proof, albeit by inference from the circumstances,<sup>473</sup> and must be based on more than isolated examples of apparently facilitative conduct.<sup>474</sup> In the particular circumstances of a systemic JCE, proof of *involvement* (not just presence) in the system is largely sufficient.<sup>475</sup> The underlying

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<sup>464</sup> *Simić.TJ*, para.158; *Stakić.TJ*, para.435; *Vasiljević.TJ*, para.66; *Krnojelac.TJ*, para.80.

<sup>465</sup> *Stakić.AJ*, para.64; *Kvočka.AJ*, para.1171; *Martić.TJ*, para.437; *Krajišnik.TJ*, para.883.

<sup>466</sup> *Brđanin.AJ*, para.390.

<sup>467</sup> *Brđanin.AJ*, paras.417–419; *Mrksić.TJ*, para.545; *Martić.TJ*, para.437. *C.f. Brđanin.TJ*, para.347.

<sup>468</sup> 'The requirement of an 'express agreement' for [JCE] liability: a critique of *Brđanin*,' GUSTAFSON, K., 2007, pp.145–149; O'ROURKE.(2006).op.cit., pp.323–325; *c.f. VAN DER WILT.(2007).op.cit.*, pp.99–100; VAN SLIEDREGT.(2007).op.cit., pp.200–201; 'The judgment of the [ICTY] in the *Brđanin* case,' BLUMENSTOCK, T., 2005, pp.72–73.

<sup>469</sup> *Brđanin.AJ*, para.418; VAN DER WILT.(2007).op.cit., p.107.

<sup>470</sup> *Krajišnik.TJ*, para.884; also *Haradinaj.TJ*, para.139. The Trial Chamber's emphasis on the importance of 'mutuality' can be understood just as well in this context: *Brđanin.TJ*, para.351.

<sup>471</sup> VAN SLIEDREGT.(2007).op.cit., pp.204–205.

<sup>472</sup> *Krnojelac.AJ*, para.116; *see further paras.117–120.*

<sup>473</sup> *Vasiljević.AJ*, para.109; *Blagojević/Jokić.TJ*, para.699; *Brđanin.TJ*, para.262. E.g., *Furundžija.AJ*, para.120.

<sup>474</sup> *Brđanin.TJ*, para.352.

<sup>475</sup> *Kvočka.AJ*, paras.118, 413; *Krnojelac.AJ*, paras.96–97; *Simić.TJ*, para.158.

purpose, or motive, for entering into a ‘common plan’ is irrelevant.<sup>476</sup> The plan’s criminal nature may be derived not only from the ultimate objective sought but also from the means contemplated to that end.<sup>477</sup>

In particular, it must be established to which crimes the accused ‘agreed’.<sup>478</sup> This is important both for the culpability principle, and in considering the extended form of JCE: the scope of the additional *actus reus* element of the latter (further crimes committed as a foreseeable consequence of the common criminal plan) necessarily depends on what the accused *actually* contemplated.<sup>479</sup>

It was asked in *Milutinović* whether the physical perpetrator(s)<sup>480</sup> must necessarily be part of the JCE. The Appeals Chamber declined to consider the issue as improvidently raised.<sup>481</sup> It was nonetheless a sufficiently important question, particularly once the ‘absence’ of a doctrine of indirect co-perpetration was established,<sup>482</sup> that the Appeals Chamber gave the matter special subsequent consideration. In determining the point, emphasis was placed not on the particular membership of the JCE<sup>483</sup> but instead upon the degree to which it may be proved that the relevant crime was part of the common purpose.<sup>484</sup> The fact that the physical perpetrator was a member of the JCE, or was closely associated with a member, simplifies the evidential burden considerably but is not the only means of discharging it.<sup>485</sup> In order to show the necessary ‘mutuality’ of purpose, physical perpetrators outside the JCE must be shown to be “linked” to a JCE member who used them pursuant to the plan.<sup>486</sup> Reliance on a physical perpetrator outside the JCE, particularly in the chaos of internecine conflict, may

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<sup>476</sup> *Kvočka.AJ*, paras.106, 209; *Brđanin.TJ*, para.342.

<sup>477</sup> *Brima.AJ*, para.76.

<sup>478</sup> *Brđanin.TJ*, para.264; *Brđanin/Talić Decision*, paras.44–45.

<sup>479</sup> *Brđanin.AJ*, para.365; *Karemera JCE Decision*, para.17; *Stakić.AJ*, para.65; *Kvočka.AJ*, para.86; *Mrksić.TJ*, para.546; *Martić.TJ*, para.439; *Krajišnik.TJ*, para.882; *Limaj.TJ*, para.512; *Krstić.TJ*, para.614.

<sup>480</sup> It has proved awkward to identify an apt term for the “people on the ground” or “trigger men” who transform the criminal plan into practical reality. The Appeals Chamber has favoured the term “principal perpetrators” (*Brđanin.AJ*, para.362) but this carries hierarchical overtones which fly in the face of the reasoning underlying JCE and co-perpetration doctrines. Thus, with some reluctance, the term “physical perpetrator” is preferred, even though it has obvious shortcomings in certain circumstances.

<sup>481</sup> *Ojdanić Indirect Co-perpetration Decision*, para.23.

<sup>482</sup> P.84.*infra*; *Ojdanić Indirect Co-perpetration Decision*, per Judge Bonomy, paras.3–4.

<sup>483</sup> Which may, in any event, be hard to prove: e.g., *Krnojelac.AJ*, para.116; *Brđanin.TJ*, paras.345–346; *Krajišnik.TJ*, paras.1081–1082, 1086.

<sup>484</sup> *C.f.* CASSESE.(2007).op.cit., pp.125–126.

<sup>485</sup> *Brđanin.AJ*, para.410; *Ojdanić Indirect Co-perpetration Decision*, per Judge Bonomy, paras.10–11, 13; *Mrksić.TJ*, para.547; *Martić.TJ*, para.438.

<sup>486</sup> *Brđanin.AJ*, paras.413, 418, 430.

increase the chances that they will operate outside the common plan, and open the question of JCE III liability.<sup>487</sup>

JCEs may overlap with each other, contain subsidiaries, or form part of a wider scheme. Smaller enterprises may be more likely to have a purpose focused on a particular criminal act,<sup>488</sup> larger ones may have broad objectives which entail the violation of a range of criminal offences.<sup>489</sup> In principle, JCEs may be usefully ‘inter-linked’.<sup>490</sup> There is no geographical or numerical limit on the size of a JCE,<sup>491</sup> providing the necessary elements are made out.<sup>492</sup> Nonetheless, prosecutions for the more generally significant enterprises (targeting a system crime as a whole—such as the prosecutions in *Brđanin* or *Krajišnik*—rather than a particular crime incidental to it—such as *Tadić*) have become rather more complicated. In particular, it may be very difficult to prove the existence of a common plan where the accused is “physically and structurally” remote from the physical perpetrator(s).<sup>493</sup> One JCE may also succeed another, although comprised of the same membership, where the objective changes fundamentally in nature.<sup>494</sup> In such circumstances, the foundations of liability must be established *ab initio*.<sup>495</sup>

The importance of the participation element in JCE should not be underestimated: JCE is not liability for mere conspiracy.<sup>496</sup> For the same reason, a crime must in fact have taken place pursuant to the common plan.<sup>497</sup> A nicely judged standard of participation can help to

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<sup>487</sup> *Brđanin.AJ*, para.411; *Mrksić.TJ*, para.547.

<sup>488</sup> *Krnjelac.AJ*, para.122.

<sup>489</sup> *Kvočka.TJ*, para.307.

<sup>490</sup> GUSTAFSON.(2007).op.cit., pp.146–149, 155–157.

<sup>491</sup> *Brđanin.AJ*, para.425; *Karemera JCE Decision*, para.17; *Rwamakuba Interlocutory Appeal*, para.25; *Krajišnik.TJ*, para.876. Further, e.g., *Ohlendorf* (NMT), pp.427–433.

<sup>492</sup> It is important to stress, however, that entire conflicts should not be regarded as JCEs: it has been recalled that it is vital to protect the notion of lawful combatancy, where applicable, in order to foster general engagement with the notion of IHL. SASSÖLI/OLSON.(2000).op.cit., pp.8–9.

<sup>493</sup> See, e.g., *Karemera JCE Decision*, para.17; *Brđanin.TJ*, paras.354–355. This is, however, a practical challenge, not a legal one: *Brđanin.AJ*, para.424.

<sup>494</sup> *Krajišnik.TJ*, para.1118; *Blagojević/Jokić.TJ*, para.700.

<sup>495</sup> This requirement is, of course, subject to the possibility that liability under JCE III may be established. It is likely, however, that any change to the objective “fundamental in nature” will not also be “natural and foreseeable”.

<sup>496</sup> *Stakić.AJ*, para.64; *Ojdanić JCE Decision*, para.26; *Brđanin.TJ*, para.263; *Simić.TJ*, para.158.

<sup>497</sup> *Fn.294.supra*.

<sup>497</sup> *Brđanin.AJ*, para.430.

address concerns about the compliance of JCE with the principle of culpability.<sup>498</sup> The jurisprudence on this point has, however, been confused.

Comparing JCE liability to aiding and abetting, it was held that “it is sufficient for [a JCE] participant to perform acts that *in some way* are directed to the furthering of the common plan or purpose.”<sup>499</sup> On the other hand, in *Furundžija*, it was observed that “to be guilty of torture as a perpetrator (or co-perpetrator), the accused must participate in an *integral part* of the torture”, as well as possessing the necessary *mens rea*.<sup>500</sup> The Trial Chamber in *Kvočka*, noting that the minimum threshold for the JCE *actus reus* had not been precisely determined,<sup>501</sup> recalled that “the contribution of persons convicted of participation in a [JCE] has to date been direct and significant”.<sup>502</sup> It continued:

The participation in the enterprise must be significant. By significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective, e.g, a participation that enables the system to run more smoothly or without disruption. Physical or direct perpetration of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution. In general, participation would need to be assessed on a case by case basis, especially for low or mid level actors who do not physically perpetrate crimes.<sup>503</sup>

References to the relevance of hierarchical position<sup>504</sup> should not themselves be afforded significance,<sup>505</sup> other than as an *indicium* of the accused’s actual degree of participation<sup>506</sup> or intent.<sup>507</sup> Some years later, the Appeals Chamber purported to reverse the requirement of significant participation, holding that:

[I]n general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he

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<sup>498</sup> O’ROURKE.(2006).op.cit., p.325.

<sup>499</sup> *Tadić.AJ*, para.229, emphasis added; *Kvočka.TJ*, para.274.

<sup>500</sup> *Furundžija.TJ*, para.257, emphasis added. The Appeal Chamber did not demur: *Furundžija.AJ*, para.118.

<sup>501</sup> *Kvočka.TJ*, para.289; also para.308.

<sup>502</sup> *Kvočka.TJ*, para.275.

<sup>503</sup> *Kvočka.TJ*, para.309; also paras.306, 312. Also *Simić.TJ*, para.159.

<sup>504</sup> *Kvočka.TJ*, paras.306, 309.

<sup>505</sup> *Kvočka.AJ*, para.101; *Krnojelac.TJ*, para.78.

<sup>506</sup> *Kvočka.AJ*, para.192.

<sup>507</sup> *Limaj.TJ*, para.511.



participated in the [JCE]. In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose.<sup>508</sup>

At the same time, the Chamber did assert that there is a minimum standard for participation in a JCE.<sup>509</sup> Neither did it touch on the finding of the Trial Chambers in *Brđanin* and *Blagojević* that the accused's involvement must at least "form a link in the chain of causation", even though it need not be a *sine qua non*.<sup>510</sup> Indeed, in expressly upholding this latter point and remaining silent on the question of general causal requirements, the Appeals Chamber at the very least left this possibility open.<sup>511</sup>

It seems likely that this finding illustrates confusion between the qualitative and quantitative meanings of the word "substantial". In the *OED*, the qualitative meaning ("having a real existence") is the primary one.<sup>512</sup> Similarly, a proper understanding of the minimum *actus reus* requirement for an act to have a "substantial" effect on the criminal consequence<sup>513</sup> (applicable to all complicity-based modes of liability) is that it means a "real" one. A "real" act is indeed one, as the *Kvočka* Trial Chamber found, that enhances the enterprise in some way, that is less than minimal.<sup>514</sup> JCE liability should comply with this standard.<sup>515</sup> Indeed, Judge Shahabuddeen had previously commented that participation in a JCE must be "real",<sup>516</sup> a determination to be made by the court on the facts of the particular case.

The *Kvočka* Appeals Chamber applied the quantitative meaning of substantial: in holding that a substantial contribution was not required, it referred to an act forming a "major" or "sizeable" component of the entire offence. This can be inferred from the Appeals Chamber's cross-reference<sup>517</sup> to its later finding that a quantitatively substantial contribution was required to show that an 'opportunistic visitor' should be included in a systemic JCE.<sup>518</sup>

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<sup>508</sup> *Kvočka.AJ*, para.97; also *Gacumbitsi.AJ*, per Judge Shahabuddeen, para.44; *Krajišnik.TJ*, paras.883, 885.

<sup>509</sup> *Kvočka.AJ*, para.193.

<sup>510</sup> *Blagojević/Jokić.TJ*, para.702; *Brđanin.TJ*, para.263. Also *Mrksić.TJ*, para.545.

<sup>511</sup> *Kvočka.AJ*, paras.98, 193, 421; also *Krajišnik.TJ*, para.883.

<sup>512</sup> *OED*, Compact Ed.

<sup>513</sup> P.64.*supra*.

<sup>514</sup> METTRAUX.(2005).op.cit., p.284.

<sup>515</sup> CASSESE.(2007).op.cit., pp.127–128; also OHLIN.(2007).op.cit., p.74.

<sup>516</sup> *Vasiljević.AJ*, per Judge Shahabuddeen, para.33; also para.40.

<sup>517</sup> *Kvočka.AJ*, para.97, fn.593.

<sup>518</sup> *Kvočka.AJ*, para.599, emphasis added. Also *Kvočka.TJ*, paras.310–311.

It is quite obvious that Žigić's contribution, resulting in "grave crimes", was qualitatively substantial and so would have been sufficient for JCE liability if he was not an outsider.

Accordingly, although it has been implied that the distinction between participation by JCE and aiding and abetting rests on the fact that only the latter requires a "substantial" contribution,<sup>519</sup> it is suggested that this is incorrect. The proper distinction between the two clearly pertains to the *mens rea* standard (intent rather than knowledge).<sup>520</sup> JCE is no different from the other complicity-based modes of liability in requiring, at minimum, that the accused's conduct has a qualitatively substantial effect. This interpretation appears to have been recently confirmed by the Appeals Chamber in *Brđanin*,<sup>521</sup> even though it introduced new terminological confusion by use of the term "significant"<sup>522</sup> (a term which is already sowing the seeds of a future confusion with notions of control of the crime<sup>523</sup>). Thus, present statements of the law are hardly self-explanatory.<sup>524</sup>

The manner of participation in a JCE can vary to include involvement in the direct personal perpetration of criminal offences, the rendering of assistance and encouragement (joined with the requisite intent) and contribution to the effective operation of a particular system within which the crimes are known to be committed.<sup>525</sup> Personal presence at the scene of the crime is not essential,<sup>526</sup> nor is physical participation in any element of the crime.<sup>527</sup> Contribution to a joint criminal enterprise can include an omission.<sup>528</sup> As with aiding and abetting,<sup>529</sup> it has been suggested that the silent but approving presence at the crime-scene of a person with significant authority or influence may itself be sufficient participation,<sup>530</sup> providing that it is shown to have a qualitatively substantial effect on the facts. The

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<sup>519</sup> GUSTAFSON.(2007).op.cit., p.142; VAN SLIEDREGT.(2007).op.cit., pp.185, 195, 200–201;

SCHABAS.(2006).op.cit., p.313.

<sup>520</sup> CASSESE.(2007).op.cit., p.116; ESER.(2002).op.cit., pp.791-792.

<sup>521</sup> *Brđanin.AJ*, para.427.

<sup>522</sup> *Ibid.*, paras.430–431; also *per* Judge van den Wyngaert, para.4; *Martić.TJ*, para.440.

<sup>523</sup> E.g., OHLIN.(2007).op.cit., p.89.

<sup>524</sup> E.g., *Mrksić.TJ*, para.545.

<sup>525</sup> *Brđanin.AJ*, para.424; *Ntakirutimana/Ntakirutimana.AJ*, para.466; *Vasiljević.AJ*, para.100; *Krnojelac.AJ*, paras.80–81; *Krajišnik.TJ*, para.883; *Blagojević/Jokić.TJ*, para.702; *Brđanin.TJ*, para.263; *Stakić.TJ*, para.435; *Vasiljević.TJ*, para.67; *Krnojelac.TJ*, para.81.

<sup>526</sup> *Kvočka.AJ*, paras.113, 251; *Mrksić.TJ*, para.545; *Limaj.TJ*, para.511; *Simić.TJ*, para.158.

<sup>527</sup> *Kvočka.AJ*, paras.99, 112.

<sup>528</sup> *Kvočka.TJ*, para.284.

<sup>529</sup> P.98 *infra*.

<sup>530</sup> *Kvočka.TJ*, para.309.

relationship with aiding and abetting is such that it generally remains an alternative mode of liability if perpetration within a JCE is not made out.<sup>531</sup>

*Mens rea* varies according to the form of JCE applicable.

#### *JCE I: 'basic JCE'*

The simplest category of JCE features intent that the crime in the common plan is committed.<sup>532</sup> Where necessary, this must include the requisite specific intent.<sup>533</sup> Cassese has recently suggested, extra-judicially, that *dolus eventualis* may suffice for JCE I.<sup>534</sup> However, this reasoning seems to collapse the distinction between JCE I and JCE III, as his example indicates, and so should be treated with great caution.

As for all modes of liability discussed, the accused must also intend their own acts, in this case the participation in the common purpose.<sup>535</sup> Personal enthusiasm or satisfaction is irrelevant.<sup>536</sup>

#### *JCE II: 'systemic JCE'*

The second form, although derived principally from concentration camp cases, is in fact applicable to any "organised system set in place to achieve a common criminal purpose".<sup>537</sup>

The required *mens rea* is personal knowledge of the system of ill-treatment and intent to promote it.<sup>538</sup> Fundamentally, it is only a minor variant of the first category.<sup>539</sup> In borrowed

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<sup>531</sup> E.g., *Vasiljević.TJ*, para.69; *Krnojelac.TJ*, para.87.

<sup>532</sup> *Stakić.AJ*, para.65; *Kvočka.AJ*, para.82; *Ntakirutimana/Ntakirutimana.AJ*, paras.463, 467; *Vasiljević.AJ*, paras.97, 101; *Krnojelac.AJ*, paras.83–84; *Delalić.AJ*, para.366; *Tadić.AJ*, para.228; *Haradinaj.TJ*, para.135; *Mrksić.TJ*, para.546; *Martić.TJ*, para.439; *Krajišnik.TJ*, para.879; *Limaj.TJ*, para.511; *Blagojević/Jokić.TJ*, para.703; *Brđanin.TJ*, para.264; *Simić.TJ*, paras.156–157, 160; *Stakić.TJ*, para.436; *Vasiljević.TJ*, para.64; *Krnojelac.TJ*, para.78; *Brđanin/Talić Decision*, paras.25–26, 42–43; *Kupreškić.TJ*, para.772.

<sup>533</sup> *Kvočka.AJ*, paras.110, 240; *Krnojelac.AJ*, para.111; *Simić.TJ*, paras.156, 160; *Stakić.TJ*, para.436; *Vasiljević.TJ*, para.68; *Krnojelac.TJ*, para.83; *Kvočka.TJ*, para.288.

<sup>534</sup> CASSESE.(2007).op.cit., pp.111–112.

<sup>535</sup> *Brđanin.AJ*, para.365; *Martić.TJ*, para.439.

<sup>536</sup> *Kvočka.AJ*, paras.106, 242; *Krnojelac.AJ*, para.100.

<sup>537</sup> *Stakić.AJ*, para.65; *Kvočka.AJ*, paras.82, 182; *Ntakirutimana/Ntakirutimana.AJ*, para.464; *Krnojelac.AJ*, para.89; *Krajišnik.TJ*, para.880.

terminology, it “does not dispense with the need to prove intent [but merely] provides a mode of proving intent in particular circumstances”.<sup>540</sup> As the immediate post-war practice illustrates, however, this can be a nice distinction.<sup>541</sup> As with JCE I, it is essential to prove that all relevant members of the enterprise had a “common state of mind”,<sup>542</sup> and that this common purpose relates to the commission of certain crimes.<sup>543</sup> Although it was suggested in *Kvočka* that the “culpable participant would not need to know of each crime committed”,<sup>544</sup> this is presumably a reference to occasions where multiple counts of the same crime are committed, a fact irrelevant to the identification of a common purpose.

