



Complicity in International Criminal Law

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Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, May 2014 (submission)

European University Institute
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Abstract:

Complicity is a criminal law doctrine that attributes responsibility to those who do not physically perpetrate the crime. It is an essential mode of liability for core international crimes because it reaches out to senior political and military leadership. These persons do not usually engage in direct offending, yet in the context of mass atrocities they are often more culpable than foot soldiers. The Statutes of the ad hoc tribunals, hybrid courts and the International Criminal Court expressly provide for different forms of complicity, and domestic legal systems recognize it in one form or another. This is in contrast with alternative modes of liability implied from the Statutes to address the situations with multiple accused removed from the scene of the crime – (in)direct co-perpetration, extended perpetration and the joint criminal enterprise.

Acknowledgements

The past four years in Florence have been, first and foremost, an exercise in personal growth, and I would like to take this opportunity to thank those who accompanied me on this journey.

I dedicate the thesis to the memory of my father and to my mother. Everything that I am in life is thanks to my wonderful parents. I inherited my dad's outlook on life that served as a reference point and kept me grounded during my studies. My mum's patience, constant support and love gave me strength and inspiration.

I have been extremely fortunate to have Professor Martin Scheinin as my supervisor. I would like to thank him for guiding me through the first steps of my academic life. I knew that I could always rely on him for a solid advice. It is his confidence and trust in me that helped me freely explore my interests. I was not fully aware of what to expect from a PhD program when I embarked on it, and it is only thanks to Martin I never lost enthusiasm in research and want to follow this path further.

I am very grateful to Professor Morten Bergsmo for offering me plenty of opportunities to present my work, learn new things and strive for excellency. I am happy to have met Professors Paola Gaeta and Payam Akhavan who brilliantly push academic boundaries and ask difficult questions. I would also like to thank the members of my jury Judge Christine Van den Wyngaert, Professor William Schabas and Professor Nehal Bhuta for taking time to read and engage with my thesis and provide me with their thoughtful and valuable comments. I am truly honored to have you as my examining board.

I would not have accomplished this huge project without my 'Florentine family' - Charlotte Werger, Alice Margaria, Marii Väljataga and Lucila de Almeida. I thank the members of the international criminal law and human rights working groups for the stimulating discussions and friendly support, and, in particular, the best co-coordinators Alexandre Skander Galand and Cornelius Wiesener. I have been lucky to share many great moments with Chantal Bratschi, Milena and Bosko Tripkovic, Margaretha Wewerinke, Daria Popova, Anna Bara and the other inspirational people I have met at the EUI in the past years.

Last but not the least, I would like to thank the city of Florence and its charming inhabitants for being the best environment for undertaking a PhD study. Florence made me happy every day of my stay here and became one of the biggest discoveries of my research.

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I. Introduction

Complicity is a notoriously difficult legal notion to grasp. K.J.M. Smith wrote “[s]urveying complicity’s hazy theoretical landscape, can, depending on the commentator’s nerve, temperament, and resilience, induce feelings running from hand-rubbing relish to hand-on-the-brow.”¹

Complicity is a doctrine that attributes criminal responsibility to those who do not physically perpetrate the crime.² Thus, complicity’s function is to construct a link between the accomplice and the criminal act of another person. This is not an easy task if one accepts the distinct moral importance of the perpetrator’s role.³ Criminal law is premised on the principle of individual autonomy that views individuals as rational persons responsible for their own acts.⁴ If the perpetrator is the one ultimately responsible for the act, why do we need to punish those who *merely* influence or aid him?

Smith referred to the difficulties of researching complicity in domestic law. Undertaking the same journey in the context of international criminal law presents even more challenging obstacles. Consider the following cases:

- The commander of the Bosnian Serb troops, positioned around Sarajevo during the siege of the city, does nothing to prevent the forces under his command from targeting - by shelling and sniping - the civilians trapped in the city. This situation lasts for twenty-three months. In this period, the commander remains passive: sometimes he decreases the level of attacks, only to increase them later. The commander’s complicity for ordering crimes perpetrated by the troops is established based on his lack of reaction to these crimes. There is no the direct evidence that he ordered the attacks. The commander is sentenced to life imprisonment;⁵
- The most senior officer in the Yugoslav Army knowingly provides logistical and personnel assistance to the Army of the Republika Srpska, which is committing crimes in Sarajevo and Srebrenica.⁶ He is acquitted

¹ K.J.M. Smith, *A Modern Treatise on the Law of Criminal Complicity*, Clarendon Press Oxford, 1991, at 4.

² Kutz defined complicity slightly differently as a concept that renders one person liable for the criminal act of another when the accomplice intentionally aids, encourages, or both, the direct perpetrator in the commission of act. See C. Kutz, ‘The Philosophical Foundations of Complicity Law’, in J. Deigh and D. Dolinko (eds) *The Handbook of Philosophy of Criminal Law*, Oxford University Press, 2011, at 151.

³ K.J.M. Smith, at 81.

⁴ A. Ashworth, *Principles of Criminal Law*, Clarendon Law Series, 2nd ed, 1995, at 83.

⁵ Prosecutor v. *Galić*, ICTY Case No. IT-98-29-T, Trial Judgment, 5 December 2003 (‘*Galić* Trial Judgment’), §§ 741-749.

⁶ Prosecutor v. *Perišić*, ICTY Case No. 04-81-A, Appeal Judgement, 28 February 2013 (‘*Perišić* Appeal Judgment’), §§ 2, 62 and 68.

of aiding and abetting crimes against humanity, including murder, persecutions, and attacks on civilians. The rationale for the acquittal is a failure to establish that the officer's assistance is specifically directed at supporting the criminal activities, and not just aimed at winning the war;⁷

- The acting president of Liberia and a member of the ECOWAS Committee supplies financial aid and other forms of practical assistance to warlords in the neighbouring Sierra Leone, where he knows crimes are being committed on a large scale.⁸ The accused is convicted of aiding and abetting and planning murders, rapes and other acts of violence committed during the Sierra Leonean civil war. He is sentenced to 50 years of imprisonment;⁹
- A pharmacy owner in Rwanda participates in a meeting where the demolition of a local church is discussed. Approximately 2000 Tutsi men, women and children are known to have taken refuge in this church. After the meeting, the businessman gets a bulldozer that is subsequently brought to the parish and used to demolish the church, crushing those inside.¹⁰ The businessman is sentenced to 30 years of imprisonment for planning genocide and extermination.¹¹

These examples demonstrate the complexity of holding an individual complicit in crimes against humanity, war crimes and genocide. International criminality breeds an infinite number of factual scenarios; the accused range from local businessmen to the former (or acting) heads of state. Because international criminal law targets organized, large-scale offending, the distance between the accomplice and the harm is usually greater compared with the regular domestic law situations. This peculiarity creates much room for inferential analysis as to the mental state of the accused and fosters creativity in the application of traditional legal doctrines. Different interpretations of the same doctrine lead to startlingly different results in each particular case – from life sentence to an acquittal.

⁷ Ibid, §§ 62 and 68.

⁸ Prosecutor v. *Taylor*, SCSL-03-1-T, Trial Judgement, 11 May 2012 ('*Taylor* Trial Judgment'), §§ 6920, 6952, 6956.

⁹ Prosecutor v. *Taylor*, SCSL-03-1-A, Appeal Judgment, 26 September 2013 ('*Taylor* Appeal Judgment').

¹⁰ Prosecutor v. *Kanyarukiga*, ICTR Case No. 02-78-T, Trial Judgement, 1 November 2010 ('*Kanyarukiga* Trial Judgment'), §§ 644-653.

¹¹ Prosecutor v. *Kanyarukiga*, ICTR Case No. 02-78-A, Appeal Judgment, 8 May 2012 ('*Kanyarukiga* Appeal Judgment'), § 285.

The state of mind of an accomplice in mass atrocities presents another difficulty as it differs from the state of mind of a complicit individual in ordinary crimes. In the context of domestic law, criminality is a form of deviance from the norm. The principal perpetrator chooses to offend with the knowledge and understanding that he is defying the rules accepted in his society. The accomplice, for his part, takes a culpable decision to assist the principal. The responses of the domestic criminal justice system are consequently tuned towards ensuring conformity and preventing deviance.¹²

In contrast, participation in international crimes often stems from obedience rather than deviance. Political violence creates circumstances whereby authority is exercised to induce offending on the part of subordinates and creates a culture of impunity. Experiments aimed at testing human capacity to resist authority when put under pressure to perform acts going against human conscience show that on average less than a half of those tested were able to do so.¹³ As a consequence, the will of the principal perpetrator in international criminal law is frequently compromised - he becomes part of the system that makes it easier for him to offend than to desist. In contrast, the accomplice that occupies a senior position in the state or army apparatus may have more leeway than the foot soldier to resist authority and make the right choices. Thus, international criminal law turns the assumption that the act of the principal has distinct moral importance on its head: the accomplice is often more culpable than the actual perpetrator.

The purpose of this dissertation is to explain what complicity means within international criminal law context and to define the legal requirements of its various forms, as well as to delimit complicity from the neighbouring concepts, such as co-perpetration and common design.¹⁴ This thesis uses legal tools to tackle complicity. It must be noted, however, that the concept lies at the intersection of law, philosophy, human psychology, sociology and

¹² In the words of Hart, criminal law sets up, in its rules, standards of behavior to encourage certain types of conduct and discourage others. See H.L.A. Hart and J. Gardner, *Punishment and Responsibility: Essays on Philosophy of Law*, Oxford University Press, 2009, at 6.

¹³ S. Milgram, *Obedience to Authority. An Experimental View*, Tavistock, 1974.

¹⁴ This thesis does not address in detail another neighbouring concept - command responsibility, also referred to as superior responsibility. This notion shares some common features with accomplice liability in that they are both accessory to principal crimes committed by primary perpetrators. The key difference that distinguishes command responsibility from complicity is the fact that superior is liable not for his part in the commission of crimes by his subordinates, but for his own personal failure to adopt measures to prevent and punish those acts. The superior is sanctioned for a culpable omission. This divergence is so fundamental that it places command responsibility in a category separate from all other liability modes. See Prosecutor v. *Orić*, ICTY Case No. IT-03-68-T, Trial Judgement, 30 June 2006 ('*Orić* Trial Judgment'), § 292; G. Mettraux, *The Law of Command Responsibility*, Oxford University Press, 2009, at 39.

criminology. Under what circumstances an individual is responsible for the act of another person is a serious dilemma that can be approached from different angles.

The task of defining complicity is not an easy one - it creates much uncertainty. What elements should be included in the various forms of complicity? Is it possible to come up with a single formula for complicity that would suit the plethora of factual scenarios in international criminal law or is this an unattainable goal? Do we need to distinguish between different forms of liability at all? And if so, why? The quest for complicity and its consequences also inevitably raises questions relating to the general nature of international criminal law, its sources, and its punishment rationales. Thus, complicity serves an additional function in this thesis: it is used as a test to assess the method and purposes of international criminal law.

Four main points will take shape on the basis of the discussion in the subsequent chapters:

1. Crafting a blanket provision defining complicity does not appear feasible in international criminal law. A single formula that would magically assist in the attribution of individual criminal responsibility to those removed from the crime is akin to a Kafkian castle – an unachievable objective.
2. Having said this, it is essential to define most comprehensively the constituent elements of the various forms of complicity - the conduct requirement and the fault requirement. Thoroughly researched doctrine serves as a solid basis for the subsequent evaluation of facts.
3. Complicity in its various manifestations is a useful tool in describing the conduct of the accused in the most accurate terms. It has the advantage over its alternatives – extended co-perpetration and joint criminal enterprise – of being deeply rooted in domestic criminal law and, thus, enjoying more acceptance and legitimacy at the national and international level. This is so because complicity as a ‘general principle of law’ has a solid foundation in the sources of international law, while its alternatives do not enjoy the same status.
4. The key to the successful application of different forms of complicity is a careful balancing of its different elements on the basis of the facts of the case: in instances when the accomplice is in the physical proximity to the unfolding atrocities, his culpability may be inferred

from the surrounding circumstances, while his contribution to the crime needs to be spelled out in detail – mere presence at the scene is not sufficient to attract criminal responsibility. In cases when the accomplice is removed from the principal perpetrator – in time or in space – the emphasis should be on the accomplice’s guilty state of mind. The more tenuous the connection between the accomplice and the crime, the less an inferential analysis of his mental state is to be allowed. In the end, it is the faulty choice to assist another in the commission of the crime that makes accessory participation punishable.

The following chapters explore complicity from various angles. Chapter I discovers the historical origins of complicity in international criminal law – a field of law that, from its very inception, has struggled with the attribution of individual responsibility for collective wrongdoing. The discussion focuses on different mechanisms of addressing the collective dimension of international crimes, including complicity. A historical perspective also showcases the importance of domestic criminal law in shaping modern international criminal law.

Chapter II investigates how the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Tribunal for Rwanda (ICTR), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Court for Sierra Leone (SCSL) use complicity in their case law. It also touches upon the ‘competing’ concepts designed to address crimes with multiple accused. This overview reaches the conclusion that there are some gaps and inconsistencies in the understanding of complicity by these judicial bodies. The problematic aspects include the lack of sufficiently defined standard of causation; frequent disconnection between the facts of the case, the elements of the substantive crimes and the legal requirements of liability modes, and refining complicity by adding to it new elements not rooted in the sources of international law.

Chapter III discusses complicity in the context of the International Criminal Court (ICC). The Rome Statute of the ICC provides the most comprehensive article on individual criminal responsibility in the history of international criminal law.¹⁵ It seems, however, that the court has until recently neglected complicity in favour of the certain forms of commission. The ICC appears to have viewed commission as the most appropriate form of responsibility for dealing with mass crimes because it corresponds to the higher levels of

¹⁵ Article 25(3) of the Rome Statute of the International Criminal Court (ICC), of 17 July 1998, UN Doc. A/CONF.183/9 (‘Rome Statute’).

culpability of the accused. Some arguments against linking culpability of the accused to the mode of participation are presented in Chapter III.

Chapters II and III show the struggle of the ad hoc tribunals - the ICTY and the ICTR; the hybrid courts - the SCSL and the ECCC; and the ICC to find a mode of participation that accommodates crimes with multiple accused. These judicial bodies define to some extent the traditional modes of participation through their statutes and jurisprudence. The tendency is to extend or adjust traditional participation modes to 'fit' international cases.

The other notable trend in international jurisprudence is a disregard of the traditional forms of liability in favour of newly developed concepts that are not expressly provided by their respective statutes. This paradox served as an inspiration for Chapter IV that includes comparative analysis of complicity in various domestic jurisdictions around the world in an attempt to find the roots of complicity and to legitimize this concept in an international arena. Complicity in one form or another appears to be recognized by all legal systems under review. The comparative exercise is instructive for two reasons: first, it grounds complicity, in legal terms, as a 'general principle of law';¹⁶ and, secondly, it helps to reach a deeper understanding of the considerations that underlie various forms of complicity. From the overview of domestic legal systems it becomes clear that international courts, at times, 'cherry picked' particular features and characterized modes of participation in different legal orders in an attempt to create a form of criminal responsibility best suited to international criminal law.¹⁷ Whether such 'cherry picking' is appropriate *in lieu* of the comprehensive analysis of different approaches is a relevant question.

Chapter V contains a comparative analysis of complicity in the law of state responsibility and in international criminal law. The limits of complicity in both fields are carefully spelled out in this chapter. The findings show strong links between the law of state responsibility and international criminal law. It appears that both fields of law are complementary in filling the impunity gaps, but there are limits to cross-fertilization between the two domains.

Chapter VI explores the correlation between complicity and punishment. In some domestic legal systems, complicity, especially in the form of aiding and abetting, results in the mitigation of an accomplice's sentence compared to

¹⁶ Article 21(1)(c) of the Rome Statute assigns "general principles of law derived from state laws of legal systems in the world" the role of a secondary source of law in the ICC. Consequently, the survey of domestic legal systems asserts the foundation of complicity as a general principle of law.

¹⁷ For example, 'indirect co-perpetration' used by the ICC stems from the German legal thought.

that of the principal perpetrator. No such rule exists in international criminal law. This is not to claim that the form of participation plays no role at sentencing at an international level. The mode of liability may or may not – depending on the facts of the case - assist in assessing the gravity of the offence for sentencing purposes. However, it is the totality of factors - and not a single parameter – that is the basis for the final determination of the appropriate punishment for the convicted person.

Finally, the concluding Chapter VII situates complicity in a broader context of international criminal law. This chapter looks at the aims of international criminal law as well as its limitations. The purpose is to set the direction in which the law on individual criminal responsibility should evolve. It appears that international criminal law currently struggles with the multitude of different aims that it strives to achieve, some of which are conflicting. In the absence of a consensus on the dominant goal of international criminal justice, defining various legal concepts, complicity included, presents some difficulties. It is argued in this chapter that the main role of international criminal law is symbolic – it signifies an agreement about the values shared by international community as a whole. In line with this general function, international criminal law should be conceptualized as an exemplary justice mechanism that embraces the notion of fairness to the greatest extent possible. Consequently, the ambition should be to apply the principle of fair labelling and describe the conduct of the accused in the most precise terms. Complicity is an indispensable tool in this process.

I. The Evolution of Complicity as a Construction for Dealing with Collective Criminality

Introduction

This chapter explores the evolution of the principle of individual criminal responsibility for violations of international law. This principle began developing at Nuremberg with the establishment of the International Military Tribunal ('IMT') pursuant to the London Agreement of 8 August 1945.¹ The Nuremberg Charter attached to the London Agreement was one of the first international legal instruments targeting persons, as opposed to states.² Article 6 of the Charter established the jurisdiction of the IMT over persons acting in the interests of the European Axis countries, 'as *individuals* or as *members of organizations*'.³ Control Council Law No. 10, passed a few months later, provided a framework for the subsequent prosecution of war criminals in the occupied Germany.⁴ The Charter of the International Military Tribunal for the Far East ('IMTFE')⁵ followed the lead of the Nuremberg Charter by focusing on Far Eastern war criminals.⁶ These instruments represented a new development in public international law: piercing the veil of the state in the sphere of war crimes.⁷ The shift to individual criminal responsibility for international crimes was easier on paper than in practice, and entailed the challenges discussed below.

Since its inception, international criminal law struggled with the problem of attributing responsibility for mass atrocities. The main difficulties are the enormity of crimes in question, the collective nature of criminal activity that involves many individuals at different levels of state hierarchy and the strong organizational element involved in the commission of international crimes.⁸

¹ United Nations, *Agreement for the prosecution and punishment of the major war criminals of the European Axis* ('London Agreement'), 8 August 1945, 82 U.N.T.C. 280.

² Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the Prosecution and Punishment of Major War Criminals of the European Axis, 82 UNTS 279 ('Nuremberg Charter').

³ Article 6 of the Nuremberg Charter, emphasis added.

⁴ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946, Art. II.2.

⁵ Charter of the International Military Tribunal for the Far East of 19 January 1946, as amended 26 April 1946 ('Tokyo Charter').

⁶ Article 6 of the Tokyo Charter.

⁷ Andrew Clapham describes the Nuremberg trials as a paradigm shift, going beyond the obligations of states and attaching duties to individuals. See A. Clapham, 'Issues of Complexity, Complicity and Complementarity: from Nuremberg Trials to the Dawn of the Next International Criminal Court', in AT Sands (ed.), *From Nuremberg to the Hague: The Future of International Criminal Justice*, Cambridge University Press, 2003, at 33.

⁸ The former IMTFE judge Röling underlined the complexity of the matter by calling international crimes 'system criminality'. See E. Van Sliedregt, *Individual Criminal*

Right from its conception, the principle of individual criminal responsibility for the violations of international law struggled with the complexity of the offences in question. The famous pronouncement of the IMT, “[c]rimes against international law are committed by men, not by abstract entities...”,⁹ stands in contrast with the constructions developed by this tribunal to capture the collective nature of crimes committed by Nazi Germany – conspiracy, criminal organization and inference of guilt based on the official position of the accused in the apparatus of power. Likewise, the judgment of the IMT/FE relied heavily on the notion of conspiracy and the group responsibility of members of the government for violations of the law of war.¹⁰

Complicity as a traditional criminal law concept for attributing criminal responsibility to those who do not physically perpetrate the crime is at the heart of this tension stemming from the need to declare individual guilt while capturing the collective nature of wrongdoing.¹¹ The Special Rapporteur of the International Law Commission (‘ILC’) assigned with drafting the Code of Crimes against the Peace and Security of Mankind, Doudou Thiam, insightfully pointed out that in the context of international crimes, the “traditional moulds are broken”, and “the classic dichotomy of principal and accomplice, which is the simplest schema, is no longer applicable because of the plurality of actors.”¹²

The purpose of the chapter is to situate complicity in the context of international criminal law by providing a historical overview of the doctrine’s development. The contours of complicity in international criminal law can only be drawn against this historical background. There are two additional reasons for looking into the past. First, from the strictly legal perspective, the historical analysis provides evidence as to the formation of custom in the meaning of Article 38(1)(b) of the Statute of the International Court of Justice. Custom is a notoriously ambiguous source of international law when

Responsibility in International Law, Oxford University Press, 2012, at 20. A. Nollkaemper developed the notion of system criminality to include the wide variety of actors. See A. Nollkaemper in A. Nollkaemper and H.V.D. Wilt, *System Criminality in International Law*, Cambridge University Press, 2009.

⁹ *France et al. v. Göring et al.*, Judgment of 1 October 1946 (‘Nuremberg Judgment’), 41 *Am. J. Int’l L.* 333 1947, at 221.

¹⁰ *US and others v. Araki, Sadao and others*, judgment of 12 November 1948, in J. Pritchard and S. M. Zaide (eds.) (‘Tokyo Judgment’), at 48,445-6. See N. Boister, “The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Tokyo International Military Tribunal”, 8 *Journal of International Criminal Justice*, 2010, at 425-447.

¹¹ In this regard, the ICTY Trial Chamber correctly noted that the principle of individual criminal responsibility implies that even those who do not physically commit the crime in question are still liable for other forms of participation. See *Prosecutor v. Delalic et al (‘Čelebići Trial Judgment’)* ICTY Case No. IT-96-21-T, 16 November 1998, § 319.

¹² *Eighth report on the draft Code of Crimes against the Peace and Security of Mankind*, by Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/430 and Add. 1, § 23, at 30.

it comes to defining human rights obligations and international criminal law provisions,¹³ and the historical analysis assists in dispelling some of the uncertainties associated with the existence or absence of a certain customary rule (in this case – complicity). Secondly, the development of complicity reveals tensions characteristic of international criminal law in general, allowing for deeper insight into this field of law.

One can identify three main avenues along which complicity historically evolved as a concept: the Nuremberg and Tokyo trials, the subsequent trials of war criminals before the Nuremberg Military Tribunals and domestic courts, and, finally, the efforts of the International Law Commission in codifying the Nuremberg principles and drafting the Code of Crimes against the Peace and Security of Mankind.¹⁴ This chapter will follow the chronological development of complicity along these three avenues, while focusing on the tensions associated with the concept of complicity that run throughout history. The first part of the paper will look into the means of addressing collective criminality during the Nuremberg and Tokyo proceedings. Part two will explore how accomplice liability evolved at the crossroads of domestic and international law in the course of the subsequent prosecutions of the former Nazis.¹⁵ Section three will discover the work of the International Law Commission (‘ILC’) in defining complicity for the purposes of international criminal law. The fourth part will elaborate on the tensions that shaped complicity over time.

1. Conspiracy vs. Complicity at Nuremberg and Tokyo

It is important to remember that the Nuremberg and Tokyo Charters were the products of a political compromise between the Allied powers.¹⁶ A number of conflicts, mostly rooted in national variations, characterized the London Conference where the Nuremberg Charter was adopted. The US Chief

¹³ B. Simma and P. Alston, ‘The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles,’ 12 *Australian Yearbook of International Law* 82, 1988-1989, at 91-92.

¹⁴ The Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission in 1996, Report of the ILC to the General Assembly, Forty-Eighth Session, U.N. GAOR, 51st Sess., Suat No. 10 U.N. A/51/10 (1996) (‘Draft Code’).

¹⁵ William Schabas noted that the war crimes case law provides many examples of prosecution of accomplices, including some directly related to the Nazi genocide. W. Schabas, ‘Enforcing International Humanitarian Law: Catching the Accomplices,’ 83 *International Review of the Red Cross* 842, 2001, at 443.

¹⁶ Richard Overly noted that the British delegation initially insisted on summary executions for the perpetrators of war crimes while the Soviets and the Americans were in favour of trial in front of the military tribunal, but with different understanding of what the trial entailed (the Soviet authorities regarded the trial as a show-trial). The final list of the defendants to be prosecuted before the IMT represented a series of compromises as well: the Allied powers assembled an eclectic list of persons, who represented the dictatorial regime in different capacities. See R. Overly, ‘The Nuremberg trials: international law in the making’, in P Sands (ed.), *From Nuremberg to the Hague: The Future of International Criminal Justice*, Cambridge University Press, 2003, at 1-29.

Prosecutor at Nuremberg, Robert H. Jackson stressed, among other things, the ideological dissimilarities between the Soviet and the Western European legal traditions and the differences between the common-law adversarial proceedings and the continental inquisitorial criminal trial.¹⁷ The wording of the Tokyo Charter was based largely on that of the Nuremberg Charter, with some changes necessitated by the different circumstances of the Far East.¹⁸ Thus, the Tokyo Charter embraced many of the ambiguities of its Nuremberg prototype. The political and legal concessions made at birth of international criminal law affects the way we view subsequent proceedings.

i. Conspiracy as a Method of Dealing with Collective Criminality

The struggle among legal traditions coupled with various extra-legal considerations did not stop at the stage of the drafting of the IMT and IMTFE Charters. Framing the charges and, in particular, defining the link between the accused and the crime, was highly influenced by the Anglo-Saxon concept of conspiracy. The first count of the IMT indictment – general conspiracy incorporating all actions of the accused deemed to be criminal from the formation of the Nazi Party in 1919 to the end of the war in 1945– was the solution proposed by Prosecutor Jackson on the basis of the memorandum by the US military lawyer Murray Bernays.¹⁹ The Nuremberg prosecution team charged, under count one, conspiracy to commit crimes against peace, war crimes, and crimes against humanity, as defined in Article 6 of the Nuremberg Charter. This Article called for individual criminal responsibility for the following acts:

(a) crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) war crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of the occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) crimes against humanity: namely, murder, extermination, enslavement,

¹⁷ R. Jackson, 'Nuremberg in Retrospect: Legal Answer to International Lawlessness,' XXXC American Bar Association Journal 813-816 and 881-887 (October 1949). Reproduced in G. Mettraux (eds), *Perspectives on the Nuremberg Trial*, Oxford University Press, 2008, at 358-359.

¹⁸ N. Boister, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, 2008, at 21-26.

¹⁹ Nuremberg judgement, at 222; R. Overy, at 14-16, E. Van Sliedregt, 2012, at 22.

deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

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 plan.

Continental lawyers at Nuremberg objected to the grand conspiracy charge and rejected the idea of conviction without proof of the specific crimes perpetrated by the defendant.²⁰ As a result of this disagreement, the IMT felt compelled to narrow the scope of the charge in two respects. First, it rejected the prosecution's idea of a single conspiracy capturing all the criminal conduct of the defendants, and instead held that the evidence establishes the existence of many separate plans. The tribunal declined to accept Hitler's 'Mein Kampf' as the evidence of a common plan:

Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party program, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed in *Mein Kampf* in later years.²¹

Secondly, the IMT distinguished between conspiracy to commit acts of aggressive war as a substantive crime flowing from Article 6(a) of the Nuremberg Charter and conspiracy in the sense of Article 6(c) aimed at establishing the responsibility of persons participating in a common plan. The IMT proceeded with charges under count one only in relation to the substantive crime of conspiracy to wage aggressive war.²² As a result of curtailing the conspiracy charge, three of the defendants – von Papen, Schacht and Fritzsche were acquitted on all four counts of the indictment.²³ The IMT entered convictions for this charge only in relation to seven defendants, who were 'informed and willing participants of German aggression'.²⁴

One of the greatest opponents of conspiracy at Nuremberg - the French judge Donnedieu de Vabres – criticized this legal doctrine as being specific to common law and unknown to German and French law.²⁵ De Vabres insisted

²⁰ R. Overy, at 19.

