



VRIJE
UNIVERSITEIT
AMSTERDAM

VU Bibliotheek

This is a postprint of

The Curious Case of International Criminal Liability

Sliedregt, E. van

Journal of International Criminal Justice, 10(5), 1172-1188

Published version: <http://dx.doi.org/10.1093/jicj/mqs078>

Link VU-DARE: <http://hdl.handle.net/1871/39246>

(Article begins on next page)

Journal of International Criminal Justice, Vol. 10, 1172-1188

The Curious Case of International Criminal Liability

Elies van Sliedregt

8/12/2012

Individual criminal responsibility (ICR) in international law is sui generis. Whilst modelled on domestic concepts of liability, ICR deviates substantially from theories of liability in municipal law. The distinctive character of criminal responsibility in international law is characterized by both intrinsic and extrinsic features. Intrinsic features go to the nature of international crimes. Extrinsic features relate to what according to Cassese is typically 'international': the composition of international courts and the rudimentary character of the governing law. An analysis of case law through the lens of ICR's distinctive features reveals international criminal law's instrumental role, which in turn puts pressure on the principle of personal culpability

The Curious Case of International Criminal Liability

Elies van Sliedregt*.

1. Introduction

Individual criminal responsibility (ICR) is a general principle in both national and international criminal law. However, this principle in international criminal law bears unique traits that make it somehow different than its domestic counterpart.

The International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber held in *Tadić* that:

[t]he basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).¹

Antonio Cassese, Judge in the *Tadić* case, former President of the ICTY, and one of the most influential scholars in the field of international criminal law, always subscribed to that principle. In that, he adopted a pragmatic approach. Bringing individuals to justice was to be preferred over the collective assignation of guilt.² As history has shown, collective guilt fuels frustration, extremism, and eventually mass violence. In Cassese's words, trials of (alleged) war criminals, 'establish that not all Germans were responsible for the Holocaust, nor all Turks for the Armenian genocide, nor all Serbs, Muslims, Croats, or Hutus but individual perpetrators — although, of course, there may be a great number of perpetrators'.³

A strong proponent of international criminal justice, Cassese found that international adjudication of war crimes, crimes against humanity and genocide has advantages over national adjudication, particularly over domestic tribunals in the territory where the atrocities occurred. Without being perceived as pursuing political prosecutions, international courts and tribunals can

* Professor of Criminal Law, Free University Amsterdam. The author wishes to thank the reviewers for their constructive comments. Any mistakes remain my own. [e.van.sliedregt@vu.nl]

¹ Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1995 (hereinafter *Tadić*, Appeal Judgment), § 186.

² A. Cassese, 'Reflections on International Criminal Justice', 61 *The Modern Law Review* (1998) 1, at 5- 6.

³ *Ibid.*, at 6.

prosecute breaches of the Geneva Conventions and the Genocide Convention as a principled demand for justice.⁴ Moreover, the very nature of these crimes, violations of international law, calls for international adjudication. Furthermore, international judges are in a better position to be impartial and unbiased.⁵

Whilst sensitive to the specific (international) context of international courts and tribunals, Cassese, like most practitioners and scholars in the field, accepted that international criminal law takes after national criminal law. In his view, 'ICL to a great extent results from the gradual transposition on to the international level of rules and legal constructs proper to national criminal law or to national trial proceedings'.⁶ To his mind, the international nature of courts like the ICTY and ICTR comprised in their composition, their method of establishment, and the fact that ICL has a rudimentary character.⁷ There would be no fundamental reason for departing from the domestic justice model and its underlying principles. Indeed, the principle of ICR captured in the maxim *nulla poena sine culpa* is a principle in ICL as much as it is in domestic law. As he states, 'In ICL the general principle applies that no one may be held accountable for an act he has not performed or in the commission of which he has not in some way participated, or for an omission that cannot be attributed to him.'⁸

As in most domestic criminal justice systems, ICR is grounded in the philosophy of autonomy and free will. International criminal law subscribes to the liberal justice model, requiring proof of personal culpability for a finding of guilt and the imposition of punishment. Cassese as no other was aware of the collective dynamics of international crimes and the evidentiary challenges of linking the accused to the crimes. In a paper on the theory of Joint Criminal Enterprise (JCE), he writes that international crimes 'tend to be an expression of collective criminality, in that they are perpetrated by groups of individuals, military details, paramilitary units or government officials acting in unison or in pursuance of a policy'.⁹ This makes it 'extremely difficult to pinpoint the specific contribution made by each individual

⁴ *Ibid.*, at 7.

⁵ *Ibid.*, at 7-8.

⁶ A. Cassese, *International Criminal Law* (2nd edn., OUP, 2008), at 7.

⁷ *Ibid.*, at 32, fn 1. (He notes, 'This body of law has not attained the degree of sophistication proper to national legal systems.')

⁸ *Ibid.*, at 33.

⁹ A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', 5 *Journal of International Criminal Justice (JICJ)* (2007) 109, 110.

participant in the collective criminal enterprise'.¹⁰ Yet, he continued, it would be 'immoral' and 'contrary to the general purpose of criminal law ... to let those actions go unpunished'.¹¹ The notion of JCE, although controversial in some respects, was an answer to the dilemma of individual criminal responsibility for collective criminality.¹² Thus, Cassese, endorsing individualized justice as an antidote to collective responsibility, admits that individual guilt attribution is difficult. In fact, by embracing JCE he, to a certain extent, accepts collective responsibility.

In scholarly writing, compelling arguments have been raised in favour of a concept of liability that is specific to international criminality; a concept that expresses the collective nature of international crimes.¹³ The gist of the argument is that the extraordinary nature of international crimes calls for a departure from 'ordinary', domestic concepts of liability. ICR, a principle drawn from municipal law, is unsuitable to international criminality. While this debate raises pertinent questions, we will leave it aside for reasons of brevity.

Instead this paper, through an analysis of jurisprudence before the ICTY and the International Criminal Court (ICC), and the identification of the main (intrinsic and extrinsic) features of ICR in international criminal law, will seek to identify the *sui generis* features of the principle. In particular, emphasis will be placed on showing how ICR is used as a tool to enforce international norms and to set an example. In this functional role, ICR is hardly compatible with the principle of personal culpability.