### *JCE III: ‘extended JCE’*

This ‘extended’ form relies on the established existence of a JCE,<sup>545</sup> either basic or systemic.<sup>546</sup> Where further, *unplanned* crimes are committed by a member of the original enterprise but which were nevertheless a foreseeable consequence of the criminal design (an additional objective element<sup>547</sup>), the accused may be liable if they are proved to have accepted that ‘risk’.<sup>548</sup>

As noted in *Brđanin*, the latter criterion was expressed by the Appeals Chamber in a number of ways, implying various possible *mens rea* standards:

The word “risk” is an equivocal one, taking its meaning from its context. In the first of these three formulations stated (“the risk of death occurring”), it would seem that it is used in the sense of a

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<sup>538</sup> *Brđanin.AJ*, para.365; *Stakić.AJ*, para.65; *Kvočka.AJ*, paras.82, 198, 237; *Ntakirutimana/Ntakirutimana.AJ*, para.467; *Vasiljević.AJ*, paras.101, 105; *Krnojelac.AJ*, para.89; *Tadić.AJ*, para.228; *Mrksić.TJ*, para.546; *Limaj.TJ*, para.511; *Simić.TJ*, para.157.

<sup>539</sup> *Karemera JCE Decision*, para.13; *Vasiljević.AJ*, para.98; *Ojdanić JCE Decision*, Per Judge Hunt, para.30; *Tadić.AJ*, para.203; *Haradinaj.TJ*, para.136; *Krajišnik.TJ*, para.880; *Krnojelac.TJ*, para.78; *Vasiljević.TJ*, para.64; *Brđanin/Talić Decision*, paras.25, 27. C.f. VAN SLIEDREGT.(2003).op.cit., p.100.

<sup>540</sup> *Brđanin Interlocutory Appeal*, per Judge Shahabuddeen, para.2.

<sup>541</sup> VAN SLIEDREGT.(2007).op.cit., p.188; VAN SLIEDREGT.(2003).op.cit., p.107.

<sup>542</sup> *Krnojelac.AJ*, paras.83–84; *Ojdanić JCE Decision*, Per Judge Hunt, para.7; *Simić.TJ*, para.160; *Brđanin/Talić Decision*, para.26. Also *Vasiljević.TJ*, para.64; *Krnojelac.TJ*, para.78.

<sup>543</sup> VAN DER WILT.(2007).op.cit., pp.100–101.

<sup>544</sup> *Kvočka.TJ*, para.312. C.f. OHLIN.(2007).op.cit., p.75.

<sup>545</sup> *Stakić.AJ*, para.65; *Kvočka.AJ*, para.83; *Ntakirutimana/Ntakirutimana.AJ*, para.465; *Vasiljević.AJ*, para.101; *Mrksić.TJ*, para.546; *Krajišnik.TJ*, para.881; *Limaj.TJ*, para.511; *Brđanin.TJ*, para.347.

<sup>546</sup> *Kvočka.AJ*, para.86.

<sup>547</sup> *Haradinaj.TJ*, para.137.

<sup>548</sup> *Stakić.AJ*, para.65; *Kvočka.AJ*, para.83; *Vasiljević.AJ*, paras.99, 101; *Tadić.AJ*, paras.204, 220, 228; *Martić.TJ*, para.439; *Kordić/Čerkez.TJ*, para.398.

possibility. In the second formulation, “most likely” means at least probable (if not more), but its stated equivalence to the civil law notion of *dolus eventualis* would seem to reduce it once more to a possibility. The word “might” in the third formulation indicates again a possibility. In many common law national jurisdictions, where the crime charged goes beyond what was agreed in the joint criminal enterprise, the prosecution must establish that the participant who did not himself commit that crime nevertheless participated in that enterprise with the contemplation of the crime charged as a *possible* incident in the execution of that enterprise. This is very similar to the civil law notion of *dolus eventualis*... So far as the *objective* element to be proved is concerned, the words “predictable” [...] and “foreseeable” [...] are truly interchangeable in this context.<sup>549</sup>

Accordingly, the Trial Chamber held that the “prosecution needs to establish only that the accused was aware that the further crime was a *possible* consequence in the execution of the enterprise and [...], with that awareness, he participated in that enterprise”,<sup>550</sup> despite the rather loose reference to *dolus eventualis*. This dictum has nonetheless been broadly applied.<sup>551</sup> The Appeals Chamber in *Kvočka* appears to have adopted a similar standard<sup>552</sup> and in *Stakić* referred to the *Brđanin* and *Kvočka* standards more or less interchangeably.<sup>553</sup> In *Brđanin*, it referred merely—and enigmatically—to “*dolus eventualis*”.<sup>554</sup>

However, although adopting the “possibility” formulation from *Brđanin*, the *Stakić* Trial Chamber had chosen to quote the *Tadić* dictum which presents the highest *mens rea* standard: a ‘proper’ articulation of *dolus eventualis* (“everyone in the group must have been able to predict [the] result... more than mere negligence is required. What is required is a state of mind which a person... was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk.”).<sup>555</sup> Similarly, the Appeals Chamber in *Krstić* summarised the standard for extended JCE liability in terms of “probability”.<sup>556</sup>

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<sup>549</sup> *Brđanin/Talić Decision*, para.29. Identically, also *Ojdanić JCE Decision*, per Judge Hunt, paras.10–12.

<sup>550</sup> *Krstić.TJ*, para.613; *Brđanin/Talić Decision*, paras.30–31.

<sup>551</sup> *Vasiljević.AJ*, para.101; *Haradinaj.TJ*, para.137; *Krajišnik.TJ*, para.882; *Blagojević/Jokić.TJ*, para.703; *Brđanin.TJ*, para.265.

<sup>552</sup> *Kvočka.AJ*, para.83, emphasis added; also *Limaj.TJ*, para.511.

<sup>553</sup> *Stakić.AJ*, paras.65, 87. Also *Mrksić.TJ*, paras.546–547.

<sup>554</sup> *Brđanin.AJ*, paras.365, 411, 431; *Martić.TJ*, para.439.

<sup>555</sup> *Stakić.TJ*, para.436, citing *Tadić.AJ*, para.220.

<sup>556</sup> *Krstić.AJ*, para.150.

It is clear, therefore, that the various decisions have sought to apply a *dolus eventualis* standard,<sup>557</sup> but that the Chambers have not shared a common understanding of its meaning. In short, what standard of possibility/probability does the term entail? Although an apparently weaker line of authority, it would seem that the *Krstić—Stakić* first instance approach is preferable, not least as it conforms much more readily to the general mental standard articulated by the Appeals Chamber in *Blaškić*.

Cassese has suggested that foreseeability should be understood in the objective sense: “not that the secondary offender actually foresaw the criminal conduct likely to be taken by the primary offender [but] rather whether a man of reasonable prudence would have foreseen that conduct under the [prevailing] circumstances”.<sup>558</sup> He justifies this view primarily on a policy basis. However, it seems hard to reconcile with the nature of *dolus eventualis*: the volitional element is predicated on the accused’s *subjective* foresight of the risk that the crime would occur. Further, given the serious nature of the crimes at consideration,<sup>559</sup> and the existing concerns as to the compatibility of extended JCE with the culpability principle,<sup>560</sup> Cassese’s suggestions seems fraught with difficulties. His rationale for extended JCE liability—that the individual ‘opened the door’ by contributing to the ‘core’ criminal enterprise<sup>561</sup>—is convincing as the doctrine stands but becomes increasingly fraught were it to be extended to a more clearly objective basis.<sup>562</sup>

It might be assumed that JCE III may not be applied to crimes of specific intent.<sup>563</sup> However, the Appeals Chamber has held that “the third category of [JCE] is no different from other forms of criminal liability which do not require proof of intent to commit a crime on the part of an accused”,<sup>564</sup> thus that knowledge of intent will suffice, and therefore that *dolus eventualis* is not repugnant. Although Judge Shahabuddeen’s separate analysis is

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<sup>557</sup> VAN DER WILT.(2007).op.cit., p.100; CASSESE.(2007).op.cit., p.130; VAN SLIEDREGT.(2007).op.cit., p.186; O’ROURKE.(2006).op.cit., p.313; VAN SLIEDREGT.(2003).op.cit., p.99.

<sup>558</sup> CASSESE.(2007).op.cit., p.123. Also OHLIN.(2007).op.cit., pp.75, 81.

<sup>559</sup> SCHABAS.(2003).op.cit., p.1033.

<sup>560</sup> VAN SLIEDREGT.(2003).op.cit., pp.106–107.

<sup>561</sup> CASSESE.(2007).op.cit., pp.118–120; also DAMAŠKA.(2001).op.cit., p.465; SASSÒLI/OLSON.(2000).op.cit., p.8.

<sup>562</sup> The line between objective and subjective assessments in *dolus eventualis* is already a narrow one:

HAMDORF.(2007).op.cit., p.215.

<sup>563</sup> E.g., *Stakić.TJ*, para.530.

<sup>564</sup> *Brdanin Interlocutory Appeal*, paras7–8.

preferable to that of the Chamber,<sup>565</sup> there is some force to this approach.<sup>566</sup> On the other hand, as Cassese suggests, although the requisite *mens rea* standard is distinct for different modes of liability, “the ‘distance’ between the subjective elements” of the JCE III participant and the more direct perpetrator cannot become too great.<sup>567</sup>

It may fairly be said that JCE III is the biggest cause of controversy in ICL: whereas the basic and systemic forms are generally considered “a reasonable, useful and important crystallization of international and national precedents and of legal thinking”,<sup>568</sup> the third has drawn the fire of a number of commentators.<sup>569</sup> Some have characterised it, along with superior responsibility, as a form of “imputed responsibility”,<sup>570</sup> whereby persons are liable for the acts of others. Insofar as this epithet is intended to be synonymous with vicarious liability, this is not correct.<sup>571</sup> Both JCE and superior responsibility punish on the basis of the individual’s own culpability, not that of others.

The interpretation of JCE advanced here also answers some of the concerns which have been raised,<sup>572</sup> notably with regard to the extent of the individual’s intent<sup>573</sup> and participation. At the very least, the parity which has been suggested between the material and mental elements for JCEs (at minimum, a substantial contribution to the criminal consequence and acceptance of the substantial likelihood of its occurrence) and those for other modes of liability eliminates the concern that the accused is disadvantaged by the Prosecution’s choice of charges. The higher degree of culpability which attaches to JCE convictions can be met, in the case of JCE III, with Cassese’s argument about the assumption of risk.

### Stakić co-perpetration

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<sup>565</sup> *Brđanin Interlocutory Appeal*, per Judge Shahabuddeen, paras.2–8.

<sup>566</sup> VAN SLIEDREGT.(2007).op.cit., pp.203–204.

<sup>567</sup> CASSESE.(2007).op.cit., pp.121–122. Further, METTRAUX.(2005).op.cit., pp.259–265.

<sup>568</sup> SASSÒLI/OLSON.(2000).op.cit., p.6.

<sup>569</sup> E.g., OHLIN.(2007).op.cit., p.76.

<sup>570</sup> DARCY.(2007).op.cit., pp.377, 381; SCHABAS.(2003).op.cit., pp.1026, 1030.

<sup>571</sup> *Delalić.AJ*, para.239.

<sup>572</sup> ‘Just convict everyone! Joint perpetration: from *Tadić* to *Stakić* and back again,’ BADAR, M.E., 2006, p.301; also FLETCHER/OHLIN.(2005).op.cit., pp.548-550.

<sup>573</sup> *Dolus eventualis* is an intent standard: HAMDORF.(2007).op.cit., p.214.

The question arose whether JCE is the only co-perpetration doctrine established within the law applied by the ICTY/R. In *Stakić*, the Trial Chamber declared that “[JCE] is only one of several possible interpretations... other definitions of co-perpetration must equally be taken into account.” Indeed, it suggested that definitions more “directly” relating to commission (or perpetration) should receive judicial priority.<sup>574</sup> It offered a control-based co-perpetration doctrine, possessing many similar characteristics to JCE but with a very different emphasis on the source of liability.<sup>575</sup> Whereas JCE predicates liability on a shared intent, the *Stakić* model emphasised “joint control over the act” (accompanied by, at least, “silent consent”).<sup>576</sup> It is not necessary that the *Stakić* co-perpetrator participates in all aspects of the criminal conduct; indeed, it is more common that they possess their own area of expertise and responsibility. It is also not necessary that the co-perpetrator performs their task(s) themselves. It is entirely sufficient if they require subordinates to act on their behalf (a form of liability informally called indirect co-perpetration). The defining characteristic of the mode of liability is that:

“The co-perpetrator can achieve nothing on his own... The plan only ‘works’ if [one co-perpetrator] works with the other... [T]hey can only realise their plan insofar as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in control of the act... This type of ‘key position’ of each co-perpetrator describes precisely the structure of joint control over the act.”<sup>577</sup>

Evidently, this model of co-perpetration also depends on some kind of “common goal” and “agreement or silent consent” but these factors receive somewhat less emphasis.<sup>578</sup> The Prosecution’s definition in *Milutinović* concurs.<sup>579</sup> The *mens rea* requirement is the general

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<sup>574</sup> *Stakić.TJ*, para.438.

<sup>575</sup> *Ibid.*, para.441.

<sup>576</sup> *Stakić.TJ*, para.490.

<sup>577</sup> *Täterschaft und Tatherrschaft*, ROXIN C., 1994, p.278, cited in *Stakić.TJ*, para.440, fn.400. Alternatively, HAMDORF.(2007).op.cit., p.212; *Vasiljević.AJ*, per Judge Shahabuddeen, para.29.

<sup>578</sup> *Stakić.TJ*, paras.470–477. See further, e.g., *Tadić.AJ*, para.224, fn.283, citing the German Federal Court: “There is co-perpetration [...] when and to the extent that the joint action of the several participants is founded on a reciprocal agreement...” Interestingly, it seems that the standards for the common goal under JCE and *Stakić* co-perpetration may be very similar: on appeal, dismissing the Trial Chamber’s conclusions, the Appeals Chamber was able to apply JCE liability on the basis of the same findings. *Stakić.AJ*, paras.73, 80–81.

<sup>579</sup> *Milutinović*, Prosecution’s Response to General Ojdanić’s Preliminary Motion Challenging Jurisdiction: Indirect Co-perpetration, para.3.



*dolus eventualis* standard,<sup>580</sup> supplemented by an awareness of the indispensable nature of the accused's role.<sup>581</sup>

The import of this development was initially uncertain. Some judges leapt to the opportunity, rather dramatically, to dismiss JCE as a “confusion and a waste of time”.<sup>582</sup> Perhaps as a consequence, the Appeals Chamber's reaction when it came was less than temperate. It summarily dismissed the doctrine, holding that “this mode of liability... does not have support in customary international law or in the settled jurisprudence of this Tribunal”.<sup>583</sup> The *Milutinović* Trial Chamber, which was required to render a decision on the point on the same day, not only dismissed the existence of the doctrine in customary law, but tacitly questioned its basis in domestic law.<sup>584</sup> Although this barb may have been misplaced, it remains true to say that even the doctrine's advocates are challenged to point to a national context in which it may be considered to have been truly secure for any substantial length of time.<sup>585</sup> In *Simić*, Judge Schomburg proffered the practice of 24 states in support of the notion of co-perpetration. However, on the basis merely of the information presented in the text, it is not immediately apparent that these all apply the “joint functional control” model of co-perpetration that he articulated.<sup>586</sup> Nonetheless, as the ICC Pre-Trial Chamber pointed out, the closely related concept of perpetration by means has a solid foundation.<sup>587</sup>

Although the introduction of *Stakić* liability was not well-judged—and its bluntness seems to have contributed substantially to its exclusion from the law of the ICTY/R—its blank rejection from customary law was not well-judged either. The interface between JCE and co-perpetration reflects the interface between the common law and civil law traditions from

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<sup>580</sup> *Stakić.TJ*, paras.442, 496, emphasis added. Also *Ojdanić Indirect Co-perpetration Decision*, para.38.

<sup>581</sup> *Stakić.TJ*, paras.442, 497–498.

<sup>582</sup> *Simić.TJ*, per Judge Per-Lindholm, paras.2–5.

<sup>583</sup> *Stakić.AJ*, para.62.

<sup>584</sup> *Ojdanić Indirect Co-perpetration Decision*, paras.37, 39.

<sup>585</sup> OLÁSULO.(2007).op.cit., pp.150–151.

<sup>586</sup> *Simić.AJ*, per Judge Schomburg, paras.13–14; further *Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks*, Expert Opinion commissioned by the [ICTY] Office of the Prosecutor, SIEBER, U., KOCH, H., & SIMON, J.M. (eds.), 2006.

<sup>587</sup> *Dyilo Charges Decision*, paras.330, 339. FLETCHER.(2000).op.cit., p.639; WERLE.(2005).op.cit., p.123, mn.354; *Gacumbitsi.AJ*, per Judge Schomburg, para.16, fn.30.

which the doctrines are principally derived.<sup>588</sup> Viewed objectively, the basis of JCE *dehors* the ICTY/R is not such that it is appropriate to be cavalier about other doctrines.<sup>589</sup> Accordingly, the *Stakić* appeal is better characterised as a preference<sup>590</sup> for JCE in the interests of “judicial discipline”<sup>591</sup> rather than an ontological rejection of co-perpetration in international law.

The survival of co-perpetration, albeit outside the ICTY/R, is likely to be beneficial. JCE and co-perpetration have different strengths, and are suitable to the prosecution of different crimes. Crimes in which it is not possible to ascertain which member of a group completed the *actus reus* (“mob crimes”) are, for example, ideally prosecuted via JCE.<sup>592</sup> *Stakić* co-perpetration, in such circumstances, would not be, as no group member possesses control over the crime. In turn, it is likely that co-perpetration doctrines are of particular efficacy in prosecuting ‘organisational’ or ‘policy’ crimes (such as *Stakić*, *Brđanin*, *Krajišnik*, where JCE law has become singularly complicated) where the accused is structurally and physically remote from the physical perpetrators.<sup>593</sup> A prosecutorial system deriving the strengths of both might be very effective indeed.<sup>594</sup>

Precisely for this reason, however, it is also appropriate to sound a note of caution. Citing to Judge Anzilotti,<sup>595</sup> Judge Shahabuddeen suggested that at least some forms of JCE and co-perpetration might be mutually exclusive, envisaging a situation where on the same facts, co-perpetration could acquit, JCE would convict, and *vice versa*.<sup>596</sup> This may be a particular problem with regard to JCE III. The problem is not insurmountable—indeed, the ICC has

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<sup>588</sup> On the roots of co-perpetration, e.g. OLÁSOLO.(2007).op.cit., pp.149, 152-156; HAMDORF.(2007).op.cit., p.211; ‘The development of the concept of [JCE] at the [ICTY],’ HAAN, V., 2005, p.197. Also *Simić.AJ, per Judge Schomburg*, paras.19–21.

<sup>589</sup> *Gacumbitsi.AJ, per Judge Shahabuddeen*, paras.41–42.

<sup>590</sup> *Gacumbitsi.AJ, per Judge Shahabuddeen*, para.48.

<sup>591</sup> *Simić.AJ, per Judge Shahabuddeen*, para.32; *Gacumbitsi.AJ, per Judge Shahabuddeen*, para.47.

<sup>592</sup> VAN SLIEDREGT.(2007).op.cit., p.198; VAN DER WILT.(2007).op.cit., pp.107-108; CASSESE.(2007).op.cit., p.115; VAN SLIEDREGT.(2003).op.cit., pp.106, 109.

<sup>593</sup> OLÁSOLO.(2007).op.cit., pp.156-161; VAN SLIEDREGT.(2007).op.cit., p.207; VAN DER WILT.(2007).op.cit., pp.105–106; also OHLIN.(2007).op.cit., pp.76–77.

<sup>594</sup> *Simić.AJ, per Judge Schomburg*, para.17.

<sup>595</sup> *Electricity Company of Sofia and Bulgaria*, Preliminary Objection (PCIJ), *per Judge Anzilotti*, 1939, p.90: “It is clear that, in the same legal system, there cannot at the same time exist two rules relating to the same facts and attaching to these facts contradictory consequences... In cases of this kind, either the contradiction is only apparent and the two rules are really coordinated so that each has its own sphere of application and does not encroach on the sphere of application of the other, or else one prevails... I know of no clearer, more certain, or more universally accepted principle than this.”

<sup>596</sup> *Gacumbitsi.AJ, per Judge Shahabuddeen*, para.50.

jurisdiction to apply both doctrines—but may require some careful consideration in the future.

Article 25(3) of the *ICC Statute* is much more sympathetic to the *Stakić* approach. It expressly provides for liability for those who commit a crime “jointly with another or through another”,<sup>597</sup> and retains common purpose liability in some vestigial form.<sup>598</sup> The extent to which the provision is interpreted comprehensively, or as a policy move away from common purpose, will be one of the most significant developments in this area of the law. Express reference to liability for perpetration “through another” gives perpetration by means a much higher profile in ICL than it previously possessed.<sup>599</sup> With clear links to the joint control co-perpetration doctrine, it is also of great potential use in its own right, particularly through the *Organisationsherrschaft* doctrine. Its elucidation is welcome.<sup>600</sup>

Certainly, a Pre-Trial Chamber of the ICC has made the consistency between Article 25(3)(a) and *Stakić* co-perpetration very clear.<sup>601</sup> It implicitly ascribed the doctrine a “synthetic” role (in Hegelian terms), whereas it suggested that alternative doctrines (including JCE) privilege either the material or subjective element over the other. This conclusion seems partial.<sup>602</sup> Through a rather opaque piece of reasoning, it inferred that the drafters of the *ICC Statute* had chosen to reject a subjective approach to co-perpetration.<sup>603</sup> As a result, it considered that “article 25(3)(d) provides for a residual form of accessory liability which makes it possible to criminalise those contributions to a crime which cannot be characterised as [falling within articles 25(3)(b) and (c)], by reason of the state of mind in which the contributions were made.”<sup>604</sup> Given, however, the fact that the ‘procuring’ and

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<sup>597</sup> *ICC Statute*, Art.25(3)(a).