²¹ Nuremberg judgment, at 222.

²² Nuremberg judgment, at 223-224.

²³ R. Overy, at 28.

²⁴ For example, Rudolf Hess, at 276.

²⁵ H. Donnedieu de Vabres, 'Le process de Nuremberg devant les principes modernes du Droit Penal International/The Nuremberg Trial and the Modern Principles of International

that the last paragraph of Article 6(c) of the Nuremberg Charter adopts the French notion of complicity and endorses the principles of ordinary criminal law.²⁶ He explained that the charge of conspiracy stems from the same social necessity to capture the acts of a multitude of individuals that is present in both continental and English law. The technical means of addressing this legal problem in continental law are, however, different. French law uses the notion of complicity or accessory participation in relation to the intended crime. The French point of view is subjective in that it captures the moral or psychological element connecting separate conducts which aim at the same result, namely the commission of the common crime. In contrast, the English notion of conspiracy focuses on the external objective indicators of the existence of a common plan. De Vabres thought that the French counterpart of conspiracy – complicity – is more consistent with modern doctrines that insist on the idea of individualized punishment.²⁷

In addition to conspiracy, the IMT used another concept to address the issue of collective criminality. The tribunal pronounced certain organizations that existed in the Nazi Germany criminal. These organizations were the Leadership Corps of the Nazi Party, SS, Gestapo, the General Staff and High Command.²⁸ The idea behind this pronouncement was that the declaration by the IMT of the criminality of a group would have the definitive authority of *res judicata* in the subsequent prosecutions of members of these organizations.²⁹

The wording of Article 5 of the Tokyo Charter was very similar to that of Article 6 of the Nuremberg Charter. Article 5 provided for individual criminal responsibility for the following acts:

- (a) crimes against peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) conventional war crimes: Namely, violations of the laws or customs of war;
- (c) crimes against humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not

Criminal Law', 70 *Recueil des Cours de l'Academie de droit international de la Haye* 477-582 (1947-1). reproduced in G. Mettraux, 2008, at 242 -251.

²⁶ *Ibid*, at 250.

²⁷ *Ibid*, at 243. De Vabres, however, acknowledged the tempting nature of conspiracy as a charge giving to the Hitlerian enterprise "the cover of a romantic prestige that is not without seductive appeal."

²⁸ Nuremberg judgment, at 223-224.

²⁹ Articles 9-11 of the Nuremberg Charter; De Vabres in Mettraux, 2008, at 253, E. Van Sliedregt, 2012, at 23

in violation of the domestic law of the country where perpetrated. 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 person in execution of such plan.

The Tokyo prosecution team, like the Nuremberg prosecutors, opted for the all-encompassing count of conspiracy (count one), but also supplemented it with a number of subsequent counts, breaking down the grand conspiracy into constituent parts. The reason for these extra counts was to secure convictions if the umbrella charge failed, as happened at Nuremberg.³⁰

The IMTFE prosecution extended conspiracy over a period of over eighteen years and defined its objective in broad terms of securing “the military, naval, political, and economic domination of East Asia and the Pacific and Indian Oceans, and for all countries and islands therein and bordering thereon...”³¹ However, in contrast with the Nuremberg judgement that rejected the existence of grand conspiracy, the first broad count of the Tokyo indictment proved to be successful, rendering the subsequent sub-conspiracy counts redundant. The majority judgment supported the broad interpretation of conspiracy to wage aggressive war – all of the defendants, except general Matsui and Foreign Minister Shigemitsu, were convicted on count one as “leaders, organizers, instigators, or accomplices” in the conspiracy.³² The IMTFE established, “the conspiracy existed for and its execution occupied a period of many years,” and “[a]ll of those who at any time were parties to the criminal conspiracy or who at any time with guilty knowledge played a part in its execution are guilty of the charge contained in Count I.”³³

The charge of conspiracy to wage an aggressive war stemmed from the provision of Article 5(a) of the Charter. The IMTFE interpreted this provision to contain five different substantive crimes: planning, preparation, initiation and waging aggressive war, and participation in a common plan or conspiracy for the accomplishment of any of the foregoing.³⁴ Therefore, the tribunal treated conspiracy, as well all the other ways of engaging in war listed under the same heading, as a separate substantive crime and not as a mode of participation. In the view of the IMTFE, the last sentence of Article 5(c) related exclusively to sub-paragraph (a), which referred to conspiracy as a crime.³⁵ Thus, just like the Nuremberg tribunal, the IMFTE rejected the view

³⁰ N. Boister, 2008, at 207.

³¹ Ibid, Tokyo judgement at 48,421.

³² Tokyo judgement at 49,773. See G. Ireland ‘Uncommon Law in Martial Tokyo’ 4 *Year Book of World Affairs*, 1950, at 80; N. Boister, 2008, at 217-219.

³³ Tokyo judgement at 49,770; N. Boister, 2008, at 223.

³⁴ Tokyo judgement at 48,447.

³⁵ Tokyo judgement at 48,450.

that the Charter criminalized conspiracy to commit war crimes or crimes against humanity.³⁶

The IMTFE also found that the charge of conspiracy subsumed the actions of the original conspirators or later adherents directed towards planning and preparing for its fulfilling. This merger rendered it unnecessary to enter convictions for planning and preparing aggressive wars.³⁷ More importantly for this discussion, the judgment did not attempt to distinguish the substantive crimes and modes of liability in the context of both sub-paragraphs (a) and (c) of the Tokyo Charter: conspiracy was treated as a substantive offence, yet its function in attributing guilt to all those who took part in the conspiracy resembled the notion of the joint criminal enterprise.³⁸

The decision of the IMTFE to adopt the notion of grand conspiracy quickly attracted criticism from contemporaries.³⁹ One of the main arguments against conspiracy was the non-transferability of the concept from domestic to international law.⁴⁰ Gordon Ireland noted back in 1950 that conspiracy is elastic and its elasticity stems from the authority of the state to administer criminal equity based on the need to prevent and suppress crimes.⁴¹ The safeguard against stretching conspiracy too far is the opt-out provision: the participant can withdraw from the agreement by adequate notice without entailing responsibility for the overt acts subsequently undertaken.⁴² The IMTFE did not develop a similar opt-out provision in relation to the defendants, making them collectively responsible for the crimes committed during the whole period of the existence of conspiracy, regardless of the time when each became part of the agreement and their respective contributions. This approach amounted to administering guilt by association.

Just like the French judge at Nuremberg, the IMTFE French judge – Henri Bernard - insisted on the broader use of complicity. His point of view was that the Japanese Emperor should have been punished as a principal author of the Pacific War and all of the defendants standing trial at Tokyo could only

³⁶ Ibid.

³⁷ Tokyo judgement at 48,448. The Tokyo tribunal dismissed 45 counts of the indictment, leaving valid only 10, which included the grand conspiracy (count 1); waging the war of aggression against China, the US, the British Commonwealth, the Netherlands, France, the Soviet Union, and Mongolia (counts 27, 29, 31, 32, 33, 35, 36 respectively); ordering, authorizing and permitting violations of the laws of war (count 54); and deliberately and recklessly disregarding the legal duty to secure the observance of the laws of war (count 55). See G. Ireland, 1950, at 61.

³⁸ For an extended discussion of the concept of the joint criminal enterprise, see Chapter II.1.iii *infra*.

³⁹ S. Horwitz, 'The Tokyo Trial' 465 *International Conciliation*, 1950, 475-583, at 553.

⁴⁰ G. Ireland, 1950, at 81-82.

⁴¹ Ibid.

⁴² Ibid.

be considered his accomplices.⁴³ Judge Pal (India) in his dissent also criticized the prominent place that conspiracy occupied in the Tokyo indictment and held that “conspiracy by itself is not at all a crime in international life.”⁴⁴ From the substantive point of view, he disagreed with the existence of conspiracy, with its alleged criminal purpose for domination of the territories and with the fact that the defendants were members of thereof.⁴⁵

ii. The Sentencing Policy

The IMT judgment was divided into three distinct parts – the first part outlined in detail the factual circumstances of Germany’s aggression against several countries. The second part followed the indictment and discussed the charges against the defendants, the third and final part of the judgment dealt with reasons for declaring the guilt or innocence of the twenty-two accused standing trial.⁴⁶ This part did not attempt to ‘label’ the behavior of the accused with any legal terms. There is no analysis as to the elements of crimes or the necessary legal requirements for the commission of these crimes. This part simply discussed the position of the accused in the Nazi regime and the specific events in which the accused took part.

Without distinguishing the modes of liability of the accused, the sentences in the judgment reflect to some extent the degree of their participation. For example, Reich Marshall Hermann Göring received a death sentence. He is described as the most prominent individual in the Nazi regime after Hitler. He developed the Gestapo and created the first concentration camps. He commanded one of the major attacks on Poland and signed a directive concerning the maltreatment of Polish workers in Germany. Therefore, his high position of authority and first hand participation in the atrocities committed by Nazi regime justified, in the view of the IMT, imposition of ultimate punishment. It is peculiar that the IMT characterized Göring’s admissions regarding the use of slave labor as ‘complicity’ in the crime. One can infer, however, that the IMT used this term loosely, referring to Göring’s association with the crime rather than the mode of participation. Similarly, Reich Foreign Minister Joachim von Ribbentrop was sentenced to death because of his significant diplomatic role in activity that ultimately led to the attack on Poland and his active assistance in carrying out certain criminal policies, particularly those involving extermination of Jews.

In contrast, the subsequent Minister of Foreign Affairs and Reich Protector of Bohemia and Moravia Konstantin von Neurath was only sentenced to fifteen

⁴³ Dissenting Opinion of Judge Bernard, at 22, reproduced in part in G. Ireland, 1950, at 64, ft. 22.

⁴⁴ Dissenting Opinion of Judge Pal at 991, reproduced in part in G. Ireland, 1950, at 100.

⁴⁵ Ibid, at 990.

⁴⁶ Nuremberg judgment, at 272 et sq.

years of imprisonment because his participation in the crimes committed by Nazi Germany was mostly limited to attending conferences and negotiations. Moreover, he intervened with the Security Police for the release of Czechoslovaks detained for protesting against German occupation. Similarly, the Supreme Commander of the Navy Karl Dönitz received only ten years of imprisonment in recognition of his limited participation in Hitler's plans. He appeared to have known about the concentration camps but his active involvement amounted to a single instance of waging unrestricted submarine warfare upon all British merchant ships - contrary to the Naval Protocol of 1936 - whereby Dönitz ordered the murder of survivors of all shipwrecked vessels, whether enemy or neutral.

Despite the fact that the offenders' role in the commission of crimes was to some extent acknowledged in the judgment, the sentencing policy of the IMT attracted wide criticism. Some scholars were dissatisfied with the fact that IMT imposed the death sentence for crimes against humanity and not for planning the aggressive wars.⁴⁷ Others criticized the Nuremberg Tribunal for adhering to an excessively high standard of proof in relation to the 'conspiracy' count of the indictment.⁴⁸

The Tokyo judgment is over one thousand pages in volume, substantially longer than its Nuremberg counterpart (less than two hundred pages). Notwithstanding the difference in length, the Tokyo judgment essentially followed the same fact-based approach adopted at Nuremberg, explaining at extraordinary length the circumstances of Japan's military domination and aggression,⁴⁹ but devoting remarkably little space to the individual contribution of each of the accused.⁵⁰ This discrepancy showcased the collective-guilt approach adopted by the Tokyo tribunal.

The sentences rendered by the Tokyo tribunal were harsher than those handed down by the IMT: out of twenty-eight senior figures of the Japanese government and military standing trial in Tokyo, seven were sentenced to death, sixteen – to life imprisonment, two (Shigemitsu and Toco) to the imprisonment of seven and twenty years, respectively, two defendants died during the trial, while one was declared insane.⁵¹ These sentences were more

⁴⁷ Q. Wright, 'The Law of the Nuremberg Trial,' 41 *American Journal of International Law* 38-72, 1947, reproduced in G. Mettraux, 2008, at 325.

⁴⁸ This criticism mostly relates to the acquittal of Von Papen - the former Vice Chancellor in Hitler's Cabinet. Von Papen put Hitler in power in 1932 and 1933. The IMT held, however, that it has not been proved beyond a reasonable doubt that Von Papen knew about Hitler's purpose when he put him into power. See N. Birkett, 'The Issues of the Nuremberg Trial,' in G. Mettraux, 2008, at 305.

⁴⁹ G. Ireland, 1950, at 61.

⁵⁰ The part of the judgment dealing with individual verdicts is less approximately 5% of the whole judgment.

⁵¹ Tokyo judgment at 49,854.

homogenous than those issued at Nuremberg, making it even more difficult to distinguish between the level of culpability and the nature of the contribution of each particular accused. The position occupied by the defendant within the government and military apparatus often served as an indication of his participation in a common plan.

For example, the IMTFE convicted and sentenced to life Sadao Araki, Japan's Minister of War between 1931 and 1934, as a 'prominent leader' of conspiracy to wage aggressive war and "an energetic proponent of the Army policy of political domination at home and of military aggression abroad."⁵² Similarly, General Kenji Dohihara, who had spent eighteen years in China, was sentenced to death due to his being "intimately involved in the initiation and development of the war of aggression waged against China." The tribunal noted that Dohihara acted in close concert with other military leaders, without however naming those individuals.⁵³

In addition to the conspiracy charge, charges related to war crimes attracted a number of convictions in Tokyo.⁵⁴ Shunroko Hata, the Commander-in-Chief of the expeditionary forces in China in 1941-1944, was convicted and sentenced to life for, *inter alia*, failing to secure the observance of the laws of war (count 55 of the indictment). The IMTFE attributed responsibility to Hata solely based on the fact that troops under his command committed atrocities in China over a long period of time, and he either knew of these things and took no steps to prevent their occurrence, or he was indifferent.⁵⁵ The IMTFE thus adhered to a very relaxed *mens rea* standard.⁵⁶ The duty to prevent war crimes was also extended to government officials.⁵⁷ The IMTFE held that the Minister of Foreign Affairs Mamoru Shigemitsu, as a member of the government, was responsible for the welfare of prisoners, and it was incumbent on him to investigate the situation and press the matter, if necessary to the point of resigning, in order to acquit himself of a responsibility.⁵⁸ Shigemitsu was sentenced only to seven years of imprisonment, which could indicate that the tribunal regarded him less culpable than his military counterparts.

⁵² Tokyo judgment at 49,774.

⁵³ Tokyo judgment at 49,777.

⁵⁴ Tokyo judgment at 49,772.

⁵⁵ Tokyo judgment at 49,784.

⁵⁶ K. Ambos, 'Individual criminal responsibility,' in G. K. McDonald and O. Swaak-Goldman (ed.), *Substantive and procedural Aspects of International Criminal Law*, The Hague/Boston/London, 2000, at 15.

⁵⁷ Judge Pal criticized in his dissent the extension of this duty to government officials: "[...] as members of the government, it was not their duty to control troops in the field. [...] [they] were certainly entitled to rely on the competency of such high ranking officers in this respect." Judge Pal Dissent, at 102.

⁵⁸ Tokyo judgment at 49,831.

2. Domestic Law vs. International Law During the Subsequent Trials

Domestic law continued to play an important role in shaping international criminal law during the criminal trials of war criminals that followed the Nuremberg IMT. These trials relied on the two sets of rules relating to criminal responsibility: provisions implementing Control Council Law No. 10 and national criminal law.⁵⁹ The rules enacted in the British and American zones were based on Control Council Law No. 10, while other states, such as France and Norway, relied exclusively on their domestic law in trying war criminals.⁶⁰ Even those states that relied on Control Council Law No. 10 drew heavily on their domestic law in determining the main criminal law concepts.

i. The British Approach

The British way of dealing with multiple perpetrators of war crimes was to charge them with ‘being concerned in’ committing a specific war crime.⁶¹ This charge stemmed from the traditional English criminal law notion of common design.⁶² Framing the charges along the lines of common design exposed the ambiguities inherent to English law, which is unclear as to whether ‘common design’ is an additional form of accomplice liability (beyond aiding, abetting, counselling or procuring), or if it is simply attached to each of them, serving as a legal construction of addressing the unexpected turn of events.⁶³ For example, during the *Trial of Franz Schonfeld and Nine Others*, the British Military Court in Essen faced the task of determining whether several members of the German Security Police were concerned in the killing of three unarmed members of the Allied air force, who were hiding in the house provided by members of the Resistance. Instead of effectuating the arrest, the defendants shot the pilots.⁶⁴ The court convicted four of the defendants and acquitted the remainder.⁶⁵ The evidence clearly established that the actual shooting was carried out by only one of the defendants, but the court convicted three more individuals of the same crime based on their actual or constructed presence at the scene of the crime (entering the pilots’ house together with the direct perpetrator). All four persons convicted of war crimes were sentenced to death.

⁵⁹ E. Van Sliedregt, 2012, at 30-31.

⁶⁰ Ibid.

⁶¹ *The Parties to Crimes: Rules Relating to Complicity*, 15 L.R.T.W.C. 49 (1949) (Law Reports prepared by the UN War Crimes Commission), at 49.

⁶² E. Van Sliedregt, 2012, at 33.

⁶³ A. Ashworth, 1995, at 429; See also J. Smith and B. Hogan, *Criminal Law*, Butterworths, 2002, at 162.

⁶⁴ *United Kingdom v. Franz Schoenfeld and Nine Others*, 11 L.R.T.W.C. 64 (1949) (British Military Court), at 64.

⁶⁵ 11 L.R.T.W.C. 64, at 67.

The precise basis for conviction in *Schonfeld* is unclear.⁶⁶ The Judge Advocate made several conflicting observations: first, he held that if the object of the visit to the house was initially lawful, i.e. to arrest the pilots, the three others were not guilty of the charge of ‘being concerned with the killing’ that resulted from one of them starting to shoot. They are innocent so long that they did not aid or abet the direct perpetrator. Secondly, if the three men aided and abetted the shooter, they would be guilty; and, finally, if the rule regarding ‘common design’ were found to be applicable, the others present would be guilty of murder whether or not they aided or abetted the offence.⁶⁷

Notwithstanding some contradictions, the most significant finding in *Schonfeld* was that the responsibility of the three defendants present at the scene of the crime depended on the guilt of the actual perpetrator, regardless of whether the principle of common design applied or whether only the rules on aiders and abettors were applicable.⁶⁸ It is noteworthy that the UN War Crimes Commission in its report on the case highlighted that British courts did not attempt to try the war criminals under English law, but rather used it to frame the charges against the accused in the absence the relevant international law provisions. The Commission attempted to further legitimize the approach of the British courts by noting, “it would not be hard to show that, for instance, the rules of English law regarding complicity in crimes, which are frequently quoted in war crime trials before British Military Courts, will be "found in substance in the majority" of systems of civilized law.”⁶⁹

The term ‘concerned in the killing’ was further clarified in the case of *Werner Rohde and Eight Others* decided by the British Military Court in Wuppertal. Judge Advocate in this case held that:

“[T]o be concerned in a killing it was not necessary that any person should actually have been present. [...] If two or more men set out on a murder and one stood half a mile away from where the actual murder was committed, perhaps to keep guard, although he was not actually present when the murder was done, if he was taking part with the other man with the knowledge that other man was going to put the killing into effect then he was just as guilty as

⁶⁶ R. Skilbeck, Case Note, in A. Cassese (eds), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, at 905.

⁶⁷ The Judge Advocate went on to explain the difference between various modes of participation in English law: accessory before the fact is always absent from the scene of the crime; a principal in the first degree is an actual perpetrator, and a principal in the second degree is present at the commission of the offence and aids and abets its commission. 11 L.R.T.W.C. 64, at 69-70.

⁶⁸ 11 L.R.T.W.C. 64, at 70.

⁶⁹ 11 L.R.T.W.C. 64, at 72.

the person who fired the shot or delivered the blow.”⁷⁰

In this case the court convicted several officials working at the Stuthof/Natzweiler camp of killing four captive women prisoners. The roles of the accused varied but none was charged with actually killing the women concerned: the medical officer at the camp admitted to giving lethal injections; the prisoner working in crematorium acknowledged preparing the oven for the occasion; while another accused, a functionary at the camp, followed the order to bring the harmful drug and overheard the conversations relating to the execution of the four women prisoners.⁷¹ In contrast with *Schoenfeld*, the *Rohde* tribunal differentiated between the contributions of ‘those concerned in killing’ at sentencing: the medical officer was sentenced to death, while the prisoner who prepared the oven and the functionary who delivered the drug were sentenced to five and four years imprisonment respectively.⁷²

ii. The US Approach

The United States military tribunals operating at Nuremberg relied on the modes of participation listed in the provision of Article II(2) of the Control Council Law No. 10, which reads as follows:

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was 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 or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

The critical modes of participation in the US trials were those involving secondary liability contained in clauses (b)-(e).⁷³ Despite the explicit reference to various forms of liability in these clauses, the tribunals never systematically distinguished between principals and accessories to a crime, primarily due to the adherence of the Control Council Law No. 10 to the unitary model of perpetration, which does not distinguish between perpetration and complicity⁷⁴ - any participant was “deemed to have committed a crime.”

⁷⁰ *United Kingdom v. Rohde et al.*, (1948) 15 L.R.T.W.C. 51 (British Military Court, Wuppertal), at 56.

⁷¹ 15 L.R.T.W.C. 51, at 55.

⁷² 15 L.R.T.W.C. 51, at 51. See also *The Parties to Crimes: Rules Relating to Complicity*, 15 L.R.T.W.C. 49.

⁷³ K. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, 2011, at 251.

⁷⁴ K. Ambos, 2000, at 17.

The *Justice* case, brought by the US Military Tribunal against judges and officials of the German Ministry of Justice, is a good example of the application of the unitary approach to participation.⁷⁵ The tribunal put all the crime participants on an equal footing by declaring “the person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime.”⁷⁶

The *Justice* indictment alleged that the accused acting in concert with each other and with others, unlawfully, wilfully, and knowingly were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises, involving the commission of war crimes and crimes against humanity.⁷⁷ These acts included, *inter alia*, the denial of the judicial process, the extension of the discriminatory German laws to non-German territories for the purpose of extermination of Jews and participation in the execution of Hitler’s decree Night and Fog, whereby the civilians accused of crimes of resistance were spirited away for secret trials.⁷⁸

The tribunal followed the ‘concerted approach’ of the indictment in laying down two essential elements for proving the guilt of the defendant: first, knowledge on the part of the defendant of the offence charged as supported by evidence, and second, his connection with the commission of that offence.⁷⁹ The nature of this connection to the crime varied on a case-by-case basis. The case of the defendant Joel exemplifies the tribunal’s treatment of responsibility issues. Joel, in his capacity as a chief prosecutor, was in charge of the Night and Fog prosecutions and was tasked with supervising all prosecutors in his office.⁸⁰

The core evidence against Joel consisted of the correspondence, mentioning the Night and Fog plan, of which he was either the author or the recipient. Thus, it could not be said that the accused was directly responsible for death or ill treatment of specific persons.⁸¹ Nonetheless, his high rank did not absolve him of responsibility for the large-scale enterprises carried out by the Ministry of Justice where he knew of those schemes.⁸² The question of personal knowledge was therefore one of the most critical issues at trial.⁸³ The court established Joel’s complicity “as having aided, abetted, participated

⁷⁵ *United States of America v. Alstötter et al.* (‘Justice trial’), 1948, 6 L.R.T.W.C. 1, at 62.

⁷⁶ *Ibid.* See also W. Schabas, 2001, at 441.

⁷⁷ 6 L.R.T.W.C. 1, at 2.

⁷⁸ 6 L.R.T.W.C. 1, at 3-4.

⁷⁹ 6 L.R.T.W.C. 1, at 84. See also *The Parties to Crimes: Rules Relating to Complicity*, 15 L.R.T.W.C. 49, at 54.

⁸⁰ 6 L.R.T.W.C. 1, at 21-22.

⁸¹ 6 L.R.T.W.C. 1, at 87.

⁸² *Ibid.*

⁸³ 15 L.R.T.W.C. 49, at 55.

in, and having been connected with, the Night and Fog scheme or plan.”⁸⁴ He was convicted of war crimes, crimes against humanity and membership in a criminal organization (SS and SD) and sentenced to ten years of imprisonment.⁸⁵

In the *Pohl* case, the US tribunal explicitly warned against assuming criminality, or even culpable responsibility, based on the official titles of the defendants.⁸⁶ The *Pohl* tribunal also clarified the *actus reus* required to sustain a conviction under Article II(2) of the Control Council Law No. 10 because solely *mens rea* - mere knowledge - was not a sufficient basis for conviction. The *Pohl* case concerned the responsibility for war crimes and crimes against humanity of SS officers managing concentration camps through the Economic and Administrative Main Office (WVHA) of the SS.⁸⁷ The tribunal acquitted the chief of the WVHA’s audit department, Vogt, based on the lack of any positive action from his side: despite having the general knowledge of the existence of concentration camps, he never took any positive action that would have established his ‘consent’ in the commission of crimes.⁸⁸ The tribunal clarified that the term ‘being connected with’ and ‘taking a consenting part in’ a crime in the meaning of Article II(2) of the Control Council Law No. 10 means more than having knowledge of it: “it means something more than being in the same building or even being in the same organization with the principals or accessories. [...] There is an element of positive conduct implicit in the word “consent.”⁸⁹ (Ibid.) Thus, Vogt’s work could not, in the view of the tribunal, have been considered any more criminal than that of the bookkeeper who made up the reports which he audited.⁹⁰

iii. The French Approach

In dealing with group crime the French courts relied almost exclusively on complicity.⁹¹ In the trial of *Gustav Becker, Wilhelm Weber and Eighteen Others*, the Permanent Military Tribunal at Lyon convicted the former

⁸⁴ 6 L.R.T.W.C. 1, at 86.

⁸⁵ 6 L.R.T.W.C. 1, at 76.

⁸⁶ *United States of America v. Pohl et al.* (‘Pohl Case’), 5 T.W.C., at 176-177. See also K. Heller, 2011, at 252

⁸⁷ K. Gustafson, Case Note in A. Cassese (eds), 2009, at 876-877. It should be noted the US tribunals followed the precedent set by the IMT and IMTFE in rejecting the count of conspiracy to commit war crimes and crimes against humanity. The *Justice* and *Pohl* indictments contained a charge of conspiracy to commit war crimes and crimes against humanity, and in both cases the US tribunal refused to exercise jurisdiction in relation to this charge because it had not been defined as a separate offence in either the Nuremberg Charter or the Control Council Law No. 10.

⁸⁸ 5 T.W.C., at 41.

⁸⁹ Ibid.

⁹⁰ 5 T.W.C., at 42.

⁹¹ E. Van Sliedregt, 2012, at 35.

German customs officers in French Savoy for illegal arrest and ill treatment of French citizens, which resulted in the death of the three victims later in Germany. Two of the accused were convicted as perpetrators, while the remaining seventeen individuals were convicted as their accomplices.⁹² The court stipulated, “[i]t is a principle of penal law that accomplices are held responsible in the same manner as actual perpetrators, and this principle is recognized in the field of war crimes as it is in that of common penal law.”⁹³ In addition to illegal arrest and ill treatment, the court found all of the defendants guilty of causing death without intent to inflict it.⁹⁴ The tribunal found the accused responsible as they were instrumental to the death inflicted on the victims by the German perpetrators regardless of whether the injuries sustained in France were the direct cause of the subsequent death of the victims in Germany.⁹⁵

The Permanent Military Tribunal in Strasbourg differentiated between different crime participants in *Robert Wagner and Six Others*.⁹⁶ The case was brought against Wagner, who was the head of the civil government in Alsace during German occupation, and a number of other high-ranking administrative and judicial officials of the region for orchestrating the judicial murder of a group of Alsatians in the so-called Ballersdorf trial. The victims were intercepted trying to cross the border with Switzerland and were subsequently tried and sentenced to death by the Special Court in Strasbourg, which operated in violation of the most elementary rules of German law.⁹⁷ All of the accused with the exception of Grüner, who was charged with premeditated murder, were charged with complicity in the crime.⁹⁸ Hence, the tribunal had to establish the relationship of each accused to the crime. The court held, *inter alia*, that Wagner had been an accomplice in the murders that followed as a result of the sham trial by virtue of him abusing his power or authority and by dictating or ordering the sentence to be awarded by the Special Court.⁹⁹ Gädeke was found guilty as an accomplice because he had transmitted Wagner's order to pass the sentence of death to the Court.¹⁰⁰ The Permanent Military Tribunal in Strasbourg sentenced all the defendants to death, with the exception of one who was acquitted.¹⁰¹ Huber was found

⁹² *France v. Becker et al*, (1948) 7 L.R.T.W.C. 67 (Permanent Military Tribunal at Lyon), at 70.