2. Intrinsic Feature: the Systemic Nature of Criminality

Criminal responsibility as it features in the Statutes of international criminal courts and tribunals, is modelled on concepts derived from national criminal law. Forms of liability such as aiding/abetting, instigation, joint criminal enterprise, co-perpetration and the concept of

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*, at 110- 111.

¹³ M.A. Drumbl, *Atrocity, Punishment and International Law* (CUP, 2007); G.P. Fletcher, 'Liberals and Romantics at War: The Problem of Collective Guilt', 111 *Yale Law Journal* (2002) 1499; H. Jäger, *Makrokriminalität. Studien zur kollektiver Gewalt* (Suhrkamp Verlag, 1989), at 132- 187; H.C. Kelman, 'The Policy Context of International Crimes', in P.A. Nollkaemper and H.G. van der Wilt (eds), *System Criminality in International Law* (CUP, 2009) 26; M.J. Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity', 105 *Columbia Law Review* (2005) 1751, 1760; A. Smeulers and B. Holá, 'ICTY and the Culpability of Different Types of Perpetrators', in A. Smeulers (ed.), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Intersentia, 2010) 175.

conspiracy all derive from municipal criminal law and are transplanted to the realm of international criminal law. The only true international mode of criminal responsibility is command responsibility, which originates in military law and international humanitarian law.¹⁴

International crimes have a specific nature. They connote organized, collective wrongdoing.¹⁵ Typically international criminality is masterminded violence, in which crimes are instigated, permitted or tolerated by an ‘intellectual’ perpetrator and physically committed by an executive machinery. There are two different but connected levels of perpetration: the senior level and the execution level, which need to be linked because eventually, those who stand trial before international courts are punished for the actual crime. With regard to senior defendants who have ‘no blood on their hands’, this means that crimes are either imputed to them, or liability derives from that of the physical perpetrator through theories of derivative liability, e.g. aiding and abetting. Whichever way the crimes are attributed, a link must be established between those who have encouraged, permitted or tolerated crimes and those who have physically committed crimes. This two-tier liability scheme is the Achilles heel of ICL. Linking the intellectual perpetrator(s) to the physical perpetrator is a difficult task for any international prosecutor. It is also here that ICR is under pressure most and where the danger of it lapsing into collective responsibility looms largely.¹⁶

The systemic nature of criminality is at odds with the individual focus of criminal responsibility. When there is a context of systemic violence, focusing on the individual can be reductionist. As André Nollkaemper observes, individuals are ‘[c]ogs in larger systems that may be beyond the reach of individual responsibility’.¹⁷ He refers to the case of Harun, former Minister of the Government of Sudan and Abd-Al-Rahman (a.k.a. Aly Kushayb) a Janjaweed-leader, both indicted by the ICC for the crimes committed in Darfur. According to the ICC prosecutor they are part of a much larger organizational context.¹⁸ This is why, in a desire to capture that organizational context fully, a year after the indictments against Harun and Abd-Al-

¹⁴ In the realm of defences the picture is more mixed. A distinction can be drawn between criminal law defences that have a national pedigree, e.g. duress, intoxication and mental incapacity, and defences that have an international pedigree, e.g. superior orders, self-defence, reprisals and *tu quoque*.

¹⁵ B.V.A. Röling, ‘Aspects of the Criminal Responsibility for Violations of the Laws of War’, in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica, 1979) 138, 203.

¹⁶ See E. van Sliedregt, ‘Criminal Responsibility in International Law: Liability Shaped by Policy Goals and Moral Outrage’, 14 *European Journal of Crime, Criminal Law & Criminal Justice* (2006) 104– 114.

¹⁷ P.A. Nollkaemper, ‘Introduction’, in Nollkaemper and van der Wilt (eds.), *supra* note 13, at 1.

¹⁸ *Ibid.*, at 2.

Rahman, the ICC Prosecutor indicted the person right at the top: the Sudanese Head of State, Al Bashir.

At the ICTY, we have witnessed a similar move up the hierarchical ladder. The first generation cases, the so-called camp cases (*Delalić and others*, *Kvočka and others*, etc.), did not capture the full organizational context of the crimes, which was the creation of a greater Serbia through a campaign of ethnic violence. Only when the ICTY moved upwards in the chain of command and indicted those at the highest political levels, e.g. Radoslav Brđanin, Milomir Stakić and Slobodan Milošević, did the systemic nature become clear(er).

The collective and organizational nature of international criminality is really only captured when those at the top are prosecuted. Only when a prosecutor moves up the hierarchical level is the role of the system fully recognized. However, this comes with evidentiary challenges and, as a result, with pressure on the principle of ICR. Linking senior defendants to individual crimes has generated broad liability theories that are difficult to reconcile with the principle of personal culpability.

3. ICR in International Law: An Overview

Criminal responsibility in international law is a dynamic concept, subject to constant change. At an abstract level one can capture the developments in the law of ICR in four phenomena, (A) the conception of JCE (B) departure from the national pedigree (C) transformation of liability theories, and (D) the quest for a liability theory that best expresses moral gravity (expressive justice).

A. Conception of JCE

Common purpose appeared in ICTY case law for the first time in the *Furundžija* case, with Judge Cassese on the bench. It was defined as ‘co-perpetration involving a group of persons pursuing a common design to commit crimes’¹⁹ where ‘the accused must participate in an integral part of the torture and partake of the purpose behind the torture’²⁰. It was distinguished from aiding and abetting which requires the accused to ‘[a]ssist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking

¹⁹ Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998 (hereinafter *Furundžija*, Trial Judgment), § 210.

²⁰ *Ibid.*, § 257 (i).

place’.²¹ Central to common purpose liability is the common plan or purpose, which compensates for the lack of physical involvement in the crime and enables imputation of the crime at the same level as the physical perpetrator. In the words of the *Furundžija* Trial Chamber: ‘Here the criminal law maxim *quis per alium facit per se ipsum facere viderus* (he who acts through others is regarded as acting himself) fully applies.’²²

It was the Appeals Chamber in *Tadić*, again with Judge Cassese on the bench, that further developed ‘common purpose’ and that, on the basis of national and international precedents, formulated the elements that defined this mode of liability. Common purpose/JCE was used to ascribe to Tadić the killing of five men at the village of Jaskići. The deaths were considered ‘natural and foreseeable consequences’ of the common purpose to ethnically cleanse the Prijedor region, a purpose to which Tadić had agreed.²³ This form of JCE, so-called extended JCE, is controversial for its attenuated link to the underlying crime and its potential to broaden beyond individual culpability.