<sup>598</sup> *Ibid.*, Art.25(3)(d).

<sup>599</sup> ESER.(2002).op.cit., p.793.

<sup>600</sup> AMBOS.(forthcoming).op.cit., mns.10-13; ‘[JCE] and command responsibility,’ AMBOS, K., 2007, pp.181-183; ESER.(2002).op.cit., pp.794-795.

<sup>601</sup> *Dyilo Charges Decision*, para.338; *Dyilo Arrest Warrant Decision*, para.96.

<sup>602</sup> In fact, both JCE and control-based co-perpetration marginally favour one element: in co-perpetration, the material element is key and the minimum standard mental element is applied; in JCE, the mental element is key, and the minimum standard material element is applied.

<sup>603</sup> *Dyilo Charges Decision*, paras.334–335.

<sup>604</sup> *Ibid.*, para.337.

‘aiding and abetting’ modes of liability cover a staggering array of conduct, such a situation is almost impossible to conceive.<sup>605</sup>

In the Chamber’s analysis, Article 25(3)(a) will classify an accused as a (co-)perpetrator only because:

- i. they physically carry out the objective elements of the offence (commission of the crime in person, or direct perpetration);
- ii. they control the will of those who carry out the objective elements of the offence (commission of the crime through another person, or indirect perpetration);
- iii. they have, along with others, control over the offence by reason of the essential tasks assigned to them (commission of the crime jointly with others, or co-perpetration).<sup>606</sup>

The Chamber also elaborated upon the *Stakić* definition of joint control co-perpetration, requiring more explicitly:

- proof of an agreement or common plan, express or implied, which entails the commission of a criminal offence, even if that is not its ultimate object.<sup>607</sup>
- division of tasks essential to the realisation of the criminal purpose between the parties: only parties charged with such a task may fall within this mode of liability.<sup>608</sup>
- mutual awareness of (and reconciliation to) the fact that the common plan will result in the commission of a criminal offence,<sup>609</sup> knowledge of the critical nature of the individual’s own contribution,<sup>610</sup> and the necessary *mens rea* for the core crime.<sup>611</sup>

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<sup>605</sup> MANTOVANI.(2003).op.cit., p.35; ESER.(2002).op.cit., p.803; *c.f.* AMBOS.(forthcoming).op.cit., mn.25; DARCY.(2007).op.cit., p.383.

<sup>606</sup> *Dyilo Charges Decision*, para.332.

<sup>607</sup> *Ibid.*, paras.343–345.

<sup>608</sup> *Ibid.*, paras.346–348.

<sup>609</sup> *Ibid.*, paras.361–365.

<sup>610</sup> *Ibid.*, paras.366–367.

<sup>611</sup> *Ibid.*, para.349. Also AMBOS.(forthcoming).op.cit., mn.8.

As Hamdorf notes, such a formulation preserves the possibility that co-perpetration may also have an ‘extended’ form in which offences reasonably foreseeable from the common plan that in fact come to pass may fall within the scope of the individual’s liability.<sup>612</sup>

Interestingly, however, both Ambos and Eser appear to leave open the possibility that JCE may have a bearing on ICC co-perpetration doctrine,<sup>613</sup> Eser particularly stressing the role of the ICTY/R in delineating the distinction between between perpetrative and other forms of liability.<sup>614</sup> He concludes that the perpetrator must, at the least, “co-determine” the crime through a more than marginal involvement, and participation in the common plan. Whether he would adopt the same position post-*Stakić* must remain ambiguous. Both commentators illustrate, however, that there is very little in the words of Article 25(3)(a) to determine the shape of co-perpetration before the ICC, one way or the other.

Even though the hierarchy of the Article 25(3) suggests that (d) is concerned with derivative liability only, it remains appropriate to consider it at the present time. The extent to which JCE liability can comfortably fit in the context of (3)(d) may be a sound indicator as to whether it should be read into (3)(a).

Plainly intended to be a reflection of the JCE doctrine<sup>615</sup>—at least in some form—Article 25(3)(d) is fairly considered more an outcome of compromise than craftsmanship.<sup>616</sup> Compared to JCE as presented here, the key material requirement (a contribution to the criminal consequence “in any other way”) is extraordinarily low.<sup>617</sup> The argument might be successfully made via Article 21 that this should be read up to the qualitatively substantial effect standard.

The relevant *mens rea* is more uncertain. A plain text reading of the relevant provisions suggests that the actor must act intentionally, either knowing the crime which is to be committed, or intending to further the group’s policies even though they involve the

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<sup>612</sup> HAMDORF.(2007).op.cit., p.216.

<sup>613</sup> AMBOS.(forthcoming).op.cit., mn.9. Further, AMBOS.(2007).op.cit., p.172.

<sup>614</sup> ESER.(2002).op.cit., pp.791-793.

<sup>615</sup> CASSESE.(2007).op.cit., p.132; FLETCHER/OHLIN.(2005).op.cit., p.546; VAN SLIEDREGT.(2003).op.cit., p.95; CRYER.(2001).op.cit., p.23. *Brima.AJ*, para.79. *C.f.* AMBOS.(2007).op.cit., p.173.

<sup>616</sup> AMBOS.(forthcoming).op.cit., mns.27-28; CRYER ET AL.(2007).op.cit., p.309; ESER.(2002).op.cit., p.803.,

<sup>617</sup> AMBOS.(forthcoming).op.cit., mn.25; ESER.(2002).op.cit., p.803.

commission of a crime.<sup>618</sup> Ambos argues that, unlike the law of the ICTY/R, the former mental requirement requires knowledge of the specific crime that is in fact committed.<sup>619</sup> These mental standards are nevertheless broadly compatible with JCE I and II, but it remains ambiguous whether they tolerate JCE III. Commentators are divided on the issue.<sup>620</sup> In principle, an individual convicted under JCE III at the ICTY/R should be liable under Article 25(3)(d)(i): by means of their participation in the core (JCE I) criminal enterprise, they are acting with the intention to further the group's policies and are aware that this entails a crime. The *ICC Statute* requires only that the group's purpose involves the commission of "a" crime within its jurisdiction—it does not indicate that the individual must necessarily know of each and every crime which that purpose may entail.<sup>621</sup> On the other hand, such an interpretation would dramatically expand the scope of liability—even beyond JCE III—making the individual liable for any crime to which their actions for the group contributed, whether or not they possessed even *dolus eventualis*. The only safe conclusion is that the compatibility of JCE III with the provision is, at least, doubtful. This leaves an unenviable selection of choices: abandoning JCE III (a doctrine of great prosecutorial efficacy<sup>622</sup>), importing JCE III through Article 21, ignoring Article 25(3)(d) altogether and applying JCE by means of Article 25(3)(a), or amending Article 25(3)(d). None of these solutions is perfect.

What this analysis does make clear, however, is that there is no great divide—at present—between the ICTY/R and the ICC's approach to co-perpetration. The law of both is deficient in some degree, but in a largely complementary fashion. It is also clear that concerns about the reach of doctrines like JCE can be addressed, and that both subjective and joint-control models of co-perpetration have utility. The greatest mistake that could be made would be for the ICC to interpret the law in this area in splendid isolation.<sup>623</sup> At the same time, although the ICTY/R have done a highly commendable job in enumerating the JCE doctrine

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<sup>618</sup> ESER.(2002).op.cit., p.803; AMBOS.(forthcoming).op.cit., mn.29.

<sup>619</sup> AMBOS.(forthcoming).op.cit., mn.30.

<sup>620</sup> CRYER ET AL.(2007).op.cit., p.309; VAN SLIEDREGT.(2003).op.cit., pp.108–109; *c.f.* CASSESE.(2007).op.cit., p.132; POWLES.(2004).op.cit., pp.617–618.

<sup>621</sup> *C.f.* OHLIN.(2007).op.cit., p.85.

<sup>622</sup> CASSESE.(2007).op.cit., p.110; GUSTAFSON.(2007).op.cit., p.157; VAN SLIEDREGT.(2007).op.cit., pp.184, 187; O'ROURKE.(2006).op.cit., p.307; SCHABAS.(2003).op.cit., p.1032. Recognising this fact in a policy context does not necessarily impugn the principle that a criminal system should stress protections to the accused rather than the mindless need to 'avoid' impunity: *c.f.* FLETCHER/OHLIN.(2005).op.cit., p.540.

<sup>623</sup> *C.f.* OHLIN.(2007).op.cit., p.77.

and ushering it into customary law, the rejection of joint-control co-perpetration should not be taken to reflect general international law.

### **C.) Prohibition of procurement**

“Procurement”<sup>624</sup> is not a term which features in the jurisprudence or constitutions either of the ICTY/R or the ICC. However, behaviour which is criminalised variously by the terms “ordering”, “instigating”, “planning”, “soliciting” and “inducing” may be compendiously considered as varying manifestations of one principle. The single provision employed in the *ICC Statute*<sup>625</sup> to this end already points to the elegance of this approach; the use of a neutral term is helpful in emphasising the commonalities between the specific applications of the rule.<sup>626</sup>

Under English law,

procurement of an offence requires that the secondary party deliberately *causes* the principal to commit the offence... [T]he perpetration of the principal crime must in some sense be a consequence of the procurement [...]. However, [the] contribution need not be a decisive, or *sine qua non* ingredient of the decision by [the direct perpetrator] to commit the offence: it is enough that the procurement was influential. Even if there were other reasons why, without [the] contribution, [the direct perpetrator] might have chosen to commit the offence anyway, that does not matter.<sup>627</sup>

All of the doctrines considered in this part are united by a similar causal requirement.<sup>628</sup> However, given the fact that the general material requirement for complicity-based modes of liability (a qualitatively “substantial” effect on the criminal consequence) may itself be

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<sup>624</sup> Definitions of the relevant verb include “to bring about by care or pain; also [...] to bring about, cause, effect, produce”: OED, Compact Ed.

<sup>625</sup> Art.25(3)(b).

<sup>626</sup> Van Sliedregt and Eser adopt a similar approach, collating these modes of liability under the heading “Instigation”. Given the existing technical use of the term in ICL, however, and the recognised semantic confusion in translation with “inciting” (*Akayesu.AJ*, para.478; *Akayesu.TJ*, para.481), the concept of “procurement” (in both English and French) is to be preferred. ‘Individual criminal responsibility,’ ESER, A., in CASSESE ET AL.(2002).op.cit., p.795; VAN SLIEDREGT.(2003).op.cit., p.77; c.f. p.93.

<sup>627</sup> SIMESTER/SULLIVAN.(2003).op.cit., pp.202–203.

<sup>628</sup> E.g., *Nahimana.AJ*, paras.479–481.

expressed in causation terms,<sup>629</sup> it may be shrewdly asked what makes the particular causal link central to procurement liability distinctive. This question assumes a particular importance in the context of the distinction between “abetting” and “procuring”: the definition of the former is, after all, very close to the various definitions embodied in the latter,<sup>630</sup> and yet there may be a significant gradient of culpability between the two.<sup>631</sup>

It is suggested that procurement, both at the ICTY/R and ICC, is distinguished by its requirement for ‘special’ causation: not just that the *nature* of the criminal consequence was affected—the “substantial effect” standard common to all forms of complicity—but that the *very occurrence* of the criminal consequence was made more likely by the actor’s conduct. In the context of ‘instigation’, *Orić* makes a finding to precisely this effect.<sup>632</sup> Van Sliedregt seems to characterise this form of special causation as requiring that the actor’s intervention represents a “decisive factor” in the causal chain.<sup>633</sup>

It is clear that this ‘special’ causation does not amount to ‘but for’ causation.<sup>634</sup> As such, some domestic criminal law tradition would doubt that it merits the term ‘causation’ at all.<sup>635</sup> (This argument applies *a fortiori* to the general causal requirement common to all forms of complicity.<sup>636</sup>) However, whereas domestic law is able to take a relatively hard theoretical line in exploring causation (it is generally concerned not so much with the *extent* of a crime once committed but its *occurrence* in the first place), ICL’s confrontation with system criminality frequently forces it to consider the culpability of those who may play no decisive part in initiating a criminal scheme but are nonetheless significant in extending its scope from the ‘merely’ terrible to the horrific. As such, ICL requires a sophisticated understanding of causation, and perhaps challenges conventional theories.<sup>637</sup>

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<sup>629</sup> E.g., VAN SLIEDREGT.(2003).op.cit., p.89.

<sup>630</sup> E.g., *Ndindabahizi.TJ*, para.457.

<sup>631</sup> Fn.290.*supra*.

<sup>632</sup> *Orić.TJ*, paras.271, 281. The lack of emphasis on the conduct of the accused is, however, a problem with this formulation. Other formulations, however, lack specificity: *Gacumbitsi.TJ*, para.279.

<sup>633</sup> VAN SLIEDREGT.(2003).op.cit., p.80; *c.f.* pp.82–83.

<sup>634</sup> *Kordić/Čerkez.AJ*, para.27; *Kordić/Čerkez.TJ*, para.387. Also *Mrksić.TJ*, para.549; *Orić.TJ*, para.274; *Limaj.TJ*, para.514; *Brđanin.TJ*, paras.269, 359; *Galić.TJ*, para.168; *Naletilić/Martinović.TJ*, para.60; *Kvočka.TJ*, para.252. *C.f.* *Blaškić.TJ*, para.339.

<sup>635</sup> E.g., FLETCHER.(2000).op.cit., pp.588–589, 593–595; *c.f.* SIMESTER/SULLIVAN.(2003).op.cit., pp.87–89

<sup>636</sup> SIMESTER/SULLIVAN.(2003).op.cit., p.239; further *A Modern Treatise on the Law of Criminal Complicity*, SMITH, K.J.M., 1991 *C.f.* DAMAŠKA.(2001).op.cit., p.461.

<sup>637</sup> E.g., *Nahimana.TJ*, paras.952–953.



It is true that the rather tenuous definition of ‘special’ causation—academics resort to describing it as “some sort of causal relationship”<sup>638</sup>—illustrates (and perhaps explains) the extent to which the notion of procurement straddles—sometimes uncomfortably—the line between assistance and perpetration. The model offered here is certainly not perfect either. It is, for example, hard to reconcile ‘planning’ with this reasoning, as the planner arguably shapes the criminal consequence (more akin to an aider/abettor) rather than procures it. It is perhaps for this reason that Article 25(3)(b) removes ‘planning’ as a head of liability altogether. The case can be reasonably be made that the conduct entailed in planning, depending on the factual circumstances, can be classified as instigating, ordering or aiding and abetting, as appropriate. On the other hand, planning is a convenient label for liability by ‘indirect instigation’.<sup>639</sup>

A uniform *mens rea* standard may be discerned for procurement. Although the practice of the ICTY/R initially seemed confused,<sup>640</sup> the mental standard for ordering liability was definitively set as “awareness of a substantial likelihood”,<sup>641</sup> a standard since applied relatively strictly.<sup>642</sup> *Kordić* confirmed that the same applies to planning and instigation.<sup>643</sup> Depending on the interpretation of Article 30,<sup>644</sup> a similar mental standard may prevail at the ICC. As illustrated in *Orić*, it remains relatively easy to finesse the distinctions between ‘intent’ and ‘knowledge’ in this area.<sup>645</sup>

Liability for “planning” before the ICTY/R may be incurred by “one or several persons [who] contemplate designing the commission of a crime at both the preparatory and execution phases”.<sup>646</sup> As a conviction may not be entered for planning a crime which is

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<sup>638</sup> SCHABAS.(2006).op.cit., p.302.

<sup>639</sup> VAN SLIEDREGT.(2003).op.cit., p.83.

<sup>640</sup> *Orić.TJ*, para.277.

<sup>641</sup> *Blaškić.AJ*, paras.41–42. Also *Haradinaj.TJ*, para.144; *Mrksić.TJ*, para.550; *Martić.TJ*, para.441; *Limaj.TJ*, para.515; *Strugar.TJ*, para.333; *Brđanin.TJ*, para.270.

<sup>642</sup> E.g., *Strugar.TJ*, paras.345–347.

<sup>643</sup> *Kordić/Čerkez.AJ*, paras.29–32. Also *Haradinaj.TJ*, paras.143-143; *Mrksić.TJ*, paras.548-549; *Limaj.TJ*, paras.513-514. This approach was in fact already well established in the jurisprudence: *Brđanin.TJ*, para.269; *Naletilić/Martinović.TJ*, para.60; *Kvočka.TJ*, para.252.

<sup>644</sup> Pp.66-68.*supra*.

<sup>645</sup> *Orić.TJ*, para.279.

<sup>646</sup> *Akayesu.TJ*, para.480. Also *Kordić/Čerkez.AJ*, para.26; *Mrksić.TJ*, para.548; *Limaj.TJ*, para.513; *Brđanin.TJ*, para.268; *Kamuhanda.TJ*, para.592; *Galić.TJ*, para.168; *Kajelijeli.TJ*, para.761; *Stakić.TJ*, para.443; *Naletilić/Martinović.TJ*, para.59; *Krstić.TJ*, para.601; *Kordić/Čerkez.TJ*, para.386; *Blaškić.TJ*, para.279. If multiple people are engaged in the planning process, the accused’s conduct must, of course, be

subsequently committed by the accused,<sup>647</sup> there is a practical implication that the crime will be committed “by others”.<sup>648</sup> Despite suggestion to the contrary,<sup>649</sup> planning is not an inchoate crime.<sup>650</sup>

The range of behaviour which can substantiate liability is quite wide<sup>651</sup> yet the core crime must be “actually committed within the framework of [the planner’s] design”.<sup>652</sup> This causal requirement illustrates the conceptual ambiguities which challenge the broad concept of procurement liability: the causal link is mitigated—but to an uncertain extent—by the open-ended term “framework”. Perhaps for these reasons, a higher test was preferred in *Brđanin*, requiring proof that “the Accused was substantially involved at the preparatory stage of that crime in the *concrete form* it took”.<sup>653</sup> The “requirement of specificity”, it was held, “distinguishes ‘planning’ from other modes of liability”.<sup>654</sup> The Appeals Chamber has affirmed, however, that the plan need only be “a factor substantially contributing to [the] criminal conduct”.<sup>655</sup>

“Instigating” is widely defined as “prompting another to commit an offence.”<sup>656</sup> The act of instigation itself need not be direct or public.<sup>657</sup> It has been considered that:

The wording is sufficiently broad to allow for the inference that both acts and omissions may constitute instigating and that this notion covers both express and implied conduct. The ordinary meaning of instigating, namely, [to] “bring about” the commission of an act by someone,

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sufficiently substantial to warrant liability: e.g., *Kamuhanda.TJ*, para.592; *Kajelijeli.TJ*, para.761; *Bagilishema.TJ*, para.30.

<sup>647</sup> *Brđanin.TJ*, para.268; *Stakić.TJ*, para.443; *Naletilić/Martinović.TJ*, para.59; *Kordić/Čerkez.TJ*, para.386. Involvement in both planning and commission may, however, be treated as a factor in aggravation for the purposes of sentencing: *Brđanin.TJ*, para.268; *Stakić.TJ*, para.443. It has been suggested that this approach applies also to ordering: *Stakić.TJ*, para.445.

<sup>648</sup> *Galić.TJ*, para.168.

<sup>649</sup> WERLE.(2005).op.cit., p.167. C.f. CRYER ET AL.(2007).op.cit., p.316.

<sup>650</sup> E.g., *Nahimana.AJ*, para.479; *Kordić/Čerkez.AJ*, para.26; *Akayesu.TJ*, para.473.

<sup>651</sup> *Semanza.TJ*, para.380.

<sup>652</sup> *Galić.TJ*, para.168.

<sup>653</sup> *Brđanin.TJ*, paras.357-358, emphasis added.

<sup>654</sup> *Ibid.*

<sup>655</sup> *Kordić/Čerkez.AJ*, para.26. Also *Mrksić.TJ*, para.548; *Limaj.TJ*, para.513.

<sup>656</sup> *Kordić/Čerkez.AJ*, para.27; *Mrksić.TJ*, para.549; *Orić.TJ*, para.270; *Limaj.TJ*, para.514; *Brđanin.TJ*, para.269; *Kamuhanda.TJ*, para.593; *Galić.TJ*, para.168; *Kajelijeli.TJ*, para.762; *Naletilić/Martinović.TJ*, para.60; *Kvočka.TJ*, para.243; *Krstić.TJ*, para.601; *Kordić/Čerkez.TJ*, para.387; *Blaškić.TJ*, para.280; *Akayesu.TJ*, para.482.