⁹³ *Ibid.*

⁹⁴ *Ibid.*, at 67.

⁹⁵ *Ibid.*, at 70.

⁹⁶ *France v. Wagner et al*, (1948) 3 L.R.T.W.C. 23 (Permanent Military Tribunal at Strasbourg), at 23.

⁹⁷ 3 L.R.T.W.C. 23, at 31.

⁹⁸ 15 L.R.T.W.C. 49, at 57.

⁹⁹ 3 L.R.T.W.C. 23, at 40.

¹⁰⁰ *Ibid.*, at 41.

¹⁰¹ *Ibid.*, at 42.

complicit in the murders on the ground of his bending under pressure from Wagner and pronouncing the death sentences in the Ballersdorf trial.¹⁰²

A few decades later, in 1992, the French courts continued to use complicity in connection with international crimes. In *Touvier* the French courts examined the notion of complicity in crimes against humanity.¹⁰³ The case revealed a complicated interrelationship between the mode of participation and the substantive crime. In 1943 and 1944, Paul Touvier served as a high-ranking militia officer in occupied Vichy France. He gave instructions for the shooting of seven Jewish prisoners at Rillieux following the announcement of the assassination of the Minister of Propaganda of the Vichy government, Philippe Henroit, by members of the Resistance. Touvier did not deny being implicated in the affair but insisted that his role was limited in that he ceded to the inevitable. By ordering the execution of the seven prisoners he attempted to limit more large scale reprisals by the occupying authorities following Henroit's assassination.

The court held that Touvier indeed had played a limited role in the murder of the prisoners, but the instructions he had given in relation to seven prisoners constituted sufficient evidence to establish his complicity in murder by assistance and instructions.¹⁰⁴ The problematic aspect was that under French law further proceedings in the case of an ordinary murder was barred by the statute of limitations. Crimes against humanity were not subject to this rule but in order to secure a finding of complicity in crimes against humanity it was necessary to show that Touvier acted with specific intent to take part in the execution of a common plan by committing inhumane acts in a systematic manner in the name of a state that practiced a policy of ideological supremacy.¹⁰⁵ The court of first instance held that the Vichy state could not be described as having practiced a policy of ideological supremacy. Hence, it could not be established that Touvier had specific intent serving a state practicing such policy.¹⁰⁶ This finding was reversed on appeal on the ground that Touvier's decision to execute the prisoners had been taken with the approval of the local Gestapo – an organization declared to be a criminal organization by the IMT.¹⁰⁷ Eventually, Touvier was convicted of complicity in crimes against humanity.¹⁰⁸

iv. Corporate Complicity

In addition to government officials, the British and the US Military courts

¹⁰² Ibid.

¹⁰³ 100 ILR 338 et sq.

¹⁰⁴ 100 ILR 347.

¹⁰⁵ 100 ILR 352.

¹⁰⁶ Ibid.

¹⁰⁷ 100 ILR 363.

¹⁰⁸ V. Thalmann, Case Note, in A. Cassese (eds), 2009, at 957.

heard also heard cases against private individuals who worked for corporations involved in the commission of crime.¹⁰⁹ The trials of industrialists in the aftermath of the Second World War, albeit focusing on the individual responsibility of businessmen, were the closest international criminal law ever came to corporate complicity in international crimes.¹¹⁰

In the *Zyklon B* case, the British Military Court in Hamburg examined the complicity of German industrialists in the murder of interned allied civilians by means of poison gas.¹¹¹ The court convicted the owner of the firm supplying the poison gas to concentration camps and the firm's procurement officer, who was described as second-in-command, of war crimes and sentenced to death.¹¹² The court acknowledged that the case dealt with commercial transactions by private individuals. However, "any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal."¹¹³ The firm's gassing technician, on the other hand, was acquitted. The Judge Advocate emphasized that the technician's knowledge of the purposes for which the gas was supplied was not sufficient to establish his guilt because the technician's subordinate position in the firm was such that he could neither influence the transfer of gas to Auschwitz nor prevent it.¹¹⁴

Other trials involving businessmen included *Flick*,¹¹⁵ *I.G. Farben*,¹¹⁶ and *Krupp Trials*;¹¹⁷ all heard by the US military tribunals.¹¹⁸ In the *Krupp* trial, several officials of the Krupp corporation, including Alfried Krupp, were found guilty of having employed, contrary to the provisions of international law, prisoners of war, foreign civilians and concentration camp inmates under inhuman conditions in work connected with the conduct of war.¹¹⁹ The

¹⁰⁹ For further discussion on corporate complicity in international crimes see W. Schabas, 2001.

¹¹⁰ The issue of whether the International Criminal Court should have responsibility not only over individuals but also over legal entities divided the Preparatory Committee charged with drafting the Rome Statute. In the absence of consensus on this issue, the draft Statute submitted to the Rome Conference did not include any provisions on corporate responsibility. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/CONF.183/2 ('Report of the ICC Preparatory Committee'), at 31, ft. 71. See also P. Saland, 'International criminal law principles,' in R. Lee (ed.), *The International Criminal Court-The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, at 193-194.

¹¹¹ *United Kingdom v. Tesch et al. ('Zyklon B Case')*, (1947) 1 L.R.T.W.C. 93 (British Military Court), at 93-101. For the discussion of this case, see also W. Schabas, 2001, at 441.

¹¹² 1 L.R.T.W.C. 93, at 102.

¹¹³ *Ibid*, at 103.

¹¹⁴ *Ibid*, at 102.

¹¹⁵ *United States of America v. Friedrich Flick et al.*, (1948) 6 T.W.C. 1217-1221.

¹¹⁶ *United States of America v. Carl Krauch et al.*, (1948) 8 T.W.C. 1169.

¹¹⁷ *United States of America v. Alfried Krupp et al.*, (1948) 10 L.R.T.W.C. 69.

¹¹⁸ *The Parties to Crimes: Rules Relating to Complicity*, 15 L.R.T.W.C. 49, at 59.

¹¹⁹ 10 L.R.T.W.C. 69, at 70.

Krupp tribunal insisted that the laws and customs of war are no less binding vis-à-vis private individuals as government officials and military personnel, albeit with a difference in the degree of guilt, depending on the circumstances. The tribunal held:

'Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company's business may be held criminally liable individually therefor. So, although they are ordinarily not criminally liable for corporate acts performed by other officers or agents, and at least where the crime charged involves guilty knowledge or criminal intent, it is essential to criminal liability on his part that he actually and personally do the acts which constitute the offence or that they be done by his direction or permission. He is liable where his scienter or authority is established, or where he is the actual present and efficient actor.'¹²⁰

The sentences in *Krupp* case were rather lenient, possibly reflecting the lesser degree of guilt as noted by the tribunal; they ranged from twelve to three years of imprisonment.¹²¹

3. Defining the Contours of Complicity: International Law Commission's Contribution

Courts were not the only bodies responsible for the development of international criminal law in general, and modes of responsibility in particular. By resolution 177 (II) of 21 November 1947, UN the General Assembly decided to entrust the International Law Commission with a twofold task: first, to formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and the Nuremberg judgment; and second, based on those principles, to prepare a draft Code of Offences against the Peace and Security of Mankind ('Draft Code').¹²² In fulfilling its mandate, the ILC contributed significantly to understanding the scope and the meaning of complicity in international criminal law.

The first part of the mandate – the adoption of the Nuremberg principles – was accomplished in 1950.¹²³ Principle VII read as follows:

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.¹²⁴

It is clear from the wording that the Commission regarded complicity as a

¹²⁰ Ibid, at 150.

¹²¹ Ibid, at 70.

¹²² UN Doc. A/RES/177(II).

¹²³ Adopted by the International Law Commission at its second session, in 1950, *Yearbook of the International Law Commission*, 1950, vol. II.

¹²⁴ Ibid, at 377. Principle VI stipulated that planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, as well as participation in a common plan or conspiracy for the accomplishment of any of these acts constitute crimes against peace.

substantive offence. The ILC referred to the last paragraph of Article 6 of the Nuremberg Charter as establishing responsibility for complicity. The comment to Principle VII shows however that the Commission failed to distinguish responsibility for conspiracy to wage aggressive war as a substantive crime and complicity as a mode of responsibility. In this comment, the ILC questions the Nuremberg tribunal's finding that the last paragraph of Article 6 of the Charter does not add a new and separate crime to those already listed, but establishes the responsibility of persons participating in a common plan. The ILC saw a contradiction in this argument because the IMT found several defendants guilty of war crimes and crimes against humanity for giving orders and not for actually perpetrating the crime.¹²⁵ This reasoning reveals a failure to distinguish between the substantive crime and the way in which individuals were involved in the crime.

The second part of the ILC's mandate – preparing the Draft Code of Crimes against the Peace and Security of Mankind – proved to be more fruitful in defining forms of responsibility. The first Draft Code was adopted by the ILC in 1954 and contained only a brief account of acts that constitute offences against the peace and security of mankind.¹²⁶ This first version of the code did not provide any definition of complicity. Article 2 of the code listed acts that constituted offences against peace and security of mankind, and subheading 13 of this Article listed conspiracy, complicity, direct incitement and attempt to commit any of the offences defined in the preceding paragraphs of the Article as acts constituting offences against peace and security of mankind. Thus, complicity was treated as a substantive offence, without further elaboration as to its content.

Following the adoption of the 1954 Draft Code, active work on the document was suspended for several decades and only resumed in the 1980's. Doudou Thiam was appointed as the ILC's Special Rapporteur charged with preparing the document.¹²⁷ Thiam identified the gap in international criminal law in attributing responsibility for the crimes committed by a plurality persons.¹²⁸ He attempted to fill this gap by investigating the notion of complicity in

¹²⁵ Ibid, at 378-378, §§ 125-127.

¹²⁶ Adopted by the Commission at its sixth session, in 1954, *Yearbook of the International Law Commission, 1954, vol. II*, § 54, at 151.

¹²⁷ At its thirty-fourth session, in 1982, the Commission appointed Mr. Doudou Thiam Special Rapporteur for the topic. The Commission, from its thirty-fifth session, in 1983, to its forty-second session, in 1990, received eight reports from the Special Rapporteur. See the *Report of the International Law Commission on the work of its forty-third session*, 29 April - 19 July 1991, UN Doc. A/46/10, at 80.

¹²⁸ *Fourth report on the draft code of offences against the peace and security of mankind ('Fourth Report')*, by Mr. Doudou Thiam, Special Rapporteur, UN Doc A/CN.4/398 and Corr. 1-3, § 89, at 61.

domestic and international law and delimiting its scope.

Thiam explored domestic law and found that the scope of the concept and its content varies from country to country: complicity may include physical acts (aiding and abetting, provision of means) and intellectual or moral assistance (counsel, instigation, orders). In some countries, those who provide intellectual assistance are labelled as ‘indirect perpetrators’, while in others as ‘originators’.¹²⁹ Moreover, the boundary between the concepts of perpetrator, co-perpetrator and accomplice shifts depending on the legislation in question.¹³⁰ Thiam stressed that the matter is further complicated when one attempts to assign the actors to one category or another and to determine the precise role played by each in the context of international law:

“Reduced to its simplest terms, complicity [in domestic law] involves two actors: the physical perpetrator of the offence (thief, murderer etc.), called the principal, and the person who assists the principal (by aiding, abetting, provision of means etc.), who is called the accomplice. But this simple schema does not reflect the complex reality of the phenomenon of complicity in the context of the topic under consideration.”¹³¹

When it came to complicity in international law, Thiam acknowledged the need for a broad definition of criminal participation corresponding to the complexity of international justice. The Special Rapporteur pointed out that the concept of criminal participation encompasses not only the traditional concept of complicity, but also that of conspiracy (*complot*), which he dealt with in separate sections of his report. He thus drew a clear line between complicity and conspiracy.¹³² Finally, Thiam explicitly raised a point as to the place of complicity within the draft code, and whether it belonged to the section dealing with general principles of law, or whether it should be placed in the part on specific offences.¹³³ He framed his inquiry as one of methodology, but in essence it amounted to establishing the nature of complicity as a mode of participation or as substantive crime.

Based on the work of Special Rapporteur, the ILC adopted a new version of the Draft Code in 1991¹³⁴ and a further version in 1996.¹³⁵ The 1991 Draft Code provided for the first time a definition of complicity as “aiding, abetting or providing the means for the commission of a crime against the peace and

¹²⁹ *Eighth report on the draft Code of Crimes against the Peace and Security of Mankind* (*‘Eighth Report’*), by Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/430 and Add. 1, §§ 7-13, at 29.

¹³⁰ *Fourth report*, § 99, at 64.

¹³¹ *Eighth*, § 22, at 30.

¹³² *Ibid*, § 26, at 31.

¹³³ *Ibid*, § 6, at 28.

¹³⁴ *Report of the International Law Commission on the work of its forty-third session*, 29 April -19 July 1991, UN Doc. A/46/10.

¹³⁵ *Report of the International Law Commission on the work of its forty-eighth session*, 6 May - 26 July 1996, UN Doc. A/51/10.

security of mankind.” The ILC also clarified that complicity is a form of participation and thus belongs in the chapter dealing with the general principles of law.¹³⁶ The final version of the Draft Code of Crimes against the Peace and Security of Mankind was adopted by the ILC in 1996 elaborated on the forms of liability even further by providing contains a list of the modes of criminal participation accompanied by a detailed description attached to each liability type.¹³⁷ Article 2(3) of the 1996 Draft Code holds an individual responsible if he or she:

- (a) intentionally commits such a crime;
- (b) orders the commission of such a crime which in fact occurs or is attempted;
- (c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;
- (d) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
- (e) directly participates in planning or conspiring to commit such a crime which in fact occurs;
- (f) directly and publicly incites another individual to commit such a crime which in fact occurs;
- (g) attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

The Draft Code of Crimes against the Peace and Security of Mankind became more or less superfluous following the adoption of the Rome Statute, but it still serves as evidence of customary international law and has been used by the ICTY and ICTR in various judgments.¹³⁸ Additionally, Article 2 of the draft Code addressing the modes of responsibility eventually served as a basis for the negotiation of the relevant provision of the Rome Statute of the International Criminal Court.¹³⁹

4. Historical Trends

The historical account contained in this chapter showed that complicity evolved across three main tensions inherent to international criminal law:

¹³⁶ Ibid, § 3, at 98.

¹³⁷ *Report of the International Law Commission on the work of its forty-eighth session*, 6 May - 26 July 1996, UN Doc. A/51/10.

¹³⁸ This is especially true of early jurisprudence. *Eg.* Prosecutor v. *Tadić*, ICTY Case No. IT-94-1-T, Trial Judgment, 7 May 1997 (*Tadić* Trial Judgment), §§ 647-649; Prosecutor v. *Furundžija*, ICTY Case No. IT-95-17/1-T, Trial Judgment, 10 December 1998 (*Furundžija* Trial Judgment), §§ 227-232; Prosecutor v. *Akayesu*, ICTR Case No. 96-4-T, Trial Chamber Judgment, 2 September 1998 (*Akayesu* Trial Judgment), § 475. For more discussion, see I. Brownlie, *Principles of Public International Law*, Oxford University Press, 2008, at 589.

¹³⁹ See P. Saland, at 198.

domestic versus international law, collective wrongdoing versus individual criminal responsibility, and substantive crimes versus forms of participation. Each of these contradictions helped to shape the definition and the content of complicity in international criminal law.

When it comes to the first contradiction of national and international law, it is important to remember that from the very beginning, international criminal law was significantly influenced by domestic penal law systems.¹⁴⁰ The drafters of the Nuremberg Charter came from different legal and political cultures. The need to compromise shaped not only the language of the constituent documents, but also the charges against the accused and the final judgements. The US concept of ‘conspiracy’ was the chosen instrument of reflecting the collective nature of crimes at both Nuremberg and Tokyo.

Complicity, as an alternative mechanism for addressing system criminality, never arose in the Nuremberg and Tokyo judgements notwithstanding the fact that Article 6(c) of the Nuremberg Charter and Article 5(c) of the Tokyo Charter specifically provided for the liability of accomplices participating in the execution of a common plan or conspiracy to commit any of the aforementioned crimes. However, the separate and dissenting opinions of individual judges from different jurisdictions reflected divergent views on the issue. These separate voices serve as the best indicators of the complexity of the legal landscape of the time. Complicity surfaced in the opinions of the French judges, primarily because of the importance of this mode of responsibility in France. Judge de Vabres of the IMT insisted that complicity would have been a more appropriate form of dealing with group criminality because of its wider acceptance in the variety of legal systems and its focus on the subjective indicators of individual culpability, rather than external evidence of common agreement.

The subsequent proceedings against former Nazis were conducted under the Control Council Law No. 10 and national penal laws of the trying states. France, for example, used its domestic criminal law during these prosecutions. Thus, it is not surprising that French courts relied almost exclusively on the complicity-perpetratorship dichotomy when determining the modes of responsibility of the accused. However, prosecutions in the British and American zones pursuant to rules based on the Control Council Law No. 10 were also highly ‘domesticated’. The British courts used the national concept of ‘common design’ to determine whether the accused were ‘concerned in’ committing the specific war crimes while the courts located in the US zone adhered to the common law ‘concerted approach’ to criminal participation and focused on the link between the accused and the crime on a

¹⁴⁰ S. Horwitz, at 540.

case-by-case basis. Finally, the work of the ILC on defining the modes of responsibility for the Draft Code of Crimes against the Peace and Security of Mankind was predicated on the exploration of domestic legal systems. Special Rapporteur Thiam looked at complicity in various jurisdictions in an attempt to define the concept in international law.

There is one concluding observation in relation to the role of domestic law in shaping complicity in international criminal law. It is the frequency with which the first war crimes courts referred to the wide domestic acceptance of a certain rule in order to secure its international legitimacy. For example, the IMT alluded to the “criminal law of most nations” in support of the rule that following the unlawful order does not absolve the defendant from responsibility.¹⁴¹ The UN War Crimes Commission held that British rules regarding complicity in crimes are found in substance in the majority of legal systems.¹⁴² This trend shows the historical importance of the general principles of law recognized by civilized nations as a source of international criminal law.¹⁴³

The second tension between individual criminal responsibility and collective wrongdoing stems from the need for some ‘medium’ between the crime and the offender in international criminal law. This is because very few men standing trial for mass crimes directly order or perpetrate certain offences. The ILC Special Rapporteur emphasized the difficulty of applying the traditional domestic law principal-accomplice dichotomy to international offences. He acknowledged that the latter require a broader definition of complicity to cover the complexity of the legal context associated with international crimes.

The Tokyo tribunal settled for conspiracy as a tool designed to capture collective criminality. Conspiracy declared the agreement to commit mass atrocities criminal without the need to prove underlying offences. The leadership position was determinative, in the eyes of the IMTFE judges, of whether the accused belonged to a conspiracy or was responsible for the crimes committed under his supervision. The IMT relied on conspiracy to a lesser extent than its Tokyo counterpart. The Nuremberg response to the problem of attribution of responsibility for the acts committed by distant others was to focus on the factual contribution of the accused to the common plan and his official position within the Nazi hierarchy. The IMT therefore avoided a legalistic discussion about the modes of participation of each accused.

¹⁴¹ Nuremberg Judgment, at 221.

¹⁴² 11 L.R.T.W.C. 64, at 72.

¹⁴³ For more discussion about complicity as a general rule of international law see Chapter IV *infra*.

The prosecutions of the former Nazis by national authorities in the aftermath of the IMT signified a shift from the fact-based approach to criminal participation of Nuremberg and Tokyo to a more nuanced and developed body of law regarding the ways in which the defendant was involved in a crime. These trials were driven, to a large extent, by national law. Thus, many ambiguities characteristic of the domestic legal systems affected the way various modes of participation were used. For example, the British court in *Schonfeld* struggled to distinguish participation in the common design and aiding and abetting. It referred to the theory of actual or constructive presence at the scene of the crime, used by the traditional English law doctrine to establish a boundary between the two forms of participation. Notwithstanding the reference to this theory in the judgements, the British courts failed to consistently apply it in cases like *Rohde* or *Schonfeld* and instead settled for a half-hearted compromise.

The US Military Tribunals adopted the unitary model of criminal participation thereby placing all modes of responsibility on an equal footing. This does not mean however that the judges paid no attention to the way in which the defendants became involved in the crimes. Quite the opposite, the US courts developed the fault and conduct requirement of the individual criminal responsibility. For example, the *Justice* case stressed the importance of the personal knowledge of the accused, while *Pohl* guarded against assuming criminality solely on the basis of official capacity. The *Pohl* tribunal also highlighted the importance of positive action in establishing a defendant's consent to the commission of the crimes. By focusing on legal requirements of responsibility the US tribunals sitting at Nuremberg distanced themselves from the approach adopted at Nuremberg and Tokyo.

The trials of industrialists in the aftermath of the war are yet another example of the tension stemming from the complexity of crimes in question. Corporations represent the middle ground between the state and the person. As demonstrated in the *Krupp* case, for example, these corporations are perfectly capable of committing violations of international law. However, the attribution of responsibility for these violations to a particular individual within the firm is challenging. Nonetheless, the US and British courts undertook this task and acknowledged the responsibility of firms' officers for breaching the laws and customs of war.

The third tension between complicity as a mode of participation and complicity as a substantive crime flows directly from the collective nature of the offences in question. The distinction between the wrongdoing and the manner in which individuals become involved is not always clear in international criminal law. One can trace how judicial reasoning evolved in this regard. The first international criminal tribunals hardly referred to the

form of liability of each accused, despite their being explicitly mentioned in the Nuremberg and Tokyo charters. The Nuremberg and Tokyo judgments, did not explicitly distinguish between primary perpetrators and other crime participants and instead adopted a rather fact-based approach to attributing responsibility.¹⁴⁴ Kai Ambos noted, “the Nuremberg approach can be called pragmatic rather than dogmatic.”¹⁴⁵ One can find two explanations for this peculiarity: first, the lack of theoretical framework during the first international criminal trials; and secondly, the adoption of an inchoate offence of ‘conspiracy’, rather than various forms of complicity, as a method of capturing the collective nature of crimes.

The ILC first codified complicity in the commission of a crime against peace, a war crime, or a crime against humanity as a substantive crime under international law.¹⁴⁶ Arguably this was the result of the lack of a distinction between the modes of participation and the substantive offences at Nuremberg. The ILC’s position regarding complicity changed only with the adoption of the 1991 Draft Code of Crimes against the Peace and Security of Mankind that recognized that complicity is a mode of participation and belongs to the section on general principles of law. The same 1991 Draft Code provided the definition of complicity for the first time since the beginning of the ILC’s work on the issue in the early 1950’s. This shift, leading to a deeper and more nuanced understanding of complicity, was likely the result of the scrupulous work on the issue by the ILC’s Special Rapporteur in the 1980’s. The other reason for this change of attitude towards complicity was the legacy of the post-IMT prosecutions war criminals. These trials rejected the fact-based approach of Nuremberg and Tokyo and stressed the importance of defining the link between the accused and the crime. The final 1996 Draft Code contained a detailed list of the modes of criminal participation, paving the road to the relevant provision of the Rome Statute.

The historical journey in this paper reveals several notable trends related to the concept of complicity: the development of the legal requirements for complicity while moving away from the fact-based approach of Nuremberg and Tokyo; introduction and abandonment of the notion of conspiracy as a substantive offence in international criminal law; introduction and abandonment of the concept of corporate complicity in war crimes; and, finally, the constant struggle to attribute personal guilt for collective wrongdoing. This latter trend is arguably the most important in understanding the evolution of complicity. While it is never easy to capture personal guilt

¹⁴⁴ E. Van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, TMC Asser Press, 2003, at 39; K. Ambos, 2000, at 8-9.

¹⁴⁵ K. Ambos, 2000, at 8.

¹⁴⁶ Principle VII of the Nuremberg Principles adopted by the International Law Commission at its second session, in 1950, *Yearbook of the International Law Commission*, 1950, vol. II.

amid mass atrocities, it is possible. Complicity as a mechanism for dealing with collective criminality is deeply rooted in both domestic and international criminal law and, notwithstanding the many ambiguities that characterize this concept, it still serves the purposes of locating individual criminal responsibility.

II. Complicity in the Jurisprudence of the ad hoc Tribunals and Hybrid Courts

Introduction

After some decades of inactivity, international criminal justice was reinvigorated with the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) pursuant to the Security Council Resolution 827.¹ Its establishment was prompted by another UN-mandated body – the Commission of Experts investigating the violations of international humanitarian and human rights law in the territory of the former Yugoslavia.² The Commission cautiously suggested in its interim report either setting up an international tribunal that would combine national jurisdictions under the universality principle, akin the IMT, or the establishment of an ad hoc tribunal authorized by the Security Council.³ The latter option was preferred.⁴ Roughly one year later, the International Criminal Tribunal for Rwanda (ICTR) came into existence with the mandate to punish those responsible for the atrocities committed in the Rwandan genocide and to put an end to such crimes.⁵

Due to the fact that the ICTY and ICTR (the ‘ad hoc tribunals’) were established under very different circumstances than their Nuremburg and Tokyo predecessors, their creation marked a new era in the development of international criminal law. The IMT and IMTFE were the result of a political compromise reached by the victorious states. In the aftermath the World War II, there was a practical necessity to ‘do something’ about the aggressors. While the solution eventually chosen by the Allied Powers was to try them in a court of law, other options, including the executions or show trials, were considered.⁶ In contrast, the ad hoc tribunals were not established by the winning powers but by the international community and not as a postscript to a war but as a mechanism of ceasing the on-going violence and preventing further atrocities. These functions were in addition to the traditional goal of a criminal justice system of bringing those responsible to justice, itself a challenging objective when pursued in the midst of a conflict. The ICTY and ICTR therefore represented an enormous aspiration on the part of the international community.

¹ SC Resolution 827 (1993) of 25 May 1993.

² SC Resolution 780 (1992) of 6 October 1992.

³ Interim report of the Commission of Experts established by resolution 780 (1992) (S/25274), 26 January 1992, §§ 73-74.

⁴ SC Resolution 808 (1993) of 22 February 1993.

⁵ SC Resolution 955 (1994) of 8 November 1994.

⁶ R. Overy, 2003, at 10.

In contrast with the ad hoc tribunals, introduced during the respective conflicts, the hybrid courts combining the features of an international and a domestic court, namely the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), were established in the aftermath of hostilities.⁷ The SCSL was established shortly before the end of the Sierra Leonean civil war,⁸ while the ECCC did not begin operations until almost three decades had passed since the end of the bloody Khmer Rouge regime.⁹ The ambitions of these two courts are nonetheless comparable to those of the ad hoc tribunals – ensuring accountability, promoting peace and contributing to national reconciliation.¹⁰

The aspirations of the modern international criminal justice had a direct bearing on the way law was formulated in the early judgements of the ICTY and ICTR, including the doctrines of individual criminal responsibility. The desire to simultaneously achieve a plethora objectives and deliberately avoid theoretical problems, such as those arising out of the interpretation of the sources of international criminal law, frequently led to unsatisfactory results.¹¹ The last chapter of this thesis provides a critical assessment of the purposes of international criminal law and suggests possible trajectories for their further refinement. This exercise is an attempt to bring coherence to the discipline in general and the law of complicity in particular.