Since the ICTY Statute does not provide for the concept of common purpose/JCE, the Appeals Chamber based its findings on customary international law and subsumed it under ‘committing’ in Article 7(1), which it held was justified by pointing to the object and purpose of the Statute and the inherent characteristics of crimes committed in warlike situations.²⁴

B. Departure from the National Pedigree

The *Tadić* Appeals Chamber endorsed the *Furundžija* Trial Judgment recognizing two distinct theories of liability: JCE and aiding and abetting.²⁵ The Chamber considered accessory liability inadequate to hold Tadić liable for the Jaskići deaths. Considering him an aider or abettor ‘might understate the degree of (his) criminal responsibility’.²⁶ The rationale for creating a hierarchy between JCE and aiding and abetting was found in the wording: committing crimes *versus* aiding and abetting crimes.²⁷ Moreover, as Cassese wrote in a paper on the limits of JCE, the distinction

²¹ *Ibid.*, § 257(ii).

²² *Ibid.*, § 256.

²³ *Tadić*, Appeal Judgment, §§ 232– 233.

²⁴ *Tadić*, Appeal Judgment, §§ 189– 191.

²⁵ See G. Boas et al., *International Criminal Law Practitioner Library, Elements of Crimes under International Law* (CUP, 2008), 10– 13.

²⁶ *Tadić*, Appeal Judgment, § 192.

²⁷ Participants in a JCE are regarded as principals who commit crimes whereas aiders/abettors contribute to the commission of crimes as accessories/secondary participants and as such are held to be less culpable than co-

comports with the reduced *mens rea* standard for aiding and abetting.²⁸ An aider and abettor ‘only intends to assist,’ but ‘does not share the *mens rea*’ of the perpetrator, so that ‘in principle, the criminal liability of the aider and abettor is more tenuous (or less weighty) than that of the participant in a common criminal enterprise.’²⁹

The hierarchy between aiding and abetting and JCE was endorsed in case law beyond *Tadić*. The Appeals Chamber in *Šljivančanin* held that, ‘[a]iding and abetting is a lower form of liability than ordering, committing, or participating in a joint criminal enterprise and may as such attract a lesser sentence’.³⁰ Empirical research on sentencing confirms that aiding and abetting is regarded less blameworthy than other modes of liability.³¹

Distinguishing between aiding and abetting and JCE-liability corresponds to the distinction between facilitators and co-perpetrators in some civil law systems. The latter are more closely involved in the commission of crimes than the former.³² Facilitators are punished less severely as instigators and co-perpetrators who are punished analogous to, or as perpetrators. While there is no ‘proof’ to make explicit the civil law influence on developing aiding and abetting into a lesser mode of liability, it is not far-fetched to assume that it is through civil law Judges like Cassese, and later Schomburg, that this categorization emerged.

This hierarchy is at odds with the domestic meaning of JCE and aiding and abetting. Both concepts, drawn from Anglo-American law, constitute forms of accomplice liability.³³ In principle no hierarchy exists between them; it is in the sentencing stage that role-variance and the degree of culpability is expressed. The difference between JCE and aiding and abetting lies in the link to the underlying crime. The latter requires a more specific link to crimes than the former.³⁴

perpetrators. Judgment, *Krstić* (IT-98-33-T), Trial Chamber, 2 August 2001, §§ 643–645; Judgement, *Kvočka* (IT-98-30/1-T), Trial Chamber, 2 November 2001, §§ 278 and 284.

²⁸ Cassese, *supra* note 9, at 116.

²⁹ *Ibid.*

³⁰ Judgment, *Šljivančanin* (IT-95-13/1-A), Appeals Chamber, 5 May 2009, § 407. Other examples: Judgment, *Vasiljević* (IT-98-32-A), Appeals Chamber, 25 February 2004, §§ 181–182; Judgment, *Krstić* (IT-98-33-A), Appeals Chamber, 19 April 2004, §§ 266, 275; Judgment, *Sainović* (IT-05-87-T), Trial Chamber, 26 February 2009, §§ 1209, 1211.

³¹ B. Holá et al., ‘International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR’, 9 *JICJ* (2011) 411, at 417.

³² E. van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP, 2012), 66–67.

³³ See K.J.M. Smith, *A Modern Treatise on the Law of Criminal Complicity* (OUP, 1991); E. van Sliedregt, ‘Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide’, 5 *JICJ* (2007) 184.

³⁴ See Smith, *ibid.*, at 69; S.H. Kadish, ‘Complicity, Cause and Blame: A Study in the Interpretation of Doctrine’, 73 *California Law Review (CLF)* (1985) 323.

There have been objections to the categorization of different types of offenders since it does not comport with Anglo-American law.³⁵ In *Odžanić*, however, the majority of the Appeals Chamber, with a dissent of Australian Judge Hunt, affirmed that ‘joint criminal enterprise is to be regarded, not as a form of accomplice liability, but as a form of commission’.³⁶ This ruling, illustrates how a mode of liability develops into a *sui generis* concept when applied in a multinational context where different legal cultures meet.³⁷

JCE, and the distinction between those who ‘commit’ and those who aid and abet, gained ground outside the ICTY as well.³⁸ At the ICTR, the categorization comes with the same moral hierarchy as at the ICTY.³⁹ At the Special Court for Sierra Leone (SCSL), the *RUF* Trial Chamber stated that ‘aiding and abetting as a mode of liability generally warrants a lesser sentence than that imposed for a more direct form of participation’.⁴⁰ The recent conviction of Charles Taylor is interesting in that respect. Taylor was convicted for aiding and abetting war crimes and crimes against humanity and sentenced to 50 years in jail.⁴¹ Had he been convicted for JCE, the sentence would have been higher.⁴² Still, 50 years is a serious sentence in the overall SCSL sentencing practice. It seems that aiding and abetting does not automatically imply a lenient sentence; leniency is relative concept.⁴³

In essence, aiding and abetting in international criminal law appears to differ from its equivalent under domestic law; it has moved away from its Anglo-American pedigree.⁴⁴

³⁵ See Separate Opinion of Judge David Hunt on Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, *Milutinović et al.* (IT-99-37-AR72), Appeals Chamber, 21 May 2003, § 31.