<sup>657</sup> E.g., *Akayesu.AJ*, para.483; *Kamuhanda.TJ*, para.593; *Gacumbitsi.TJ*, para.279; *Kajelijeli.TJ*, para.762; *Semanza.TJ*, para.381. Further, fn.662 *infra*.

corroborates the opinion that a causal relationship between the instigation and the physical perpetration of the crime is an element requiring proof.<sup>658</sup>

Skating perhaps too close to the doctrine of command responsibility,<sup>659</sup> it has been held that “omissions amount to instigation in circumstances where a commander has created an environment permissive of criminal behaviour by subordinates.”<sup>660</sup> Certainly, instigation by omission can only occur where an individual is under a positive duty.<sup>661</sup>

Instigation must be distinguished from incitement to commit genocide.<sup>662</sup> the latter is an inchoate crime, directed to prohibiting a discrete wrong, while the former is a mode of liability reflecting the actor’s culpable contribution to the commission of the ‘crime of crimes’.<sup>663</sup> The elements of the two liabilities are distinct.<sup>664</sup> The fact that a direct and public incitement does actually result in the commission of genocide may—as a matter of evidence rather than law—assist in the inference that it is more than ‘mere’ hate speech.<sup>665</sup> It is an open question whether convictions for incitement to commit genocide and genocide (by means of procurement) are permissibly cumulative. The *ICC Statute* reflects a similar distinction,<sup>666</sup> despite the strain placed on the text by the inclusion of an inchoate crime in the midst of modes of liability.<sup>667</sup> Given the rather concise formulation of the substantive provision on genocide itself,<sup>668</sup> however, the conclusion is hard to escape.

“Ordering implies a hierarchical relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince

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<sup>658</sup> *Blaškić.TJ*, para.280. Also *Mrksić.TJ*, para.549; *Orić.TJ*, para.273; *Limaj.TJ*, para.514; *Brđanin.TJ*, para.269; *Kajelijeli.TJ*, para.762; *Kordić/Čerkez.TJ*, para.387.

<sup>659</sup> The fuzzy line between Arts.7(1) and 7(3) was generally discernible in the majority’s findings in *Galić*: e.g., *Galić.TJ*, per Judge Nieto-Navia, paras.116–120. It may be preferable, as in fact held by the Appeal Chamber with regard to ordering, to restrict this sort of ‘instigation by omission’ in favour of command responsibility: see, e.g., *Galić.AJ*, paras.176–177.

<sup>660</sup> *Galić.TJ*, para.168; *Blaškić.TJ*, para.337.

<sup>661</sup> *Orić.TJ*, para.273.

<sup>662</sup> Linguistic differences between English and French initially introduced a degree of confusion into what is, at heart, quite simple. *Akayesu.AJ*, paras.478–483; *Akayesu.TJ*, para.481.

<sup>663</sup> *Nahimana.AJ*, para.678; *Kajelijeli.TJ*, para.855; *Niyitegeka.TJ*, para.431; *Musema.TJ*, para.120; *Rutaganda.TJ*, para.38; *Akayesu.TJ*, paras.561–562. Also *Orić.TJ*, para.269, fn.732; METTRAUX.(2005).op.cit., p.256; VAN SLIEDREGT.(2003).op.cit., pp.77, 110–111; ESER.(2002).op.cit., pp.803–806.

<sup>664</sup> *Nahimana.AJ*, para.679; *Orić.TJ*, para.273; *Kamuhanda.TJ*, para.593; *Kajelijeli.TJ*, para.762.

<sup>665</sup> E.g., *Nahimana.TJ*, paras.1013–1015; *Akayesu.TJ*, para.675.

<sup>666</sup> *Nahimana.AJ*, para.678, fn.1615; also SCHABAS.(2004).op.cit., pp.102–103.

<sup>667</sup> C.f. Ambos.(forthcoming).op.cit., mns.31, 34.

<sup>668</sup> *ICC Statute*, Art.6.

another to commit an offence.”<sup>669</sup> Crucially, the position of authority, and thus the relationship, can be *de facto* rather than *de jure*.<sup>670</sup> However, despite the similarity of the concepts, the hierarchical relationship required is **not** the same as the superior-subordinate relationship required for superior responsibility,<sup>671</sup> and does not require proof that the accused generally possessed effective control over the relevant parties.<sup>672</sup> Use of the term in the context of ordering, although understandable, is thus not altogether helpful.<sup>673</sup>

The Appeals Chamber has held that “the very notion of ‘instructing’ requires a positive action by the person in a position of authority.”<sup>674</sup> There is no requirement for the form of the order, or the degree to which it must be made explicit.<sup>675</sup> It need not be given directly to the direct perpetrator of the core offence,<sup>676</sup> it is sufficient if it enters a chain of command. A preferred definition, therefore, is that ‘ordering’ entails a person in a position of authority, *de facto* or *de jure*, using that position to instruct another to commit an offence.<sup>677</sup>

Given the implication of some earlier authorities,<sup>678</sup> it should be emphasised that ordering is not an inchoate crime under international law,<sup>679</sup> and is no different in this respect than any of the other modes of liability. This position has been long implicit in the practice of the ICTY/R, although it has only recently been plainly stated.<sup>680</sup>

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<sup>669</sup> *Akayesu.TJ*, para.483. Also *Naletilić/Martinović.TJ*, para.61.

<sup>670</sup> *Gacumbitsi.AJ*, para.181; *Kamuhanda.AJ*, para.75; *Semanza.AJ*, paras.361, 363; *Kordić/Čerkez .AJ*, para.28; *Mrksić.TJ*, para.550; *Martić.TJ*, para.441; *Limaj.TJ*, para.515; *Strugar.TJ*, para.331; *Brđanin.TJ*, para.270; *Kamuhanda.TJ*, para.594; *Kajelijeli.TJ*, para.763; *Naletilić/Martinović.TJ*, para.61; *Kordić/Čerkez.TJ*, para.388; *Akayesu.TJ*, para.483.

<sup>671</sup> P.108.*infra et seq.* C.f. ‘Convictions for command responsibility under Articles 7(1) and 7(3) of the [ICTY Statute],’ HENQUET, T., 2002, p.812.

<sup>672</sup> *Seromba.AJ*, para.202; *Kamuhanda.AJ*, para.75.

<sup>673</sup> E.g., *Kamuhanda.AJ*, para.75; *Semanza.AJ*, paras.359-364. C.f., e.g., *Blaškić.TJ*, para.268; *Akayesu.TJ*, para.483; VAN SLIEDREGT.(2003).op.cit., pp.78, 84.

<sup>674</sup> *Galić.AJ*, para.176. A positive order can, however, be *proven* by taking into account omissions: *Galić.AJ*, para.177.

<sup>675</sup> *Kamuhanda.AJ*, para.76; *Mrksić.TJ*, para.550; *Limaj.TJ*, para.515; *Strugar.TJ*, para.331; *Brđanin.TJ*, para.270; *Galić.TJ*, para.168; *Naletilić/Martinović.TJ*, para.61; *Kordić/Čerkez.TJ*, para.388; *Blaškić.TJ*, para.281.

<sup>676</sup> *Limaj.TJ*, para.515; *Strugar.TJ*, para.331; *Brđanin.TJ*, para.270; *Naletilić/Martinović.TJ*, para.61; *Kordić/Čerkez.TJ*, para.388; *Blaškić.TJ*, para.282.

<sup>677</sup> *Galić.AJ*, para.176; *Kordić/Čerkez.AJ*, para.28; *Mrksić.TJ*, para.550; *Martić.TJ*, para.441; *Brđanin.TJ*, para.270; *Galić.TJ*, para.168; *Stakić.TJ*, para.445; *Krstić.TJ*, para.601.

<sup>678</sup> E.g., *Von Falkenhorst (UK)*, p.24.

<sup>679</sup> CRYER ET AL.(2007).op.cit., p.313. C.f. CRYER.(2001).op.cit., p.23.

<sup>680</sup> *Haradinaj.TJ*, para.141; *Brđanin.TJ*, para.267.

The *ICC Statute* makes liable those who “order, solicit or induce” a crime which in fact occurs or is attempted.<sup>681</sup> The terms “soliciting” and “inducing” both “refer to a situation where a person is influenced by another to commit a crime.”<sup>682</sup> Both of these concepts coincide with the ICTY//R doctrines of “instigation”<sup>683</sup> and, in a rather applied manner, “planning”.

Ambos points out that the connotation of agency implicit in the most straightforward model of ordering (C orders P to do X crime; P complies regardless of his own sentiments) amounts to perpetration by means, and thus might be better located in Article 25(3)(a).<sup>684</sup> As such, he appears to dismiss ordering as an example of procurement at all. He is, of course correct that in circumstances where the superior has the power to “dominate” the subordinate to the appropriate extent, perpetration through means would lie. However, given that he does not make the same argument for solicitation or inducements—which he acknowledges can include the use of physical duress,<sup>685</sup> a factor almost as dominating as a formal hierarchy—it may be inferred that he recognises circumstances where even a considerable degree of compulsion on a person may not amount to the domination required for perpetration by means. Such a position should also be feasible with regard to ordering. As such, although he is correct to identify that the prosecutor now has two options when confronted with the fact of an individual ordering another, he is not right to dismiss this lesser form of liability for such conduct. A key factor in evaluating which avenues is more suitable might be the presence of other subordinates and the nature of the hierarchical relationship: for example, if the superior is assured that another subordinate will perform the order, even if some refuse, perpetration by means might be made out: the superior’s order is, in fact, the *sine qua non* of the criminal consequence. Where this is not the case, ordering as procurement is preferable, reflecting that although there may be a hierarchical relationship, the superior’s order is causally less significant. It must be frankly acknowledged that this is a theoretical response to a theoretical challenge: the considerable evidential difficulties that such a distinction may provoke have not been taken into consideration.

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<sup>681</sup> *ICC Statute*, Art.25(3)(b).

<sup>682</sup> AMBOS.(forthcoming).op.cit., mn.15; VAN SLIEDREGT.(2003).op.cit., p.87; ESER.(2002).op.cit., p.796.

<sup>683</sup> CRYER ET AL.(2007).op.cit., p.314.

<sup>684</sup> AMBOS.(forthcoming).op.cit., mn.14; also VAN SLIEDREGT.(2003).op.cit., pp.77, 86–87; ESER.(2002).op.cit., p.797.

<sup>685</sup> *Ibid.*, mn.15.

#### **D.) Prohibition of knowing assistance**

Aiding and abetting (traditionally a unified concept<sup>686</sup>) includes “all acts of assistance that lend encouragement or support to the perpetration of an offence”,<sup>687</sup> however undertaken,<sup>688</sup> and which make *in fact*<sup>689</sup> a sufficient contribution to the criminal consequence for liability to be justified. Given that the *ICC Statute* appears to use these terms more precisely,<sup>690</sup> however, this form of liability is now better described generally as ‘knowing assistance’.

Implicit in this definition is the notion that the acts of assistance must be “specifically directed” to the criminal consequence,<sup>691</sup> in the sense that the end result is not mere coincidence. This does not mean, however, that “independent initiative, power, or discretion must be shown”: the quality of the assistance must be determined on a case-by-case basis.<sup>692</sup> It was initially suggested that a mere “contribution” to or “effect” upon the core crime was sufficient.<sup>693</sup> However, the general requirement for a “substantial effect” was re-articulated in *Furundžija* and subsequently universally followed.<sup>694</sup>

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<sup>686</sup> *Limaj.TJ*, para.516; *Kvočka.TJ*, para.254; *Akayesu.TJ*, para.484. Also *Mrksić.TJ*, para.551.

<sup>687</sup> *Delalić.TJ*, para.327. Also *Blagojević/Jokić.AJ*, para.127; *Brđanin.AJ*, para.277; *Simić.AJ*, para.85; *Blaškić.AJ*, paras.45–46; *Vasiljević.AJ*, para.102; *Kordić/Čerkez.AJ*, para.399; *Aleksovski.AJ*, para.163; *Tadić.AJ*, para.229; *Mrksić.TJ*, para.551; *Orić.TJ*, paras.280, 282; *Limaj.TJ*, paras.516–517; *Strugar.TJ*, para.349; *Blagojević/Jokić.TJ*, paras.726, 782; *Brđanin.TJ*, para.271; *Simić.TJ*, paras.161–162; *Naletilić/Martinović.TJ*, para.63; *Vasiljević.TJ*, para.70; *Krnojelac.TJ*, para.88; *Kvočka.TJ*, paras.253–254; *Kunarac.TJ*, para.391; *Blaškić.TJ*, para.283; *Furundžija.TJ*, para.249.

<sup>688</sup> *Blagojević/Jokić.AJ*, para.127; *Simić.AJ*, para.85; *Mrksić.TJ*, para.552; *Orić.TJ*, paras.282–283; *Limaj.TJ*, para.517; *Strugar.TJ*, para.349; *Blagojević/Jokić.TJ*, para.726; *Brđanin.TJ*, para.271; *Simić.TJ*, para.162; *Naletilić/Martinović.TJ*, para.63; *Vasiljević.TJ*, para.70; *Krnojelac.TJ*, para.88; *Kvočka.TJ*, para.256; *Kunarac.TJ*, para.391; *Blaškić.TJ*, para.285; *Delalić.TJ*, para.327.

<sup>689</sup> *Blagojević/Jokić.AJ*, para.134; *Mrksić.TJ*, para.552.

<sup>690</sup> ESER.(2002).op.cit., p.798.

<sup>691</sup> *Blagojević/Jokić.AJ*, para.189; *Aleksovski.AJ*, para.163; *Tadić.AJ*, para.229; *Fofana/Kondewa.TJ*, para.229; *Brima.TJ*, para.775.

<sup>692</sup> *Blagojević/Jokić.AJ*, para.194.

<sup>693</sup> *Delalić.TJ*, para.327.

<sup>694</sup> *Furundžija.TJ*, para.249. Also *Blagojević/Jokić.AJ*, para.127; *Brđanin.AJ*, para.277; *Simić.AJ*, para.85; *Kvočka.AJ*, para.90; *Blaškić.AJ*, paras.45–46, 48; *Vasiljević.AJ*, paras.102, 142; *Kordić/Čerkez.AJ*, para.399; *Aleksovski.AJ*, para.163; *Tadić.AJ*, para.229; *Mrksić.TJ*, paras.551–552; *Orić.TJ*, paras.282, 284; *Limaj.TJ*, paras.516–517; *Strugar.TJ*, paras.349, 354; *Blagojević/Jokić.TJ*, paras.726, 782; *Brđanin.TJ*, para.271; *Galić.TJ*, para.168; *Simić.TJ*, para.161; *Naletilić/Martinović.TJ*, para.63; *Vasiljević.TJ*, para.70; *Krnojelac.TJ*, para.70; *Kvočka.TJ*, para.243; *Krstić.TJ*, para.601; *Kunarac.TJ*, para.391. Further p.64.*supra*; c.f. CRYER ET AL.(2007).op.cit., p.311.

The particular identities of direct perpetrators do not need to be known,<sup>695</sup> provided the accused is aware of the crime itself.<sup>696</sup> Omissions *may* qualify as assistance if they meet the necessary standard.<sup>697</sup> Mere presence<sup>698</sup> at the scene of the crime will not usually be sufficient,<sup>699</sup> although it has been suggested that the presence “of a person with superior authority, such as a military commander, is a *probative* indicator for determining whether that person encouraged or supported the [direct] perpetrators”.<sup>700</sup> Accordingly, it must again be subject to a determination on the facts that the individual’s presence had a substantial effect.<sup>701</sup> The Appeals Chamber in *Brđanin* applied this requirement to find that the direct perpetrator must be aware of the abettor’s tacit encouragement.<sup>702</sup>

If the aider and abettor’s contribution is made *after* the completion of the core crime,<sup>703</sup> a prior agreement must exist between the aider and abettor and direct perpetrator, in order that the latter was genuinely assisted in the commission of their act.<sup>704</sup> This rule is an exception to the otherwise prevailing view that the direct perpetrator need not know of the aider and abettor’s assistance,<sup>705</sup> best explained on the basis of causation.<sup>706</sup> The *dicta* indicating that

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<sup>695</sup> *Brđanin.AJ*, para.355; *Krstić.AJ*, para.143; *Musema.TJ*, para.174; *Akayesu.TJ*, para.531.

<sup>696</sup> Indeed, an individual may aid and abet a single offence committed by one individual, or a number of offences committed by a JCE: *Kvočka.AJ*, para.90. Despite references to the contrary, this latter circumstance has no special ontology (“aiding and abetting a JCE”) but merely involves multiple direct perpetrators: *Kvočka.AJ*, para.91; *Krajišnik.TJ*, para.886.

<sup>697</sup> *Blaškić.AJ*, para.47; *Mrksić.TJ*, para.553; *Limaj.TJ*, para.517; *Strugar.TJ*, para.349. Initially, it was suggested that omissions must have “decisive” effect: *Blaškić.TJ*, para.284; subsequently, “significant” effect: *Naletilić/Martinović.TJ*, para.63; *Kvočka.TJ*, para.256. However, it should properly be understood, again, as “substantial effect”: *Fofana/Kondewa.TJ*, paras.228, 230; *Simić.TJ*, para.162. It can only have this effect if the accused is under a positive duty: *Mrksić.TJ*, paras.553–554; *Orić.TJ*, para.283.

<sup>698</sup> Strictly, an act, not an omission: *Brđanin.AJ*, para.273; *c.f. Kayishema/Ruzindana.AJ*, para.201; *Orić.TJ*, para.283.

<sup>699</sup> *Mrksić.TJ*, para.553; *Orić.TJ*, para.283; *Limaj.TJ*, para.517.

<sup>700</sup> *Blaškić.TJ*, para.284, emphasis added. Also *Brđanin.TJ*, para.271; *Simić.TJ*, para.165; *Naletilić/Martinović.TJ*, para.63; *Kvočka.TJ*, para.257. The SCSL acknowledged the possibility that a superior’s repeated failures to punish could be charged as aiding and abetting, rather than superior responsibility: *Brima.TJ*, para.777; also para.800.

<sup>701</sup> *Brđanin.AJ*, para.273; *Limaj.TJ*, para.517; *Aleksovski.TJ*, para.87. On occasion, the term used has been “significant effect”: *Strugar.TJ*, paras.349, 355; *Vasiljević.TJ*, para.70; *Krnojelac.TJ*, para.89; *Kvočka.TJ*, para.257; *Kunarac.TJ*, para.393. It is suggested that this apparently higher standard (*c.f. Orić.TJ*, para.284) is, in formal terms, inappropriate; it does, however, illustrate that the “substantial effect” test should be applied rigorously, and is very often likely to be challenging to prove on the evidence. Although it refers to both views, this seems to be the approach adopted by a Trial Chamber in 2003: *Simić.TJ*, para.165. Further *Akayesu.TJ*, para.693; *Tadić.TJ*, para.690.

<sup>702</sup> *Brđanin.AJ*, para.277.

<sup>703</sup> *Orić.TJ*, para.282.

<sup>704</sup> *Blagojević/Jokić.AJ*, paras.177–181; *Haradinaj.TJ*, para.145; *Blagojević/Jokić.TJ*, para.731.

<sup>705</sup> E.g., *Brđanin.AJ*, para.349; *Tadić.AJ*, para.229; *Simić.TJ*, para.161. *C.f. Brđanin.AJ*, para.277, which implies an exception to this rule in the context of “tacit encouragement”.

<sup>706</sup> VAN SLIEDREGT.(2003).op.cit., p.112.

a causal link is not required should be interpreted as excluding the special causation which defines procurement.<sup>707</sup> It is likely that the same principle applies before the ICC.<sup>708</sup>

The *mens rea* standard includes “knowledge”<sup>709</sup> that the assistance will contribute to the criminal consequence. In *Kvočka*, the Trial Chamber referred to the requirement of “intent” to assist the criminal consequence that would result.<sup>710</sup> In disapproving this approach,<sup>711</sup> the *Blaškić* Appeals Chamber arguably over-reacted. As the analysis in *Orić* illustrates, “knowledge” and “intent” are closely related in assessing *mens rea* (“a cognitive element of knowledge and a volitional element of acceptance”),<sup>712</sup> and this standard is precisely that which *Blaškić* offers for general application. In accepting the argument that intent to assist is not required,<sup>713</sup> Cryer et al seem to miss this point, as well as the implication of the general principle laid down in *Delalić* and *Tadić*.<sup>714</sup> Such a view also establishes a tension more apparent than real with the position under the *ICC Statute*.

One line of authority suggests that the accused need not know the precise crime committed, provided that they are aware that one of a number of crimes will probably be committed and this in fact comes to pass.<sup>715</sup> A competing line, rather stronger in its formal precedential value, suggests that the aider and abettor must know that their acts assist the commission of the “specific crime” of the direct perpetrator.<sup>716</sup> The Trial Chamber in *Simić* explicitly noted

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<sup>707</sup> *Blagojević/Jokić.AJ*, paras.127, 134; *Simić.AJ*, para.85; *Blaškić.AJ*, para.48; *Mrksić.TJ*, para.552; *Orić.TJ*, para.284; *Limaj.TJ*, para.517; *Strugar.TJ*, para.349; *Blaškić.TJ*, para.285; *Furundžija.TJ*, para.233.

<sup>708</sup> ESER.(2002).op.cit., p.807.

<sup>709</sup> *Blagojević/Jokić.AJ*, para.127; *Brđanin.AJ*, para.484; *Simić.AJ*, para.86; *Krstić.AJ*, para.140; *Vasiljević.AJ*, paras.102, 142; *Krnojelac.AJ*, para.51; *Aleksovski.AJ*, para.163; *Tadić.AJ*, para.229; *Mrksić.TJ*, para.556; *Limaj.TJ*, para.518; *Strugar.TJ*, para.350; *Blagojević/Jokić.TJ*, para.727; *Brđanin.TJ*, para.272; *Naletilić/Martinović.TJ*, para.63; *Vasiljević.TJ*, para.71; *Krnojelac.TJ*, para.90; *Kvočka.TJ*, para.253; *Kunarac.TJ*, para.392; *Blaškić.TJ*, para.283; *Furundžija.TJ*, para.249; *Delalić.TJ*, para.328.