The present chapter has a different objective in mind. It aims at defining complicity, its scope and aims, in the jurisprudence of the ad hoc tribunals and hybrid courts. The work of these institutions can be conceptualized as an intermediate step in the development of international criminal law linking the military tribunals of the post-World War II era and the permanent body of international criminal justice – the International Criminal Court ('ICC'). The

⁷ This chapter will not cover the work of the Special Tribunal for Lebanon for two main reasons: first, it was conceived as a purely domestic court, albeit with some international elements, and secondly, it is still at the early stages of its operation. See SC Resolution 1757 (2007) of 30 May 2007.

⁸ SC Resolution 1315 (2000) of 14 August 2000.

⁹ The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea ('ECCC Law'), *Reach Kram NS/RKM/0801/12* as amended in 2004 by *NS/RKM/1004/006*.

¹⁰ SC Resolution 1315 (2000) of 14 August 2000; UN GA Resolution regarding the situation of human rights in Cambodia, 27 February 1998 (A/RES/52/135).

¹¹ On the lack of a clear objective: M. Damaška, 'What is the Point of International Criminal Justice?' 83 *Chi.-Kent L. Rev.*, 2008, 329; On collective responsibility: A. M. Danner and J. S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* (2005) 75; G. Boas, J. L. Bischoff, N. L. Reid, *International Criminal Law Practitioner Library International Criminal Procedure* (2 volumes), Cambridge University Press, 2007, at 17-22; S. Powles, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?' 2 *Journal of International Criminal Justice*, 2004, at 606.

'step' is however enormous. In the last two decades international criminal law has become the symbol of the international community's efforts to address political violence as it has unfolded in different parts of the world.¹² It is also possible to view the existence of the ad hoc tribunals and hybrid courts as a separate vector of the development of international criminal law independent from the ICC, given the fact that the circumstances of their creation and the aspirations of these institutions are not identical. However, regardless of how one perceives them, the ICTY, ICTR, SCSL and the ECCC contributed immensely to the definition and evolution of the law on individual criminal responsibility.

The first part of the chapter discusses the elements of different forms of responsibility in the jurisprudence of the ad hoc tribunals and hybrid courts. The purpose is twofold: first, to define various forms of complicity and to separate them from 'commission'; and, secondly, to analyse some problematic and contentious issues pertaining to the law on individual criminal responsibility. This section does not comprehensively cover all forms of responsibility as defined in the jurisprudence of the ad hoc tribunals and hybrid courts but builds on excellent recent works dealing with the issue,¹³ selecting those aspects that are crucial for defining and understanding complicity in all of its complexity.¹⁴ The second part of this chapter discusses four problems characteristic of international criminal justice that hinder a coherent and just application of the concept of complicity. This exercise is intended to determine how best to deal with the complicity doctrine in international criminal law. When properly defined and employed, different forms of complicity allow accurately describing the conduct of the accused and attaching responsibility for the particular act thereby avoiding the finding of collective guilt that is often produced by newly invented doctrines, such as the joint criminal enterprise.

¹² D. Luban, 'After Honey Moon: Reflections on the Current State of International Criminal Justice', 11 *Journal of International Criminal Justice*, 2013, at 505.

¹³ The past decade saw an increased interest in the legal requirements for the modes of liability in international criminal law – a trend to be applauded. Kai Ambos argued in 2000 that the elements of individual criminal responsibility are not sufficiently discussed in the literature, despite this concept being universally recognized. Only recently have the technical issues received more profound treatment in the literature. See K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, Oxford University Press, 2013, at 103 Cf K. Ambos, 2000, at 6.

¹⁴ E. Van Sliedregt, 2012; G. Mettraux, *International Criminal and Ad Hoc Tribunals*, Oxford University Press, 2005; G. Boas et al.

1. Forms of Participation in the Statutes of the ad hoc Tribunals and Hybrid Courts

i. Requirements of Individual Criminal Responsibility

The following provisions the Statutes of the ICTY, ICTR, SCSL ('Statutes')¹⁵ and the ECCC Law¹⁶ deal with matters of individual criminal responsibility.¹⁷

Article 7(1) ICTY Statute:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

Article 6(1) ICTR and SCSL:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

Article 29 of the ECCC Law:

Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime. [...]

The modes of participation are not defined in the Statutes¹⁸ and the ECCC Law. The ICTY Appeals Chamber clarified that the Statute only provides an *a priori* jurisdictional framework *ratione personae*, and the existence of a particular form of liability as well as its legal requirements will be determined by customary international law.¹⁹ This is in contrast with the Rome Statute of

¹⁵ Statute of the International Criminal Tribunal for the Former Yugoslavia adopted on 25 May 1993, S/RES/ 827; Statute of the International Criminal Tribunal for Rwanda adopted on 8 November 1994, S/RES/955; Statute of the Special Court for Sierra Leone adopted on 14 August 2000, S/RES/1315.

¹⁶ Article 29 ECCC Law.

¹⁷ The full text of the relevant articles is reproduced in Appendix I.

¹⁸ F. Pocar noted in respect to the ICTY Statute, "[t]he drafters of the Statute had explicitly declined to make it a self-contained criminal code. They instead granted the Tribunal jurisdiction over a set of very broadly defined crimes, the specific content of which was to be found in customary international law." F. Pocar, *Audiovisual Library of International Law*, available at <http://untreaty.un.org/cod/avl/ha/icty/icty.html>, accessed on 15 May 2013.

¹⁹ *Prosecutor v. Milutinović, Šainović and Ojdanić*, ICTY Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003 ('*Ojdanić* JCE Appeal Decision'), §§ 9-10 (quoting Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993), § 21).

the ICC that spells out the modes of participation in greater detail and assigns customary international law a secondary role vis-à-vis the provisions of the Rome Statute.²⁰

In the absence of a definition in the Statutes and the ECCC Law, it is up to the ICTY, ICTR, SCSL and the ECCC to spell out the legal requirements for each mode of liability. In this process, it is important to distinguish the constituent elements of the offence and the legal requirements of the mode of responsibility used in conjunction with this offence.²¹ The constituent elements of the offence are the objective element or *actus reus*; and the subjective element or *mens rea*. Cassese defines *actus reus* as a conduct (an act or omission contrary to a rule imposing specific behavior); and *mens rea* as a state of mind (a psychological element required by the legal order for the conduct to be blameworthy and consequently punishable).²²

There exists a separate set of requirements for each form of individual criminal responsibility. Their purpose is to help the judge or the juror decide whether individual's involvement in a crime entails criminal responsibility or not. In the literature and the judgments, the terms 'mens rea' and 'actus reus' are often used in relation to both the substantive offences and the mode of responsibility.²³ The goal of this dissertation is to separate the two sets of elements. This aim is in line with an important tendency of international criminal law to view modes of participation and substantive offences as separate issues – a significant trend that has taken some time to evolve.²⁴ The terms frequently used in this thesis to refer to the elements of individual criminal responsibility (as opposed to the elements of the crime) are the 'legal requirements', consisting of a 'conduct requirement' and a 'fault requirement'.²⁵

In cases of direct primary participation (i.e. commission), the conduct and fault requirement of legal responsibility form 'mirror' *mens rea* and *actus*

See also Prosecutor v. *Delalic et al* ('Čelebići Appeal Judgment') ICTY Case No. IT-96-21-A, Appeal Judgment, 20 February 2001, § 178 as cited by G. Mettraux, 2005, at 270.

²⁰ For the detailed discussion of the relevant provisions of the Rome Statute see Chapter III.

²¹ Various forms of liability have different conduct and mental requirements. See R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, (2ed), Cambridge University Press, 2010, at 361.

²² A. Cassese, *International Criminal Law*, 2nd edn Oxford University Press, 2008, at 53.

²³ G. Boas et al, at 4.

²⁴ See Chapter I.4 *supra*.

²⁵ Despite the author's attempt to reserve the terms 'mens rea' and 'actus reus' for the substantive crimes and 'fault requirement' and 'conduct requirement' for modes of participation, the former set of terms still appear occasionally throughout this thesis in conjunction with modes of responsibility. This is so because many academic works and judgements refer to the constituent elements of the modes of responsibility as 'mens rea' and 'actus reus'.

reus of the substantive offence: the conduct of the principal fully corresponds to the elements of the crime. However, when it comes to more complex forms of commission, such as commission through the joint criminal enterprise, as well as different forms of complicity, the requirements of liability supplement the constituent elements of an offence. It is essential to establish that the crime was committed and *the way* in which the accused was involved in it.

The first international criminal law judgement since Nuremberg – *Tadić* – pointed out this phenomenon. The Trial Chamber had to determine “whether the conduct of the accused [...] sufficiently connects the accused to the crime.”²⁶ In doing so, the judges drew a distinction between instances when the accused directly engaged in the actions alleged and cases when the accused did not directly commit some of the offences charged but was present at the time of, or otherwise involved in, their commission.²⁷ The *Tadić* Trial Chamber consequently established a two-prong test to establish liability for ‘complicitous’ conduct. The first element of the test is “intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime.” To satisfy the second part of the test, the conduct of the accused must have contributed to the commission of an illegal act.²⁸

ii. The Scope of Complicity

The early *Tadić* interpretation of ‘complicitous conduct’ introduced the broader understanding of complicity then subsequently applied by the ad hoc tribunals and the hybrid courts. It encompassed all forms of participation

²⁶ See *Tadić* Trial Judgment, § 673.

²⁷ The subsequent case law of the ICTY and ICTR does not stress this subtle difference, with the exception of situations when conviction on appeal was revised: multiple Appeals Chambers allowed changing the mode of liability on appeal, reiterating that it does not amount to entering a new conviction. Judge Pocar noted the following instances of changing the mode of liability on appeal: Prosecutor v. *Vasiljević*, ICTY Case No. IT-98-32-A, Appeal Judgment, 25 February 2004 (*Vasiljević* Appeal Judgment), §§ 132-135, 141-143, 147, 181-182; Prosecutor v. *Krstić*, ICTY Case No. IT-98-33-A, Appeal Judgment, 19 April 2004 (*Krstić* Appeal Judgment), §§ 135-144, 266, 268; Prosecutor v. *Simić et al.*, ICTY Case No. IT-95-9-A, Appeal Judgment, 28 November 2006 (*Simić* Appeal Judgment), §§ 74-75, 84, 105, 114-118, 130-138, 148-159, 182-189, 300-30; Prosecutor v. *D. Milošević*, ICTY Case No. IT-98-29/1-A, Appeal Judgment, 12 November 2009 (*D. Milošević* Appeal Judgment), §§ 275-282, 334; Prosecutor v. *Rukundo*, ICTR Case No. 2001-70-A, Appeal Judgment, 20 October 2010 (*Rukundo* Appeal Judgment), §§ 39, 50-54, 175-177, 269-270; Prosecutor v. *Blaskić*, ICTY Case No. IT-95-14-A, Appeal Judgment, 29 July 2004 (*Blaskić* Appeal Judgment), §§ 32-42, 659-670. See Prosecutor v. *Gotovina and Markač*, ICTY Case No. IT-06-90-A, Appeal Judgment, 16 November 2012; (*Gotovina* Appeal Judgment), Dissenting Opinion of Judge Pocar, § 33.

²⁸ *Tadić* Trial Judgment, §§ 674 and 688.

mentioned in Article 7(1) of the ICTY Statute.²⁹ Such a broad understanding of complicity can be explained by the legacy of the IMT and subsequent jurisprudence that formed the basis of the first ICTY judgment. As discussed in chapter one, pre-1993 case law adopted a rather fact-based unitary approach to the modes of responsibility. Thus, little clarity existed in this regard at the time when *Tadić* judgment was drafted.³⁰ In *Krnjelac* the ICTY Appeals Chamber addressed the *Tadić* approach by clarifying that the term ‘accomplice’ has different meanings depending on the context and may refer to a co-perpetrator or an aider and abettor.³¹ The ECCC Trial Chamber delimited ‘aiding and abetting’ from the broader notion of complicity. This finding was made despite the French version of Article 29 of the ECCC law translating ‘aiding and abetting’ with the word ‘complicité’. Given the fact that ‘complicité’ encompasses a broader conduct, a more accurate translation would have been ‘aidé et encouragé’.³² The conclusion about the shifting scope of complicity is corroborated by the separate declaration of Judge Keith to the *Genocide* Judgment in which he examined various definitions of ‘complicity’ and came to the conclusion that ‘complicity is *often* restricted to aiding and abetting’.³³

If one views international criminal law as being rooted in domestic criminal law,³⁴ complicity should be understood as embracing planning, instigating, ordering, aiding and abetting. This conclusion follows from the theoretical underpinning of complicity as a form of secondary participation, which is derivative in nature.³⁵ Various domestic law systems recognize different

²⁹ *Ibid.*, § 674.

³⁰ In a different part in the same judgment the Trial Chamber used the term ‘complicity’ as a synonym to ‘aiding and abetting’. *Tadić* Trial Judgment, § 688.

³¹ Prosecutor v. *Krnjelac*, ICTY Case No. IT-97-25-A, Appeal Judgment, 17 September 2003 (*Krnjelac* Appeal Judgement), § 70.

³² Prosecutor v. KAINING Guek Eav *alias* Duch, ECCC Case No. 001/18-07-2007/ECCC/TC, Trial Judgment, 20 March 2012 (*Duch* Trial Judgement), § 532.

³³ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C. J. Reports 2007 (*Genocide Judgment*), Declaration of Judge Keith, at 353, emphasis added.

³⁴ At the time of the conception of the ICTY, the idea seemed to be precisely to ground international criminal law in the two disciplines – public international law and domestic criminal law. The French jurists suggested finding the satisfactory balance between the principles of public international law, on the one hand, and the principles of criminal law and criminal procedure, on the other. See *Report of the Committee of French Jurists to study the establishment of International Criminal Tribunal to judge the crimes committed in the Former Yugoslavia* (*Report of the Committee of French Jurists*), appended to the letter dated 10 February 1993 from the Permanent Representative of France to the United Nations addressed to the Secretary General, UN DOC S/25266, § 50(d).

³⁵ As Smith put it: “complicity’s function is to determine the circumstances when one party (an accessory) by virtue of prior simultaneous activity or association will be held criminally responsible for another’s (the perpetrator’s) wrongful behaviour.” He adds that English common law adopted and developed a derivative form of complicity. See K.J.M. Smith, at 1-3.

forms of complicity; aiding and abetting and instigating being the most common.³⁶ The idea is that an accomplice does not directly perpetrate the crime but is nonetheless involved in its commission. ‘Committing’, on the other hand, signifies principal perpetration, whether directly or indirectly through an agent.³⁷ Broader and narrower notions of complicity shall be contextualized and treated as mere rhetorical tools. Consequently all modes of participation listed in the statutes of the ad hoc tribunals and hybrid courts aside from ‘committing’ belong to the sphere of ‘complicity’.³⁸

Complicity should be distinguished from command responsibility regulated by distinct provisions of the Statutes and the ECCC Law. These norms allow for holding the superior responsible for the acts of his subordinate “if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.”³⁹ The common feature of the accomplice and superior responsibility is that they both entail culpable commission by others. Command responsibility cannot be characterized as complicity, however.⁴⁰ The key conceptual distinction between the two is that the superior bears responsibility for his *own* culpable omission to act in the presence of such duty, while accomplice liability is derivative in nature and necessarily stems from the criminal conduct of another person.⁴¹ For this reason, command responsibility has been referred to in *Orić* as responsibility *sui generis*.⁴²

The ad hoc and hybrid courts and tribunals defined the legal requirements of various forms of liability on a case-by-case basis relying on the existent customary international law.⁴³ The following subsections summarize their findings. Complicity in genocide is treated in a distinct section because it is a separate provision in the ICTY and ICTR the Statutes (but not the SCSL Statute or the ECCC Law). ‘Committing’ is included in the description of the

³⁶ For the detailed analysis of complicity in the domestic legal systems, see Chapter IV.

³⁷ For the theoretical discussion on the distinction between primary and secondary participation in domestic criminal law see Chapter IV.

³⁸ W. Schabas, *The U.N. International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, 2006, at 305.

³⁹ Article 7(3) of the ICTY Statute, Article 6(3) of the ICTR and SCSL Statute and Article 29 (paragraph 3) of the ECCC Law. See texts attached in Appendix I.

⁴⁰ G. Mettraux, 2009, at. 39.

⁴¹ ‘Ordering’ is the form of complicity arguably the closest to ‘superior responsibility’. The former, unlike the latter, does not require superior-subordinate relationship between the order giver and the perpetrator so long as it is demonstrated that there existed the authority to order. Responsibility of the order giver derives from the wrongful act of the principal rather than the formal link between the two participants in the crime. See section vi *infra*.

⁴² *Orić* Trial Judgment, § 293.

⁴³ See, for example, *Čelebići* Appeal Judgment, § 178.

modes of liability for the purposes of better defining the contours of complicity.⁴⁴

iii. Committing

The term ‘commit’ in the jurisprudence of the ICTY, ICTR, SCSL and the ECCC implies direct commission and participation in the joint criminal enterprise.⁴⁵ The *Tadić* Appeal Chamber held that Article 7(1) of the Statute covers “first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law.”⁴⁶ Despite this statement, only slightly more than a dozen of the accused standing trial at the ICTY, less than 20% of all convictions, were convicted as direct perpetrators or co-perpetrators. The remainder of convictions were founded on participation in the joint criminal enterprise, superior responsibility or various forms of complicity.⁴⁷ The SCSL or the ECCC produced no convictions for direct perpetration.⁴⁸

The ICTR jurisprudence on commission stands in contrast with that of other courts. It issued convictions for committing in a third of the cases it dealt with and assigned a less prominent role to the joint criminal enterprise.⁴⁹ This trend could be explained by the unique approach to ‘commission’ adopted by the ICTR. The Appeals Chamber in *Gacumbitsi* accepted the extended interpretation of this form of liability, holding that “direct and physical perpetration” need not be confined to physical killing but can also include other acts including “directing” and “playing a leading role in conducting and, especially, supervising”.⁵⁰ In accordance with this interpretation, the ICTR judges held that Sylvestre Gacumbitsi - the highest-ranking local administrative official in one of the municipalities in Rwanda – committed genocide through being physically present at the scene of the crime and personally directing the Tutsi and Hutu refugees to separate in different groups. The Chamber found these actions to be “as much an integral part of

⁴⁴ Smith noted “...analysis of complicity’s distinct *mens rea* and *actus reus* elements needs to be carried out within the complete framework of responsibility demands”, K.J.M. Smith, at 64.

⁴⁵ E. Van Sliedregt, 2012, at 91.

⁴⁶ Prosecutor v. *Tadić*, ICTY Case No IT-94-1, Appeals Chamber Judgment, 15 July 1999 (*Tadić* Appeal Judgment) § 188. The SCSL and the ECCC followed the same approach. Prosecutor v. *Brima, Kamara and Kanu*, SCSL-04-16-T, Trial Judgment, 20 June 2007 (*AFRC Trial Judgment*), § 762; *Duch* Trial Judgment, § 479.

⁴⁷ See Appendix VI.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Prosecutor v. *Gacumbitsi*, ICTR Case No. 2001-64-A, Appeal Judgment, 7 July 2006 (*Gacumbitsi* Appeal Judgment), § 60.

the genocide as were the killings which it enabled”.⁵¹ The subsequent paragraph of the judgment provides reasons for such a broad interpretation of commission. That is the belief that other modes of participation - ordering, planning or instigating do not, taken alone, fully capture the accused’s criminal responsibility.⁵² The appellate judges stated that by being present at the scene of the crime, Gacumbitsi did not “merely ‘instigate’ the killings”, but rather committed them.⁵³

The Appeals Chamber in *Seromba* adopted the same approach to commission by holding that “Athanasé Seromba crossed the line separating aiding and abetting from committing genocide and became a principal perpetrator in the crime itself.”⁵⁴ The judges noted that Seromba, in his capacity as the local priest, exercised influence over the driver who drove a bulldozer into the church where 1,500 Tutsi were taking refuge.⁵⁵ The Appeals Chamber observed that Seromba’s conduct “was not limited to giving practical assistance, encouragement or moral support to the principal perpetrators of the crime, which would *merely* constitute the *actus reus* of aiding and abetting.”⁵⁶ The recent *Munyakazi* Appeal judgement confirmed this broad interpretation of commission.⁵⁷

Not all of the appellate judges supported this wide reading of commission. Judge Liu dissented in *Seromba* and *Munyakazi* on three main points: first, he noted that the *Gacumbitsi* interpretation of commission is reserved for genocide alone;⁵⁸ secondly, extended commission is somewhat superfluous because the joint criminal enterprise is the mode of liability covering commission without physical perpetration, thus it must be pleaded instead of the commission;⁵⁹ finally, “the expanded notion of commission not only embraces acts that technically amount to secondary forms of participation, but also extends to conduct that contributes to the commission of crimes of

⁵¹ Ibid.

⁵² Ibid, § 61.

⁵³ Ibid.

⁵⁴ Prosecutor v. *Seromba*, ICTR Case No. 2001-66-A, Appeal Judgment, 12 March 2008 (*‘Seromba Appeal Judgment’*), § 182.

⁵⁵ Ibid, § 171.

⁵⁶ Ibid, § 172, emphasis added. The word ‘merely’ denotes implied hierarchy of the modes of participation accepted by the Appeals Chamber.

⁵⁷ Prosecutor v. *Munyakazi*, ICTR Case No. 97-36A-A, Appeal Judgment, 28 September 2011 (*‘Munyakazi Appeal Judgment’*), §§ 136-138.

⁵⁸ *Seromba Appeal Judgment*, Dissenting Opinion of Judge Liu, § 2; *Munyakazi Appeal Judgment*, Dissenting Opinion of Judge Liu §§ 2 and 5.

⁵⁹ *Seromba Appeal Judgment*, Dissenting Opinion of Judge Liu, § 6; *Munyakazi Appeal Judgment*, Dissenting Opinion of Judge Liu § 4.

others.”⁶⁰ This interpretation resembles co-perpetration or indirect perpetration as possible envisaged by the ICC, but not the ICTR Statute.⁶¹

It is noteworthy that the accused need not hold a position in the army or state apparatus to incur individual criminal responsibility under the jurisprudence of the ad hoc tribunals. Alfred Musema, the director of a tea factor, was involved in attacks against Tutsi refugees in the area surrounding his factory at the time when the Rwandan atrocities occurred. The ICTR Prosecutors charged Musema with extermination, rape as a crime against humanity, genocide, or, alternatively, complicity in genocide.⁶²

The form of commission that Judge Liu alluded to when he criticized the extended form of commission in the ICTR jurisprudence is that of joint criminal enterprise. This form of liability is not explicitly mentioned in the ICTY, ICTR, SCSL Statutes or the ECCC Law but has frequently been used by all of these courts to address situations where multiple accused are removed from the scene of the crime. The ICTY in *Tadić* developed three forms of the joint criminal enterprise:⁶³

- The first category involves cases where all participants are acting pursuant to a common purpose and share the same criminal intent;
- The second category refers to instances of systemic ill-treatment in organized institutions, such as concentration camps;
- The third category, called the ‘extended form’ of the joint criminal enterprise, entails liability of the members of the group for the acts which occur as a ‘natural and foreseeable consequence’ of carrying out the common purpose.⁶⁴

The conduct requirement of all three forms of the joint enterprise is the following: (i) a common plan involving the commission of a crime; (ii) a plurality of persons, and (iii) an individual contribution of the accused to the execution of the plan.⁶⁵ The fault requirement differs depending on the type of the joint enterprise – intent to perpetrate for the first type, personal

⁶⁰ *Seromba* Appeal Judgment, Dissenting Opinion of Judge Liu, §§ 9-10; *Munyakazi* Appeal Judgment, Dissenting Opinion of Judge Liu § 4.

⁶¹ Even at the ICC, these concepts receive some critical appraisal. For the detailed discussion, see Chapter III.

⁶² Prosecutor v. *Musema*, ICTR Case No. 96-13-T, Trial Judgement, 27 January 2000 (‘*Musema* Trial Judgment’), §§ 149, 168, 218, 220. The Prosecution also charged Musema with the violations of Article 4 of the ICTR Statute (war crimes) but the Trial Chamber failed to establish the nexus between the acts of the accused the armed conflict. See *Musema* Trial Judgment, § 974.

⁶³ *Tadić* Appeal Judgement, §§ 195-226 as discussed by W. Schabas, 2006, at 309-310.

⁶⁴ *Tadić* Appeal Judgment, § 204.

⁶⁵ *Ibid.*, § 227.

knowledge of the system of ill-treatment and the intent to further the system for the second type.⁶⁶ The third type of the joint criminal enterprise requires the intention to participate and further the criminal activity or the criminal purpose of the group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. The responsibility for a crime other than that agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.⁶⁷

Despite the acknowledgment in the jurisprudence that the joint criminal enterprise is a form of ‘commission’,⁶⁸ the legal requirements of the joint criminal enterprise are similar to those of certain forms of complicity, namely aiding and abetting.⁶⁹ This proximity prompted the ICTY Appeals Chamber to distinguish joint criminal enterprise from aiding and abetting. The main difference between the two forms of participation is that the aider and abettor *knowingly* commits acts *specifically directed* at assisting the perpetration of a particular crime, while members of the joint criminal enterprise perform acts *in some way directed* to the furtherance of common design with the *intent* to pursue this design.⁷⁰ No proof of common plan is required for aiding and abetting.⁷¹ In addition, the threshold for contribution to the specific crime pursuant to aiding and abetting appears to be higher than the contribution to the joint criminal enterprise.⁷²

Van Sliedregt has traced the evolution of the application of the joint criminal enterprise.⁷³ It was initially created as a solution for small-scale enterprises and group criminality such as in *Tadić* and *Furundžija*, but was later used to address the liability of senior political and military leaders in cases such as

⁶⁶ *Tadić* Appeal Judgment, § 228.

⁶⁷ *Ibid.*

⁶⁸ *Vasiljević* Appeal Judgment, § 95; *Tadić* Appeal Judgement, § 188; *Krnjelac* Appeal Judgement, § 29; G. Mettraux, 2005, at 288.

⁶⁹ Schabas even considers joint criminal enterprise as a form of participation or complicity. W. Schabas, 2006, at 319.

⁷⁰ *Tadić* Appeal Judgment, § 229.

⁷¹ *Ibid.*; *Duch* Trial Judgement, § 534.

⁷² The Appeals Chamber in *Kvočka* held that there is no specific legal requirement for the accused to make substantial contribution to the joint criminal enterprise. The significance of the accused’s contribution is only relevant to demonstrating that the accused shared the intent to pursue the common purpose. Prosecutor v. *Kvočka*, ICTY Case No. IT-98-30/1-T, Appeal Judgment, 28 February 2005 (*Kvočka* Appeal Judgement’), § 97. See also *Gotovina* Appeal Judgement, § 149. *Cf.* Contribution to the specific crime pursuant to aiding and abetting has to be substantial.

⁷³ E. Van Sliedregt, 2012, at 136.

Krajišnik,⁷⁴ *Popović*,⁷⁵ and *Nuon Chea*.⁷⁶ The ICTR Appeals Chamber in *Rwamakuba* expressly refuted the defence's claim that the doctrine of common purpose, as applied in post-World War II cases, was limited to crimes with a large degree of specificity:

The fact that certain prosecutions charged participation in small-scale plans involving few victims or in the operation of specific concentration camps does not suggest that customary international law forbade punishment for genocide committed through plans formulated and executed on a nationwide scale.⁷⁷

As a result of the application to the large-scale enterprises, the scope of the common plan required to hold individuals responsible under this form of liability expanded significantly.⁷⁸ For example, the Appeal Chamber in *Krajišnik* ruled that the contribution to the joint criminal enterprise does not need to be criminal so long "that it furthers the execution of the common objective or purpose involving the commission of crimes."⁷⁹ This feature of the judgment is startling. The Appeals Chamber held that *Krajišnik*'s main contribution to the joint criminal enterprise was in setting up and supporting the structures of the Serbian Democratic Party (SDS), an activity not criminal in itself but instrumental to the commission of the crimes.⁸⁰

The SCSL Appeals Chamber reasoned along the similar lines. In the AFRC case, in addition to the modes of responsibility expressly mentioned in Articles 6(1) and 6(3) of the SCSL Statute, the prosecution charged the accused with participation in the joint criminal enterprise, the objective of which was to take any action necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas.⁸¹ Initially, the Trial Chamber found that the prosecution failed to define the criminal objective when determining the responsibility of the accused and refused to consider the joint criminal enterprise as a mode of participation.⁸² The Appeals Chamber subsequently overturned this particular

⁷⁴ Prosecutor v. *Krajišnik*, ICTY Case No. IT-00-39-A, Appeal Judgment, 17 March 2009 ('*Krajišnik* Appeal Judgement').