³⁶ *Ibid.*, § 20.

³⁷ See Van Sliedregt, *Joint Criminal Enterprise as a Pathway*, *supra* note 33, 184-207.

³⁸ ICTR: Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ndirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, *Karemera et al.* (ICTR-98-44-T), Trial Chamber, 11 May 2004; Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, *Rwamakuba* (ICTR-98-44-A72.4), Appeals Chamber, 22 October 2004, §§ 19–21, 31–32; Judgment, *Simba* (ICTR-2001-76-A), Appeals Chamber, 27 November 2007. SCSL: Judgment, *Sesay et al.* (SCSL-04-15-A), Appeals Chamber, 26 October 2006; Further Amended Consolidated Indictment, *Brima et al.* (ARFC-case) (SCSL-2004-26-PT), Trial Chamber, 18 February 2005, § 33.

³⁹ Judgment, *Semanza* (ICTR-97-20-A), Appeals Chamber, 20 May 2005, § 388; Judgment, *Ndindabahizi* (ICTR-01-71-A), Appeals Chamber, 16 January 2007, § 122.

⁴⁰ Sentencing Judgment, *Sesay et al.* (SCSL-04-15-T), Trial Chamber, 8 April 2009.

⁴¹ Judgment, *Charles Taylor* (SCSL-03-1-T), Trial Chamber, 26 April 2012, § 6959.

⁴² Sentencing Judgment, *Charles Taylor* (SCSL-03-1-T), Trial Chamber, 30 May 2012.

⁴³ Rather, it affects, along with other factors, the sentence of the convicted person. Charles Taylor’s capacity as a former head of state was an aggravating factor that seems to have counterbalanced the mitigation that aiding/abetting implies.

⁴⁴ The debate between Kevin Heller and Diane Amann on the *Opinio Juris*-blog is interesting in this respect. Heller, in a breaking-news article on the day of the conviction, commented that the conviction for ‘only’ aiding and abetting was a ‘stunning rebuke to the prosecution’ and a ‘colossal victory’ for Taylor thus embracing the mitigation that

C. Transformation of Liability Theories

1. JCE

JCE in *Tadić*, and like the World War II precedents it was modelled on,⁴⁵ was applied to a small-scale, mob violence situation. Yet, JCE-law beyond *Tadić* mainly concerns large enterprises establishing liability of senior military and political leaders. Prominent examples are the cases of *Krajisnik*,⁴⁶ *Brđanin*,⁴⁷ *Martić*,⁴⁸ and *Šainović and others*.⁴⁹ The usage of JCE at leadership level has changed the concept of JCE as originally constructed.

The common purpose/plan is JCE's distinctive feature. Its scope, as to time and geographical location, has expanded considerably as a result of its application to large-scale enterprises. While the plan must amount to or involve the commission of a crime, it does not require an accused's contribution to a JCE to be criminal.⁵⁰ Common plans or objectives may be as broad as persecution, deportation and forcible transfer in a certain area or with regard to a certain group of people. These objectives can be achieved through the commission of specific crimes such as murder, torture and rape.⁵¹ The objective can be even more at a 'meta-level', e.g. the aim to modify the balance of Kosovo through the commission of deportation, murder, forcible transfer and persecution⁵² or 'the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population'⁵³.

The structure of this type of JCE-liability with criminal objectives at meta-level and specific crimes at micro level, generated a theory of liability where the crimes committed by

aiding/abetting implies: <http://opiniojuris.org/2012/04/26/breaking-charles-taylor-convicted-but/>, accessed on 1 May 2012. Responding to Heller — in the period before the sentence was announced — Amann faults the attempts to minimize the conviction of Taylor. Referring to the US Criminal Code she makes clear that there is no reason to regard aiding/abetting a lesser form of liability: 'Thus in the United States — a jurisdiction whose behavior contributes to the state practice that forms customary international law — an aider and abettor is equally criminally responsible, and subject to equal punishment, as the principal perpetrator of a crime'. <http://www.intlawgrrls.com/2012/04/questions-on-aiding-abetting.html>, accessed on 1 May 2012

⁴⁵ *Trial of Erich Heyer and six others*, British Military Court for the Trials of War Criminals, 18- 19 and 21- 22 December 1945, UNWCC, Vol. I, 88 *et seq.*

⁴⁶ Judgment, *Krajisnik* (IT-00-39-A), Appeals Chamber, 17 March 2009 (hereinafter *Krajisnik* Appeal Judgment).

⁴⁷ Judgment, *Brđanin* (IT-99-36-A), Appeals Chamber, 3 April 2007 (hereinafter *Brđanin*, Appeal Judgment).

⁴⁸ Judgment, *Martić* (IT-95-11-A), Appeals Chamber, 8 October 2008 (hereinafter *Martić* Appeal Judgment).

⁴⁹ Judgment, *Šainović et al.* (IT-05-87-T), Trial Chamber, 26 February 2009.

⁵⁰ As long as the acts significantly contribute to the common criminal objective they can generate criminal liability. *Krajisnik* Appeal Judgment, § 218.

⁵¹ Judgment, *Kvočka et al.* (IT-98-30/1-A), Appeals Chamber, 25 February 2008, §§ 319- 320.

⁵² Amended Joinder Indictment, *Milutinović et al./ Sainović et al.* (IT-05-87-PT), 21 June 2006, §19.

⁵³ *Martić* Appeal Judgment, § 445.

those on the ground ('relevant physical perpetrators' or 'principal perpetrators') are imputed to those at leadership level. This is a very different form of JCE as conceptualized in *Tadić*.