<sup>710</sup> *Kvočka.TJ*, para.255; *Blaškić.TJ*, para.286. This view would appear to result from an unfortunate echo of the general *mens rea* standard for all modes of liability, and should not be considered properly to be an additional element.

<sup>711</sup> *Blaškić.AJ*, para.49.

<sup>712</sup> *Orić.TJ*, para.288.

<sup>713</sup> CRYER ET AL.(2007).op.cit., p.311.

<sup>714</sup> Fn.392.*supra*.

<sup>715</sup> *Haradinaj.TJ*, para.145; *Orić.TJ*, para.288; *Limaj.TJ*, para.518; *Strugar.TJ*, para.350; *Brđanin.TJ*, para.272; *Naletilić/Martinović.TJ*, para.63; *Kvočka.TJ*, para.255; *Blaškić.TJ*, para.287; *Furundžija.TJ*, para.246. Also METTRAUX.(2005).op.cit., p.286.

<sup>716</sup> *Seromba.AJ*, para.44; *Blagojević/Jokić.AJ*, paras.127, 221–222; *Brđanin.AJ*, para.484; *Vasiljević.AJ*, para.102; *Kordić/Čerkez.AJ*, para.399; *Aleksovski.AJ*, para.163; *Tadić.AJ*, para.229; *Blagojević/Jokić.TJ*, para.782; *Vasiljević.TJ*, para.71; *Kunarac.TJ*, para.392; *Kupreškić.TJ*, para.772.



this discrepancy, and preferred (without reasoning) the latter approach.<sup>717</sup> On the other hand, the Appeals Chamber was content in both *Blaškić*<sup>718</sup> and *Simić*<sup>719</sup> to approve the two formulations without attempting to reconcile them. Most recently, the *Mrksić* Trial Chamber took the Appeals Chamber's lead and sat itself firmly on the fence, saying:

While it has been held that it need not be shown that the aider and abettor was aware of the specific crime that was intended or committed, provided that he was aware that one of a number of crimes would probably be committed, and one of those crimes is in fact committed, the Appeals Chamber recently confirmed that this ruling does not extend the definition of *mens rea* of aiding and abetting.<sup>720</sup>

The SCSL Appeals Chamber chose to endorse the wider approach on the basis of the *Blaškić* and *Simić* precedents,<sup>721</sup> even though they too leave the question unresolved.

In any event, the accused is not required to share the direct perpetrator's *mens rea*<sup>722</sup> or a common plan.<sup>723</sup> Indeed, their subjective motivation is irrelevant.<sup>724</sup> They must however be aware of the "essential elements" of the crime ultimately committed,<sup>725</sup> including any special intent.<sup>726</sup> It is not necessary that the aider and abettor and direct perpetrator share a common plan.

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<sup>717</sup> *Simić*.TJ, para.163.

<sup>718</sup> *Blaškić*.AJ, paras.45–46, 50. Latterly, this decision has been interpreted restrictively to suggest that it only affirms the "specific crime" standard: *Blagojević/Jokić*.AJ, para.222.

<sup>719</sup> *Simić*.AJ, para.86. The Appeals Chamber here seemed to draw a semantic distinction between knowledge of the "specific crime" of the perpetrator (which the aider and abettor must have) and the "precise crime" (which the aider and abettor need not have).

<sup>720</sup> *Mrksić*.TJ, para.556.

<sup>721</sup> *Brima*.AJ, para.243; also *Fofana/Kondewa*.TJ, para.231; *Brima*.TJ, para.776.

<sup>722</sup> *Simić*.AJ, para.86; *Krnojelac*.AJ, para.51; *Aleksovski*.AJ, para.162; *Mrksić*.TJ, para.556; *Limaj*.TJ, para.518; *Strugar*.TJ, para.350; *Blagojević/Jokić*.TJ, para.727; *Vasiljević*.TJ, para.71; *Krnojelac*.TJ, para.90; *Kunarac*.TJ, para.392.

<sup>723</sup> *Simić*.TJ, para.162; *Delalić*.TJ, para.328.

<sup>724</sup> E.g., *mutatis mutandis*, *Krnojelac*.AJ, paras.100, 102; *Kunarac*.AJ, paras.103, 153; *Jelisić*.AJ, para.49.

<sup>725</sup> *Krnojelac*.AJ, para.51; *Kordić/Čerkez*.AJ, para.400; *Aleksovski*.AJ, para.162; *Haradinaj*.TJ, para.145; *Mrksić*.TJ, para.556; *Orić*.TJ, para.288; *Limaj*.TJ, para.518; *Strugar*.TJ, para.350; *Blagojević/Jokić*.TJ, para.727; *Brđanin*.TJ, para.273; *Simić*.TJ, para.163; *Naletilić/Martinović*.TJ, para.63; *Vasiljević*.TJ, para.71; *Krnojelac*.TJ, para.90; *Kvočka*.TJ, para.255; *Kunarac*.TJ, para.392.

<sup>726</sup> *Seromba*.AJ, paras.56, 65; *Blagojević/Jokić*.AJ, para.127; *Simić*.AJ, para.86; *Krstić*.AJ, para.140; *Vasiljević*.AJ, para.142; *Krnojelac*.AJ, paras.51–52; *Mrksić*.TJ, para.556; *Limaj*.TJ, para.518; *Blagojević/Jokić*.TJ, paras.727, 779, 782; *Brđanin*.TJ, para.273; *Simić*.TJ, para.164; *Naletilić/Martinović*.TJ, para.63; *Vasiljević*.TJ, para.71; *Krnojelac*.TJ, para.90; *Kvočka*.TJ, para.262. They are not required, however, to share this intent: *Furundžija*.TJ, para.252.

It has been suggested that an aider and abettor may “graduate” into a perpetrator within a JCE.<sup>727</sup> The permeable nature of the distinction between an aider and abettor and JCE member was highlighted as early as 1998: in *Delalić*, it was noted that where a common criminal purpose exists, to which an individual “knowingly” makes a direct and substantial contribution, that individual may “[d]epending upon the facts” be held responsible “either” as a direct perpetrator or aider and abettor.<sup>728</sup> The key determinant between the two modes is “intent to perpetrate the crime or to pursue the joint criminal purpose”.<sup>729</sup> In circumstances where an individual is involved with the activities of a JCE but shared intent cannot be proved, it

...may be inferred from knowledge of the criminal enterprise and continued participation... Eventually, an aider or abettor... may become a co-perpetrator, even without physically committing crimes, if their participation lasts for an extensive period or becomes more directly involved in maintaining the functioning of the enterprise.<sup>730</sup>

On its face, this reasoning is curious: when an aider and abettor performs the same daily act of assistance over a year, the character of their behaviour *per se* is not obviously different at the end of the period than the beginning. If the graduation doctrine is applied, however, the relative culpability of the same action markedly increases. This approach might be justified on the pragmatic basis that a prolonged contribution to the JCE assumes greater importance to it, or on the basis of the evidential assumption that an individual cannot act in the knowledge of the criminal intent for such a long period without sharing it. Neither argument necessarily relates to the personal culpability of the individual concerned, however: the doctrine should be used with caution. There is at least some evidence of this approach, in the observation that “[t]he level of participation necessary to render someone a participant in a joint criminal enterprise is less than the level [...] necessary to graduate an aider or abettor to a co-perpetrator of that enterprise”.<sup>731</sup>

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<sup>727</sup> *Kvočka.TJ*, para.273.

<sup>728</sup> *Delalić.TJ*, para.328.

<sup>729</sup> *Krnojelac.AJ*, para.511 *Kvočka.TJ*, para.285. In *Furundžija*, it was initially held, misleadingly, that “intent to participate” is the key determinant between the two modes, a formula unfortunately reminiscent of the general *mens rea* standard for modes of liability: *Furundžija.TJ*, para.249; *c.f. Tadić.TJ*, para.674. However, the Trial Chamber’s meaning in *Furundžija* was at least partly clarified by the example given: *Furundžija.TJ*, para.252.

<sup>730</sup> *Kvočka.TJ*, para.284.

<sup>731</sup> *Kvočka.TJ*, para.287.

The *ICC Statute* provides for liability for any who “[f]or the purpose of facilitating the commission of... a crime, aids, abets or otherwise assists in its commission”.<sup>732</sup> Although basically similar to the law on knowing assistance under the ICTY/R, it is nuanced in two respects. As Cryer notes, the material element is apparently rather broader while the mental element is restrained by the additional purposive requirement. As such, he concludes that the liability is slightly narrowed.<sup>733</sup> This is likely correct, not least as the broadening of the material element is more or less illusory: any material contribution less than one with a qualitatively substantial effect (the ICTY/R standard) might be soundly argued not to amount to an act of “assistance” at all.<sup>734</sup> Ambos considers that the additional mental element under the *ICC Statute* must have been deliberately intended to contradict the jurisprudence of the ICTY/R<sup>735</sup> and, as such, may not be circumvented via Article 21. Nonetheless, if it were posited that the ICTY/R in fact applied a *dolus eventualis* standard to aiding and abetting, rather than mere knowledge *stricto sensu*, the difference between the true scope of the liabilities might seem rather smaller.

#### **‘RULE 1 ½’: A SUPERIOR’S LIABILITY FOR SUBORDINATES**

Superior (or command) responsibility is a protean term. A superior may be held responsible—like anyone else—for participation in an act which violates international law, either as ‘perpetrator’ or ‘accomplice’. However, it is also established that a superior may be *indirectly* responsible for offences committed by subordinates,<sup>736</sup> even without ‘participating’ in their acts. This indirect liability is justified as a device to acknowledge and enforce the particular responsibilities assumed by an individual trusted to command the actions of others. It is in this latter sense that the term “superior responsibility” has acquired independent legal meaning.

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<sup>732</sup> *ICC Statute*, Art.25(3)(c).

<sup>733</sup> CRYER ET AL.(2007).op.cit., p.312; CRYER.(2001).op.cit., p.23. Also VAN SLIEDREGT.(2003).op.cit., p.93.

<sup>734</sup> Further AMBOS.(forthcoming).op.cit., mns.21-22; ESER.(2002).op.cit., pp.799-801.

<sup>735</sup> *Ibid.*, mn.23.

<sup>736</sup> HENQUET.(2002).op.cit., p.806.



The theory underpinning superior responsibility is, however, in some doubt. One view links it directly with the complicity concept,<sup>737</sup> another considers it a *sui generis* mode of liability outside the scope of complicity (often described as “imputed”<sup>738</sup> responsibility),<sup>739</sup> and a third considers it to be an independent offence of omission.<sup>740</sup> Certainly, it is true to say that the elements which define the nexus between the superior’s conduct and the criminal consequence (knowledge and causation) appear to be characterised in a way which distinguish superior responsibility from complicity. For this reason, the second model described here presents a clear challenge to conventional understandings of the principle of culpability,<sup>741</sup> to which the answers are not altogether convincing.<sup>742</sup> It remains an open question, however, whether the distinction between the first and second models—and thus the problem of culpability—is not more apparent than real.

The ICTY/R are best considered—at least formally—as committed to the second model. This approach is reflected in the fact that convictions are subject to those for perpetration of or complicity in the crime itself.<sup>743</sup> In such circumstances, superior responsibility may be an aggravating factor—and, indeed, should be in order to best characterise the qualities of the offence committed<sup>744</sup>—but not an independent head of liability.<sup>745</sup>

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<sup>737</sup> E.g., *von Leeb* (NMT), cited in 12 LRTWC 1, 74–75; *Halilović TJ*, para.43. Further DAMAŠKA.(2001).op.cit., p.456; ‘The contemporary law of superior responsibility,’ BANTEKAS, I., 1999, p.577; WU & KANG.(1997).op.cit., p.284; ‘Command responsibility in international humanitarian law,’ GREEN, L.C., 1995, pp.356–361.

<sup>738</sup> ‘Command responsibility of non-military superiors in the [ICC],’ VETTER, G.R., 2000, pp.92, 97–99; DAMAŠKA.(2001).op.cit., p.461; BANTEKAS.(1999).op.cit., p.577; *Kordić/Čerkez TJ*, para.369; *Report of the Secretary-General*, para.56.

<sup>739</sup> E.g. *Hadžihasanović Command Responsibility Appeal*, para.16; *per Judge Shahabuddeen*, paras.32–33; *Orić TJ*, paras.292–293; *Hadžihasanović/Kubura TJ*, paras.74–75; *Halilović TJ*, paras.38–39. This distinction is not necessarily imperilled by the fact that both accessory and superior responsibilities are instances of derivative liability: VAN SLIEDREGT.(2003).op.cit., p.200, fn.333; ‘Criminal liability for the acts of subordinates—the doctrine of command responsibility and its analogues in United States law,’ WU, T., & KANG, Y., 1997, pp.279, 290.

<sup>740</sup> E.g., DARCY.(2007).op.cit., p.385; CRYER ET AL.(2007).op.cit., pp.328–330; JIA.(2004).op.cit., pp.13, 32–33; SCHABAS.(2003).op.cit., p.1030.

<sup>741</sup> DAMAŠKA.(2001).op.cit., p.461. *C.f.* *Hadžihasanović/Kubura TJ*, para.192.

<sup>742</sup> E.g., REID.(2005).op.cit., p.824; also BANTEKAS.(1999).op.cit., pp.594–595.

<sup>743</sup> HENQUET.(2002).op.cit., pp.826–827, 829; BANTEKAS.(1999).op.cit., p.595.

<sup>744</sup> HENQUET.(2002).op.cit., pp.827–832.

<sup>745</sup> E.g., *Galić AJ*, para.186; *Naletilić/Martinović AJ*, para.368; *Kvočka AJ*, para.104; *Kordić/Čerkez AJ*, paras.34–35; *Blaškić AJ*, paras.91–92; *Orić TJ*, para.343; *Brđanin TJ*, para.285; *Stakić TJ*, paras.464–466; *Krnjelac TJ*, para.173; *Krstić TJ*, para.605. *C.f.* *Kordić/Čerkez TJ*, paras.836, 843; *Blaškić TJ*, Disposition; *Musema TJ*, paras.901–906; *Kayishema/Ruzindana*, paras.554–555, 558–559, 562–563, 568–569. With regard to the likely practice of the ICC, *see* ‘Causality, a separate element of the doctrine of superior responsibility as expressed in Article 28 Rome Statute?’ TRIFFTERER, O., 2002, pp.187–188.

As Ambos implies,<sup>746</sup> there is good reason to acknowledge aspects of multiple models. There is a risk, however, that the tensions which have underlain superior responsibility at the ICTY/R will be laid bare at the ICC. In particular, it is appropriate to ask whether Article 28 still represents a mode of liability at all, or whether it has become a discrete offence in its own right.

The second key controversy relating to superior responsibility revolves around the extent to which it reflects a requirement for militarily responsible command. In other words, beyond punishing certain behaviour by a superior when presented with a criminal act, does it also establish liability for a generally incompetent superior? The latter concept is broadly captured by the term 'dereliction of duty', although unfortunately there is some variation in the manner in which it is applied. Superior responsibility clearly has a necessary relationship with military discipline,<sup>747</sup> and so there are arguments for both positions. Although it is the author's conclusion that superior responsibility and dereliction of duty should be kept distinct, the following pages illustrate that the opposite is beginning to appear increasingly likely, at least at the ICC.

Despite comment to the contrary,<sup>748</sup> it can be stated preliminarily that none of the models of superior responsibility is a form of vicarious liability: the fact of responsibility is predicated not on the breach of duty by another, but by the superior themselves.<sup>749</sup> However, it cannot be denied, at least under the second model, that the gravity of the offence with which the superior is charged is determined by the third party.

### **The concept of superior responsibility**

Although it has been suggested that the modern conception of superior responsibility (a knowing or otherwise culpable failure to prevent or punish crimes carried out by

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<sup>746</sup> 'Superior responsibility,' AMBOS, K., in CASSESE ET AL.(2002).op.cit., p.824.

<sup>747</sup> *Bagilishema.AJ*, paras.35–36; 'Article 28: responsibility of commanders and other superiors,' FENRICK, W.J., in TRIFFTERER.(2008 forthcoming).op.cit., mns.1–2; SCHABAS.(2003).op.cit., pp.1026, 1028.

<sup>748</sup> VETTER.(2002).op.cit., p.99; 'The evolution and scope of command responsibility,' LIPPMAN, M., 2000, p.139.

<sup>749</sup> REID.(2005).op.cit., p.822; LIPPMAN.(2000).op.cit., pp.162–163; BANTEKAS.(1999).op.cit., p.577; *Krnojelac.AJ*, para.171; *Delalić.AJ*, para.239.

subordinates) is well established in the core instruments of modern international humanitarian law,<sup>750</sup> this may be something of an overstatement.<sup>751</sup> It is true, however, that the basic concept has ancient origins.<sup>752</sup> One of the earliest references to the principle in its modern form (*i.e.*, comprised of functional/cognitive/operational elements<sup>753</sup>) dates from 1919, identifying that a charge for violations of the laws or customs of war may lie against

...all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war...<sup>754</sup>

A number of countries enacted legislation shortly after the second World War with a similar purpose.<sup>755</sup> Related doctrines seem to have been applied (more or less intelligibly) in cases tried by a range of states, arguably including *Brandt*,<sup>756</sup> *Hisakasu*,<sup>757</sup> *Holstein*,<sup>758</sup> *Masao*,<sup>759</sup> *Sakai*<sup>760</sup> and *Meyer*.<sup>761</sup> Although the accused in question was acquitted, a doctrine of “culpable negligence” of a person in authority was also considered by a British court.<sup>762</sup> A similar notion was included in the context of the charge of being “concerned in the killing” in the unreported case of *Seeger*.<sup>763</sup> However, as discussed earlier, it is clear that the line in the early case law between superior responsibility and complicity concepts, either through

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<sup>750</sup> UK MINISTRY OF DEFENCE.(2005).op.cit., p.438, mn.16.36, fn.169. Also *Hadžihasanović Command Responsibility Appeal*, para.17; *Halilović.TJ*, para.40.

<sup>751</sup> *Delalić.TJ*, para.335.

<sup>752</sup> *Henry's Laws and Shakespeare's Wars*, MERON, T., 1993, p.149; *De Jure Belli ac Pacis Libri Tres*, GROTIUS, H., trans. KELSEY, F.W., 1925, Bk. 2, p.523. Also ‘Command responsibility for war crimes,’ PARKS, W.H., 1973, pp.3–14.

<sup>753</sup> VAN SLIEDREGT.(2003).op.cit., pp.135.

<sup>754</sup> ‘Report presented to the Preliminary Peace Conference,’ COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES, reprinted in [1920] 14 *AJIL* 95, 121.

<sup>755</sup> *Law on the Suppression of War Crimes*, Grand Duchy of Luxembourg, 2 August 1947, Art.3, cited in PARKS (1973) op.cit., p.18; *Law of 24 October 1946*, China, Art.9, cited at 14 *LRTWC* 158; *Ordinance Concerning the Suppression of War Crimes*, France, 28 August 1944, Art.4, cited at 4 *LRTWC* 87; *Extraordinary Penal Law Decree*, Netherlands, 22 December 1943, Art.27(a)(3), cited at 11 *LRTWC* 100.

<sup>756</sup> *Brandt* (NMT), pp.193–194, 198. Also *Flick* (NMT), cited in 9 *LRTWC* 1, 54.

<sup>757</sup> *Hisakasu* (US), 1946, pp.78–79.

<sup>758</sup> *Holstein* (France), 1947, pp.26, 32.

<sup>759</sup> *Masao* (Australia), 1947, pp.58–60.

<sup>760</sup> *Sakai* (China), 1946, pp.1–2.

<sup>761</sup> *Meyer* (Canada), 1945, pp.99, 107–109.

<sup>762</sup> *Schonfeld* (UK), 1946, pp.70–71. Also *Student* (UK), 1946, pp. 89, 118, in which the accused was acquitted of being “responsible” for various law of war violations.

<sup>763</sup> *Seeger* (UK), 1946, unreported, cited at 4 *LRTWC* 88.

participation in a common plan or ordering, seems to have been rather blurred.<sup>764</sup> Certainly, it was observed in 1949, on behalf of the UN War Crimes Commission, that “the doctrine is not easy to lay down, either legally or morally” and that “[t]he principles governing this sphere of law have not yet crystallised”.<sup>765</sup> Nonetheless, by 1971, the military judge in *U.S. v. Medina*, a prosecution resulting from the My Lai incident, was able to give a definition of superior responsibility that is substantially similar to that used by the ICTY/R.<sup>766</sup> 167 states ratified the first Additional Protocol to the Geneva Conventions, which requires military commanders “to prevent and, where necessary, to suppress” breaches of the Conventions.<sup>767</sup> Even states who are not party to the Protocol have independently manifested their largely similar interpretations of the principle.<sup>768</sup> The UN Security Council expressly provided for superior responsibility in the *Statutes* of the ICTY and ICTR,<sup>769</sup> and the parties to the Rome Conference included such a measure in the *ICC Statute*.<sup>770</sup> For these reasons, perhaps of all the modes of liability, superior responsibility (of some kind) enjoys the soundest independent basis in customary international law, being established at the latest by 1993.<sup>771</sup>

There is a caveat, however. Although the basic *concept* of superior responsibility has been clearly recognised for some long time, its precise definition (the meaning of and relationship between the three elements) remained contested:<sup>772</sup> as Triffterer observes, the pre-1993 authorities illustrate “a more pragmatic than theoretical approach”.<sup>773</sup> The debate at the ICC conference over the wording of the provision, but not its existence, bears testament to this fact.<sup>774</sup> This is not of great moment as far as the principle of legality is concerned—the

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<sup>764</sup> E.g., *Alstoetter* (NMT), as cited in 6 *LRTWC* 1, 87.