⁷⁵ Prosecutor v. *Popović et al.*, ICTY Case No. 05-88-T, Trial Judgement, 10 June 2010 ('*Popović* Trial Judgment').

⁷⁶ Prosecutor v *Ieng Sary et al*, ECCC, Case No. 002/19-09-2007/ECCC/OCIJ, Closing Order, Office of the Co-Investigating Judges, 15 September 2010 ('*Ieng Sary* Closing Order'), § 1524.

⁷⁷ Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, *Rwamakuba v. Prosecutor*, Case No. ICTR-98-4-AR72.4, 22 October 2004, § 25.

⁷⁸ E. Van Sliedregt, 2012, at 136.

⁷⁹ *Krajišnik* Appeal Judgment, § 218 as cited by E. Van Sliedregt, 2012, at 137.

⁸⁰ *Ibid.*

⁸¹ Prosecutor v. *Brima, Kamara and Kanu*, SCSL-04-16-A, Appeal Judgment, 22 February 2008 ('AFRC Appeal Judgment'), § 15.

⁸² AFRC Trial Judgment, § 1639.

finding noting, “the criminal purpose underlying the joint criminal enterprise can derive not only from its ultimate objective, but also from the means contemplated to achieve that objective.”⁸³ The Appeals Chamber then suggested that even though gaining and exercising political power over the territory of Sierra Leone may not be a crime itself, the criminal actions taken by the AFRC to reach this goal qualify as means to achieve the objective and hence themselves constitute a criminal objective.⁸⁴

The concept of the joint criminal enterprise created much debate in academic circles and to some extent in the case law of the ad hoc tribunals.⁸⁵ The first line of criticism relates to the questionable legal status of the concept under the customary international law. In the *Milutinović et al.* case, the defence of Dragoljub Ojdanić raised this point claiming that the Appeals Chamber in *Tadić* misinterpreted the drafters’ intentions by inferring the joint criminal enterprise from the Statute – the drafters would have explicitly mentioned this form of liability if they intended it to be applicable.⁸⁶ The appellate panel *Milutinović et al.* refuted this argument, holding that it was satisfied with the *Tadić* interpretation of the Statute, which provides, albeit not explicitly, for joint criminal enterprise as a form of liability because it has basis in customary international law.⁸⁷

The second major criticism of the joint criminal enterprise is the inconsistency between the theoretical concept and its practical application.⁸⁸ Harmen van der Wilt drew attention to the fact that “the doctrine does not entirely dovetail with the gloomy reality of the modern bureaucracies that engage in systematic crime.”⁸⁹ The conceptual idea of the joint criminal enterprise is based on one subjective and one objective element: the subjective element is the agreement and the shared intent to pursue a common plan that aims at or includes the commission of criminal acts; the objective is the accused’s participation in that plan. The emphasis is, however, on the subjective element.⁹⁰ In the actual application of the concept, the judges seem to have reversed the importance of the objective and subjective elements of JCE. While many Chambers set a higher standard for the objective element,

⁸³ AFRC Appeal Judgment, § 76.

⁸⁴ AFRC Appeal Judgment, §§ 81-84.

⁸⁵ E. Van Sliedregt, 2012, at 141.

⁸⁶ *Ojdanić* JCE Appeal Decision, § 18.

⁸⁷ *Ibid.*, § 21.

⁸⁸ V. Haan, ‘The Development of the Concept of Joint Criminal Enterprise at the ICTY’, 5 *International Criminal Law Review*, 2005, at 167-201.

⁸⁹ H.V.D.Wilt, ‘Joint Criminal Enterprise: Possibilities and Limitations,’ 5 *Journal of International Criminal Justice* 5, 2007, at 91.

⁹⁰ This importance of *mens rea* has been confirmed by *Tadić* Appeal when the Chamber has delineated JCE from aiding and abetting based on the *mens rea* criteria. See *Tadić* Appeal Judgment, § 229.

requiring, in addition to participation, that the accused played an influential part within the JCE, and that he was in a position of authority *vis-à-vis* the direct perpetrators,⁹¹ they do not examine whether there existed a shared intent between the accused person and the direct perpetrator at all.⁹² As Verena Haan noted, the ICTY deals with complex cases where numerous persons acted at various levels of authority. While there might have existed a common agreement to pursue a criminal plan among members of “one level of authority”, the persons acting at different levels of authority have most likely not been linked to the crime through a common agreement but through hierarchical structures, such as military chains of command.⁹³

The third major criticism relates to the scope of application of the joint criminal enterprise, and in particular, its extended version. Powles has observed that it is hard to see how someone guilty of participating in the third category of the joint criminal enterprise, i.e. where the crime falls beyond the object of criminal enterprise, can be said to have actually ‘committed’ the crime in question, where they do not possess the intention to actually commit the crime and may not even be aware of that crime before, during or even after the crime has actually been committed.⁹⁴ Danner and Martinez added that the prosecution may use this over-expansive form of responsibility in cases when there is not sufficient evidence to secure the conviction under a different form of responsibility leading to a dangerous over-reliance on victim-oriented teleological interpretation that produces a result of ‘guilt by association’.⁹⁵ The authors advocate for an approach that is more sensitive to the concern that low-level perpetrators may be charged and convicted of large-scale mass crimes, even where they played only a minor role.⁹⁶

On a conceptual level, it appears that the joint criminal enterprise constitutes a somewhat ‘borderline’ case, lying between complicity and the actual commission of an offence. On the one hand, the acts of the participants are attributed to all members of the group as if each participant has committed these acts himself. On the other hand, certain members of the group do not directly perpetrate these acts and their liability is derivative. The concept of the joint criminal enterprise seems to be borrowed from English law, with the

⁹¹ Eg. Prosecutor v. *Stakić*, ICTY Case No. IT-97-24-T, Trial Judgment, 31 July 2003 (*‘Stakić Trial Judgment’*), § 440; Prosecutor v. *Krstić*, ICTY Case No. IT-98-33-T, Trial Judgment, 2 August 2001 (*‘Krstić Trial Judgment’*), § 607; Prosecutor v. *Simić et al.*, ICTY Case No. IT-95-9-T, Trial Judgment, 17 October 2003 (*‘Simić Trial Judgment’*), § 998.

⁹² Eg. *Krstić Trial Judgment*, par. 612, *Tadić Appeal Judgment*, § 230; *Stakić Trial Judgment*, § 478.

⁹³ V. Haan, at 196.

⁹⁴ S. Powles, at 606 – 619.

⁹⁵ A. M. Danner and J. S. Martinez, at 56.

⁹⁶ *Ibid.*, at 85.

difference that in England the joint enterprise is a creation designed to deal for the most part with an unexpected turn of events⁹⁷ whereas in the jurisprudence of the ad hoc tribunals it has become an independent, stand-alone mode of liability. The joint criminal enterprise also seems to resemble some features of the national law concepts of co-perpetration and conspiracy.⁹⁸

iv. Planning

‘Planning’ usually focuses on the responsibility of high-level civil and military commanders.⁹⁹ Tokyo and Nuremberg Charters mentioned ‘planning’ in relation to crimes against peace only.¹⁰⁰ The ICTY, ICTR, SCSL Charters and the ECCC Law¹⁰¹ include planning along with the other forms of complicity applicable to all crimes within the jurisdiction of the respective court or tribunal. The Rome Statute does not mention ‘planning’ in the forms of participation under Article 25(3).¹⁰²

‘Planning’ implies “that one or several persons contemplate designing the commission of a crime at both the preparation and execution phases”.¹⁰³ The Trial Chamber in *Akayesu* clarified that in order for a person to incur liability under the heading of ‘planning’, the crime that had been planned must have been executed.¹⁰⁴ This clarification distanced planning from the notion of conspiracy, which is similar to planning in that it criminalizes preparatory steps for the commission of the crime. The difference between the two concepts is that conspiracy is an inchoate offence, completed once the

⁹⁷ A. Ashworth, 1995, at 429; See also J. Smith and B. Hogan, 2002, at 162. For more details see Section III (B).

⁹⁸ For the Comparative treatment of these forms of participation in domestic law, see Chapter IV and Appendix III.

⁹⁹ S. Manacorda in A. Cassese (eds), 2009, at 456.

¹⁰⁰ Article 6(a) Nuremberg Charter and 5(a) Tokyo Charter.

¹⁰¹ The ECCC Trial Chamber highlighted that from the modes of responsibility, mentioned in Article 29 of the ECCC Law, only planning and superior responsibility were not covered by the general provisions of the domestic criminal code applicable at the time of the commission of the crimes by Khmer Rouge. ‘Planning’ was, however, criminalized by specific provisions of this code, meaning criminalization of such conduct was foreseeable to the accused. *Duch* Trial Judgment, § 474.

¹⁰² ‘Planning’ resembled the contentious notion of ‘conspiracy’ that the drafters of the Rome Statute attempted to avoid. See Chapter III.1 *infra*.

¹⁰³ *Akayesu* Trial Judgment, § 480; Prosecutor v. *Blaskić*, ICTY Case No. IT-95-14-T, Trial Judgment, 3 March 2000 (*Blaskić* Trial Judgment), § 279; Prosecutor v. *Sesay, Kallon and Gbao*, SCSL-04-15-T, Trial Judgment, 2 March 2009 (*RUF* Trial Judgment), § 268. In *Kordić and Čerkez* Appeals Chamber adopted slightly different definition, later reproduced by the ECCC: “The *actus reus* of “planning” requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.” See Prosecutor v. *Kordić and Čerkez*, ICTY Case No. IT-95-14/2-A, Appeal Judgment, 17 December 2004 (*Kordić and Čerkez* Appeal Judgment), § 27; *Duch* Trial Judgment, § 518.

¹⁰⁴ *Akayesu* Trial Judgment, § 473.

preparatory steps are undertaken, while planning is a form of responsibility dependent on the commission of the crime towards which it is directed.

To attract responsibility for planning, the person other than the planner, who is considered an actual perpetrator, must be acting in furtherance of a plan.¹⁰⁵ Thus, there must be a connection between the plan and the crime, it being sufficient that planning was a factor substantially contributing to criminal conduct.¹⁰⁶ In other words, the level of involvement of the accused in the planning of the crime must have been sufficiently ‘substantial’.¹⁰⁷ The SCSL Appeals Chamber gave important practical guidance in assessing whether the accused’s acts amount to a substantial contribution to attract liability for planning: it has to be done on a case-by-case basis in the light of evidence as a whole.¹⁰⁸ The fault requirement for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.¹⁰⁹

The *Dragomir Milošević* case illustrates the importance of an individual assessment of the mode of liability together with the facts. In this case, the Appeals Chamber acquitted the accused of responsibility for planning the campaign of sniping and shelling of civilians in Sarajevo because the evidence as to whether he orchestrated each and every incident, which he allegedly planned, was lacking.¹¹⁰ While the conviction for planning failed, the appellate judges found the same facts to constitute a sufficient basis to support a conviction for ordering.¹¹¹ The Appeals Chamber found that the accused personally ordered the deployment and distribution between different brigades of air modified bombs, a highly inaccurate weapon with a high explosive force. He also ordered the construction of launchers for these weapons.¹¹²

Planning a crime also serves as an aggravating factor when sentencing the actual perpetrator.¹¹³

¹⁰⁵ *Blaskić* Trial Judgment, § 278.

¹⁰⁶ *Kordić and Čerkez* Appeal Judgment, § 26.

¹⁰⁷ Prosecutor v. *Bagilishema*, ICTR Case No. 95-1A-T, Trial Judgement, 7 June 2001 (‘*Bagilishema* Trial Judgment’), § 30; G. Mettraux, 2005, at 280.

¹⁰⁸ *Taylor* Appeal Judgment, § 550; RUF Appeal Judgment, § 769.

¹⁰⁹ *Kordić and Čerkez* Appeal Judgment, §§ 29, 31; *D. Milošević* Appeal Judgement, § 268.

¹¹⁰ *D. Milošević* Appeal Judgment, § 268.

¹¹¹ *Ibid.*, § 273.

¹¹² *D. Milošević* Appeal Judgment, § 272.

¹¹³ G. Mettraux, 2005, at 280.

v. Instigating

‘Instigation’ presupposes “urging, encouraging, or prompting” another person to commit a crime.¹¹⁴ Instigation can take the form of a positive act or an omission so long that it can be established that the accused’s conduct had an effect on the perpetrator.¹¹⁵ It is not necessary that these actions be perpetrated in public or take any particular form.¹¹⁶ Several Trial and Appeals Chambers have held that there must be a causal relationship between the act of instigation and the commission of the crime.¹¹⁷ This statement is qualified by the explanation that the contribution of the accused does not need to be a *conditio sine qua non* for the crime to occur, it is sufficient to show that his or her conduct was a contributing factor to the conduct of the other person(s).¹¹⁸

The requirement of a causal relationship between the act of instigation and the commission of the crime stands in contrast with the requirements for the other forms of complicity – planning, ordering, and aiding and abetting – that do not require such causal relationship according to the wording adopted by the ad hoc tribunals.¹¹⁹ This disparity shows some lack of understanding of the appropriate standard of causation for complicity.¹²⁰ It seems that *sine qua non* test is not applicable to complicity because any form of complicity entails influencing voluntary conduct of another person. Hence, it cannot be reasonably said that an accomplice is a necessary prerequisite for harm caused by the primary perpetrator, rather he or she affects the behavior of the principal.¹²¹ Likewise, causation in a strict sense of the word appears to be applicable only to the events happening in the physical world and not to the actions of others. The causal chain is broken when interrupted by the free choice of an individual, even one acting under an accomplice’s influence.¹²² Consequently, singling out ‘instigation’ as the only form of complicity

¹¹⁴ Prosecutor v. *Semanza*, ICTR Case No. 97-20-T, Trial Judgment, 15 May 2003 (‘*Semanza* Trial Judgment’), § 381, *Akayesu* Trial Judgment, par 482; *Orić* Trial Judgment, § 270; *Kordić and Čerkez* Appeal Judgment § 27; *Krstić* Trial Judgment, § 601.

¹¹⁵ *Blaskić* Trial Judgment, § 270; *Duch* Trial Judgment, § 522.

¹¹⁶ Prosecutor v. *Akayesu*, ICTR Case No. 96-4-A, Appeal Judgment, 1 June 2001 (‘*Akayesu* Appeal Judgment’), §§ 478-482; *Blaskić* Trial Judgment, § 270.

¹¹⁷ *Blaskić* Trial Judgment, § 278; *Bagilishema* Trial Judgment, § 30; *Semanza* Trial Judgment, § 381.

¹¹⁸ *Kordić and Čerkez* Appeal Judgment, § 27; Prosecutor v. *Kvočka*, ICTY Case No. IT-98-30/1-T, Trial Judgment, 2 November 2001 (‘*Kvočka* Trial Judgment’), § 252; Prosecutor v. *Kordić and Čerkez*, ICTY Case No. IT-95-14/2-T, Trial Judgment, 26 February 2001 (‘*Kordić and Čerkez* Trial Judgment’), § 387; E. Van Sliedregt, 2012, at 104.

¹¹⁹ *Furundžija* Trial Judgment, § 233; *Simić* Appeal Judgment, § 85; *Blaskić* Appeal Judgment, § 48.

¹²⁰ G. Mettraux, 2005, at 281.

¹²¹ For the discussion of causation in complicity, see section II.ii *infra*.

¹²² S. H. Kadish, ‘Complicity, Cause and Blame: A Study in the Interpretation of Doctrine,’ 73 *California Law Review* 2, 1985, 1985, at 334.

requiring a causal relationship to the crime appears unreasonable. Instigation, as all other forms of complicity, affects the freely chosen acts by other individuals – primary perpetrators. It cannot be said that that an act of an instigator (or, equally, aider and abettor, planner or order giver) *causes* the crime to occur in the same way as the primary perpetrator brings about the offence in the real world. Causation may be extended to complicity but its content must be modified.¹²³

The *Orić* Trial Chamber seems to have adopted a broad view on the question of causation in cases of complicity. It held that the commission of the crime may depend on a variety of activities and circumstances and it suffices to prove that the conduct of the accused was a substantially contributing factor.¹²⁴ The Trial Chamber made a noteworthy distinction between aiding and abetting and instigating. Persuasion or a strong encouragement by an instigator may contribute to the final determination of the principal perpetrator to commit a crime, while further encouragement or moral support in cases when the principal has definitely decided to commit a crime “may *merely*, though still, qualify as aiding and abetting.”¹²⁵ This interpretation of the difference between aiding and abetting and instigating, does not however seem to find support in international jurisprudence. The *Orić* Trial Chamber further clarified, “not any contributing factor can suffice for instigation, as it must be a substantial one, on the other hand, it need not necessarily have direct effect, as prompting another to commit a crime can also be procured by means of an intermediary.”¹²⁶

When it comes to the fault requirement, it is necessary that the accused directly intended to provoke the commission of the crime,¹²⁷ or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.¹²⁸ The Trial Chamber in *Orić* clarified that the intention has two components: a cognitive element of knowledge and a volitional element of acceptance.¹²⁹ The first element is present when the accused is aware of the influencing effect of his actions on the principal perpetrator and is aware of, and agrees to, the intentional completion of the principal crime.¹³⁰ The second volitional element of intent is met when the

¹²³ See section II.ii *infra* for more discussion.

¹²⁴ *Orić* Trial Judgment, § 274.

¹²⁵ *Orić* Trial Judgment, § 271. See also E. Van Sliedregt, 2012, at 105.

¹²⁶ *Ibid.*, § 276.

¹²⁷ *Kordić and Čerkez* Trial Judgment, § 387.

¹²⁸ *Kvočka* Trial Judgment, § 282; *Akayesu* Trial Judgment, § 482; *Prosecutor v. Simeon Nchamihigo*, ICTR, Case No. 2001-63-A, Appeal Judgment 18 March 2010 (*‘Nchamihigo Appeal Judgment’*), § 62.

¹²⁹ *Orić* Trial Judgment, § 279. See also E. Van Sliedregt, 2012, at 104.

¹³⁰ *Ibid.*

instigator accepts the occurrence of the crime with the knowledge the commission of the crime will more likely than not result from his conduct.¹³¹

vi. Ordering

‘Ordering’ entails “a person in a position of authority using that position to convince another to commit an offence”.¹³² Ordering requires a positive act from the person in the position of authority.¹³³ The very notion of ‘instructing’ requires a positive action of the person in the position of authority.¹³⁴ The authority may be reasonably implied from the circumstances.¹³⁵ The issue of the probative value of the inferences was at stake in the *Galić* appeal case in which the Appeals Chamber held that an omission cannot constitute an act of ordering *per se*, but failures to act may form circumstantial evidence to prove the mode of liability of ordering.¹³⁶ Thus, *Galić*’s responsibility for ordering the shelling and snipping of civilians in the occupied Sarajevo was not inferred from the fact that he failed to act and his omission constituted an order. Instead, his multiple failures to act in response to the attacks over a period of twenty-three months served as circumstantial evidence for the mode of liability of ordering.¹³⁷ In contrast, in *Kalimanzira*, the Appeals Chamber answered in the negative the question of whether the assistance in providing armed reinforcements substantially contributing to the overall attack served as circumstantial proof that the accused ordered the attack.¹³⁸ It concluded that, despite the fact that *Kalimanzira* had authority over the attackers, and thus had the possibility to order the attack, it was not the only reasonable inference following from the surrounding circumstances.¹³⁹

Neither the form of the order (explicit or implicit) nor its legality is a decisive factor attracting the liability for ordering a crime.¹⁴⁰ With regard to the fault requirement, the person ordering must have the state of mind as that required

¹³¹ *Ibid.*

¹³² *Akayesu* Trial Judgment, § 483 as cited by G. Mettraux, 2005, at 270; *Dorđević* Trial Judgment, § 1871; Prosecutor v. *Galić*, ICTY Case No. IT-98-29-A, Appeal Judgment, 30 November 2006 (‘*Galić* Appeal Judgment’), § 176; *Duch* Trial Judgment, ECCC, § 527.

¹³³ *Galić* Appeal Judgment, § 176.

¹³⁴ *Ibid.*; *Blaskić* Appeal Judgment, § 660.

¹³⁵ Prosecutor v. *Dorđević*, ICTY Case No. IT-05-87/1-T, Trial Judgment, 23 February 2011 (‘*Dorđević* Trial Judgment’), § 1871; Prosecutor v. *Brđanin*, ICTY Case No. 99-36-T, Trial Judgment, 1 September 2004 (‘*Brđanin* Trial Judgment’), § 270.

¹³⁶ *Galić* Appeal Judgment, § 177.

¹³⁷ *Galić* Trial Judgment, § 749; *Galić* Appeal Judgment, § 177.

¹³⁸ Prosecutor v. *Kalimanzira*, ICTR Case No. 05-88-A, Appeal Judgment, 20 October 2010 (‘*Kalimanzira* Appeal Judgment’), §§ 208 and 213.

¹³⁹ *Ibid.*, §§ 211 and 213.

¹⁴⁰ *Blaskić* Trial Judgment, § 281; See also A. Cassese, 2008, at 230; G. Mettraux, 2005, at 282.

for the crime that he or she orders.¹⁴¹ In addition, it is necessary that the order giver is aware of the substantial likelihood that a crime would be committed as a consequence of the execution or implementation of the order.¹⁴² ICTY and ICTR case law is not clear on whether responsibility follows from the order that was not implemented or instigation that failed.¹⁴³ If one adopts the view of complicity as derivative in nature, it seems that the underlying offence has to occur or at least be attempted.¹⁴⁴

‘Ordering’ is the form of complicity that is particularly similar to superior responsibility.¹⁴⁵ The difference between these two forms of responsibility is that no formal superior-subordinate relationship is required for a finding of “ordering” so long as it is demonstrated that the accused possessed the authority to order.¹⁴⁶ This is in contrast with superior responsibility, which is only applicable if the superior has effective control over the persons committing underlying violations, in the sense of having the ability to prevent and punish these violations.¹⁴⁷ The Appeals Chamber in *Semanza* stressed the formality of the super-subordinate relationship as the distinguishing factor between the two forms of responsibility – all that is required for ‘ordering’ is the implied existence of a superior-subordinate relationship.¹⁴⁸ The *Gacumbitsi* Appeal Chamber further confirmed this statement by holding that the superior-subordinate relationship under Article 6(3) of the ICTR Statute is characterized by effective control.¹⁴⁹ It is peculiar that in the case law of the ICTR ‘ordering’ is treated as a mode of participation inferior to ‘committing’. The *Gacumbitsi* Appeal Chamber held:

“[the accused] did not simply “order” or “plan” genocide from a distance and leave it to others to ensure that his orders and plans were carried out [...] [r]ather, he was present at the crime scene to supervise and direct the massacre, and participated in it actively [...]”, and this constitutes “committing” genocide.¹⁵⁰

¹⁴¹ *Brđanin* Trial Judgment, § 270.

¹⁴² *Dorđević* Trial Judgement, § 1872; *Brđanin* Trial Judgment, § 270; *Blaskić* Appeal Judgement, § 42; *Duch* Trial Judgement, § 528.

¹⁴³ E. Van Sliedregt, 2012, at 106.

¹⁴⁴ Sliedregt and Cryer support conceptualizing ordering in such a way as to require the execution of the order. See E. Van Sliedregt, 2012, at 106; R. Cryer et al, at 379.

¹⁴⁵ Article 7(3) of the ICTY Statute, Article 6(3) of the ICTR and SCSL Statutes and Article 29 (paragraph 3) of the ECCC Law.

¹⁴⁶ *Kordić and Čerkez* Trial Judgment, § 388.

¹⁴⁷ *Čelebići* Trial Judgment, § 387; Prosecutor v. *Kunarac*, ICTY Case No. IT-96-23-T& IT-96-23/1-T, Trial Judgment, 22 February 2001 (‘*Kunarac* Trial Judgment’), § 399.

¹⁴⁸ Prosecutor v. *Semanza*, ICTR Case No. 97-20-A, Appeal Judgment, 20 May 2005 (‘*Semanza* Appeal Judgment’), § 361.

¹⁴⁹ *Gacumbitsi* Appeal Judgment, § 182; E. Van Sliedregt, 2012, at 106.

¹⁵⁰ *Ibid.*, § 61.

vii. Aiding and Abetting

The early judgments of *Tadić* and *Furundžija* interpreted ‘aiding and abetting’ by relying heavily on the case law produced by the post-Nuremberg war crimes trials and the ILC Draft Code.¹⁵¹ These interpretations proved to be authoritative, with subsequent judgments merely clarifying the elements set out by *Tadić* and *Furundžija*.¹⁵²

An aider or abettor is one who provides “practical assistance, encouragement, or moral support” to the principal.¹⁵³ These actions must have had a substantial effect on the perpetration of a crime.¹⁵⁴ The *Tadić* Trial Chamber borrowed this element of aiding and abetting from the formulation of the ILC Draft Code, which called for criminal responsibility of the individual who “knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime [...]”¹⁵⁵ The ILC Commentary does not define ‘substantially’, but does provide a hint; assistance of the accomplice must facilitate the commission of a crime in some *significant* way.¹⁵⁶ Based on these considerations, the *Tadić* Chamber clarified that substantial contribution requirement presupposes a contribution that in fact has an effect on the commission of the crime.¹⁵⁷ The *Furundžija* Chamber further elaborated on the effect of assistance, holding that the acts of the accomplice need not “bear a causal relationship to, or be a *conditio sine qua non* for, those of the principal.”¹⁵⁸ This finding underlines the derivative nature of aiding and abetting: an accomplice can only influence the conduct of the principal perpetrator to a certain extent; the final decision to commit or not to commit a crime rests with the perpetrator and not with the accomplice.¹⁵⁹

¹⁵¹ G. Boas et al, at 307; E. Van Sliedregt, 2012, at 121.

¹⁵² G. Boas et al, at 303-304.

¹⁵³ *Furundžija* Trial Judgment, § 235; Prosecutor v. *Delalić et al (Čelebići)* ICTY Case No. IT-96-21-A, Appeal Judgment, 20 February 2001, § 35.; *Tadić* Appeal Judgment, § 229; *Duch* Trial Judgment, ECCC, § 533.

¹⁵⁴ *Furundžija* Trial Judgment §§ 223, 224, 249; *Blaskić* Appeal Judgment, § 48 as discussed by G. Mettraux, 2005, at 284; A. Cassese, 2008, at 188.

¹⁵⁵ ILC Draft Code 1996, Article 2(3)(d).

¹⁵⁶ ILC Commentary to the Draft Code 1996, at 21, § 11, emphasis added.

¹⁵⁷ *Tadić* Trial Judgment, § 688.

¹⁵⁸ *Furundžija* Trial Judgment, § 233. See also *Simić* Appeal Judgment, § 85; *Blaskić* Appeal Judgment, § 48; G. Boas et al, at 318.

¹⁵⁹ It seems that the judges in this instance use ‘causation’ in a narrow sense of the word meaning causing events in the physical world. Complicity is linked to the voluntary acts of individuals rather than directly to the physical events. Causation may be the term applicable to complicity, but its scope must be understood as extended. Thus, when Sliedregt discussed different formulas in respect of the of ‘causation requirement’ of aiding and abetting - namely ‘substantial effect or ‘substantial contribution’ – she presumably referred to causation in a broader sense as applicable to complicity. For more discussion on causation see section II.ii *infra*.