The leading case that marks this transformation of JCE is *Brđanin*.⁵⁴ The key finding, changing JCE is that the principal perpetrator does not have to be a member of the JCE. The Appeals Chamber found that '[w]hat matters is ... not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE but whether the crime in question forms part of the common purpose'.⁵⁵ To hold a member of the JCE responsible for crimes perpetrated by a non-member, it is sufficient to show that at least one member of the JCE can be linked to a non-member. When the latter is used by the former as a tool to carry out the common criminal purpose, the other participants of the JCE can be held equally liable for the crimes.⁵⁶

The appellate ruling in *Brđanin* introduced a vertical⁵⁷ or inter-linked form of JCE.⁵⁸ The *Brđanin* judgement enabled the prosecutor to apply JCE entirely at leadership level, as long as it can be shown that one of the participants is linked to the physical perpetrator who is used as a tool to carry out the crime(s). On the basis of this ruling the link between the JCE participants and the principal perpetrator(s) effectively loosens. This 'delinking' through the acceptance of non-membership of the physical perpetrator, fits the nature of system criminality as discussed previously.

Loosening the link between participants in the JCE at leadership level and perpetrators at execution level raises concerns with regard to the principle of personal culpability. An attenuated link increases the possibility of guilt by association.⁵⁹ We are reminded here of what Cassese wrote with regard to the Trial Chamber judgment in *Brđanin*,

To extend criminal liability to instances where there was no agreement or common plan between the perpetrators and those who participated in the common plan would seem to excessively

⁵⁴ *Brđanin* Appeal Judgment. See C. Farhang, 'Point of No Return: Joint Criminal Enterprise in *Brđanin*', 23 *Leiden Journal of International Law (LJIL)* (2010) 137.

⁵⁵ *Brđanin* Appeal Judgment, § 410.

⁵⁶ *Ibid.*, § 413.

⁵⁷ 'Vertical' in the sense of a senior person using another as a tool to commit crimes. This can be opposed to a 'horizontal' JCE like that of *Tadić* where all perpetrators are engaged with crimes at the same level.

⁵⁸ See also J.D. Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability', 25 *LJIL* (2012) 771.

⁵⁹ The *Brđanin* Appeals Chamber was aware of coming close to exceeding the limits of individual responsibility and emphasized that 'JCE is not an open-ended concept that permits conviction based on guilt by association.' (§ 428) Judge Van den Wyngaert in a separate declaration draws attention to the safeguards enumerated in the Judgement and the requirement of a 'significant contribution' to the criminal endeavour. *Brđanin* Appeal Judgment, Declaration of Judge Van den Wyngaert, § 7.

broaden the notion, which is always premised on the sharing of a criminal intent by all those who take part in the common enterprise (and this premise is the sine qua non condition for the possible additional liability arising in the third category of JCE, where the ‘primary offender’ commits a further crime, not envisaged in the common plan).⁶⁰

In substantiating the existence of a vertical JCE in international law, the Appeals Chamber relied on only two cases, the *Justice* case and the *RuSHA* case. This is not sufficient to sustain a customary law basis. The judges themselves were aware of the thin legal basis supporting vertical JCE as evidenced by their statement that these cases have been ‘interpreted as a valid source of the contours of joint criminal enterprise liability in customary international law [emphasis added].’⁶¹

2. Superior Responsibility

Analysis of ICTY case law with regard to superior or command responsibility⁶² shows a division into first, second and third generation cases.⁶³ The first generation of cases concerns the detention camp cases and the land mark ruling in *Delalić and others*.⁶⁴ The second-generation case law emerged with the ruling in *Hadžihasanović and others* on so-called successor superior responsibility.⁶⁵ Since the latter decision, two views of command responsibility can be identified: command responsibility as mode of liability and command responsibility as separate offence, as a failure to act.⁶⁶ The linkage between superiors and culpable subordinates has been gradually loosened in what can be regarded third generation cases, starting with *Blagojević* and *Orić*.

⁶⁰ Cassese, *supra* note 9, at 126.

⁶¹ *Ibid.*, § 415.

⁶² These terms are used interchangeably.

⁶³ E. van Sliedregt, ‘Command Responsibility at the ICTY. Three Generations of Case Law and still Ambiguity’, A.W. Swart et al. (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP, 2012).

⁶⁴ Judgment, *Delalić et al.* (IT-96-21-T), Trial Chamber, 16 November 1998 and Appeals Chamber, 20 February 2001.

⁶⁵ This concerns the liability of commanders for crimes committed by their subordinates *before* they assumed command and which have not been punished once the commander assumed command. Decision on Joint Challenge to Jurisdiction, *Hadžihasanović et al.* (IT-01-47-AR72), Appeals Chamber, 16 July 2003. See B. Sander, ‘Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence’, 23 *LJIL* (2010) 105; A.M.M. Orić, ‘*Stare decisis* in the ICTY Appeal System? Successor Responsibility in the *Hadžihasanović* Case’, 10 *JICJ* (2012) 365.

⁶⁶ The fact that these views emerged relatively late into the ICTY’s existence is because command responsibility as a liability theory was for a long time ignored by the prosecutor who favoured JCE as a basis of liability. This had to do with the fact that command responsibility, certainly in early cases, has been regarded as narrowly defined, requiring a close link between superiors and subordinates, which was unappealing for a prosecutor seeking to secure convictions. See Sander and Orić, *supra* note 65.

These are cases of more senior defendants and of operational commanders — commanders in the field — who are further removed from the scene of the crimes than the superiors that stood trial in the early case of *Čelebići*.

A number of requirements need to be met before a defendant can be held accountable under the theory of superior or command responsibility.⁶⁷ Two of these requirements are demanding: that the superior-subordinate relationship is governed by ‘effective control’, and that a commander knew or had reason to know of subordinate crimes.

Over the years superior or command responsibility has expanded through a broad interpretation of ‘commission’. In *Blagojević*, and *Orić* ‘commission’ was interpreted as encompassing all modes of participation listed in Article 7(1) of the ICTY Statute, planning, ordering, instigating, and aiding and abetting crimes.⁶⁸ This position has also been adopted at the ICTR.⁶⁹ A further broadening was sought in the *Karadžić* indictment where the prosecutor alleged that the defendant could be held liable for the crimes that his subordinates, in turn, failed to prevent or punish. In other words, ‘commission’ in Article 7(3) encompasses superior responsibility, which enables a form of ‘superior responsibility for superior responsibility’ or ‘multiple superior responsibility’.⁷⁰

Superior responsibility further expanded by interpreting ‘subordinate’ as to include those who are not *directly* subordinate to a superior.⁷¹ Moreover, a superior can be held responsible for acts of ‘unidentified’ subordinates. It suffices to specify to which group the perpetrator belonged to and to prove that the accused exercised effective control over that group.⁷²

For the sake of brevity I will not go into the details, but on a broad level, it can be argued that also in the area of superior responsibility notions have been broadened that loosen the link between subordinates and superiors and hence raise concern as to the state of the principle of

⁶⁷ Namely (i) the existence of a superior-subordinate relationship; (ii) that the superior knew or had reason to know that the subordinate was about to, or had committed a crime (excluding a negligence standard) and (iii) that the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.