<sup>765</sup> 15 *LRTWC* 62.

<sup>766</sup> *U.S. v. Medina* (US), 1971, unreported, cited in ‘Superior orders and command responsibility,’ GREEN, L.C., 2003, pp.356–357.

<sup>767</sup> *API*, Art.87. Also Art.86(2).

<sup>768</sup> E.g., *Report of the Commission of Inquiry into the events at the refugee camps in Beirut*, 1983, available online courtesy of the Ministry of Foreign Affairs of Israel.

<sup>769</sup> *ICTY Statute*, Art.7(3); *ICTR Statute*, Art.6(3); also *SCSL Statute*, Art.6(3).

<sup>770</sup> *ICC Statute*, Art.28.

<sup>771</sup> VAN SLIEDREGT.(2003).op.cit., p.177; AMBOS.(2002).op.cit., p.825. Unlike JCE or indirect co-perpetration, the only challenge to the basic principle of superior responsibility has been to its application in internal armed conflict: *Hadžihasanović Command Responsibility Appeal*. The reference to the sound “statutory basis” of the doctrine is not itself significant (beyond providing further evidence of its customary status) as the statutes are not (at least for the ICTY/R) determinative of substantive law but only of jurisdiction: DARCY.(2007).op.cit., p.387.

<sup>772</sup> *Ibid.*, p.161; HENQUET.(2002).op.cit., p.814; AMBOS.(2002).op.cit., pp.846–847; DAMASKA.(2001).op.cit., pp.485–486, 489–490, 492–493.

<sup>773</sup> TRIFFTERER.(2002).op.cit., p.181; also WU & KANG.(1997).op.cit., pp.286–287.

<sup>774</sup> TRIFFTERER.(2002).op.cit., p.187.

popular notion is more than sufficient for to give potential defendants the relevant degree of notice—but some of the questions, particularly with regard to the required *mens rea*,<sup>775</sup> are significant as a matter of law.

It has been suggested that the first significant exploration of command responsibility took place in *Yamashita*.<sup>776</sup> At the USSC, Chief Justice Stone for the majority held that international law imposed “an affirmative duty to take such measures as were within [the accused’s] power and appropriate in the circumstances”. In a teleological interpretation of the laws of war, it was held that this principle extended to the imposition of personal responsibility on commanders who, by their breach of duty, thus ‘permitted’ their subordinates to commit crimes.<sup>777</sup> In effect, liability was upheld on the basis of the superior’s dereliction of those unspecified duties which were consonant with his role and rank. However, as Justice Murphy, dissenting, noted:

[P]etitioner was rushed to trial under an improper charge.. In all this needless and unseemly haste there was no serious attempt to charge or to prove that he committed a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander...<sup>778</sup>

Most damning was Justice Murphy’s emphasis on the disrupted communication and general chaos suffered by the Japanese army at the time of the relevant offences: the defendant had neither effective control over, nor information about, many of his subordinates.<sup>779</sup> Parks suggests that the dissent was not in fact directed at the standard of responsibility applied, but on the factual conclusions drawn from the evidence.<sup>780</sup> He further suggests that the decision did not evince a strict liability doctrine.<sup>781</sup> However, it is clear that the first instance decision

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<sup>775</sup> E.g., WU & KANG.(1997).op.cit., pp.278, 297.

<sup>776</sup> *Yamashita* (US), 1945, p.1 *et seq.* Also UK MINISTRY OF DEFENCE.(2005).op.cit., p.438, mn.16.36.1; JIA.(2004).op.cit., pp.6, 8–10, 12; VAN SLIEDREGT.(2002).op.cit., p.120; AMBOS.(2002).op.cit., pp.825–827; LIPPMAN.(2000).op.cit., p.142.

<sup>777</sup> *In re Yamashita* (US), 1946, pp.14–16.

<sup>778</sup> *Ibid.*, pp.27–28. Also *Yamashita* (US), 1945, pp.3–4, 19–33.

<sup>779</sup> *In re Yamashita* (US), 1946, pp.34–36.

<sup>780</sup> PARKS.(1973).op.cit., p.35; also AMBOS.(2002).op.cit., p.828.

<sup>781</sup> *Ibid.*, p.37.



was ambiguous as to the basis for liability,<sup>782</sup> and Chief Justice Stone certainly did not bring the question of the defendant's knowledge front and centre in the majority decision on appeal. It must be concluded, therefore, that *Yamashita* has come to be seen as a precedent for a strict liability variant of a 'dereliction of duty' offence,<sup>783</sup> whatever its 'true' meaning. As such, its relevance to the modern law of superior responsibility is relatively limited.<sup>784</sup>

In *Pohl*, the NMT seemed to apply the reasoning in *Yamashita*, holding that "[t]he law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command". However, in choosing to acquit a defendant on the basis of the inadequacy of his knowledge of the crimes committed, it acknowledged a different conception of the form of responsibility.<sup>785</sup> Similarly, in *Milch*, the NMT considered that the controlling legal questions to be answered on the facts included the extent of the defendant's participation, the extent to which he had directed the criminal acts, the extent of his knowledge, the extent of his control, and the actions he in fact undertook.<sup>786</sup> Although this approach possibly illustrates the confusion between superior responsibility and complicity, it clearly suggested a requirement that the defendant had both knowledge and effective control before a failure to act could be rendered criminal.<sup>787</sup>

Other key decisions introduced new variations in the relation between the predicate elements for liability. The *von Leeb* and *List* trials, for example, stressed the importance of knowledge, although developing the notion of constructive knowledge in order to meet the standard.<sup>788</sup> The NMT in these cases also appears to have retreated from *Milch* in adopting a formal, rather than actual, standard in assessing the authority of the accused;<sup>789</sup> an approach with significant drawbacks<sup>790</sup> and one clearly rejected by successor tribunals.<sup>791</sup> Similarly, *Toyoda* completed the circle back to a *Yamashita*-like notion of dereliction of duty, in

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<sup>782</sup> *Ibid.*, pp.30–31.

<sup>783</sup> E.g., REID.(2005).op.cit., p.818; VAN SLIEDREGT.(2003).op.cit., p.123; LIPPMAN.(2000).op.cit., p.144; WU & KANG.(1997).op.cit., p.279.

<sup>784</sup> AMBOS.(2002).op.cit., p.830. *C.f.* VAN SLIEDREGT.(2003).op.cit., pp.123, 128.

<sup>785</sup> *Pohl* (NMT), pp.1011–1012.

<sup>786</sup> *Milch* (NMT), p.774.

<sup>787</sup> *Ibid.*, pp.776–777, 779.

<sup>788</sup> *List* (NMT), cited in 8 *LRTWC* 34, 70–71; *von Leeb* (NMT), cited in 12 *LRTWC* 1, 77, 79, 112.

<sup>789</sup> *List* (NMT), cited in 8 *LRTWC* 34, 89; *von Leeb* (NMT), cited in 12 *LRTWC* 1, 77, 110–111.

<sup>790</sup> BANTEKAS.(1999).op.cit., pp.578, 580, 594.

<sup>791</sup> Fn.797.*infra*.

holding that knowledge was a necessary element—but that a superior’s dereliction of duty in not being adequately informed was also culpable (“knew, or should by the exercise of ordinary diligence have learned”).<sup>792</sup> This reasoning has remained a source of controversy for both the ICTY/R and the ICC.

It should be clear, therefore, that the pre-1993 jurisprudence permits a certain latitude for judicial interpretation. Despite the considerable advances made by the ICTY/R, it is striking that the same areas of contention, highlighted in this very brief review of the post-WWII decisions, remain to trouble the relationship between the ICTY/R and the ICC.

### **Superior responsibility at the ICTY/R**

The three-pronged test for superior responsibility applicable at the ICTY/R clearly reflects the doctrine’s functional, cognitive and operational elements. As with the other attribution doctrines, the ICTY/R’s major contribution is the systematic and reasoned consideration it has given to the *minutiae* of the concept. From their jurisprudence, the following principles may be discerned.

#### *The superior-subordinate relationship*

Inherent in the notion of superior responsibility is the existence of a superior/subordinate relationship between the accused and the physical perpetrators of the relevant offences.<sup>793</sup> The terminology clearly indicates that there must be some formal or informal difference in status between the ‘superior’ and ‘subordinate’,<sup>794</sup> and thus the subordinates must at least be a defined class.<sup>795</sup> The relationship does not have to be formal or *de jure*;<sup>796</sup> indeed, it may

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<sup>792</sup> *U.S. v. Toyota (US)*, unreported, cited in *Halilović.TJ*, para.47, fn.726.

<sup>793</sup> *Halilović.AJ*, para.59; *Kordić/Čerkez.AJ*, para.827; *Aleksovski.AJ*, para.72; *Mrksić.TJ*, para.558; *Hadžihasanović/Kubura.TJ*, para.76; *Limaj.TJ*, paras.520–521; *Halilović.TJ*, para.56; *Strugar.TJ*, paras.358–359; *Blagojević/Jokić.TJ*, para.790; *Brđanin.TJ*, paras.275, 370; *Galić.TJ*, para.173; *Stakić.TJ*, para.457; *Naletilić/Martinović.TJ*, para.65; *Krnojelac.TJ*, para.92; *Kvočka.TJ*, paras.313–314; *Krstić.TJ*, para.604; *Kordić/Čerkez.TJ*, para.401; *Kunarac.TJ*, paras.395–396; *Blaškić.TJ*, para.294; *Aleksovski.TJ*, paras.69, 72; *Delalić.TJ*, para.346.

<sup>794</sup> *Halilović.AJ*, para.59; *Delalić.AJ*, para.303; *Hadžihasanović/Kubura.TJ*, para.76; *Halilović.TJ*, para.60; *Blagojević/Jokić.TJ*, para.791; *Brđanin.TJ*, para.276; *Stakić.TJ*, para.459; *Krnojelac.TJ*, para.93; *Kordić/Čerkez.TJ*, para.408.

<sup>795</sup> *Blagojević/Jokić.AJ*, para.287; *Orić.TJ*, para.311; *Hadžihasanović/Kubura.TJ*, para.90.

only be proved by showing that the superior actually manifested “effective control” over the subordinate.<sup>797</sup> For this reason, relative<sup>798</sup> *de jure* authority is not a conclusive determinant,<sup>799</sup> although it may establish a strong basis for judicial inference.<sup>800</sup> Certain functions—the classic example is the chief of staff<sup>801</sup>—may be highly important and yet not apparently bear command authority; nonetheless, in such circumstances, it is important that an objective look is taken at the actual role assumed by the individual. The relationship between superior and subordinate should be assessed on a case-by-case basis.<sup>802</sup> Operational responsibility may cease at the time of a valid transfer of command (*i.e.*, when another individual assumes all the duties of the superior), although there are obvious circumstances (such as promotion within the unit, formation or army) when that responsibility may be retained. The temporary or *ad hoc* nature of subordination is not a bar to superior responsibility,<sup>803</sup> providing that the necessary elements exist at the relevant time.

Command structure is not directly relevant to superior responsibility. Multiple individuals in the chain of command may bear superior responsibility for the criminal offence of a subordinate.<sup>804</sup> The superior is not required *per se* to be geographically proximate to the relevant subordinates,<sup>805</sup> although the greater the distance, the more difficult it may be to

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<sup>796</sup> *Halilović.AJ*, paras.59, 210; *Bagilishema.AJ*, paras.50, 61; *Delalić.AJ*, paras.193, 197, 251; *Mrksić.TJ*, para.560; *Orić.TJ*, paras.309–310; *Hadžihasanović/Kubura.TJ*, para.78; *Limaj.TJ*, para.522; *Halilović.TJ*, para.60; *Strugar.TJ*, para.362; *Blagojević/Jokić.TJ*, para.791; *Brđanin.TJ*, para.276; *Stakić.TJ*, para.459; *Naletilić/Martinović.TJ*, paras.67, 69; *Krnjelac.TJ*, para.93; *Kordić/Čerkez.TJ*, paras.405–406; *Kunarac.TJ*, paras.396–397; *Blaškić.TJ*, paras.300, 302; *Aleksovski.TJ*, para.76; *Delalić.TJ*, para.354.

<sup>797</sup> *Brima.AJ*, para.257; *Halilović.AJ*, para.59; *Blagojević/Jokić.AJ*, paras.302–303; *Kordić/Čerkez.AJ*, para.840; *Blaškić.AJ*, para.67; *Bagilishema.AJ*, paras.50, 56, 61; *Delalić.AJ*, paras.195–197, 251; *Mrksić.TJ*, para.560; *Orić.TJ*, para.311; *Hadžihasanović/Kubura.TJ*, paras.77, 79; *Limaj.TJ*, para.522; *Halilović.TJ*, para.58; *Strugar.TJ*, para.360; *Blagojević/Jokić.TJ*, para.791; *Brđanin.TJ*, paras.276, 372; *Galić.TJ*, para.173; *Stakić.TJ*, para.459; *Naletilić/Martinović.TJ*, para.67; *Krnjelac.TJ*, para.93; *Kvočka.TJ*, para.315; *Kordić/Čerkez.TJ*, para.406; *Kunarac.TJ*, para.396; *Blaškić.TJ*, paras.300–301, 335; *Aleksovski.TJ*, para.76; *Delalić.TJ*, paras.370–378.

<sup>798</sup> There is no ‘seniority threshold’ for command responsibility: the key factor is the relative difference in status between superior and subordinate, not their significance in the hierarchy as a whole: *Orić.TJ*, para.312; *Kunarac.TJ*, para.398.

<sup>799</sup> E.g., *Kvočka.AJ*, paras.144, 382; *Delalić.AJ*, para.299; *Kordić/Čerkez.TJ*, paras.413, 418; *Delalić.TJ*, paras.806, 809.

<sup>800</sup> *Hadžihasanović/Kubura.AJ*, para.21, *c.f.* paras.191–193; *Delalić.AJ*, para.197; *Galić.TJ*, para.173.

<sup>801</sup> E.g., *Halilović.AJ*, paras.212–214. Further *List* (NMT), cited in 8 LRTWC 34, 89–90; *von Leeb* (NMT), cited in 12 LRTWC 1, 112–118; *c.f.* *Hisakasu* (US), 1946, p.79.

<sup>802</sup> *Hadžihasanović/Kubura.TJ*, para.84.

<sup>803</sup> *Mrksić.TJ*, para.560; *Orić.TJ*, para.310; *Limaj.TJ*, para.522; *Halilović.TJ*, para.61; *Strugar.TJ*, para.362; *Kordić/Čerkez.TJ*, para.411; *Kunarac.TJ*, para.399.

<sup>804</sup> *Mrksić.TJ*, para.560; *Orić.TJ*, para.313; *Limaj.TJ*, para.522; *Halilović.TJ*, paras.61–62;

*Naletilić/Martinović.TJ*, para.69; *Krnjelac.TJ*, para.93; *Blaškić.TJ*, para.303; *Aleksovski.TJ*, para.106.

<sup>805</sup> *Kordić/Čerkez.AJ*, para.828.

demonstrate ‘effective control’.<sup>806</sup> Superior-subordinate relationships are not necessarily direct<sup>807</sup> or immediate,<sup>808</sup> or confined to the ‘proper’ (*i.e.*, doctrinally correct) operation of the chain of command.<sup>809</sup> Although a superior may delegate aspects of their authority to subordinates, s/he cannot delegate the relevant legal responsibility without effectively detaching them to another unit or formation altogether.<sup>810</sup> Where authority is shared in a ‘flatter’ hierarchical structure, the court must consider the power actually devolved to an individual, “taking into account the cumulative effect of [their] various functions.”<sup>811</sup>

Superior responsibility is not limited to members of military or paramilitary organisations.<sup>812</sup> In principle, any civilian may be in a position to exercise the powers (and bear the responsibility) of a superior, even though they may do so in a different way from the standard military paradigm.<sup>813</sup> For this reason, in practical terms, proving the status of a civilian superior may often prove difficult. Nonetheless, the only determinant of this form of responsibility is compliance with the three major limbs of the test.<sup>814</sup>

A superior has effective control if they have the material ability to prevent or punish the ‘commission’<sup>815</sup> of offences by subordinates.<sup>816</sup> A key *indicium* of effective control, for either serving member of the armed forces or civilian, is the practical capacity of the

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<sup>806</sup> *Halilović.TJ*, para.66.

<sup>807</sup> *Kordić/Čerkez.AJ*, para.828; *Blaškić.AJ*, para.67; *Delalić.AJ*, para.252; *Orić.TJ*, paras.310–311; *Brđanin.TJ*, para.276; *Stakić.TJ*, para.459.

<sup>808</sup> *Halilović.TJ*, para.63; *Strugar.TJ*, paras.361, 363–366.

<sup>809</sup> BANTEKAS.(1999).op.cit., pp.580–582, 584; *c.f. Kordić/Čerkez.TJ*, para.416. On parallel chains of command, VAN SLIEDREGT.(2003).op.cit., pp.155–156.

<sup>810</sup> VAN SLIEDREGT.(2003).op.cit., pp.156–157; AMBOS.(2002).op.cit., p.859; BANTEKAS.(1999).op.cit., p.585, fn.126.

<sup>811</sup> *Brđanin.TJ*, para.277. Also *Orić.TJ*, para.313.

<sup>812</sup> *Brima.AJ*, para.257; *Bagilishema.AJ*, para.51; *Delalić.AJ*, paras.195–196, 240; *Aleksovski.AJ*, para.76; *Orić.TJ*, para.308; *Brđanin.TJ*, para.281; *Stakić.TJ*, paras.459, 462; *Naletilić/Martinović.TJ*, para.68; *Kvočka.TJ*, para.315; *Kordić/Čerkez.TJ*, para.407; *Aleksovski.TJ*, para.75; *Delalić.TJ*, paras.356–363.

<sup>813</sup> *Bagilishema.AJ*, paras.52, 55; *Brđanin.TJ*, para.281.

<sup>814</sup> *Bagilishema.AJ*, paras.50, 55; *Orić.TJ*, para.320; *Brđanin.TJ*, paras.281–283; *Naletilić/Martinović.TJ*, para.68; *Krnojelac.TJ*, para.94; *Kordić/Čerkez.TJ*, paras.414–415, 435, 446. *C.f. Delalić.AJ*, para.240, where the Appeals Chamber consciously left open the question as to whether a civilian form of superior responsibility is identical to that of the military.

<sup>815</sup> ‘Commission’ is used as a term of art: a superior may be held responsible for the engagement of subordinates in criminal activity through any mode of liability: *Blagojević/Jokić.AJ*, paras.280–282; *Orić.TJ*, paras.295–305.

<sup>816</sup> *Brima.AJ*, paras.257, 289; *Halilović.AJ*, paras.59, 175; *Delalić.AJ*, paras.192, 198, 254, 256; *Aleksovski.AJ*, para.76; *Mrksić.TJ*, para.560; *Orić.TJ*, para.311; *Hadžihasanović/Kubura.TJ*, para.77; *Limaj.TJ*, para.522; *Halilović.TJ*, para.58; *Blagojević/Jokić.TJ*, para.791; *Brđanin.TJ*, paras.276, 374; *Stakić.TJ*, para.459; *Naletilić/Martinović.TJ*, para.67; *Krnojelac.TJ*, para.93; *Kvočka.TJ*, para.315; *Kordić/Čerkez.TJ*, para.406; *Kunarac.TJ*, para.396; *Blaškić.TJ*, para.335 (*c.f. para.300*).

superior to induce compliance with their instructions.<sup>817</sup> This generally requires something more than “substantial influence” upon an individual’s actions, unless the term is ‘read up’ to such an extent that it means effective control anyway.<sup>818</sup> ‘Effective control’ outside the context of a superior/subordinate relationship is not sufficient to found superior responsibility.<sup>819</sup> The possible indicators are numerous; their recognition is more a question of evidence than substantive law<sup>820</sup> and they must be assessed in all the circumstances.<sup>821</sup> Traditional forms of disciplinary power may also frequently be a useful indicator, although generally only applicable in the context of a formal hierarchy.<sup>822</sup> Powers of enforcement may be direct, potentially including the use of force,<sup>823</sup> or indirect, such as by submitting reports to the competent authorities.<sup>824</sup> However, given that, in principle, any individual may make a report, it is suggested that an accused in this circumstance would have to possess sufficient status as to make their report likely to be acted upon. This conforms with the observation in *Kvočka* that the action of the accused must represent an “important step”.<sup>825</sup>

*Mens rea: know, or have reason to know*

The accused must know of their own position of authority in the prevailing circumstances and to the relevant extent.<sup>826</sup> The accused must also have known or had reason to know that the criminal act had been, or would be, committed.<sup>827</sup> Command responsibility is not strict

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<sup>817</sup> *Blaškić.TJ*, para.302; *Aleksovski.TJ*, para.78.