There is a slight semantic difference between the terms ‘aiding’ and ‘abetting’. Aiding has been described by international criminal tribunals as meaning “giving somebody assistance”, whereas ‘abetting’ stands for “facilitating the commission of an act by being sympathetic thereto”.¹⁶⁰ The contribution of the aider or abettor may be provided at any stage of a criminal process including planning, preparation and execution.¹⁶¹

Assistance may occur before, during or after the commission of the crime.¹⁶² However, *ex post facto* aiding and abetting only comes within the scope of this provision if there was a prior agreement between the principal and the person who subsequently aids and abets at the time of planning, preparation and execution of the crime.¹⁶³ Assistance may take the form of either a positive act or an omission. Indeed, mere presence at the scene of the crime could constitute aiding and abetting where “it is demonstrated to have significant encouraging effect on the principal offender”.¹⁶⁴ Aiding or abetting may manifest itself in a culpable omission “provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*.”¹⁶⁵ The *Blaškić* Appeals Chambers stressed however that the circumstances of a given case determine whether an omission may constitute *actus reus* of aiding and abetting.¹⁶⁶

In *Furundžija*, the position of the accused as a local commander led the judges to conclude that he is guilty of aiding and abetting rape by virtue of merely being present in the room because his position of authority had an encouraging effect.¹⁶⁷ In the *Šljivančanin* case, failure of the accused to prevent the implementation of the unlawful order satisfied, in the view of the Appeals Chamber, all the requirements for a conviction for aiding and abetting murder by omission.¹⁶⁸ The judges in this case held that, regardless of the fact that Šljivančanin no longer exercising *de jure* authority over the military police, his duty to protect the prisoners of war required him to order

¹⁶⁰ *Kvočka* Trial Judgment, § 254; *Akayesu* Trial Judgment, § 484.

¹⁶¹ *Tadić* Trial Judgment, § 677.

¹⁶² *Blaskić* Appeal Judgment, § 48; Prosecutor v. *Aleksovski* Trial Judgment, ICTY Case IT-95-14/1-T, 25 June 1999 (*Aleksovski* Trial Judgment), § 62.

¹⁶³ Prosecutor v. *Blagojević and Jokić*, ICTY Case No. IT-02-60, Trial Judgment, 17 January 2005 (*Blagojević* Trial Judgment), § 731; See also W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, at 435.

¹⁶⁴ Prosecutor v. *Vasiljević*, ICTY Case No. IT-98-32-T, Trial Judgment, 29 November 2002 (*Vasiljević* Trial Judgment), § 70; *Furundžija* Trial Judgment, § 232.

¹⁶⁵ *Blaskić* Trial Judgment, § 284.

¹⁶⁶ *Blaskić* Appeal Judgment, § 47.

¹⁶⁷ *Furundžija* Trial Judgment, § 275.

¹⁶⁸ Prosecutor v. *Mrkšić and Šljivančanin*, ICTY Case No. T-95-13/1-A, Appeal Judgement, 5 May 2009 (*Šljivančanin* Appeal Judgment), §§ 101-103.

the police not to withdraw from the hospital where the prisoners were kept.¹⁶⁹ The Appeals Chamber employed largely inferential analysis suggesting “had he ordered the military police not to withdraw, these troops may well have, in effect, obeyed his order to remain there.”¹⁷⁰

With regard to the fault requirement, it is not necessary that the accomplices share *mens rea* of the principal perpetrator,¹⁷¹ it being sufficient that he or she knows of the essential elements of the crime, including the *mens rea* of the actual perpetrator and takes “the conscious decision to act in the knowledge that he thereby supports the commission of the crime”.¹⁷² Furthermore, it must be shown that the aider and abettor “knew (in the sense he was aware) that his own acts assisted the commission of the specific crime in question by the principal offender”.¹⁷³ The aider and abettor need not know the precise crime that was intended and which in the event was committed – awareness that one of a number of crimes will probably be committed is sufficient.¹⁷⁴

When it comes to the specific intent crimes, such as genocide and persecution, the position is that the aider and abettor does not need to share the intent of the principal perpetrator but does need to be aware of it.¹⁷⁵ Judge Shahabuddeen in his partial dissenting opinion in *Krstić* highlighted the difference between the intent of the perpetrator and the intent of the aider and abettor in relation to the crime of genocide – the former intends to commit genocide, while the latter intends to provide means by which the perpetrator, if he wishes, can realize his intent to commit genocide.¹⁷⁶

In the view of some Trial and Appeals Chambers, the fact that the aider and abettor may not have shared the intent of the principal offender generally lessens his or her culpability for sentencing purposes.¹⁷⁷ However, as discussed in more detail in chapter six of this thesis, a number of

¹⁶⁹ Ibid, §§ 92 and 98.

¹⁷⁰ Ibid, § 93.

¹⁷¹ *Furundžija* Trial Judgment, § 245; *Vasiljević* Appeal Judgment, § 102; *Blaskić* Appeal Judgment, § 49.

¹⁷² *Kunarac* Trial Judgment, § 392; *Orić* Trial Judgment, §§ 286-288. See also E. Van Sliedregt, 2012, at 122-123; G. Boas et al, at 321.

¹⁷³ *Vasiljević* Trial Judgment, § 71; Prosecutor v. *Aleksovski*, ICTY Case IT-95-14/1-A, Appeal Judgment, 24 March 2000 (*Aleksovski* Appeal Judgment’); *Furundžija* Trial Judgment, § 245.

¹⁷⁴ *Furundžija* Trial Judgment, § 245.

¹⁷⁵ *Krstić* Appeals Judgment, § 140; *Vasiljević* Appeal Judgment, § 142; *Krnojelac* Appeal Judgment, § 489. See also G. Boas et al, at 325.

¹⁷⁶ *Krstić* Appeal Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, § 66 as cited in G. Boas et al, at 320.

¹⁷⁷ *Vasiljević* Appeal Judgment, § 181 -182; *Krstić* Appeal Judgment, § 268; *Kajelijeli* Trial Judgment, § 963.

considerations usually affect the judges' reasoning at sentencing; the mode of participation of the accused being just one of them.¹⁷⁸

The last remark in this section is on the novel interpretation of the conduct requirement of aiding and abetting as containing the element of the 'specific direction'. This contentious point is currently debated in the jurisprudence of international courts.

The roots of the 'specific direction' issue can be found in the early ICTY jurisprudence. According to the ILC the contribution of an aider and abettor need not only be 'substantial', as discussed above, but also 'direct'.¹⁷⁹ The ILC Commentary does not explain the exact meaning of 'direct' contribution. This particular qualifier has caused some confusion in the case law of the ad hoc tribunals from their creation. The *Tadić* Trial Chamber seems to have embraced this requirement, treating the accused as culpable where his participation "directly and substantially affected the commission of the offence."¹⁸⁰ However, in *Furundžija* the court rejected the term 'direct' in qualifying the proximity of the assistance and the principal act as misleading because "it may imply that assistance needs to be tangible, or to have a causal effect on the crime."¹⁸¹

The issue of the direction of the contribution by the accused resurfaced in early 2013 when the ICTY Appeals Chamber returned to the question in *Perišić*, when it interpreted the *actus reus* of aiding and abetting as requiring that the assistance is specifically directed towards the crimes.¹⁸² The justification for this additional element was the need to address the situations where the accused's individual assistance is remote from the actions of principal perpetrators or when such assistance could be used for both lawful and unlawful activities.¹⁸³ In such circumstances, the Chamber reasoned, it is necessary to establish "a *direct link* between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators."¹⁸⁴ In line with this restrictive formulation of accessory liability, the Appeals Chamber overturned Perišić's conviction for aiding and abetting the Army of

¹⁷⁸ To that effect the *Šljivančanin* Appeals Chamber acknowledged the practice of treating aiding and abetting as a lower form of liability that attracts a lesser sentence. The Chamber clarified, however, that gravity of the underlying crimes remains an important consideration in order to reflect the totality of the criminal conduct. *Šljivančanin* Appeal Judgment, § 407.

¹⁷⁹ ILC Commentary to the Draft Code 1996, at 21, § 11.

¹⁸⁰ *Tadić* Trial Judgment, § 692. Consequently, the *Tadić* Appeal Chamber later used the 'specific direction' criterion to delimit aiding and abetting and participation in the joint criminal enterprise. See *Tadić* Appeal Judgment, § 229.

¹⁸¹ *Furundžija* Trial Judgment, § 232.

¹⁸² *Perišić* Appeal Judgment, § 44.

¹⁸³ *Ibid.*, §§ 44 and 73.

¹⁸⁴ *Ibid.*, § 44, emphasis added.

the Republika Srpska (VRS) in his capacity as Chief of the Yugoslav Army General Staff. This is notwithstanding the fact that Perišić, as the most senior figure in the Yugoslav Army, knowingly provided logistical and personnel assistance to the VRS, which was committing crimes in Sarajevo and Srebrenica.¹⁸⁵

The rationale for the acquittal in *Perišić* was the Chamber's reluctance to find that the accused's assistance was specifically directed at supporting the criminal activities, and not just geared towards the general war effort.¹⁸⁶ In particular, the VRS was conceptualized as 'an army fighting a war' rather than an organization whose actions were criminal *per se*.¹⁸⁷ The judges, thus, concluded that since not all of the VRS activities were criminal in nature, the policy of providing assistance to the VRS's general war effort did not, in itself, demonstrate that assistance facilitated by Perišić was specifically directed to aid the crimes.¹⁸⁸

The *Perišić* appellate panel justified its explicit consideration of the 'specific direction' issue on two main grounds. First, the judges claimed that they do not diverge from, but merely clarify the *Tadić* formula for aiding and abetting, which already contains the contentious element.¹⁸⁹ In so deciding, the *Perišić* Appeals Chamber had to dismiss previous pronouncement made in the *Šljivančanin* Appeal judgment that "'specific direction' is not an essential ingredient of the actus reus of aiding and abetting".¹⁹⁰ The *Perišić* Appeals Chamber found feeble arguments to support the dismissal of the *Šljivančanin* definition: it held that in *Šljivančanin* the reference to the 'specific direction' was erroneously made in the context of *mens rea* element of aiding and abetting, and not the *actus reus* where it rightfully belongs. Secondly, the Chamber held that the issue was mentioned only in passing, and therefore does not amount to 'careful consideration' that warrants departure from previous case law.¹⁹¹

By arguing that the 'specific direction' element has been part of the previous jurisprudence and the *Šljivančanin* judgement rejecting it does not alter this practice, the *Perišić* Appeals Chamber avoided the situation whereby it would have to furnish "cogent reasons in the interests of justice" for departing from

¹⁸⁵ Ibid, §§ 2, 62 and 68.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid, §53.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid, §§ 27, 32.

¹⁹⁰ *Šljivančanin* Appeal Judgment, § 159.

¹⁹¹ *Perišić* Appeal Judgment, §§ 33, 34.

the previous precedents.¹⁹² The established rule is that the Appeals Chamber should follow its previous decisions for the reasons of legal certainty and predictability, unless the previous decision has been decided on the basis of a wrong legal principle or the judges were ill informed about the applicable law.¹⁹³

The second reason for expressly considering the specific direction in *Perišić* was the alleged lack of treatment of the issue in the jurisprudence of the ad hoc tribunals. This peculiarity was explained “by the fact that prior convictions for aiding and abetting entered or affirmed by the Appeals Chamber involved relevant acts geographically or otherwise proximate to, and thus not remote from, the crimes of principal perpetrators”.¹⁹⁴ This is to some extent tenuous because comparable cases have been before the ICTY Appeals Chamber in the past. For example, in *Brđanin*, the accused – a leading political figure in the Autonomous Region of Krajina and the president of the Crisis Staff – was found guilty of aiding and abetting due to the decisions he took in his official capacity having a substantial effect on the commission of the charged acts. Due to his general leadership role, Brđanin’s proximity to the specific crimes is questionable. A discussion about the specific direction is does not however appear in this judgment.

The ‘specific direction’ test also appeared in the recent *Stanišić and Simatović* case.¹⁹⁵ The accused in this case organized and directed a special unit within the Serbian state security service, which they knew committed crimes of murder, deportation, forcible transfer, and persecution.¹⁹⁶ The Chamber fell short, however, of declaring this unit a criminal organization, despite the fact that it operated covertly and was engaged in numerous crimes.¹⁹⁷ The extensive involvement of the accused with the operation of the unit led the judges to conclude that their contributions assisted the commission of the crimes by the unit members.¹⁹⁸ However, the fact that the accused were not physically present in the field during operations resulted in the finding that their assistance may have been directed towards the legitimate military objective of establishing and maintaining Serb control and not the criminal goals.¹⁹⁹

¹⁹² *Aleksovski* Appeal Judgment, § 107.

¹⁹³ *Ibid.* §§ 107-108.

¹⁹⁴ *Perišić* Appeal Judgment, § 38.

¹⁹⁵ *Prosecutor v. Stanišić and Simatović*, ICTY Case No. IT-03-69-T, Trial Judgment, 30 May 2013 (‘*Stanišić and Simatović* Trial Judgement’), § 2360.

¹⁹⁶ *Stanišić and Simatović* Trial Judgement, §§ 2318, 2323.

¹⁹⁷ *Ibid.*, §§ 1421, 1423.

¹⁹⁸ *Ibid.* § 2359.

¹⁹⁹ *Ibid.* § 2360.

The matter was not however closed following *Perišić* and *Stanišić and Simatović*. Both the SCSL and the ICTY revisited the issue of the specific direction as an element of aiding and abetting. First, the SCSL in the *Taylor* Appeal judgment rejected the requirement of specific direction.²⁰⁰ The Appeals Chamber concluded that the definition of the *actus reus* of aiding and abetting under customary international law is established by the substantial effect on the crimes, not the particular manner in which such assistance is provided.²⁰¹ The *Taylor* appellate panel found the requirement that the acts of the accused have a substantial effect on the commission of the crime establish a sufficient causal link. It therefore saw no reason to depart from the settled principles of law and introduce the novel element of the specific direction in the definition of *actus reus* of aiding and abetting.²⁰² The judges further noted that the question of physical proximity between the accused and the crimes may be relevant on a case-by-case basis, but it is not a legal requirement.²⁰³ The *Taylor* Appeals Chamber stressed that the element of specific direction discussed in *Perišić* could be inferred from the *Tadić* Appeal judgment that purported to distinguish aiding and abetting liability from the joint criminal enterprise liability rather than establish the elements of aiding and abetting under customary international law.²⁰⁴

Secondly, the appeal judgement rendered by the ICTY in *Šainović et al.* in early 2014 also reversed the direction of the *Perišić* Appeals Chamber.²⁰⁵ The defence team of Vladimir Lazarević in the *Šainović et al.* case contested his conviction for aiding and abetting deportation and forcible transfer on the basis of the lack of determination by the Trial Chamber of whether his alleged acts and omissions were specifically directed to assist the commission of these crimes.²⁰⁶ The majority of the Appeals Chamber disagreed with the pronouncement in *Perišić* that the previous jurisprudence of the ICTY does not diverge on the issue of the specific direction.²⁰⁷ On the contrary, the *Šainović et al.* judges concluded that there is a clear divergence on the matter between the *Perišić* and the *Šljivančanin* Appeal judgments.²⁰⁸ The *Šainović et al.* judges solved the legal conundrum by assessing where the law stands on

²⁰⁰ *Taylor* Appeal Judgment, § 486.

²⁰¹ *Ibid.*, § 475.

²⁰² *Ibid.*, § 490.

²⁰³ *Ibid.*

²⁰⁴ *Taylor* Appeal Judgment, § 475.

²⁰⁵ Prosecutor v. *Šainović et al.*, ICTY Case No. IT-05-87-A, Appeal Judgement, 23 January 2014, (*Šainović et al.* Appeal judgment), § 1649.

²⁰⁶ *Šainović et al.* Appeal Judgment, § 1617.

²⁰⁷ Cf. Dissenting Opinion of Judge Tuzmukhamedov, *Šainović et al.* Appeal Judgment, § 43, 47.

²⁰⁸ *Šainović et al.* Appeal Judgement, § 1621.

the issue of the specific direction.²⁰⁹ Extensive review of the jurisprudence the ad hoc tribunals and post Second World War cases begged for the conclusion that specific direction is not an element of aiding and abetting liability under customary international law or the Statute of the Tribunal.²¹⁰ The Appeals Chamber also made brief a reference to national law, correctly stating that the variations among national jurisdictions do not allow deducing a common principle on the issue at hand.²¹¹

The ‘specific direction’ saga did not end with the rejection of the contentious criterion in the *Šainović et al.* Appeal judgment. The ICTY Office of the Prosecution attempted to reverse the acquittal in *Perišić* by filing a motion seeking reconsideration.²¹² The Appeals Chamber denied the request failing to find “cogent reasons in the interests of justice” for the reconsideration of a final judgment.²¹³ It is disappointing that this brief decision does not explain or elaborate on what constitutes “cogent reasons in the interests of justice” and why this test is not met in present circumstances.

The recent rejection of ‘specific direction’ as an element of aiding and abetting liability in *Taylor* and *Šainović et al.* is to be applauded for a number of reasons. The new enhanced version of aiding and abetting purports to bridge the temporal and/or spatial gap between the accomplice and the principal perpetrator. This is unnatural for aiding and abetting; the form of liability that targets precisely the situations where the accused is removed from the scene of the crime. The new standard may lead to gaps in responsibility, where culpable assistance with a substantial effect on the crime does not attract liability due to a simple lack of physical proximity between the crime and the assistance. There are a number of other problems with the latest approach. First, it lacks foundation in the jurisprudence of the ad hoc tribunals. The requirement of the specific direction, creatively inferred from the wording of the *Tadić* appeal judgment, appears to have been taken out of context, and there is case law rejecting ‘specific direction’ as an element of aiding and abetting.²¹⁴ The *Tadić* Appeals Chamber used the ‘specific

²⁰⁹ *Šainović et al.* Appeal Judgement, § 1622.

²¹⁰ *Ibid.*, § 1649.

²¹¹ *Ibid.*, § 1644.

²¹² Statement of Prosecutor Serge Brammertz in relation to the motion for reconsideration submitted by the Prosecution in the *Perišić* case, available at <http://www.icty.org/sid/11447>, last accessed 3 April 2014.

²¹³ *Prosecutor v. Perišić*, ICTY Case No. 04-81-A, Decision on Motion for Reconsideration, 20 March 2014.

²¹⁴ *Šljivančanin* Appeal Judgment, § 159; *Prosecutor v. Blagojević and Jokić*, ICTY Case No. IT-02-60-A, Appeal Judgment, 9 May 2007 (*Blagojević* Appeal Judgment), § 189; *Furundžija* Trial Judgment, § 232. Judge Liu argued to this effect in his partially dissenting opinion: “Given that specific direction has not been applied in past cases with any rigor, to insist on such a requirement now effectively raises the threshold for aiding and abetting

direction' criterion for aiding and abetting in order to contrast it with acts in some way directed to the furtherance of common design.²¹⁵ Thus, the emphasis was not on the physical proximity of the accomplice's aid to the offence in question but on the existence of the crime-specific relationship between the aider and abettor and the principal perpetrator. This is in contrast to the group-specific situation, characteristic of the joint criminal enterprise.

Secondly, this additional criterion conflates assistance with performing part of *actus reus* of the offence itself and brings aiding and abetting dangerously close to commission. The former, in contrast with the latter, need not be the direct cause of the crime.²¹⁶ Thirdly, the specific direction requirement is superfluous and does not have an independent standing of its own. One can view it either as an implied element of substantial contribution, in a sense of accomplice's actions having some impact on the conduct of the principal, and, thus, being *directed* towards the crime; or as part of the accused's *mens rea* for aiding and abetting, which is knowledge. If the accused knew about the crime and still provided assistance, then logically his acts are directed towards the offence.²¹⁷

Finally, the requirement that the aid is specifically directed towards the crime, and not just to the establishing military control or other fighting objective, - even in the circumstances when the assistance is provided with the knowledge and facilitates the commission of offences - brings to the surface an uncomfortable question that goes beyond the legal technicalities of a particular liability mode: what are the conditions that turn the 'general war effort' into a 'crime' attracting individual criminal responsibility? Also, what is the standard of behavior that we expect from the senior leadership in the context of war?

It remains to be seen whether the recent *Šainović et al.* Appeal judgment concluding that 'specific direction' is not an element of aiding and abetting liability under customary international law or the ICTY Statute puts an end to

liability." Partially Dissenting Opinion of Judge Liu, *Perišić* Appeal Judgment, § 3.

²¹⁵ *Tadić* Appeal Judgment, § 229.

²¹⁶ Judge Liu argued, "If specific direction is indeed part of the *actus reus* of aiding and abetting liability, it could be argued that there is little difference between aiding and abetting and certain forms of commission." *Perišić* Appeal Judgment, Partially Dissenting Opinion of Judge Liu, ft. 9.

²¹⁷ Judges Meron and Agius, in their joint Separate opinion in *Perišić*, packed the 'specific direction' element under the fault requirement of aiding and abetting, stating, "whether an individual specifically aimed to assist relevant crimes logically fits within our current *mens rea* requirement." *Perišić* Appeal Judgment, Joint Separate Opinion of Judges Meron and Agius, §§ 2-3. See also *Perišić* Appeal Judgment, Partially Dissenting Opinion of Judge Liu, ft. 7.

a juridical saga.²¹⁸ What is clear at this stage is that the disagreement between various Chambers showcased certain degree of ambiguity regarding both the scope of complicity and the weight of precedents in international criminal law.

viii. Complicity in Genocide

Article 4(3)(e) of the ICTY Statute and Article 2(3)(e) of the ICTR Statute dealing with the substantive crime of genocide, criminalize, *inter alia*, complicity in genocide. These provisions create an overlap with those articles that provide for different forms of complicity as a form of individual criminal responsibility.²¹⁹

Boas summarized three approaches adopted by different Trial Chambers when addressing the relationship between the two provisions.²²⁰ The first approach, adopted by the *Akayesu* Trial Chamber, was to treat aiding and abetting genocide and complicity in genocide as having distinct physical and mental elements. Aiding and abetting genocide consisted in a failure to act or refraining from action, combined with the accused possessing a genocidal intent while complicity in genocide required that the accused engage in an overt act with the mere knowledge of the actual perpetrator's intent.²²¹ The second approach, adopted in *Stakić* and *Semanza*, held that aiding and abetting genocide and complicity in genocide are identical.²²² Finally, the most authoritative approach is that of *Krstić* Appeals Chamber, which held that 'complicity' and 'accomplice' may encompass conduct broader than that of aiding and abetting. The court characterized *Krstić*'s as that of aiding and abetting genocide.²²³ The Appeals Chamber did not require an aider and abettor to possess a specific intent, mere knowledge of the intent of the physical perpetrator sufficed.²²⁴

It appears that the most reasonable way of delineating these two overlapping norms is to distinguish them functionally: 'complicity in genocide' shall be regarded as a substantive offence because it is located in an article dealing with the crime of genocide, while various modes of liability in Articles 7 and 6 of the ICTY/R Statutes serve the different purpose of attaching liability and characterising the conduct of the accused. The consequence of the functional

²¹⁸ *Šainović et al.* Appeal judgment, § 1649.

²¹⁹ Article 7 of the ICTY Statute and Article 6 of the ICTR Statute.

²²⁰ G. Boas et al, at 291 et sq.

²²¹ *Akayesu* Trial Judgment, §§ 485, 538, 548 as cited by G. Boas et al, at 294.

²²² *Semanza* Trial Judgment, § 394; *Stakić* Trial Judgment, § 31 as cited by G. Boas et al, at 294.

²²³ *Krstić* Appeal Judgment, § 139 as cited by G. Boas et al, at 297.

²²⁴ *Ibid.*, § 140

approach is to treat the substantive crime provision on complicity in genocide as embracing all forms of participation in the *actus reus* and *mens rea* of the offence itself. The *Krstić* approach endorses the functional distinction between complicity in genocide as a substantive crime and complicity in genocide as a mode of responsibility and a crime.

2. Problems with Building the Coherent Account of Complicity

The above discussion concerned the legal requirements for modes of liability in international criminal law. It seems that the judges of the ad hoc tribunals and the hybrid courts often resort to predetermined formulas to discuss the ways in which the accused are involved in crimes. Different forms of complicity are frequently utilized by the ad hoc tribunals and hybrid courts: a table demonstrating the correlation between liability modes and sentencing, provided in the Appendix IV of the thesis, shows that situations of instigating, ordering, aiding and abetting and planning arise in approximately one third of the ICTY cases and approximately two thirds of the ICTR cases. The SCSL employed the joint criminal enterprise in one case and various forms of complicity as well as superior responsibility in the other cases, while the ECCC chose to use all available forms of participation aside from ‘committing’ in its first judgement.²²⁵ The joint criminal enterprise, commission, extended commission and superior responsibility are the alternative legal tools used by courts to address international criminality sometimes alongside and sometimes instead of complicity. This section summarizes four problems preventing coherent application of the liability doctrines, in particular complicity, in international criminal law.

i. Fragmentation

An overview of the jurisprudence of the ad hoc tribunals and hybrid courts shows that each body applying international criminal law adopts its own approach to the modes of participation. The ECCC seems to adhere to the unitary model of participation and resembles the Nuremberg prototype. Its first judgement listed convictions for every mode of liability available under the ECCC Law aside from committing.²²⁶ The ICTY frequently used the concept of the joint criminal enterprise to address collective criminality while the ICTR adopted its own notion of commission, namely the extended one. Various forms of complicity also frequently make an appearance in the jurisprudence of the ad hoc tribunals and the hybrid courts but the way in which they are applied to the facts are entirely different. The ICTR often

²²⁵ See Appendix IV.

²²⁶ *Duch* Trial Judgment, §§ 486; 516; 521; 526; 531; 537; 549.

employs several modes of responsibility to address the same conduct whereas the ICTY and the SCSL are more selective in that they usually prefer a particular form of responsibility.²²⁷ Even within one institution the legal standards differ from case to case. The ICTY extended aiding and abetting to include liability for omission. It convicted Šljivančanin as an aider and abettor for failing to prevent the implementation of an unlawful order in the absence of any formal position of authority. It then dramatically restricted aiding and abetting liability by introducing the requirement of ‘specific direction’ in *Perišić* and *Stanišić and Simatović*.

The recent *Taylor* and *Šainović et al.* Appeal judgments, rejecting the specific direction requirement as an element of the *actus reus* of aiding and abetting, are the most vivid examples of the fragmentation of international criminal law. The rejection of the specific direction requirement in by the SCSL and the ICTY is a double-edged sword. On the positive side it upholds the appropriate standard of complicity for the purposes of international criminal law. The negative side is the lack of coherence and coordination between different courts and tribunals applying international criminal law.²²⁸ The discipline is becoming highly fragmented as it is pulled apart by a multitude of considerations, many of which are extra-legal. The prosecution’s motion to reconsider the final Appeal judgment in *Perišić* in the light of the recent developments and the subsequent decision denying the motion on the grounds of the lack of cogent reasons in the interests of justice only added to the overall ambiguity about the standards applicable in international criminal law.

Why do we need coherence in international criminal law? Why not allow each international judicial body adopt its own set of rules? The answer to this question is threefold. First, differential treatment of offenders across various courts and tribunals violates the principle of the equality of punishment. This principle is at heart of the retributive rationale adopted as one of the guiding principles by international criminal justice.²²⁹ As Kant framed it, the punishment should be commensurate to whatever undeserved evil one inflicts on another person.²³⁰ In modern retributive thinking, the measuring is done according to the principle of proportionality – the sentence must be

²²⁷ See Appendix IV.

²²⁸ Judge Tuzmukhamedov disagreed with the Majority in *Šainović et al.* exactly on this point. He argued that the case at hand did not merit consideration of the ‘specific direction’ issue for factual reasons - Lazarević’s assistance was not remote. He also maintained that the reasons of legal certainty, stability and predictability required the Majority to furnish cogent reasons for deviating from the *Perišić* judgment. See Dissenting Opinion of Judge Tuzmukhamedov, *Šainović et al.* Appeal Judgment § 43, 45, 47

²²⁹ For the detailed discussion of the retributive rationale in domestic and international criminal law, see *infra* Chapter VI.