⁶⁸ Judgment, *Blagojević and Jokić* (IT-02-60-A), Appeals Chamber, 9 May 2007, §§ 277–285; See *Orić* Trial Judgment, § 20 (hereinafter *Orić*, Trial Judgment); Judgment, *Boškoski and Tarculovski* (IT-04-82-T), Trial Chamber, 10 July 2008, § 404.

⁶⁹ See *Nahimana et al.* (ICTR-99-52-T), Trial Chamber, 3 December 2003, §§ 485 *et seq.*

⁷⁰ See C. Meloni, *Command Responsibility in International Criminal Law* (TMC Asser Press, 2010) 89–91 (referring to superior responsibility per superior responsibility), and G. Mettraux, *The Law of Command Responsibility* (OUP, 2009) 134–137 (using the term ‘perpendicular command responsibility’).

⁷¹ *Orić*, Trial Judgment, § 478.

⁷² Judgment, *Hadžihasanović & Kubura* (IT-01-47-T), Trial Chamber, 15 March 2006, § 90. See Meloni, *supra* note 70, 87–89; Mettraux, *supra* note 70, 159–162.

individual culpability. There appears to be little or no support for the broadening of Article 7(3) ICTY Statute through the interpretation of the notion of ‘commission’ or of ‘subordinate’.⁷³

D. The Quest for Expressive Justice

A fourth phenomena that describes the development of ICR in international law, is the quest for a liability theory that not only captures systemic crime but that also serves the expressive function of ICL; a theory that enables ‘fair labelling’.

Increasingly, value is attached to fair labelling requiring that liability be branded in a way that it fairly represents the nature and magnitude of the law-breaking.⁷⁴ In the words of David Nersessian, ‘The fair labelling principle aims to ensure that the label describing criminal conduct accurately reflects its wrongfulness and severity A proper label reflects both the *essence* and the *totality* of the criminal conduct.’⁷⁵ Fair labelling accounts for the advance of the normative approach to criminal participation and the desire to adhere to the distinction between those who are culpable as principals and those who are culpable as accessories.

In the normative approach a principal is the one who is ‘most responsible’ in the sense that he or she has decisive influence on the commission of the crime, without necessarily physically committing it. This contrasts to what one can term the ‘naturalistic approach’ to liability⁷⁶, which takes as starting point the natural world and the reality of cause and effect. In the naturalistic approach the principal is the one who most immediately causes the *actus reus*/the offence. The accessory is the one who contributes to causing the *actus reus*. This generally means that the principal is the physical perpetrator and the accessory or secondary party the intellectual perpetrator. Anglo-American complicity law is the classic example of a naturalistic approach.

⁷³ For instance Art. 86 of Additional Protocol I, ILC draft codes; Art. 28 ICCSt.; UN Darfur Report. See Mettraux, *supra* note 71, at 135.

⁷⁴ On fair labelling: A. Ashworth, *Principles of Criminal Law* (6th edn., OUP, 2009), at 78; A. Ashworth, ‘The Elasticity of Mens Rea’, in C. Tapper (red.), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, 1981) 45, 53. D. Guilfoyle, ‘Responsibility for Collective Atrocities: Fair labelling and Approaches to Commission in International Criminal Law’, *Current Legal Problems* (2011), at 6 (doi:10.1093/clp/cu006).

⁷⁵ D. Nersessian, ‘Comparative Approaches to Punishing hate: The Intersection of Genocide and Crimes Against Humanity’, 43 *Stanford Journal of International Law* (2007) 254, 255– 256.

⁷⁶ On normative and naturalistic approaches to criminal participation in international law, see J. Vogel, ‘How to Determine Individual Criminal Responsibility in Systematic Contexts: Twelve Models’, *Cahiers de Défense Sociale* (2002) 151; Van Sliedregt, *supra* note 33, 71– 73.

The previously discussed evolution of aiding and abetting as a lesser form of liability and the concomitant bolstering of JCE-liability as committing, which connotes principal liability, is illustrative for the advance of the normative approach in ICTY case law. Participants in a JCE are to be termed ‘principals’ and not accessories; accessorial liability would not suffice to express their role as masterminds.

Preference for categorization, i.e. creating a hierarchy of liability in normative terms, is even stronger at the ICC where the distinction between principals and accessories is cultivated through the adoption of the theory of ‘control of the crime’.⁷⁷ The Pre-Trial Chambers in the confirmation decisions in *Lubanga* and *Katanga* distinguish between principal liability in subparagraph (a) and accessorial liability in subparagraphs (b-d). While they do not say so in so many words,⁷⁸ the PTCs’ decisions in *Katanga* and *Lubanga* imply that a principal-accessory classification indicates a greater or lesser degree of responsibility. Charging defendants as intellectual or remote principals under 25(3)(a) means they played a central role, that they had ‘control of the crime’.⁷⁹ This is contrasted to liability under subparagraphs 25(3)(b-d) where control plays no role.⁸⁰ Consider for instance Gerhard Werle and Boris Burghardt’s comment, ‘in light of the principle of culpability, a mode of participation that requires control over the crime inevitably results in a higher degree of individual criminal responsibility than a mode of participation not based on such control. This has to be reflected in the sentencing stage.’⁸¹

The legal basis of the control of the crime theory is found in German legal doctrine. This has evoked criticism for not being widely accepted, let alone being established in customary

⁷⁷ Decision on the Confirmation of Charges, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/01-01/06, ICC, P-T. Ch. I, 29 January 2007, §§. 330-335; Decision on the Confirmation of Charges, *Prosecutor v. Katanga et al.*, Case No. ICC-01/04-01/07, ICC, P-T. Ch. I, 26 September 2008, §§. 506-508.