<sup>818</sup> *Brima.AJ*, para.289; *Delalić.AJ*, paras.257–266, 300; *Orić.TJ*, para.311; *Halilović.TJ*, para.59; *Blagojević/Jokić.TJ*, para.791; *Stakić.TJ*, para.459; *Naletilić/Martinović.TJ*, para.68; *Kordić/Čerkez.TJ*, para.415. E.g., *Brđanin.TJ*, para.376. C.f. *Hadžihasanović/Kubura.TJ*, para.81, which implied that the test in respect of military commanders of occupied territory may differ. Respectfully, this cannot be correct. VAN SLIEDREGT.(2003).op.cit., pp.147–149; c.f. BANTEKAS.(1999).op.cit., p.586.

<sup>819</sup> *Halilović.AJ*, para.210.

<sup>820</sup> *Blaškić.AJ*, para.69; *Mrksić.TJ*, para.561; *Orić.TJ*, para.312; *Hadžihasanović/Kubura.TJ*, para.82; *Halilović.TJ*, para.58.

<sup>821</sup> *Halilović.AJ*, paras.204, 207.

<sup>822</sup> *Aleksovski.TJ*, para.78.

<sup>823</sup> *Hadžihasanović/Kubura.TJ*, paras.85–88.

<sup>824</sup> *Blaškić.AJ*, para.68; *Blaškić.TJ*, para.302.

<sup>825</sup> *Kvočka.TJ*, para.316. Also *Halilović.AJ*, para.194; *Halilović.TJ*, para.100.

<sup>826</sup> *Orić.TJ*, para.316.

<sup>827</sup> *Halilović.AJ*, para.59; *Kordić/Čerkez.AJ*, para.827; *Delalić.AJ*, para.222; *Aleksovski.AJ*, para.72; *Mrksić.TJ*, paras.558, 562; *Hadžihasanović/Kubura.TJ*, para.91; *Limaj.TJ*, paras.520, 523; *Halilović.TJ*, paras.56, 64; *Strugar.TJ*, paras.358, 367; *Blagojević/Jokić.TJ*, paras.790, 792; *Brđanin.TJ*, paras.275, 278; *Galić.TJ*, para.173; *Stakić.TJ*, para.457; *Naletilić/Martinović.TJ*, para.65; *Krnojelac.TJ*, para.92; *Kvočka.TJ*, paras.313–314; *Krstić.TJ*, para.604; *Kordić/Čerkez.TJ*, paras.401, 425; *Kunarac.TJ*, para.395; *Blaškić.TJ*, para.294; *Aleksovski.TJ*, paras.69, 72; *Delalić.TJ*, para.346.

liability,<sup>828</sup> and knowledge cannot merely be presumed,<sup>829</sup> although it may be proved circumstantially in conformity with the ICTY/R's general practice.<sup>830</sup> A superior may possess the required *mens rea* either where they have actual knowledge of the fact of past or imminent crimes, or where they *possess* information which would at the least place a reasonable person in their role on notice of the need to investigate further.<sup>831</sup>

The fact of possession of the information is sufficient; it does not need to be shown that the accused was actually acquainted with its contents.<sup>832</sup> The extent of this “constructive”<sup>833</sup> or “imputed”<sup>834</sup> knowledge is limited to the information in fact available to the superior,<sup>835</sup> it need not be conclusive<sup>836</sup> but must show a present and real risk<sup>837</sup> that unlawful acts are being, or will be, committed by subordinates.<sup>838</sup> It must also give notice of the particular offence with which the accused is charged: in the case of torture, for example, “it is not enough that an accused has sufficient information about beatings... he must also have information—albeit general—which alerts him to the risk of beatings being inflicted for one of the [prohibited] purposes”.<sup>839</sup> Although this finding is hard to reconcile with the general tone of some of the other jurisprudence on point,<sup>840</sup> the underlying reasoning is hard to

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<sup>828</sup> *Delalić.AJ*, para.239; *Mrksić.TJ*, para.562; *Orić.TJ*, para.318; *Hadžihasanović/Kubura.TJ*, para.92; *Halilović.TJ*, para.65; *Blagojević/Jokić.TJ*, para.792; *Brđanin.TJ*, para.278; *Stakić.TJ*, para.460; *Naletilić/Martinović.TJ*, para.70; *Delalić.TJ*, para.383.

<sup>829</sup> *Mrksić.TJ*, para.563; *Orić.TJ*, para.319; *Hadžihasanović/Kubura.TJ*, para.94; *Limaj.TJ*, para.524; *Halilović.TJ*, para.66; *Strugar.TJ*, para.368; *Naletilić/Martinović.TJ*, para.71; *Blaškić.TJ*, para.307; *Aleksvoski.TJ*, para.80; *Delalić.TJ*, para.386.

<sup>830</sup> E.g. *Kordić/Čerkez.AJ*, para.834.

<sup>831</sup> *Blaškić.AJ*, para.62; *Delalić.AJ*, paras.228–235, 241; *Mrksić.TJ*, para.564; *Orić.TJ*, para.322; *Hadžihasanović/Kubura.TJ*, paras.92, 95; *Halilović.TJ*, para.65; *Strugar.TJ*, paras.369–370; *Blagojević/Jokić.TJ*, para.792; *Stakić.TJ*, para.460; *Naletilić/Martinović.TJ*, para.75; *Krnjelac.TJ*, para.94; *Kvočka.TJ*, paras.317–318; *Kordić/Čerkez.TJ*, para.435; *Delalić.TJ*, para.383; *API*, Art.86(2).

<sup>832</sup> *Delalić.AJ*, paras.238–239; *Mrksić.TJ*, para.564; *Orić.TJ*, para.322; *Naletilić/Martinović.TJ*, para.75.

<sup>833</sup> *Brđanin.TJ*, para.278; *AMBOS.(2002).op.cit.*, p.865, citing to ‘Command responsibility for war crimes,’ *HESSLER, C.A.*, 1973, pp.1278–1279, 1298–1299. *C.f. BANTEKAS.(1999).op.cit.*, pp.587–588; *WU & KANG.(1997).op.cit.*, pp.285–286.

<sup>834</sup> *Orić.TJ*, para.321.

<sup>835</sup> *Hadžihasanović/Kubura.TJ*, para.95; *Strugar.TJ*, para.369.

<sup>836</sup> *Mrksić.TJ*, para.564; *Orić.TJ*, para.322; *Hadžihasanović/Kubura.TJ*, para.97; *Limaj.TJ*, para.525; *Halilović.TJ*, para.68; *Strugar.TJ*, para.369; *Delalić.TJ*, para.393.

<sup>837</sup> *Halilović.TJ*, paras.65, 68; *Brđanin.TJ*, para.278. Other formulations have required the “general possibility” (*Delalić.AJ*, para.238) or “likelihood” (*Kordić/Čerkez.TJ*, para.437). Whether these standards should be considered to be essentially the same is an open question: *Halilović.TJ*, para.68; *Strugar.TJ*, para.370; *AMBOS.(2002).op.cit.*, p.835.

<sup>838</sup> *Bagilishema.AJ*, para.42; *Delalić.AJ*, paras.235, 238; *Hadžihasanović/Kubura.TJ*, para.119; *Strugar.TJ*, para.417.

<sup>839</sup> *Krnjelac.AJ*, paras.155, 166, 171. Also *Orić.TJ*, para.323; *Hadžihasanović/Kubura.TJ*, para.98.

<sup>840</sup> E.g. *Hadžihasanović/Kubura.TJ*, para.97; *Galić.TJ*, para.175; *Bagilishema.AJ*, para.42. *C.f. Limaj.TJ*, para.525; *Strugar.TJ*, para.369.

dispute: as a result, we are left with the odd formulation that “[a]lthough the information may be general in nature, it must be sufficiently specific to demand further clarification.”<sup>841</sup> Knowledge of the prior commission of crimes by an identified and discrete group of subordinates *may* be sufficient to give notice of future crimes.<sup>842</sup> In any event, however, such knowledge would also require the commander to intervene in order to punish the subordinates in question, which is likely also to have a preventative function.<sup>843</sup>

Superior position may be a significant factor in adducing proof of knowledge, although this must be assessed in the relevant factual context.<sup>844</sup> Similarly, participation in a well-organized, formal hierarchy with established reporting systems may be significant.<sup>845</sup> Relative physical proximity between the superior and the offending subordinate(s) may also be important, as is the fact of repeat offending, the numbers involved, and the operational tempo.<sup>846</sup> The existence of different ‘levels’ of command in a military hierarchy (political/strategic/operational/tactical<sup>847</sup>) is not dispositive, however, of the extent of the accused’s knowledge:<sup>848</sup> the levels do not act as ‘glass floors’ to shield those above from liability. Given that both forms of *mens rea* may largely depend on circumstantial proof, the court should take care to assess whether the requisite standard was met in the particular circumstances prevalent in the case.<sup>849</sup> Constructive knowledge, in particular, may require a “finely balanced assessment”.<sup>850</sup>

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<sup>841</sup> *Orić.TJ*, para.322. *C.f. Galić.AJ*, para.184.

<sup>842</sup> *Hadžihasanović/Kubura.AJ*, paras.30–31; *Hadžihasanović/Kubura.TJ*, para.118.

<sup>843</sup> *Hadžihasanović/Kubura.TJ*, paras.128–136, 160–164, 168–169.

<sup>844</sup> *Blaškić.AJ*, paras.56–57; *Orić.TJ*, para.319; *Naletilić/Martinović.TJ*, para.71; *Blaškić.TJ*, para.308; *Aleksovski.TJ*, para.80.

<sup>845</sup> *Orić.TJ*, para.320; *Hadžihasanović/Kubura.TJ*, para.94; *Halilović.TJ*, para.66; *Blagojević/Jokić.TJ*, para.792; *Galić.TJ*, para.174; *Kordić/Čerkez.TJ*, para.428. Citing this principle, it has been considered (*Hadžihasanović/Kubura.TJ*, para.94; *Naletilić/Martinović.TJ*, para.73) that “the standard of proof is higher” when considering the responsibility of *de facto* superiors in informal structures. This is obviously incorrect. The standard of proof remains the same, but a greater quantity of evidence may be required to meet the necessary standard.

<sup>846</sup> *Mrksić.TJ*, para.563; *Orić.TJ*, para.319; *Hadžihasanović/Kubura.TJ*, para.94; *Limaj.TJ*, para.524;

*Halilović.TJ*, para.66; *Strugar.TJ*, para.368; *Blagojević/Jokić.TJ*, para.792; *Stakić.TJ*, para.460;

*Naletilić/Martinović.TJ*, para.72; *Kordić/Čerkez.TJ*, para.427; *Blaškić.TJ*, para.307; *Aleksovski.TJ*, para.80.

<sup>847</sup> *Kordić/Čerkez.TJ*, para.419; BANTEKAS.(1999).op.cit., pp.578–579.

<sup>848</sup> Fn.808 *supra*.

<sup>849</sup> *Krnojelac.AJ*, para.156; *Delalić.AJ*, para.239; *Mrksić.TJ*, para.562; *Hadžihasanović/Kubura.TJ*, para.101; *Halilović.TJ*, para.70.

<sup>850</sup> *Strugar.TJ*, para.417.

The Trial Chamber in *Blaškić* had adopted a different interpretation of the alternative mental standard, much closer to the ‘dereliction of duty’ concept apparent in post-WWII cases, implying that a commander’s failure to exercise due diligence in the fulfilment of their duties (which, crucially, includes awareness of the acts of subordinates) was sufficient for conviction.<sup>851</sup> This view comes impermissibly close to a strict liability model,<sup>852</sup> and was rejected—quite rightly<sup>853</sup>—by the ICTY Appeals Chamber in *Delalić*.<sup>854</sup> It must be acknowledged, however, that the subtlety of the distinctions in play renders the line a narrow one.<sup>855</sup> Similarly, the prohibition of a superior’s ‘wilful blindness’ (which, correctly understood, is itself a form of knowledge,<sup>856</sup> as it depends upon the recognition of the fact to which the actor wishes to remain blind<sup>857</sup>) has occasionally—but wrongly—led to statements which could be taken to suggest a dereliction of duty approach.<sup>858</sup> Although the reasoning behind the stricter approach is understandable in the context of a military command structure, it is nonetheless dubious when applied to a doctrine which pertains to all sorts of superiors, *de jure* and *de facto*. To this end, the Appeals Chamber correctly pointed out the distinction between the dereliction of duty offence which may exist under national military discipline and the mode of liability in ICL.<sup>859</sup> The doctrine of superior responsibility is not, and should not be, a mandate for ‘responsible’ (*i.e.*, professionally-approved) command; an international equivalent for the common municipal substantive ‘dereliction of duty to supervise’ offence is in principle feasible, but is not presently law.<sup>860</sup>

Damaška considers that superior responsibility begins to depart from municipal law principles—and thus a traditional understanding of the principle of culpability—when a

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<sup>851</sup> *Blaškić*. TJ, paras.314–332; *Bagilishema*. TJ, para.46. Further, *Orić*. TJ, paras.317, 325; *Report of the Secretary-General*, para.56.

<sup>852</sup> *Delalić*. AJ, para.226.

<sup>853</sup> DAMAŠKA.(2001).op.cit., pp.480–481.

<sup>854</sup> *Delalić*. AJ, paras.238–240. Also *Blaškić*. AJ, paras.62–64; *Mrksić*. TJ, para.564; *Orić*. TJ, para.322; *Hadžihasanović/Kubura*. TJ, para.96; *Limaj*. TJ, para.525; *Halilović*. TJ, para.69; *Strugar*. TJ, para.369; *Kordić/Čerkez*. TJ, para.432. With respect to negligence, *Bagilishema*. AJ, para.35; *Halilović*. TJ, para.71.

<sup>855</sup> E.g., BANTEKAS.(1999).op.cit., pp.590, *c.f.* 593–594.

<sup>856</sup> DAMAŠKA.(2001).op.cit., p.462.

<sup>857</sup> AMBOS.(2002).op.cit., p.865.

<sup>858</sup> E.g., *Stakić*. TJ, para.460. *C.f.* *Mrksić*. TJ, para.564; *Orić*. TJ, para.322; *Halilović*. TJ, para.69; *Blagojević/Jokić*. TJ, para.792; *Brđanin*. TJ, para.278. Further, PIRAGOFF/ROBINSON.(forthcoming).op.cit., mn.26; VAN SLIEDREGT.(2003).op.cit., p.44; SCHABAS (2003) op.cit., pp.1029–1030, citing to Glanville Williams; ESER.(2002).op.cit., pp.931–932; LIPPMAN.(2000).op.cit., p.160.

<sup>859</sup> *Delalić*. AJ, para.226. Also *Hadžihasanović Command Responsibility Appeal*, para.22; *Halilović* TJ, para.40.

<sup>860</sup> VAN SLIEDREGT.(2003).op.cit., pp.173–174.



superior attracts liability for “consciously disregard[ing] a perceived risk of subordinate delinquency”, a standard which he describes as a “possibility” about which the superior is “reckless”.<sup>861</sup> Although the ICTY/R have not been clear precisely about what level of awareness constitutes a ‘present and real risk’,<sup>862</sup> it is by no means certain that Damaška’s assessment in 2001 remains consistent with modern jurisprudence. Certainly, the *Blaškić* standard, which he also criticised, is now no more; and the recent interpretive trend (*Delalić—Brđanin—Halilović*) with respect to the risk at which the superior has reason to know might be argued to be coming even closer to ‘true’ constructive knowledge. Further, the clear statement that the language of negligence is “unhelpful”<sup>863</sup> also suggests that the ICTY/R inclines at least to a model of advertent recklessness.

Perhaps along these lines, it has been suggested that the requirement of knowledge for superior responsibility might be construed to conform with the general *mens rea* requirement under the rule on complicity: *dolus eventualis*.<sup>864</sup> Bantekas also uses this terminology, despite confusing its meaning with that of second-degree *dolus directus*.<sup>865</sup> Although imposing what amounts to an intent standard upon superior responsibility conflicts with much incidental academic and judicial comment, there is no real reason why such an approach would be impracticable. Indeed, given that the volitional element is almost always inferred from the fact of the actor’s knowledge and corresponding action/inaction anyway,<sup>866</sup> it seems hard to deny the feasibility of this concept for superior responsibility.<sup>867</sup>

This reasoning is of some interest, not least as it suggests that the only serious distinction between superior responsibility and complicity-based modes of liability before the ICTY/R is the absence of a minimal material requirement expressed in terms of causation.<sup>868</sup> It is

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<sup>861</sup> DAMAŠKA.(2001).op.cit., pp.463–464.

<sup>862</sup> AMBOS.(2002).op.cit., p.835.

<sup>863</sup> *Bagilishema.AJ*, para.35; *Blaškić AJ*, para.63; *c.f. Orić.TJ*, para.324.

<sup>864</sup> METTRAUX.(2005).op.cit., pp.305–306, fn.48.

<sup>865</sup> BANTEKAS.(1999).op.cit., p.590.

<sup>866</sup> DAMAŠKA.(2001).op.cit., p.462. Also ‘The doctrine of command responsibility revisited,’ *JIA*, B.B., 2004, pp.13, 32; *Musema.TJ*, para.131; *Akayesu.TJ*, para.489.

<sup>867</sup> VAN SLIEDREGT.(2003).op.cit., pp.186–187.

<sup>868</sup> *Ibid.*, pp.32–33.

perhaps no surprise, therefore, that the issue of causation in superior responsibility is attracting increasing consideration.<sup>869</sup>

*Actus reus: failure to prevent or punish*

The relevant *actus reus*, rooted in the other two elements, lies in the superior's failure to take reasonable measures to prevent the relevant offence(s)<sup>870</sup> or punish the perpetrator(s).<sup>871</sup> These two aspects of the general responsibility to suppress criminal acts represent distinct legal obligations<sup>872</sup> but their legal characterisation is largely consistent.<sup>873</sup> Determination of what counts as "reasonable" is a factual question to be resolved by the court in the light of all the circumstances.<sup>874</sup> As such, it is not precisely a question of substantive law.<sup>875</sup> Evidently, it is not reasonable for the superior to choose not to prevent the commission of a crime but to punish it afterwards:<sup>876</sup> their form of action must be dictated by the point at which they have the requisite knowledge.<sup>877</sup> On this basis, it was suggested that individuals who assume command after the relevant incident but who come to learn about it in timely fashion are equally required to take the necessary steps.<sup>878</sup> This has been disapproved by the ICTY Appeals Chamber,<sup>879</sup> provoking mixed reactions.<sup>880</sup>

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<sup>869</sup> Pp.118-120.*infra*.

<sup>870</sup> *Hadžihasanović/Kubura.TJ*, para.185.

<sup>871</sup> *Halilović.AJ*, para.59; *Kordić/Čerkez.AJ*, para.827; *Blaškić.AJ*, para.85; *Aleksovski.AJ*, para.72; *Mrksić.TJ*, para.558; *Limaj.TJ*, para.520; *Halilović.TJ*, para.56; *Strugar.TJ*, para.358; *Blagojević/Jokić.TJ*, para.790; *Brđanin.TJ*, para.275; *Galić.TJ*, para.173; *Stakić.TJ*, para.457; *Naletilić/Martinović.TJ*, para.65; *Krnjelac.TJ*, para.92; *Kvočka.TJ*, paras.313–314; *Krstić.TJ*, para.604; *Kordić/Čerkez.TJ*, paras.401, 441; *Kunarac.TJ*, para.395; *Blaškić.TJ*, para.294; *Aleksovski.TJ*, paras.69, 72; *Delalić.TJ*, para.346.

<sup>872</sup> *Blaškić.AJ*, para.83; *Mrksić.TJ*, para.566; *Orić.TJ*, para.326; *Hadžihasanović/Kubura.TJ*, para.125; *Halilović.TJ*, paras.72, 93–94; *Strugar.TJ*, para.372.

<sup>873</sup> *Orić.TJ*, para.336.

<sup>874</sup> *Hadžihasanović/Kubura.AJ*, paras.33, 151; *Halilović.AJ*, paras.63–64; *Blaškić.AJ*, para.417; *Mrksić.TJ*, para.565; *Orić.TJ*, paras.329–330; *Hadžihasanović/Kubura.TJ*, paras.123–124, 155, 177; *Limaj.TJ*, para.528; *Halilović.TJ*, para.74; *Strugar.TJ*, paras.372, 374; *Galić.TJ*, para.176; *Naletilić/Martinović.TJ*, para.77; *Aleksovski.TJ*, para.81; *Delalić.TJ*, para.394.

<sup>875</sup> *Blaškić.AJ*, para.72; *Hadžihasanović/Kubura.TJ*, para.124; *Halilović.TJ*, para.74; *Brđanin.TJ*, para.279.

<sup>876</sup> *Mrksić.TJ*, para.566; *Orić.TJ*, para.326; *Hadžihasanović/Kubura.TJ*, para.126; *Limaj.TJ*, para.527; *Halilović.TJ*, para.72; *Strugar.TJ*, para.373; *Blagojević/Jokić.TJ*, para.793; *Brđanin.TJ*, para.279; *Stakić.TJ*, para.461; *Kordić/Čerkez.TJ*, para.444; *Blaškić.TJ*, para.336.

<sup>877</sup> *Mrksić.TJ*, para.566; *Orić.TJ*, para.326; *Hadžihasanović/Kubura.TJ*, paras.125–126; *Limaj.TJ*, para.527; *Halilović.TJ*, para.72; *Strugar.TJ*, para.373; *Kvočka.TJ*, para.317.