²³⁰ I. Kant, *The physics of Morals* (1797), 1991 ed., Cambridge University Press, at 141.

proportionate to the gravity of criminal conduct.²³¹ The idea behind this principle is that individuals should be treated as rational beings capable of making choices, and it is the choice to offend that is punished, not the individual himself, consequently punishment must be commensurate to the evil inflicted.²³² In Dworkinian terms, individuals have a right to equal concern and respect in the administration of the political institutions that govern them.²³³ Acceptance of the differential treatment of offenders in international criminal law requires, at minimum, some adjustments to the retributive punishment rationale extensively cited as one of the main sentencing goals in international criminal law.²³⁴

The matter is further complicated if one focuses on a particular legal concept, that of complicity. The law of complicity distorts the principle of the equality of punishment on a conceptual level, making it ever more important to maintain a uniform approach to the matter. Common law position illustrates this bias of complicity. Common law translates the principle of the equality of punishment for all parties into treating principal perpetrators and accomplices alike.²³⁵ Reconciling this principle with complicity's derivative nature required many changes and refinements in English law, including the adoption of the broad notion of presumed causality for complicity.²³⁶ While these modifications allowed for the principle of the equality of punishment in English law, the matter is by no means free from controversy.

Secondly, there is a pragmatic reason militating against fragmentation. The judgements in the area of international criminal law are often criticized for being too lengthy and requiring significant time and financial input. One way to improve the efficiency is to facilitate a better dialogue between different international courts and within each institution. For example, it appears that both the *Taylor* and the *Šainović et al.* Appeals Chambers undertook essentially the same exercise trying to determine whether specific direction as an element of aiding and abetting is part of customary international law. It seems reasonable, for the purposes of judicial efficiency, to promote cross-referencing and collaboration across the field with the view of reducing extra workload for individual Chambers.

The final reason for maintaining some level of internal coherence in

²³¹ A. von Hirsch, 'Proportionate Punishment: A Desert Perspective', in A. von Hirsch, A. Ashworth and J. Roberts (eds) *Principled Sentencing*, 3rd ed., Hart Publishing, 2009, at 117.

²³² A. Ashworth, 1995, at 26.

²³³ R. Dworkin, *Taking Rights Seriously*, 1977, at 180.

²³⁴ See Chapters VI and VII for the discussion on the adjustments that international criminal law should make in relation to the domestic punishment goals.

²³⁵ K.J.M. Smith, 73.

²³⁶ K.J.M. Smith, 90. See *infra* subsection ii.

international criminal law arises from the need to preserve the principle of legality. This fundamental principle, sometimes expressed by the maxim *nullum crimen sine lege* or the ‘rule of law’, has both procedural and substantive implications.²³⁷ The specific aspects of the principle of legality that are eroded by fragmentation are the principle of maximum certainty in defining offences (also termed ‘fair warning’) and the principle of ‘fair labelling’, concerned with providing a fair representation of the nature and the magnitude of the law breaking.²³⁸ The reason for maintaining the distinctions is again the principle of proportionality – one of the aims of criminal law is to provide a proportionate response to offending by accurately describing the criminal conduct.²³⁹

These principles in domestic law do not exist unchecked but are balanced by current pragmatic and political considerations.²⁴⁰ Ashworth noted that the principle of legal certainty runs counter to the policy of social defence, a position that some vagueness in criminal law is beneficial because it allows the enforcement authorities and the judiciary to deal flexibly with new variations in misconduct without awaiting the legislature.²⁴¹ The principle of fair labelling is balanced by the considerations of increasing efficiency in the administration of criminal justice – fewer and broader categories of offence make it easier to secure convictions and lead to the reduction in spending on the court system.²⁴²

The examples provided are from the domestic system of criminal justice. International criminal law has yet to define its objectives, as well as the policy consideration that shape judicial reasoning in an international context. How to balance procedural fairness and the completion strategy? How to make the mass atrocities ‘fit’ individual indictments? How to maintain economic efficiency? How to draw the line between a ‘general war effort’ and a war crime?²⁴³ These are some of the problematic questions with policy implications. It is difficult to answer these while international criminal law

²³⁷ A. Ashworth, 1995, at 67.

²³⁸ *Ibid* at 73, 86.

²³⁹ *Ibid*, at 86.

²⁴⁰ *Ibid*, at 67.

²⁴¹ *Ibid*, at 75.

²⁴² *Ibid*, at 89.

²⁴³ It seems that one emerging trend is the pragmatic approach to war, which manifests itself in the acceptance of the inevitability of some level of wrongdoing during the hostilities. The recent ICTY acquittals in *Gotovina*, *Perišić* and *Stanišić and Simatović* have this consideration in common. See *Gotovina* Appeal Judgment, *Perišić* Appeal Judgment, *Stanišić and Simatović* Trial Judgment.

still searches for its identity and purposes.²⁴⁴ Without an understanding of what this field of law aspires to achieve, it is difficult to conceptualize how the policy considerations counter-balance different aspects of the principle of legality in the context of international criminal law. Fragmentation should be avoided to the maximum extent possible, pending the resolution of the general problems of policy and purposes. Undermining coherence requires more justification than what is currently provided.

ii. Unclear Standard of Causation

The jurisprudence emanating from the ad hoc tribunals and hybrid courts appears ambiguous when it comes to defining the standard of causation for complicity. The fact that some Chambers held that instigation, in contrast with aiding and abetting, ordering and planning, requires a causal link between an act of instigation and the commission of a crime exemplifies the lack of clarity in this sphere.²⁴⁵

The classification by Sanford Kadish of the consequences of human actions is helpful in understanding causation in the context of complicity. Kadish explained that a person's actions might result in two outcomes: first, they may lead to the subsequent chain of events governed by the laws of nature, as for example with setting a house on fire by lighting a match; secondly, the consequence of a person's action may also consist in actions of other people, in the situations of instigation, persuasion, etc.²⁴⁶ In the first case, responsibility follows for the harm that is *caused* by the freely chosen action, while in the second instance, the basis of responsibility is whether help or persuasion renders an accomplice accountable for another's actions and their effect.²⁴⁷ Kadish wrote:

“[...] whether I am to be blamed for the other person's action would not be assessed by asking whether I caused his action in the same sense that his lighting the match caused the fire. Rather, my responsibility would be determined by asking whether my persuasion or help made me accountable for the other person's actions and what they caused.”²⁴⁸

Causation *stricto sensu* manifests itself only in the first case, when the events happen in the natural world, through its two components: the ‘cause in fact’

²⁴⁴ D. Robinson, Identity Crisis of International Criminal Law, 21 *Leiden Journal of International Law* 4, 2008, at 925-963. For more discussion on purposes and limitations of international criminal law, see Chapter VII.1 *infra*.

²⁴⁵ See Section 1.v. *supra*.

²⁴⁶ S. H. Kadish, at 334.

²⁴⁷ *Ibid*, at 334.

²⁴⁸ *Ibid*, at 332. On the nature of derivative liability see also G. Fletcher, 1978, at 583.

requirement and the ‘proximate’ or ‘legal’ cause requirement.²⁴⁹ The first requirement refers to causation in the scientific or factual sense and the dominant test for the cause in fact is ‘*sine qua non*’ or ‘but-for’ test, which implies that the defendant’s action was a necessary condition for the harm to occur.²⁵⁰ The second, legal, requirement of causation is evaluative in nature and involves determining whether the defendant is culpable of causing certain harm based on a number of policy considerations; protected social interests, foreseeability, deterrence, directness of the contribution.²⁵¹ The synergy of these two requirements allows us to establish causation in the narrow sense of the word. The process is not however a clear-cut exercise: the unified view of causation conceives causation as a matter of *degree* – one thing can be more of a cause of a certain event than another.²⁵² Consequently, even establishing causation in the physical world, between the harm and the perpetrator, requires some flexibility and an evaluative assessment.

In the second scenario discussed by Kadish, the causal chain is interrupted by others’ freely chosen acts.²⁵³ It is therefore not necessary to establish that the crime would not have been perpetrated without the accused’s involvement; the *sine qua non* test is not applicable in this situation.²⁵⁴ The accomplice is only able to influence the conduct of the actual perpetrator, but he cannot be said to have caused the crime. This understanding of complicity is in line with its derivative nature. The secondary party incurs the liability by virtue of the violation of the law by the primary party to which secondary party contributed.²⁵⁵ Accomplice liability therefore depends on the liability of the primary perpetrator.²⁵⁶ This is not to suggest that the language of causation is inapplicable to complicity. Kadish admitted that complicity and causation are cognate issues – “they fix blame for a result characterized by a but-for relationship to the actor’s contribution, although complicity allows for a weaker version of that relationship”.²⁵⁷ Furthermore, causation “*broadly conceived*, concerns the relationship between successive phenomena, whether they have the character of events or happenings, or of another person’s

²⁴⁹ M. Moore, ‘Causation in the Criminal Law,’ in J. Deigh and D. Dolinko (eds), at 169.

²⁵⁰ Ibid, at 170.

²⁵¹ Ibid, at 170; 179-185.

²⁵² Ibid, at 186, emphasis added.

²⁵³ Kutz in J. Deigh and D. Dolinko (eds), at 154.

²⁵⁴ Kadish explained: “In causation, the requirement of a condition *sine qua non* assures this sense of success, since the requirement means that without the act the result would not have happened as it did. In complicity, however, a *sine qua non* relationship in this sense need not be established. It is not required that the prosecution prove, as it must in causation cases, that the result would not have occurred without the actions of the secondary party.” S.H. Kadish, at 357.

²⁵⁵ S. H. Kadish, at 337.

²⁵⁶ Ibid.

²⁵⁷ S. H. Kadish, at 366.

volitional actions.”²⁵⁸

The key distinction is that causation in complicity is different from physical causation. It is essential that international judges stress and clarify this difference. Kutz conceptualized complicity as avoiding individual inquiries into causation by treating harm intended (as opposed to harm caused) as the basis of criminal responsibility.²⁵⁹ For Kutz, the essential shift that complicity entails is from objective causation to the subjective intent; from actual harm to risk.²⁶⁰ Gardner contended, “[...] the difference between principals and accomplices is a causal difference, i.e. a difference between two types of causal contribution, not a difference between a causal and a non-causal contribution.”²⁶¹ The link between an accomplice and the harm for Gardner lies in the subjective sphere of reasoning as to why one engages in criminal conduct – justifying one’s wrongs by claiming that they make no impact is not cancelling them, but showing one committed them for a sufficient reason.²⁶²

According to K.J.M. Smith, English law adopted the broad notion of causality for complicity doctrine as a compromise between the strict theoretical demands of causality and the limitations of proof.²⁶³ Smith maintained that the problem stems from the need to distinguish causal roles of the principals and accessories on the basis of immediacy and directness of causal contribution to *actus reus*.²⁶⁴ The accessory contributes only indirectly by influencing the principal. This peculiarity, the distance of an accomplice from the actual harm and the practical difficulty of showing causation, prompted English courts to adopt the implicit rule of the presumed cause – a theoretical adjustment driven by policy demands for a wide-ranging coverage of complicity.²⁶⁵ This rule embraces the limitations of causation in the context of complicity: an accomplice may not be said to have ‘caused’ the principal to act in the same way as the principal causes certain crime to occur in the physical world through his voluntary act.²⁶⁶ This is so because interpersonal relations lack predictability; they lack the sequence of cause and effect.²⁶⁷ At

²⁵⁸ S. H. Kadish, at 334, emphasis added.

²⁵⁹ C. Kutz in J. Deigh and D. Dolinko (eds), at 157.

²⁶⁰ Ibid.

²⁶¹ J. Gardner, ‘Complicity and Causality’ in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law*, Oxford Scholarship Online, 2007, at 58.

²⁶² Ibid, at 73.

²⁶³ K.J.M. Smith, at 87. For more on modes of liability in English law see Chapter VI.2.iii *infra*.

²⁶⁴ K.J.M. Smith, 89.

²⁶⁵ Ibid.

²⁶⁶ S.H. Kadish, at 326; H.L.A. Hart and T. Honoré, *Causation in the Law*, Oxford Scholarship Online, 1985, at 388.

²⁶⁷ K.J.M. Smith, at 83.

the same time, if the accomplice's acts have no effect on the crime, no liability follows.²⁶⁸ Consequently, the operating basis of complicity, according to Smith, is not positively established causal contribution but the 'assumed cause', which is the product of tension between what could feasibly be proved and the breadth of conduct that should be covered by complicity law pursuant to policy demands.²⁶⁹

The theoretical discussion about the nature of causation in the sphere of complicity leads to three conclusions pertinent to international criminal law. First, all forms of complicity, instigation included, share the same derivative basis, thus they may not be distinguished on the basis of present or absent causal connection to the crime.²⁷⁰ One may safely assume that no causation in a strict sense of the word is required for any form of complicity. The standard of international criminal law that the relationship between the contribution of the accomplice and the crime does not need to be *sine qua non* is correct. It seems however that this test does not belong with complicity at all because it deals with events happening in the natural world and cannot be strictly applied to the acts of other people in light of the presumption of the freedom of choice and individual autonomy.

Secondly, it is possible to construct a wider concept of causation so as to include the effect of accomplice's aid or influence on the voluntary act of the primary perpetrator. The artificial nature of the link between accessory's contribution and the crime follows from the distinct moral importance of the perpetrator's role, regardless of the scale of accessory's contribution.²⁷¹ The process of expanding the ordinary meaning of causation requires further elaboration.

One way to conceptualize causality in the sphere of complicity is to focus on the distinction found in the domestic legal systems between unitary and differentiated participation. The unitary model presupposes that any involvement whatsoever on the part of an actor in any offence establishes his connection to the crime, while the differential model requires connecting the

²⁶⁸ K.J.M. Smith, at 87.

²⁶⁹ K.J.M. Smith, at 87.

²⁷⁰ 'Instigation' in domestic law appears to be a form of complicity that entails a stronger link between the instigator and the primary perpetrator than that between the aider and abettor and the primary perpetrator. For example, in Germany the instigator increases the likelihood of the principal committing an offence, while aiding and abetting only furthers that acts of the principal in some way. Consequently, it is understandable why some international judges sought to highlight the significance of the influence of the instigator on the principal with strengthening the causal link between his act and the crime. For the domestic law take on the issue, see Chapter IV.II and Appendix III *infra*.

²⁷¹ *Ibid*, at 81.

liability of accomplices to the conduct of the principal perpetrator.²⁷² Thus, the unitary model allows for more flexibility when it comes to the causation standard – any contribution to the crime establishes the connection. The peculiarity of this model is that liability of each crime participant stands on its own; in other words, it is not derivative. It seems, however, that the ICTY, ICTR, and SCSL recognize the derivative nature of complicity.²⁷³ The ECCC’s conception of the forms of participation in the *Duch* judgement is perhaps a step closer to the unitary model of participation: the ECCC judges adopted a factual approach to the evidence. They established the responsibility of Kaing Guek Iev, or Duch, for every liability mode available under the ECCC Law, aside from ‘committing’ on the basis of his position as the head of the extermination centre Toul Sleng (S-21). The ECCC Trial Chamber did not elaborate on the specific crimes committed by Duch’s subordinates, the prison staff, but focused on the responsibility of Kaing Guek Iev himself.²⁷⁴

There is room for constructed causation even within the differential participation model. It appears that the jurisprudence of the ad hoc tribunals requires that the contribution of the aider and abetter has a substantial effect upon the perpetration of the crime.²⁷⁵ Likewise, planning or instigation must be a factor that contributes substantially to the conduct of another person committing the crime.²⁷⁶ The terms ‘substantial effect’ or ‘substantial factor’ present some conceptual difficulties if one views the will of the principal as autonomous. How does one measure the effect of the aid or influence on the primary perpetrator if he is an independent moral agent?

One potential solution to this problem is shifting the focus from the actual harm caused by the accessory’s actions to the risk that he took by providing

²⁷² A. Eser, ‘Individual Criminal Responsibility (Article 25)’ in A. Cassese et al (ed), *The Rome Statute of the International Criminal Court: A Commentary*, 2002 at 788; For the detailed discussion of the difference between unitary and differentiated perpetrator models, see Chapter IV.I.iii *infra*.

²⁷³ This conclusion follows from the fact that various forms of complicity are defined with reference to the act of the principal perpetrator. For instance, an aider or abettor is one who provides “practical assistance, encouragement, or moral support” to the principal. *Furundžija* Trial Judgment, § 235.

²⁷⁴ For example, the finding on aiding and abetting is just one paragraph: “In light of the Chamber’s previous findings, it is clear that the practical assistance, encouragement and moral support provided by the Accused to his staff had a substantial effect on their perpetration of crimes at S-21 (Section 2.3.3.5). The Chamber further finds that the Accused was aware that his conduct assisted in the commission of these crimes. Moreover, having trained his staff to consider all detainees as enemies of the CPK (Section 2.3.3.5.2), the Accused was aware of the discriminatory intent of the perpetrators in committing these crimes.” *Duch* Trial Judgement, § 537.

²⁷⁵ Eg. *Blaskić* Appeal Judgment, § 48.

²⁷⁶ Eg. *Kordić and Čerkez* Appeal Judgment, §§ 26-27.

assistance or encouragement to the principal. This is in line with the proposition by Kutz that the basis for accomplice's responsibility is not the harm caused but the harm intended.²⁷⁷ This conceptualization of complicity leaves room for the extended form of causation, which may be called the 'subjective' causation: what matters is the internal perception of the risk of harm by the accomplice and the actions that he undertakes to further his plans. This is a shift from the objective causation required for primary perpetration.²⁷⁸ It seems reasonable that international judgments should focus more on accomplice's state of mind and his culpable contribution to the crime, rather than seek an objective, close cause-effect relationship between the accessory and the crime. This approach does not entail conflating conduct and fault requirements of complicity, these should be assessed separately and balanced against each other, but rather shifts the emphasis from the end result, the crime, to the accomplice, his conduct and his intentions. When evaluating culpability of an accomplice, it is also essential to bear in mind the specific type of criminality involved in international offending – a criminality that stems from obedience rather than deviance.²⁷⁹

Thirdly, causation is a matter of degree and not a 'yes' or 'no' question. Even the causal link between the primary perpetrator and the harm implies attributing *relative degrees* of significance. The event is usually caused by a number of factors and each of them contributes to its occurrence to some extent.²⁸⁰ When it comes to complicity, the effect of the influence of the accomplice on the primary perpetrator is subject to even more relativity. Predicting the principal's behaviour in the absence of the contribution by the accomplice is a speculative exercise. Consequently, it is essential to undertake a case-by-case assessment of the connection between the accomplice and the crime. The *Taylor* Appeals Chamber correctly held, "the causal link between the accused's acts and conduct and the commission of the crime is to be assessed on a case-by-case basis."²⁸¹ Domestic law provides for similar indications: in *Maxwell*, the UK House of Lords strongly emphasized the desirability of indictments that indicate the true factual nature of the case presented against the defendant.²⁸² The rationale is that, because all forms of behaviour have certain potential to produce an encouraging effect on the principal perpetrator, complicity is not determined by literal constructions. Its

²⁷⁷ C. Kutz in J. Deigh and D. Dolinko (eds), at 157.

²⁷⁸ Ibid.

²⁷⁹ See Chapter VII.

²⁸⁰ C. Kutz in J. Deigh and D. Dolinko (eds), at 156; M. Moore in J. Deigh and D. Dolinko (eds), at 186.

²⁸¹ *Taylor* Appeal Judgment, § 391.

²⁸² *Maxwell v DPP* [1978] 1 WLR 1350 at 1352, 1357 and 1360 as cited by K.J.M. Smith, at 33.

limits are conceptual and lie elsewhere in causal expectations and the fault requirement.²⁸³

The level of influence on the principal varies from case to case and from one form of complicity to another. An instigator who uses threats or lies to induce the commission of a crime is closer to ‘causing’ a crime in the actual sense of the word than an aider who merely provides the means that could allow principal commit an offence if he wished to do so.²⁸⁴ It is ever more difficult to assess the impact of accessory’s contribution on the primary perpetrator and ultimately on the offence in the context of international criminal law due to the scale of criminality involved and significant spatial and temporal gap between the crime and factors contributing to it. This lack of proximity has to be compensated by enhancing the fault requirement or conduct requirement, depending on the circumstances of the case.²⁸⁵

The problem of the specific direction partially stems from the lack of the well-defined causation standard for complicity. The justification for the introduction of the ‘specific direction’ element in the *actus reus* of aiding and abetting is the need to expressly establish the link between accomplices’ contribution and the wrongdoing in cases when the accused is removed from the offence. The assumption is that the link is implied when the accomplice is physically close to the crime.²⁸⁶ However, physical proximity is often a false friend for establishing this connection – even when an accomplice is present at the scene of the crime, he is not directly perpetrating it and his contribution to the offence is often inferred from the evidence.²⁸⁷ The same conclusion follows from the fact that the causal link between the accomplice and the crime is constructed: the connection stems from the risk that the secondary party envisages and undertakes rather than the actual harm that his actions cause. Hence, it is the mental state of the accomplice that grounds his relationship to the offence rather than his conduct. If one accepts that distance is not dispositive for establishing the effect of accessory’s contribution on the offence, then the whole *raison d’être* for the specific direction fails. It is no longer necessary to compensate for the distance by adding additional requirements to *actus reus* of complicity, i.e. that aid is specifically directed towards the crime.

²⁸³ K.J.M. Smith, at 33-34.

²⁸⁴ H.L.A. Hart and T. Honoré, at 388.

²⁸⁵ For more discussion on balancing the two elements of complicity, see subsection iii *infra*.

²⁸⁶ *Perišić* Appeal Judgment, § 38.

²⁸⁷ For example, Furundžija’s contribution was inferred from his position of authority.

iii. Disconnection Between Facts, Law and Forms of Liability

In an ideal world the facts of the case, the definition of substantive offences and the legal requirements of the liability modes function as a single unit.²⁸⁸ The harmonious collaboration of these three elements leads to the fair assessment of conduct of the accused in the particular circumstances of the case. Due to high complexity of issues presented in international courts and the evolving nature of international criminal law, international judgments are usually very voluminous, with the structure reflecting a clear division between ‘the law’, ‘the facts’ and ‘the sentencing’. This rigidity in the way international judgements are constructed and the autonomous nature of each distinct part of the document sometimes leads to the ‘missing links’ between the mode of liability and the substantive offence, between the facts of the case and the legal definitions, or among all three elements. It follows from the description of the liability modes furnished in the previous section that the wording that one finds in the case law of international tribunals and hybrid courts is frequently mechanical. We observe an engagement with the forms of responsibility as the simple application of certain labels. These labels are often not linked to the actual facts of the case or to the substantive offence.

The missing link between the substantive offence and the mode of responsibility is revealed in the lack of a distinction between the legal requirements of the liability modes, conduct requirement and fault requirement, and the *actus reus* and *mens rea* of the substantive crimes.²⁸⁹ Historically, the interplay between the two sets of elements has not been straightforward. The IMT and IMTFE did not distinguish them, instead opting for a fact-based approach to attributing responsibility. The later case law and the work of the ILC show more awareness of the issue, divorcing the mode of liability and the substantive offence to which this liability attaches.²⁹⁰

The interplay between the offence and the form of responsibility is essential in developing a comprehensive theory of individual criminal responsibility in international criminal law. Forms of participation and substantive offences consist of elements, and, to secure conviction, the prosecution has to prove

²⁸⁸ This is not to suggest that other factors are not part of the overall assessment. Defenses, for instance, also form part of the analysis, but are not discussed in this thesis. Sentencing and the aims of punishment – discussed in Chapter VI – also appear to be detached from the rest of the discussion – they usually found in a Separate part of the judgment.

²⁸⁹ See Section 1.i. *supra*.

²⁹⁰ See Chapter I.4. *supra*.

both sets of elements.²⁹¹ To further complicate matters, the prosecution must also establish the existence of the so-called *chapeaux* elements or the ‘general’ or ‘preliminary’ conditions characteristic of the certain type of offence (for example, the existence of an armed conflict for war crimes, or the widespread or systematic attack for crimes against humanity).²⁹² This complexity makes it difficult to link different elements in one judgement, leading to a situation where the ad hoc tribunals and the hybrid courts treat the definition of crimes and the modes of liability for crimes as separate questions with the ICTY, ICTR, SCSL and ECCC discussing the substantive crimes and the forms of individual criminal responsibility in different parts of the judgments.²⁹³

Complicity in genocide – a provision that exists in the ICTY/R Statutes as a substantive offence – showcases the difficulties encountered by the ad hoc tribunals in distinguishing the legal requirements of liability forms and the elements of the substantive offence.²⁹⁴ The inclusion of ‘complicity in genocide’ as a substantive crime in the ICTY and ICTR Statutes is problematic in its own right – it creates an overlap between Articles 7 and 6, respectively, dealing with various forms of complicity, and Articles 4 and 2, respectively, covering the offence of genocide, including ‘complicity in genocide’. However, the point to be made here is that until the *Krstić* Appeal judgement that distinguished ‘complicity in genocide’ as a substantive offence from aiding and abetting genocide as a combination of the mode of liability and the substantive offence, there existed little clarity on the matter.²⁹⁵ Arguably, the root of the problem – the existence of the two sets of requirements in respect of every incident that the prosecution has to prove - is still not sufficiently spelled out in the jurisprudence of the ad hoc tribunals and the hybrid courts.

The other frequently missing link is between the facts of the case and the legal labels attached to them. This concern is especially pressing with regards to complicity, which is a highly fluid legal concept that has no rigid definition.²⁹⁶ The legal requirements of various forms of complicity - the conduct requirement and the fault requirement - provide only the initial

²⁹¹ Appendix IV to this thesis shows for each accused the mode of responsibility and the crimes for which he is convicted in Separate columns.

²⁹² G. Mettraux, 2005, at 30.

²⁹³ A. Zahar and G. Sluiter, *International Criminal Law: A Critical Introduction*, Oxford University Press, 2008, at 220.

²⁹⁴ See Section 1.viii. *supra*.

²⁹⁵ *Krstić* Appeal Judgment, §§ 139-140.

²⁹⁶ Chapter IV explains that the dividing line between complicity and perpetration shifts even within one legal system, depending on the facts of the case. Likewise, the scope of complicity is fluid.

framework for the assessment in each individual case. The abstract formulas utilized by the ad hoc tribunals and hybrid courts in respect of various forms of complicity seem to allow a flexibility to place more emphasis on the level of contribution of the accused *or* his knowledge of the crime. *Furundžija* provides a good example of balancing the two elements in establishing the case of aiding and abetting rape. The accused witnessed the crime happening. Presence at the scene of the crime was a ‘strong’ indicator of *Furundžija*’s culpable mental state; this allowed for a ‘weaker’ conduct requirement – his contribution was inferred from the position of authority.²⁹⁷

Thus, the two constituent parts of complicity are interconnected – they cannot be assessed independently – something that the *Perišić* Appeals Chamber tried to do by stressing that it will only focus on the *actus reus* of aiding and abetting.²⁹⁸ A more solid approach in the view of the constructed nature of complicity appears to be balancing the fault and the conduct requirement based on the facts of the particular case. As Smith put, “complicity’s derivative quality must convincingly reside *at least* in either *mens rea* or *actus reus* components [...] diminution in demands on the *mens rea* side have repercussions for the causal element as part of the *actus reus*; and vice-versa.”²⁹⁹

The need to perceive fault and conduct requirement of complicity as one mechanism is relevant for the discussion on specific direction as part of the *actus reus* of aiding and abetting. It seems that making the requirements for the conduct element more stringent, without simultaneously lessening the fault requirement or getting rid of the requirement that the contribution of the accused must be substantial skews the construction of complicity. The *Taylor* Appeal judgment hinted at a more balanced approach to the two elements of aiding and abetting by drawing on the example of the US Model Penal Code (MPC) that requires ‘purpose’ -instead of a more widely accepted ‘knowledge’ – as a mental element for aiding and abetting because it allows for *any* contribution to crime to qualify as a conduct element instead of a significant or substantial contribution.³⁰⁰

In sum, a harmonious approach to all three elements – facts, description of the substantive offences and the modes of liability – is preferred. This is achieved

²⁹⁷ *Furundžija* Trial Judgment, §§ 273-274.