⁷⁸ See Olásolo, who refers to non-principal liability, as ‘mere’ participation and ‘only’ accessorial liability. H. Olásolo, *The Criminal Responsibility of Senior Political and Military Superiors as Principals to International Crimes* (Oxford: Hart Publishing, 2009), at 13 and 15. Schabas, with regard to the liability of Eichmann and Schreibtischmörder more generally, ‘Characterizing those who do not physically commit the crime as ‘accomplices’, however, fails to capture the significance of their role’, W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 431.

⁷⁹ Consider for instance § 518 of the *Katanga et al.* Confirmation Decision: ‘The leader’s ability to secure this automatic compliance with his orders is the basis for his principal – rather than accessorial – liability. The highest authority does not merely order the commission of a crime, but through his control over the organisation, essentially decides whether and how the crime would be committed’.

⁸⁰ The PTCs in *Lubanga* and *Katanga* reject the ICTY understanding of JCE-liability as a form of co-perpetration/principal liability and instead regard common purpose liability in 25(3)(d) as a ‘residual form of accessorial liability’ since it is caught in term of *contributing* to the commission of crimes. *Katanga* Confirmation Decision, § 483 and the *Lubanga* Confirmation Decision, § 337.

⁸¹ G. Werle and B. Burghardt, ‘Indirect Perpetration: A Perfect Fit for International Prosecution of Armchair Killers?’ 9 *JICJ* (2011) 85, at 88.

international law.⁸² Like JCE, ‘control of the crime’ is a product of judicial creativity. In a dissenting opinion to the *Lubanga* judgment, Judge Fulford opines that a plain reading of the Statute does not support the ‘control of the crime’ theory nor does it provide for a hierarchy of liability. In his view, Article 25(3) of the ICC Statute contains a number of overlapping modes of liability.

The fact that international courts adhere to a principal–accomplice classification is noteworthy, particularly since labelling does not come with a mandatory mitigated or increased sentence in international law. Moreover, accessories are punished for the underlying crimes and not for ‘participating in’ or ‘contributing to a crime’. As John Gardner, in his analysis of complicity law, writes, ‘Someone against whom it is proved that they aided, abetted, counselled or procured the commission of murder by another – for example, by supplying the gun which fired the fatal shot – is herself convicted of murder. So far as her conviction goes, it is just as if she had pulled the trigger herself.’⁸³ This nuances the distinction between principals and accessories and the need to rely on the classification of ‘principal’ for the sake of fair labelling.

Cultivating the principal–accomplice distinction and embracing the normative approach to participation is prompted by the desire to bolster the principal-status.⁸⁴ Stigmatization through the principal status is important bearing in mind the denunciatory and educational function of punishment.⁸⁵ Making clear who masterminded crimes by referring to him/her as ‘principal’ who ‘commits’ crimes is important in communicating to victims and the international community as a

⁸²S. Manacorda and C. Meloni, ‘Indirect Perpetration versus Joint Criminal Enterprise. Concurring Approaches in the Practice of International Criminal Law?’ 9 *JICJ* (2011), 159– 178, at 170. See also T. Weigend, ‘Perpetration Through an Organization. The Unexpected Career of a German Legal Concept’, 9 *JICJ* (2011) 91– 111, 105.

⁸³ J. Gardner, ‘Aid, Abet, Counsel, Procure: an English View of Complicity’, in A. Eser et al. (eds), *Einzelverantwortung und Mitverantwortung im Strafrecht. European Colloquium 1996 on Individual, Participatory and Collective Responsibility in Criminal Law* (Max Planck Publications, 1998), 227– 228.

⁸⁴ Consider in this respect Flavia Zorzi Giustiniani’s paper on the ICTR Appeals Chamber’s ruling in *Seromba* where a broad concept of ‘commission’ was adopted, arguing that instigation would have been more appropriate. According to Zorzi Giustiniani this was to impose a severe and exemplary punishment on Seromba: F. Zorzi Giustiniani, ‘Stretching the Boundaries of Commission Liability: The ICTR Appeals Judgment in *Seromba*’, 6 *JICJ* (2008) 783, at 798. See also G. Townsend, ‘Current Developments in the Jurisprudence of the International Criminal Tribunal for Rwanda’, 5 *ICLR* (2005) 147, at 156.

⁸⁵ M. Drumble, *Atrocity, Punishment and International Law* (CUP, 2007), at 174. In sentencing practice, this translates to attaching much weight to the sentencing purposes of retribution and deterrence. Judgment, *Delalić et al.* (IT-96-21-A), Appeals Chamber, 20 February 2001, § 806; Sentence, *Serushago* (ICTR 98-39-S), Trial Chamber, 5 February 1999, § 20; Judgment In Sentencing Appeals, *Tadić* (IT-94-1-A and IT-94-1-Abis), Appeals Chamber, 26 January 2000, § 48. Judgment, *Brđanin* (IT-99-36-T), Trial Chamber, 1 September 2004, § 1092; Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, §§ 287– 291; Judgement and Sentence, *Ruggiu*, Case No. ICTR-97-32-I, ICTR, T.Ch., 1 June 2000, § 33; Cf. R. Henham, ‘Some issues for sentencing in the International Criminal Court’, 52 *International and Comparative Law Quarterly* (2003), at 81. Note also § 5 of the preamble of the ICC Statute and the aim to contribute to the prevention of such crimes.

whole, who was the ‘real’ culprit.⁸⁶ Against this background, the naturalistic approach to criminal participation, referring to masterminds as secondary participants, seems inadequate.

4. Extrinsic Features: Multiculturalism and Flexibility

The four phenomena described above support the argument that ICR has a *sui generis* nature. Moreover, from the overview, two extrinsic features of ICR emerge: multiculturalism and (some) flexibility of the law.

As to multiculturalism, it is not difficult to discern in the JCE/aiding and abetting debate, the common law position, on the one hand, and the civil law position, on the other hand. A similar divide of legal cultures can be discerned in the debate on the distinction between principals and accessories, which brings to light the difference between the naturalistic approach and the normative approach to criminal participation. The former represents Anglo-American complicity law, the latter civil law categorization of modes of liability. The multinational composition of international courts has led to misunderstandings and jurisprudential disputes, pulling liability theories in either a common law or a civil law direction. Eventually, multiculturalism lead to concepts that have no precise equivalent in domestic law and do not belong to either legal tradition and in that sense qualify as truly *sui generis*.