<sup>878</sup> *Kordić/Čerkez.TJ*, para.446.

<sup>879</sup> *Hadžihasanović Command Responsibility Appeal*, paras.44–56; *c.f. per Judge Hunt; per Judge Shahabuddeen*. Also *Halilović.AJ*, para.67.

<sup>880</sup> *Orić.TJ*, para.335; METTRAUX.(2005).op.cit., p.301. *C.f. VAN SLIEDREGT.(2003).op.cit., pp.167–172.*

Certainly, the consequent liability gap which may potentially result for crimes perpetrated or coming to light at times of transition has not been resolved.<sup>881</sup>

It is clear that the superior is not required to perform the impossible<sup>882</sup> but it has been suggested that they should use “every means” available to them.<sup>883</sup> In particular, reliance on “non-assertive orders” is not a valid defence.<sup>884</sup> Thus, the obligation does not extend only to their *de jure* powers but includes all those avenues which it was materially possible for them to pursue.<sup>885</sup> The timely initiation of an investigation when required and the submission of a report to authorities competent to take direct remedial action may, for example, be almost universally required.<sup>886</sup> Other measures taken should be specific, and reasonably suited to the ill they are intended to remedy.<sup>887</sup>

The requirement to prevent the commission of international crimes has a general aspect,<sup>888</sup> as well as the specific obligation when the superior understands that a criminal act is imminent. Although this conceptual distinction has been disapproved for litigation purposes,<sup>889</sup> it does help illustrate the distinction between responsible command and command responsibility. The general aspect, which is part and parcel of responsible command, entails the provision of effective training and education for subordinates, maintenance of an efficient command structure, maintenance of discipline, and so on. International criminal liability does not attach to a failure to meet this general obligation *per se*, although it may be a relevant circumstance in assessing the superior’s responsibility on the facts.<sup>890</sup>

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<sup>881</sup> E.g., *Hadžihasanović/Kubura.TJ*, paras.194–199.

<sup>882</sup> *Orić.TJ*, para.329; *Hadžihasanović/Kubura.TJ*, para.122; *Blagojević/Jokić.TJ*, para.793; *Brđanin.TJ*, para.279; *Stakić.TJ*, para.461; *Krnojelac.TJ*, para.95; *Delalić.TJ*, para.395.

<sup>883</sup> *Blaškić.AJ*, para.72; *Mrksić.TJ*, para.568; *Halilović.TJ*, paras.73, 100; *Stakić.TJ*, para.461; *Krnojelac.TJ*, para.95; *Kordić/Čerkez.TJ*, para.445. Also BANTEKAS.(1999).op.cit., pp.591–592.

<sup>884</sup> BANTEKAS.(1999).op.cit., p.585.

<sup>885</sup> *Mrksić.TJ*, para.565; *Orić.TJ*, paras.329, 331; *Hadžihasanović/Kubura.TJ*, paras.122, 170; *Limaj.TJ*, para.526; *Halilović.TJ*, para.73; *Strugar.TJ*, paras.372, 378; *Blagojević/Jokić.TJ*, para.793; *Brđanin.TJ*, para.279; *Galić.TJ*, para.176; *Stakić.TJ*, para.461; *Naletilić/Martinović.TJ*, para.76; *Krnojelac.TJ*, para.95; *Kordić/Čerkez.TJ*, paras.442–443; *Delalić.TJ*, para.395.

<sup>886</sup> *Halilović.AJ*, para.182; *Mrksić.TJ*, para.564; *Orić.TJ*, para.336; *Limaj.TJ*, para.529; *Halilović.TJ*, paras.97, 100; *Strugar.TJ*, para.376; *Blagojević/Jokić.TJ*, para.793; *Brđanin.TJ*, para.279; *Stakić.TJ*, para.461; *Blaškić.TJ*, para.335.

<sup>887</sup> *Orić.TJ*, para.329; *Hadžihasanović/Kubura.TJ*, para.155.

<sup>888</sup> *Hadžihasanović/Kubura.TJ*, paras.143–151; *Halilović.TJ*, paras.81–87.

<sup>889</sup> *Halilović.AJ*, paras.61–64.

<sup>890</sup> *Mrksić.TJ*, para.567; *Orić.TJ*, para.330; *Hadžihasanović/Kubura.TJ*, para.144; *Halilović.TJ*, para.88.

There is no requirement that the superior's failure causes the commission of a particular offence,<sup>891</sup> although in the context of a 'failure to prevent' a causal link may be a natural, incidental result.<sup>892</sup> Although not enshrined as a formal element of superior responsibility before the ICTY/R, the general relevance of the concept of causation remains hard to escape.<sup>893</sup>

### Superior responsibility before the ICC

Superior responsibility under Article 28 of the *ICC Statute* is different from the ICTY/R doctrine in some notable respects,<sup>894</sup> relating especially to *mens rea*, causation and the distinction between military and non-military superiors. With regard to other issues (such as the meaning of effective control, actual knowledge, and the nature of "necessary and reasonable measures"), however, there is good reason to believe that the ICC's approach will be similar to that of the ICTY/R.<sup>895</sup> As van Sliedregt observes, the ICC provision should be understood, to the greatest extent possible, in the light of the ICTY/R's jurisprudence.<sup>896</sup>

Perhaps the most radical innovation in Article 28 is the formal recognition of a causation requirement for superior responsibility, contradicting the findings of the ICTY/R.<sup>897</sup> In the case of both military and non-military superiors, responsibility lies only where crimes are committed "as a result of his or her failure to exercise control properly". As Damaška points out, the absence of a causal connection between the superior's conduct and the criminal act for a supposed mode of liability, rather than a discrete substantive offence, stretches the culpability principle to breaking point:<sup>898</sup> the intention behind this innovation is thus clear. However, whereas the requirement is easily explicable in the context of a

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<sup>891</sup> *Hadžihasanović/Kubura.AJ*, paras.38, 40; *Kordić/Čerkez.AJ*, para.832; *Blaškić.AJ*, para.77; *Orić.TJ*, para.338; *Hadžihasanović/Kubura.TJ*, paras.188, 191; *Halilović.TJ*, paras.77–78; *Brđanin.TJ*, para.280; *Kordić/Čerkez.TJ*, para.447; *Delalić.TJ*, para.398.

<sup>892</sup> *Blaškić.TJ*, para.339; LIPPMAN.(2000).op.cit., p.161; BANTEKAS.(1999).op.cit., p.593.

<sup>893</sup> METTRAUX.(2005).op.cit., p.310.

<sup>894</sup> REID.(2005).op.cit., p.822; DAMAŠKA.(2001).op.cit., p.457.

<sup>895</sup> FENRICK.(forthcoming).op.cit., mns.7–8, 10, 12–18, 80, 23–25.

<sup>896</sup> VAN SLIEDREGT.(2003).op.cit., p.143.

<sup>897</sup> CRYER.(2001).op.cit., pp.28–29.

<sup>898</sup> DAMAŠKA.(2001).op.cit., pp.468–470.

superior's knowing failure to prevent crimes, it seems impossible with regard to the failure to punish. In the absence of a prior agreement of immunity from punishment, how can the superior's failure to act *after* the crime causally affect the criminal consequence?<sup>899</sup>

The best solution to this paradox seems to be the recognition that the causal requirement indicates a new contextual element to the mode of liability. An individual will only be held responsible if, with the proper *mens rea*, they fail to prevent or punish the crimes of subordinates within their control. However, in addition, it also seems necessary to prove before the ICC that the superior's general deficient approach to their command had a real influence on the subordinates' disorderly behaviour. As van Sliedregt suggests, the causal link is analogous more to the minimum material standard for complicity (that the accused's conduct 'substantially' contributed to the criminal consequence) than the 'special' causation requirement for procurement liability: it represents a threshold standard to preserve the "reasonable attribution" of criminal responsibility rather than a defining characteristic of the mode of liability.<sup>900</sup> This interpretation is persuasive, broadly consistent with other authoritative interpretations.<sup>901</sup> Nonetheless, two effects of this development require comment. First, Article 28 has now re-introduced questions of 'responsible' command into ICL:<sup>902</sup> as Fenrick notes, the ICC will now likely inquire into the superior's general control of their subordinates (including the provision of relevant training and reporting systems, maintenance of discipline, and non-passive command)<sup>903</sup> in a way that was not common before the ICTY/R. These factors, although of some relevance to an assessment of the failure to prevent, still tended to be of little more than academic note. In practical terms, any failure to prevent case is likely to automatically meet the failure of control threshold test: at the very least, the superior's culpable failure to prevent is *ipso facto* evidence of irresponsibly passive command. With regard to failure to punish, however, prosecutions may become marginally more difficult: if a superior is running an otherwise 'responsible' command but neglects to punish an isolated incident of criminality, it is difficult to predict the likely verdict. Nonetheless, in most cases of superior responsibility, the tests under the

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<sup>899</sup> CRYER ET AL.(2007).op.cit., p.327; *c.f.* VETTER.(2000).op.cit., p.115.

<sup>900</sup> VAN SLIEDREGT.(2003).op.cit., p.175.

<sup>901</sup> E.g., TRIFFTERER.(2002).op.cit., pp.192, 197-205, who views the superior's failure to control as a trigger for potential liability which can then be averted by appropriate action at the proper times. He also plainly sees this approach as reinforcing the culpability principle. Also CRYER ET AL.(2007).op.cit., p.328.

<sup>902</sup> AMBOS.(2002).op.cit., pp.851, 860.

<sup>903</sup> FENRICK.(forthcoming).op.cit., mn.9, also mn.19.

ICTY/R and the ICC seem likely to reach similar conclusions. The introduction of the causal requirement is thus more significant for its second implication: in attempting to meet the principle of culpability in this way, it raises the strong possibility that superior responsibility should no longer be considered a *sui generis* mode of liability but instead simply another complicity doctrine. As observed in *Halilović*, the requirement for a causal link alters “the very nature of the liability imposed”.<sup>904</sup> Given the approach that the ICTY/R has taken to the *mens rea* requirement, a conceptual realignment of superior responsibility with complicity principles has in fact been a lurking possibility for some time. Strengthening the causal link brings that possibility one step closer.

It is ironic, therefore, that at the same time, Article 28 seems to introduce a much less demanding approach to *mens rea* in certain respects. The distinction in standards applicable to military and non-military superiors is the most instantly apparent novelty in Article 28. The development is, in part, a cosmetic one, highlighting the particular need for care in assessing the actual powers of civilian superiors already reflected in the ICTY/R case-law.<sup>905</sup> Nonetheless, the distinction is largely superfluous and can lead to a problematic confusion of thought.<sup>906</sup> In particular, the opportunity taken to introduce separate mental standards, although with an understandable rationale,<sup>907</sup> represents an unfortunate blow to the culpability principle. For military superiors, under the ICC, it need only be proved that they “knew or, owing to the circumstances at the time, should have known” of crimes committed or threatened by forces under their control.<sup>908</sup> It is very difficult to interpret this standard as anything other than a negligence standard, similar to that applied in the *Blaškić* trial and subsequently rejected by the ICTY/R.<sup>909</sup> Such an approach is unhelpful in a

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<sup>904</sup> *Halilović*. TJ, para. 78.

<sup>905</sup> E.g., *Bagilishema*. AJ, para. 52; *Kordić/Čerkez*. TJ, para. 840; *Akayesu*. TJ, para. 491. Also AMBOS.(2002).op.cit., pp. 849–850, 858; WU & KANG.(1997).op.cit., p.295.

<sup>906</sup> VAN SLIEDREGT.(2003).op.cit., pp. 191–192; VETTER.(2000).op.cit., pp. 127, 141. Litigation over the definition of those “effectively acting as a military commander” is also likely to flourish as a result. Potentially, there is a certain irony in permitting groups with less rigorous disciplinary standards than traditional militaries to benefit from this fact by asserting their ‘non-military’ status in a criminal trial. FENRICK.(forthcoming).op.cit., mn.5; VAN SLIEDREGT.(2003).op.cit., pp. 181–182.

<sup>907</sup> SCHABAS.(2004).op.cit., p. 107.

<sup>908</sup> For non-military superiors, the formulation is more similar to that reached in the ICTY/R jurisprudence “knew, or consciously disregarded information which clearly indicated,” that subordinates were committing or threatening crimes.

<sup>909</sup> FENRICK.(forthcoming).op.cit., mn. 11; DARCY.(2007).op.cit., p.391; AMBOS.(2006).op.cit., p.672; VAN SLIEDREGT.(2003).op.cit., pp. 185–186; AMBOS.(2002).op.cit., pp.864–869; ESER.(2002).op.cit., p.903; TRIFFTERER.(2002).op.cit., p. 192, fn.40; CRYER.(2001).op.cit., p.28.

criminal context—even for members of the military—as the circumstances of armed struggle mean that there is always a risk that criminal acts may occur.<sup>910</sup>

The argument has been made that the “should have known” formulation may not be as distant from the ICTY/R standard as it appears. Vetter suggests that the ICTY in *Delalić*, referring to Article 28 in passing, unintentionally created a “mythical” should have known standard, unqualified by the phrase “owing to the circumstances at the time”.<sup>911</sup> He implies that this myth has remained a persistent influence on attitudes to Article 28. It is certainly indisputable that the phrase “should have known” considered alone is a negligence concept; the import of the qualifying phrase, on the other hand, is ambiguous. It could be construed as a minor modification to the objective standard imposed or, as has also been suggested, it could represent a term of art along the lines of “had reason to know”. Bantekas seems to support this view, arguing that the phrase has been taken out of context. He refers back to the ICRC, influential on the drafting of the provision, who stated that “widespread and publicly notorious, numerous, geographically and temporarily spanned breaches ‘should be taken into consideration in reaching a presumption that the persons responsible could not be ignorant of them.’”<sup>912</sup> The implication of this statement would be to convert the phrase “owing to the circumstances at the time, should have known” from a negligence standard to a legal/evidentiary principle: as appropriate, the ICC will infer knowledge (i.e., a constructive knowledge standard) from the circumstances. This is not strictly an objective approach, since it is directed to proving what the accused ‘must have’ subjectively known. Such an interpretation would certainly resolve much of the conflict with the ICTY/R, avoiding the use of a pure negligence approach, and would be welcomed. It must be acknowledged, however, that this interpretation rather strains the plain text. Ambos’ gloom at this prospect is reflected in his conclusion that the only appropriate way forward from Article 28 is to transform it into a substantive criminal offence of ‘failure of proper supervision’.<sup>913</sup> Van Sliedregt goes so far as to suggest that this is precisely what Article 28 has created.<sup>914</sup>

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<sup>910</sup> METTRAUX.(2005).op.cit, pp.305–306.

<sup>911</sup> VETTER.(2000).op.cit., p.122. Cf. VAN SLIEDREGT.(2003).op.cit., p.161.

<sup>912</sup> BANTEKAS.(1999).op.cit., p.589; also AMBOS.(2002).op.cit., p.838, fn.106; LIPPMAN.(2000).op.cit., pp.163–164.

<sup>913</sup> AMBOS.(2002).op.cit., p.871.

<sup>914</sup> VAN SLIEDREGT.(2003).op.cit., pp.190–191, 197.

It has also been suggested that the mental standard for civilians under the ICC regime is slightly more relaxed than under the jurisprudence of the ICTY/R.<sup>915</sup> Given the ambiguity in the ICTY/R jurisprudence on the extent to which the accused must be aware of the ‘present and real risk’ of criminal action by subordinates, it is difficult to draw a firm conclusion as to parity with the “consciously disregarding information which clearly indicates” standard. It seems likely, however, that any difference between the two standards is reducing in line with the ICTY/R’s gradual trend away from the hard line in *Blaškić*.<sup>916</sup>

In conclusion, it is hard to determine the extent to which the rule on superior responsibility has truly developed. The ICTY/R’s most notable achievement in this context has certainly been the development of the doctrine of effective control, the very touchstone of liability. This is soundly consolidated, and of undoubted legal influence. Both the ICC and the ICTY/R also seem to betray a concern with the culpability principle, and the need to strengthen the link between the superior and the criminal consequence. The ICC’s rather more sophisticated theory of causation is an interesting step in that direction. The divergence of opinion with regard to the appropriate mental standard, however, is a symptom of a profound unresolved ambiguity about the purpose of the doctrine, in a way that the difference of opinion as to mechanisms of co-perpetration is not. Ironically, although this mode of liability has the soundest pre-1993 basis in customary law by far, this is the only doctrine considered in this study whose future shape still seems uncertain. Further—and perhaps not accidentally—it should be observed that the doctrine in which the *ICC Statute* is most prescriptive (and thus leaves least room for application of other sources of law<sup>917</sup>) is also the one which is likely to be in the greatest tension with the law of the ICTY/R.

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<sup>915</sup> VETTER.(2000).op.cit., p.93; LIPPMAN.(2000).op.cit., p.165.

<sup>916</sup> AMBOS.(2007).op.cit., p.179.

<sup>917</sup> TRIFFTERER.(2002).op.cit., pp.186, 189.



## CONCLUSION

It is clear that in engaging with the attribution of responsibility, one braves murky waters. Despite his own preference for pragmatism, Ambos expresses a wish that in the development of the general part of the law some of the basic questions might be tackled before attention is paid to the specifics.<sup>918</sup> At the same time, it is clear that ICL has never been—and is still not—amenable to such a premeditated approach, growing not according to a particular design but by evolution. In that context, the relative success and security of the law developed is striking.

Perhaps a necessary consequence of its dynamism, the extent to which the principle of legality has been interpreted down in the context of ‘hard cases’, both by international criminal courts but also by international human rights organs, is still something of a shock. Although most people do ordinarily rely on moral instinct to warn of potential criminality, the gap between the rational, positive law idea implied by the best-established test (relying on “foreseeability” and “accessibility”) and its instinctive, almost natural law-based reality is striking. This state of affairs has not done injustice, yet the apparent lack of substance to a cherished ideal remains disturbing.

A brief examination of the ICTY/R’s approach to customary law and the other formal sources has revealed a major issue for future study: the uncertainty that exists both with regard to the obligations that in fact bound the ICTY/R in discerning and applying the law and, reflexively, with regard to the status to be afforded to the body of law so developed. In particular, it might be asked whether the time has come to reconsider the attitude to international judicial decisions, traditionally derived from Article 38(1)(d) of the *ICJ Statute*.

In the meantime, it is hoped that the very conservative approach taken in this paper to identifying norms which are independently established in customary law will help to illustrate that the difficulties endemic to the doctrine of sources do not detract from the quality and breadth of the legal reasoning which has developed.

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<sup>918</sup> AMBOS.(2006).op.cit., p.673.

In that context, can we say that the various attribution doctrines now amount to a body of 'rules'? Cautiously, yes. Whereas little structure could be inferred from the collection of pre-1993 authorities, the ICTY/R's most significant contribution has been the elucidation of a unified body of consistent principles. They are reasonably determinate, precise, and widely recognised. Although their substance may or may not survive unchanged, they provide a common basis for the international community to engage with ICL, in a way that it could not before. In Hart's terms, the doctrines for the attribution of responsibility under ICL can now be said to be truly "general" in their application. Perhaps the greatest indicator of this success is that a study of this size, with a reasonable aspiration to comprehensiveness, is viable at all.

In substantive terms, it seems safe to say that the rules on direct perpetration, procurement, and knowing assistance are clearly defined. Although the approaches of the ICTY/R and ICC in these respects are not quite identical, they are sufficiently close that a radical upheaval would be astonishing. Similarly, despite the confusion caused by the sudden advent and exit of control-based perpetration at the ICTY/R, the various co-perpetration doctrines are also well-established. The existence of two models for co-perpetration does not detract from this status, as both are based on a common understanding of their general purpose and function. In the short-term, they have the potential to be used complementarily; in the long-term, the event that one supercedes the other will not alter the general body of legal principles within which they both operate.

Despite its long pedigree, the doctrine of superior responsibility is beset by the most ambiguities and seems to be least secure. The existence of the basic principle is undoubted, but the possibility of a fairly radical shift in emphasis (towards or away from the culpability principle) in the early years of the ICC's operations is not out of the question. The effect of such a re-orientation on the status of the law on point established by the ICTY, given the number of parties to the *ICC Statute*, bears consideration.

Analysis of the various attribution doctrines has indicated various opportunities where the law could be consolidated and simplified. The ripest opportunity for development, interestingly, appears to be the body of law relating to basic standards of culpability, the

minimum material and mental standards which could potentially underpin all the forms of liability. Although at present the status of such a rule is only arguable, the resonance between the approach taken by the ICTY/R and available to the ICC is sufficient to render them an interesting prospect. In the context of increasing national interest in conducting trials which purport to draw on aspects of the (international) law of war, such a rule might be of some interest.

It remains to conclude that the future of ICL—at least foreseeably—is the ICC. It must be recalled that, as a treaty body, the approach it takes is not necessarily dispositive of the content of general international law, either drawn from custom or general principles. On the other hand, as a representative of the majority of the international community, its influence cannot be ignored. As illustrated in detail here, the law developed by the ICTY/R is highly relevant to the questions which arise under the framework of the *ICC Statute*. Thus, in both the doctrines it adopts, and the method of its reasoning, it is likely that it will be the true arbiter of the extent of the ICTY/R's contribution in this field.

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