The second extrinsic feature that surfaces from the overview of case law is the flexibility of legal concepts. Two reasons seem to drive the evolution of the law in the area of liability. One is the quest for the liability theories that best serve the expressive function of international criminal law. The other is a result-oriented approach towards adjudication where judges redevelop and transform theories of liability to make them fit the facts and a certain (senior) class of defendants. The evolution of JCE and superior responsibility shows how fluid the law is and how the need to adjust to reality is an important factor.

In international criminal law, judges play an important role in clarifying and developing the law through interpretation of statutes and treaties as well as identifying customary law. Antonio Cassese was a proponent of what can be referred to as ‘progressive law-making’.⁸⁷ He believed that the rudimentary character of international criminal law allowed for

⁸⁶ See C. Kress, ‘Claus Roxins Lehre von der Organisationsherrschaft und das Völkerstrafrecht’, 153 *Goldammer’s Archiv für Strafrecht* (2006) 304, at 308; Weigend, *Perpetration through an Organization*, *supra* note 83, 102– 103.

⁸⁷ In particular his view to the ascertainment of custom, see A. Cassese, ‘The ICTY: A Living and Vital Reality’, 2 *JICJ* (2004) 585.

progress and a certain flexibility with regard to the principle of legality.⁸⁸ Through judicial interpretation international humanitarian law has been updated⁸⁹ and crime definitions and liability theories have been developed. Certainly in the early stages, it was necessary for international criminal justice to be a ‘creative interpretational enterprise’.⁹⁰ But while there is merit in filling gaps of a rudimentary law, what about transforming existing law and liability theories? Are there limits to judicial development, and if so, what are they?

Here we can refer to theories on casuistry. In *The Abuse of Casuistry*,⁹¹ Albert Jonsen and Stephen Toulmin argue that there is good and bad casuistry: it is bad when different situations are treated the same without a clear motivation or explanation or when similar situations are treated differently without a justification for this differential treatment. Good casuistry is the opposite; it recognizes the inevitability of facts changing legal concepts and justifies and makes explicit the reasons for such a change. Bad casuistry violates the principle of legal certainty; good casuistry does not.

Casuistry is inevitable, also in international criminal law. Yet one wonders whether some of the case law discussed previously stands the test of good casuistry. The transformation of JCE-liability and superior responsibility has not been motivated in light of the facts and, most importantly, of earlier findings and case law. Treating JCE-liability in *Brđanin* as if it were the same as in *Tadić* is, in my view, not good casuistry and not comporting with the principle of legality.

5. Culpability Principle under Pressure

Allison Danner and Jennifer Martinez, who regard international criminal law as an outgrowth of three legal traditions — domestic criminal law, international human rights law, and transitional justice — convincingly argue that the victim-oriented approach of human rights proceedings and the ‘wide-angle lens’ of criminal trials in the transitional context account for the expansion of ICR in international law.⁹² In their view, the international criminal justice model enhances the

⁸⁸ Cassese, *supra* note 6, at 32, fn. 1.

⁸⁹ See for instance E. Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP, 2010).

⁹⁰ J. Powderly, ‘Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?’ in S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (OUP, 2010), at 44.

⁹¹ A.R. Jonsen and S. Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (UCP, 1989).

⁹² J.S. Martinez and A.M. Danner, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, 93 *CLF* (2005) 75, 96–100.

risk of expanding the concept of criminal responsibility beyond its individual limits. Domestic criminal law systems may themselves have seen significant incursions into the vitality of the culpability principle, however, international criminal law seems to face distinct challenges not encountered by municipal criminal justice systems.

The *sui generis* features of ICR reveal international criminal law's instrumental role. International trials are tools to enforce international law. Punishment has a denunciatory and educational function. Prosecutors focus on leaders to capture the systemic nature of international crimes. Theories of liability are created and transformed with the purpose to convict, and with the desire to express the guilt of those who, while responsible, had no blood on their hands. This instrumental character inevitably puts pressure on the principle of culpability.

Instrumentality is not halted by a clear legal framework or a black letter law approach. To the contrary, it is reinforced, or at least accommodated, by rudimentary statutory law (at the ad hoc Tribunals) and an activist approach to law-making. Even at the ICC where the normative framework consists of an elaborate statute, elements of crime and a strict provision on sources of law (Article 21), judges have taken the opportunity to develop the law through interpretation. The first decisions by PTCs developing the control of the crime-theory are close to law making and go well beyond the mere task of confirming charges on the basis of existing law.

6. Concluding Observations

This paper develops the argument that ICR at the international level has a *sui generis* nature. One can identify intrinsic and extrinsic features that substantiate the distinctive character of criminal responsibility in international law. As to the intrinsic features, ICR in international law is distinctive in its two-tier liability scheme. This is a one-size fits all approach; while masterminds and executioners play a different role in the context of masterminded violence, they are punished on an equal basis for having *committed* crimes. It serves the expressive value of punishment to punish intellectual perpetrators as if they had blood on their hands. Yet, squeezing a two-tier criminality scheme into a one-tier liability model has caused linkage problems and puts pressure on the principle of personal culpability. The extrinsic features surfaced from an appraisal of ICR in international law. Criminal responsibility in international law is the product of a *sui generis* adjudication process, marked by multiculturalism and flexibility. The process of international

adjudication affects the shaping of liability. ICR is a dynamic concept with loose outer limits, increasingly forging its own path, away from its national pedigree.

According to the above the case of ICR in international law can be termed 'curious' for two main reasons. Firstly, because of the *sui generis* nature; it is not simply a transplant of domestic legal concepts onto the international level, but a new unique creation. Secondly, although the principle of individual responsibility is widely accepted, it is difficult to realize in practice. On account of the collective and systemic nature of international crimes individual guilt attribution (which would not necessarily reflect reality) becomes more complicated. Moreover, international criminal law's instrumental role, reflected in ICR's flexibility, has generated broad liability theories that border on collective responsibility.