²⁹⁸ *Perišić* Appeal Judgment, § 48: “[t]he Appeals Chamber also underscores that its analysis of specific direction will exclusively address *actus reus*.”

²⁹⁹ K.J.M. Smith, at 195, emphasis added.

³⁰⁰ *Taylor* Appeal Judgment, § 447. K.J.M. Smith pointed out that American jurisdictions requiring purposeful accessorial attitudes experience less problems with specificity. For the discussion of complicity in the US, see Chapter IV.4.v *infra*.

by the different parts of the judgements speaking to each other. The process of attribution of responsibility can be made more transparent if the form of responsibility is not used as an instrument for reaching a certain result – conviction or acquittal – but rather as a lens through which the court assesses the circumstances of the case, without any predetermined bias. The legal formulas should be attached to the specific facts and an inferential analysis, such as that which led to the conviction in the *Šljivančanin* case, should be justified at all times.³⁰¹

iv. Problem with the Sources

One of the defence teams in *Milutinović et al.* raised the question whether the *Tadić* Appeals Chamber was correct in inferring the joint criminal enterprise from the ICTY Statute.³⁰² This concern exemplifies the problem with sources in international criminal law. The first judgements of the ICTY – *Tadić* and *Furundžija* rely extensively on the post-World War II jurisprudence to establish the existence of a customary rule in international criminal law. The analysis in the previous chapter shows however that the Nuremberg and Tokyo judgments, as well as the subsequent convictions of the Nazi perpetrators pursuant to Control Council Law No. 10, were highly politicized and influenced by domestic law considerations.³⁰³ International criminal law is not incidental but is the product of a combination of factors that need to be accounted for.

Most of the considerations that shaped international criminal justice at the time of its conception are extra-legal. Shklar referred to the environment that led to setting up the IMT in the following terms: “...a very rare situation in which there is no law, no government, no political order, and people have committed acts so profoundly shocking that something must be done about them.”³⁰⁴ In spite of this, the early ICTY judgments seem to ignore the context in which the precedents they are relying on came into existence. The first steps of the ICTY can be characterised by uncritical adherence to the post-World War jurisprudence. Boas et al. argue that the most worrying characteristic of the *Tadić* is the methodology used to establish the rules of customary international law. International judgements pursuant to Control Council Law No. 10 supporting in *Tadić* the existence of common purpose liability do not amount to state practice.³⁰⁵

³⁰¹ *Šljivančanin* Appeal Judgment § 93. See Section 1.vii. *supra*.

³⁰² See Section 1.3. *supra*.

³⁰³ See Chapter I.

³⁰⁴ J. Shklar, *Legalism: An Essay on Law, Morals and Politics*, 1964, at 153.

³⁰⁵ G. Boas et al, at 21-22.

Custom is a very problematic source of international criminal law: tribunals often avoid making a distinction between the two constituent elements of the custom – *opinio juris* and state practice. This is understandable because the discipline is very peculiar in that the state practice element of the custom often points to an undesirable outcome (i.e. a violation).³⁰⁶ In addition, the field of international criminal law is relatively new and is still evolving, making it difficult to assess whether a particular provision has crystallized as a custom or not.³⁰⁷

A certain discomfort with the customary nature of the modes of liability in international criminal law is discernible in the jurisprudence of both hybrid courts. The Co-Investigative judges at the ECCC scrutinized the cases the cases that *Tadić* relied on in support of the three forms of the joint criminal enterprise.³⁰⁸ The judges found sufficient support in the customary international law for the first and second forms of the joint criminal enterprise³⁰⁹ but not the third, extended, form.³¹⁰ The Trial Chamber confirmed these findings a year later and, after having reviewed domestic legislation of several states, rejected the proposition that the extended form of the joint criminal enterprise finds support in another source of international law, namely the general principles of law.³¹¹

The SCSL, in the *Taylor* Appeal judgment showed its unwillingness to directly engage with custom. The *Taylor* Appeals Chamber attempted to circumvent the difficulty related to the fragmentation of international criminal law by framing the discussion about the specific direction not along the lines of shaping the custom but as a rejection of the ICTY precedent that is only internally binding.³¹² As Kevin Jon Heller pointed out, this reasoning is unconvincing.³¹³ International courts and tribunals operating in the field apply

³⁰⁶ *First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur*, 17 May 2013, UN Doc. A/CN.4/663, § 70. See also L. van den Herik, ‘Using Custom to Reconceptualise Crimes Against Humanity’ in S. Darcy and J. Powderly (eds) *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press, 2010, at 101.

³⁰⁷ *First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur*, 17 May 2013, UN Doc. A/CN.4/663§ 68.

³⁰⁸ *Prosecutor v Ieng Sary et al*, ECCC, Case No. 002/19-09-2007/ECCC/OCIJ, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, Pre-Trial Chamber, 20 May 2010 (‘*Ieng Sary* PTC JCE Decision’).

³⁰⁹ *Ibid.*, §§ 57-71.

³¹⁰ *Ibid.*, §§ 75-83.

³¹¹ *Prosecutor v Ieng Sary et al*, ECCC, Case No. 002/19-09-2007/ECCC/TC, Decision on Applicability of Joint Criminal Enterprise, 12 September 2011 (‘*Ieng Sary* TC JCE Decision’), §§ 36-38.

³¹² *Ibid.*, § 476.

³¹³ K. J. Heller, ‘The SCSL’s Incoherent — and Selective — Analysis of Custom’, *Opinio Juris Blog*, 27 September 2013, last accessed 6 December 2013, available at <http://opiniojuris.org/2013/09/27/scsls-incoherent-selective-analysis-custom/>

the sources of international law – treaty, custom, and the general principles of law.³¹⁴ Their statutes do not expressly mention the specific direction requirement for complicity. The question is therefore whether it is a custom or a general principle. However, the *Perišić* Appeals Chamber was on equally feeble grounds when it entered the discussion in the first place.³¹⁵

In modern international criminal law, a uniform approach by different courts and tribunals to a particular issue may serve as the evidence of a consensus on a given topic, and thus permit one to speak of the formation of a customary rule. For example, the *Taylor* and the *Šainović et al.* Appeals Chambers certainly weakened (if not disposed of) the emerging customary rule requiring the ‘specific direction’ element as a part of *actus reus* of complicity, even though the *Taylor* appellate panel was not willing to engage expressly with the issue, while the analysis furnished in *Šainović et al.* is not free from controversy when it comes to assessing what constitutes a custom in international criminal law: not all of the cases cited in support of the absence of the specific direction in customary international law dealt aiding and abetting liability.³¹⁶

Looking at the other source of international law, the general principles of law, it seems that the requirement that the aid is directed towards the specific offence, in the sense that the ICTY attributed to it in *Perišić*, also lacks support in the majority of domestic legal systems.³¹⁷ In this regard, the initiative of the *Šainović et al.* Appeals Chamber to ‘probe’ this third source of international law in order to establish whether domestic law may be of assistance in resolving the ‘specific direction’ problem deserves credit.³¹⁸ The Chamber’s substantive conclusion about the lack of the uniform rule in respect of this particular aspect of aiding and abetting also appears correct.³¹⁹ The methodology employed for assessing domestic law is however far from clear. The judgment adopted a reductionist approach when grouping the countries together, without taking into account the specific features of

³¹⁴ The ICC is possibly an exception because of the special regime created by the Article 21 of the Rome Statute. UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html>

³¹⁵ See Section I.vii *supra*.

³¹⁶ For example, the *Justice* case, referred to in §1641 of the judgment, showcases a unitary model of participation, rather than any form of accomplice liability. See Chapter I.2.ii *supra*.

³¹⁷ J. Stewart, ‘Specific Direction’ is Unprecedented: Results from Two Empirical Studies,’ EJIL Blog, 4 September 2013, last accessed 6 December 2013, available at <http://www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies/>

³¹⁸ *Šainović et al.* Appeal Judgement, § 1643.

³¹⁹ For the detailed discussion of different elements of aiding and abetting in national law see Chapter VI and Appendix III *infra*.

different legal families and individual legal systems.³²⁰ The overview of national case law is cramped together in three paragraphs and several lengthy footnotes.³²¹

Chapter four of this thesis argues in favour of the more extensive use of the general principles of law as a source of international criminal law: the acceptance of a certain rule in the majority of national legal systems resonates with the domestic law origin of international criminal law³²² and helps to increase the perceived legitimacy of international courts; the population of the affected states is more likely to view international judgments as legitimate if the juridical concepts employed in these judgements correspond to what is accepted and understood in a given domestic legal system.³²³

Conclusion

This chapter provided an overview of the forms of responsibility that have crystalized in the jurisprudence of the ad hoc tribunals and hybrid courts. The special focus was on the contentious issues in the application of various responsibility doctrines. Different forms of complicity appear to be commonly employed to address the wrongdoing of the accused removed from the scene of the crime. Complicity serves as an alternative to the extended commission as developed by the ICTR and the joint criminal enterprise, used by both international tribunals and hybrid courts. The chapter summarized four main challenges of international criminal law that prevent coherent deployment of the complicity doctrine: fragmentation, deficiency in understanding the appropriate causation standard for complicity, frequent lack of cohesion between factual circumstances and the legal labels attached to them, and unreliability of some sources utilized by international courts.

How does one achieve a more harmonious integration of complicity into international criminal law? As argued in this chapter, this process is impeded by the absence of well-defined goals of international criminal justice. It is difficult to shape legal concepts and determine their respective weight without answering the question of what international criminal law strives to achieve. The lack of clarity about goals leads to a lack of agreement on the so-called ‘policy objectives’ of international criminal law, those pragmatic considerations counterbalancing legal concepts in the domestic law context. The last chapter of this dissertation attempts to define an overarching

³²⁰ For example *Šainović et al.* Appeal Judgement, § 1645.

³²¹ *Šainović et al.* Appeal Judgement, § 1643-1646.

³²² *Report of the Committee of French Jurists*, § 50(d). For the discussion on limitations of international criminal law as a product of two fields – public international law and domestic criminal law, see Chapter VII.1 *infra*.

³²³ M. Damaška, at 350.

objective of international criminal law and show how a unifying goal may affect the legal definition of complicity.

In the absence of a consensus on its objectives, it is important that international criminal law relies on its domestic law origins when engaging with the modes of responsibility. The need to accurately describe the behaviour of the accused in the context of national law stems from the notion of fairness – the accused has a right to be judged based on his conduct in the specific case. In addition, he has the right to be properly informed about the charges against him so that he stands a chance of preparing his defence.³²⁴ It appears that similar considerations ought to apply to international criminal law. The practical outcome of this approach is careful selection of the most appropriate mode of responsibility at the stage of charging and meticulous application of the legal requirements of this mode of responsibility to the particular case at issue.

³²⁴ W. Jordash and J. Coughlan, 'The Right to be Informed of the Nature and Cause of the Charges: A Potentially Formidable Jurisprudential Legacy,' in Darcy and Powderly (ed.), *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press, 2010.

III. Complicity and the Hierarchy of the Participation Modes at the ICC

Introduction

This chapter examines complicity in the context of the International Criminal Court (ICC). Article 25(3) of the Rome Statute contains the most comprehensive description of the liability modes as they have appeared in the history of international criminal law. The forms of participation are organized in a systematic fashion under the subparagraphs (a) – (d) of Article 25(3). Aside from ‘committing’, contained in subparagraph (a) of the article, all other liability modes listed in the Rome Statute fit within the notion of ‘complicity’.¹ Notwithstanding the availability of various forms of complicity under Article 25(3) of the Rome Statute, the ICC, in its early case law, leaned towards expanding the notion of ‘commission’ to include a wide array of conduct.²

Since its very beginning, the ICC favoured the concepts of direct and indirect co-perpetration by means of control over crime in attaching responsibility to the accused removed from the scene of the crime.³ These constructions were inferred from subparagraph (a) of Article 25(3) of the Rome Statute, which mentions commission of a crime ‘as an individual, jointly with another or through another person’. The control over crime theory, which has its origins in German legal thought, is a form of commission that extends principal liability to those persons who do not physically commit the offence but nonetheless possess a certain degree of control over its commission.⁴ Accessories, on the other hand, do not have such control.⁵ The ICC used the idea of control over crime to create the form of participation that not only

¹ Commentaries to the 1996 ILC Draft Code that served as a basis for the relevant provision of the Rome Statute refer to all modes of participation with the exception of ‘commission’ as ‘complicity’. Report of the ILC to the General Assembly, Forty-Eighth Session, U.N. GAOR, 51st Sess., No. 10 U.N. A/51/10 (1996), at 20, § 6. See also W. Schabas, 2006, at 305. Article 25(3)(e) is a contentious case because it embodies the crime itself, rather than a mode of responsibility. Genocide does not need to be committed or attempted to attract responsibility under this provision.

² W. Schabas, 2010, at 427-428.

³ Prosecutor v. Thomas *Lubanga Dyilo*, ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007 (‘*Lubanga Decision*’); Prosecutor v. *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008 (‘*Katanga Decision*’); Prosecutor v. *Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, 15 June 2009 (‘*Bemba Decision*’)

⁴ C. Roxin, Crimes as Part of Organized Power Structures, *Goldammer’s Archiv für Strafrecht* (1963) 193-207. Reproduced in 9 *Journal of International Criminal Justice*, 2011, 191-205.

⁵ G. Fletcher, 1978, at 655. For the detailed description of this theory see Chapter IV.

delimits the conduct that warrants criminal liability but also functions as a criterion for qualifying the degree of responsibility of the accused.⁶

The reason for neglecting complicity in favour of the other forms of commission in the early case law of the ICC could be explained by the structure of Article 25(3) of the Statute and the alleged hierarchy of the participation modes that it contains. The ICC, by siding with the German legal tradition and inferring direct and indirect co-perpetration from the wording of the relevant provision, has acknowledged, in its first pronouncements on the matter, that the hierarchy of the modes of participation is implicit in Article 25(3).⁷ Consequently, the court felt compelled to utilize the ‘stronger’ concept of co-perpetration as opposed to the various forms of complicity enshrined in the subsequent paragraphs of Article 25(3) with the view of stressing the magnitude of crimes falling within the jurisdiction of the ICC.⁸ Accordingly, the first conviction of the ICC was under the doctrine of co-perpetration pursuant to Article 25(3)(a) of the Statute.⁹

Recently, the ICC began showing some signs of disillusionment with the doctrine of co-perpetration as means of control over crime. The first serious benchmark decision questioning this theory - as well as the alleged hierarchy of crimes within Article 25(3) of the Rome Statute - was separate opinion of Judge Adrian Fulford attached to the *Lubanga* judgment.¹⁰ The other important development in this regard was the demise of the very case that pioneered the notion of indirect co-perpetration at the ICC – *Katanga*. Months after the parties’ closing arguments in this case, the Trial Chamber changed the legal characterization of facts relating to Germain Katanga’s mode of participation from indirect co-perpetration under Article 25(3)(a) of the Statute to complicity in the commission of a crime by a group of persons acting with a common purpose under on the basis of Article 25(3)(d) of the

⁶ G. Werle and B. Burghardt, ‘Indirect Perpetration: a Perfect Fit for International Prosecution of Armchair Killers?’ 9 *Journal of International Criminal Justice*, 2011, at 88.

⁷ For references to this hierarchy see Prosecutor v. *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I, Judgment pursuant Article 74 of the Statute, 14 March 2012 (‘*Lubanga* Judgment’), §§ 996-999; *Katanga* Confirmation of Charges §§ 469-471; Prosecutor v. *Mbarushimana*, Pre-Trial Chamber I, ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011 (‘*Mbarushimana* Decision’), § 279. Cf. Prosecutor v. *Germain Katanga*, ICC-01/04-01/07, Trial Chamber II, Judgment pursuant Article 74 of the Statute, 7 March 2014 (‘*Katanga* Judgment’), § 1386; Prosecutor v. *Germain Katanga*, ICC-01/04-01/07, Trial Chamber II, Minority opinion of Judge van den Wyngaert to Judgment Pursuant to Article 74 of the Statute, 7 March 2014 (‘Minority Opinion of Judge van den Wyngaert’), § 279.

⁸ E. Van Sliedregt, 2012, at 85.

⁹ *Lubanga* Judgment, § 976. For more discussion on this judgment see the following section.

¹⁰ Prosecutor v. *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Separate Opinion of Judge Adrian Fulford to the Trial Chamber I, Judgment pursuant Article 74 of the Statute, 14 March 2012 (‘Separate Opinion of Judge Fulford’).

Statute.¹¹ Germain Katanga was recently convicted under this latter form of responsibility of murder, attack against the civilian population and the destruction of property.¹²

The same decision that re-characterized Katanga's liability mode also severed the charges against the co-accused in the case¹³ - Mathieu Ngudjolo who was subsequently acquitted for the lack of evidence.¹⁴ Judge Christine Van den Wyngaert submitted a powerful concurring opinion to the judgment of acquittal, expressing her views on the interpretation of Article 25(3)(a) of the Statute, whereby she criticized 'indirect co-perpetration' inferred from this provision and argued against the hierarchy of the modes of participation under Article 25(3) of the Statute.¹⁵ The lack of confidence in 'indirect co-perpetration' as a mode of liability also surfaced in the arrest warrants against Laurent and Simone Gbagbo – the former President of Côte d'Ivoire and his wife. The Pre-Trial Chamber III charged them with indirect co-perpetration in crimes but stipulated that the mode of liability "may well need to be revisited in due course."¹⁶

The latest decline of enthusiasm in relation to (in)direct co-perpetration based on control over crime could be explained by the loss of faith in the general assumption underlying the excessive use of this doctrine. That is the assumption that the modes of participation within Article 25(3) are ranked according to their degree of blameworthiness; thus the mode of participation on top of the list - commission - best reflects the culpability of the offenders standing trial for mass crimes within the ICC jurisdiction. It is surprising that the recent *Katanga* judgment retained control of over crime theory as implicit in Article 25(3), while rejecting the hierarchy of guilt based on the forms of responsibility – the two notions appear closely linked in the ICC jurisprudence.¹⁷

¹¹ Prosecutor v. *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012 ('*Katanga Severing Decision*'), § 7.

¹² *Katanga* Judgement, § 1691.

¹³ *Katanga Severing Decision*, § 59.

¹⁴ The Prosecutor v. *Mathieu Ngudjolo Chui*, ICC-01/04-02/12-4, Trial Chamber II, Judgment Pursuant to Article 74 of the Statute ('*Chui Judgment of Acquittal*'), 18 December 2012, § 503.

¹⁵ The Prosecutor v. *Mathieu Ngudjolo Chui*, ICC-01/04-02/12-4, Trial Chamber II, Concurring opinion of Judge van den Wyngaert to Judgment Pursuant to Article 74 of the Statute, 18 December 2012 ('*Concurring Opinion of Judge van den Wyngaert*'), § 6.

¹⁶ Arrest Warrant *Laurent Gbagbo*, § 11; Arrest Warrant *Simone Gbagbo*, § 16.

¹⁷ *Katanga* Judgement, §§ 1387; 1394. Cf. Minority Opinion of Judge van den Wyngaert, § 279.

The aim of this chapter is to explore complicity in relation to the competing concept of co-perpetration. It questions the assumptions underlying the overuse of the latter and paves the way to a more extensive and accurate use of the former. Part one of this chapter critically examines the forms of participation at the ICC, with the special emphasis on the role of complicity in the attribution of liability as opposed to the notion of '(in)direct co-perpetration'. Section two explores the question of the alleged hierarchy of liability modes implicit in Article 25(3) of the Rome Statute. This section provides arguments against ranking the forms of responsibility in the Rome Statute. Some conclusions are drawn in the final part of the chapter.

1. Modes of Participation at the ICC

The Rome Statute of the ICC represents the future of the international criminal law, as it was drafted after the creation of ICTY and ICTR and makes use of their experience when defining different modes of participation.¹⁸ It also takes into account the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission in 1996.¹⁹ There is general agreement that, at least on the face of it, Article 25(3) of the Rome Statute leans towards the differential participation model, as opposed to unitary approach.²⁰ The division between differential and unitary perpetration is inherent to domestic criminal law. The core of this distinction is that the unitary model makes the responsibility of a party independent from the liability of the principal perpetrator, while the differential model implies accessory dependence of the accomplice on the principal act of the perpetrator.²¹ Thus, the premise underlying the differential participation model is that liability of an accessory derives from the wrongful act of the principal. This model in domestic law usually indicates lesser punishment for the accomplices, as they are considered less blameworthy than the principals.²² Chapter four of the thesis discusses how these two models play out in the specific domestic law systems and what is the practical significance, if any, of this distinction.

¹⁸ E. Van Sliedregt, 2003, at 65.

¹⁹ Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, UN Doc. A/51/10. For more discuss on the preparation of the Draft Code of Crimes against the Peace and Security of Mankind, see Chapter I.

²⁰ A. Eser, at 788; K. Ambos, 'The First Judgment of the International Criminal Court (Prosecutor v. *Lubanga*): A Comprehensive Analysis of the Legal Issues,' 12 *International Criminal Law Review*, 2012, at 144; E. Van Sliedregt 2012, at 71-73, 79. Sliedregt employs slightly different terminology. She discusses the ICC's preference for the 'normative model'. This model implies that the principal is the one most responsible in the sense of having decisive influence over the commission of the crime. In essence this normativity falls within the ambit of differential participation model as it is based on the idea of the increased blameworthiness of the perpetrator.

²¹ A. Eser, at 788.

²² See, for example, the German model, discussed in further detail in Chapter IV.

Article 25(3) of the Rome Statute provides that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Unlike the Statutes of the ad hoc tribunals, the Rome Statute contains a separate provision establishing the general fault requirement for the crimes under the ICC jurisdiction - Article 30 of the Rome Statute, which embraces two forms of culpability: *dolus directus in the first degree* - direct intent, - and *dolus directus in the second degree* - awareness that the crime will be the almost inevitable outcome of the acts or omissions of the accused.²³ This article shall be read in conjunction with the Article 25(3) setting out the modes of responsibility. Article 30 reads as follows:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

²³ *Katanga* Judgement, §§ 774, 775. See also W. Schabas, 2010, at 475.

2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

The following subsections elaborate on the forms of participation embodied in Article 25(3)(a)-(d) of the Rome Statute. Incitement to commit genocide under subparagraph (e) is not discussed because it constitutes an inchoate crime rather than a mode of responsibility. This is so because of the derivative nature of complicity – the conduct in the form of incitement derives its criminality from the crime that is attempted or committed. In this case, however, the crime of genocide does not need to be attempted or occur in order to bring about responsibility under this subheading.²⁴ Criminalizing the act of incitement to commit genocide could be explained by the extreme gravity of the crime of genocide that calls for additional preventative measures. The inclusion of this inchoate offence in the article dealing with modes of responsibility is unfortunate as it properly belongs to the section dealing with substantive offences.

Complicity after the fact is also not examined in the following sections as it is not covered by Article 25.²⁵ The reason for this is the lack of a nexus between the act of assistance and the crime necessary according to the derivative nature of complicity.²⁶ While the Draft Code of Crimes adopted two years before the Rome Statute included *ex post facto* assistance in the category of complicity, it stipulated that this assistance would have to be agreed upon *prior* to the perpetration of the crime.²⁷

Another provision that is not discussed at length in this chapter is Article 28 of the Rome Statute. It contains a distinct form of responsibility, namely that

²⁴ K. Ambos in O. Triffterer (eds) ‘*Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*’, (Second Edition), 2003, at 487. Cf. Article 2(3)(f) of the Draft Code of Crimes (1996), which provides for responsibility of the individual who “directly and publicly incites another individual to commit such a crime which in fact occurs.” Emphasis added.

²⁵ W. Schabas, 2010, at 435; K. Ambos, 2003, at 491.

²⁶ K. Ambos, 2003, at 491.

²⁷ Report of the ILC, 48th session, at 21, § 12. The ICC case law appears to take the same approach. In *Mbarushimana*, the Chamber found that 25(3)(d) liability can include contributing to a crime’s commission after it has occurred, so long as this contribution had been agreed upon by the relevant group acting with a common purpose and the suspect prior to the perpetration of the crime. See *Mbarushimana* Decision, § 287.

of commanders and other superiors.²⁸ Command responsibility shares some characteristics with accomplice liability in that it emphasizes one's relationship or association with others.²⁹ The theoretical underpinnings of these two forms of liability are entirely different, however: responsibility under Article 28 arises from the formal link between the superior and the agent and not from the latter's wrongful conduct as is the case with complicity.³⁰ The basis for command responsibility is thus superior's culpable failure to act.³¹

i. (a) 'Commits such a crime, whether as an individual, jointly with another or through another person...'

Subparagraph (a) of the Rome Statute gives rise to most ICC practice relating to criminal participation.³² It covers the commission of the crime through perpetration, co-perpetration and indirect perpetration, also referred to as 'perpetration by means'. Co-perpetration implies a functional division of the criminal tasks between the different co-perpetrators, who are usually interrelated by the common plan.³³ Indirect perpetration means that the person who commits the crime can be used as an instrument by the indirect perpetrator.³⁴ Article 25(3)(a) provides for the liability of the indirect perpetrator regardless of the *mens rea* of the person who actually commits the offence.³⁵ This permits the extension of criminal responsibility of indirect

²⁸ Text of Article 28 is included in the Appendix I.

²⁹ G. Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court', 25 *Yale Journal of International Law* 89, 2000, at 98.

³⁰ *Ibid.*, at 99.

³¹ G. Vetter, at 100. 'Command responsibility' most closely resembles complicity in the form of 'ordering' under Article 25(3)(b) of the Rome Statute. For further comparison of the two forms of responsibility see section ii *infra*.

³² *Lubanga* Judgement; *Katanga* Decision; *Mudacumura* Decision; Prosecutor v. *Abu Garda*, ICC-02/05-02/09, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010 ('*Abu Garda* Decision'); *Ruto* Decision; Prosecutor v. *Abdallah Banda* and *Saleh Jerbo*, ICC-02/05-03/09, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 7 March 2011 ('*Abdallah Banda* and *Saleh Jerbo* Decision'); Prosecutor v. *Al Bashir*, ICC-02/05-01/09, Pre-Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009 ('*Al Bashir* Arrest Warrant'); Prosecutor v. Simone *Gbagbo*, ICC-02/11-01/12, Pre-Trial Chamber III, Warrant of Arrest for Simone Gbagbo, 29 February 2012 ('*Simone Gbagbo* Arrest Warrant'); Prosecutor v. *Gaddafi*, ICC-01/11, Pre-Trial Chamber I, Warrant of Arrest for Saif Al-Islam Gaddafi, 27 June 2011 ('*Gaddafi* Arrest Warrant'); Prosecutor v. *Hussein*, Pre-Trial Chamber I, ICC-02/05-01/12, Warrant of Arrest for Abdel Raheem Muhammad Hussein, 1 March 2012 ('*Hussein* Arrest Warrant').

³³ K. Ambos, 2003, at 479.

³⁴ *Ibid.*

³⁵ The initial Working paper submitted by Canada, Germany, Netherlands and the United Kingdom to the Preparatory Committee as part of work on the modes of responsibility provided for the commission "through a person who is not criminally responsible". Working paper submitted by Canada, Germany, Netherlands and the United Kingdom to the Preparatory Committee ('Working Paper'), A/AC.249/1997/WG.2/DAT1, 14 February 1997.

perpetrators beyond the cases of innocent agency.³⁶ Due to this peculiarity, the ICC Pre-Trial Chambers have been actively using the concept of co-perpetration when confirming charges in the situations with multiple accused removed from the scene of the crime.³⁷

The discussion about the correct interpretation of co-perpetration and indirect perpetration within Article 25(3)(a) began in *Lubanga*. The origin of this development was the need to identify the criteria for distinguishing principals and accessories. The *Lubanga* Pre-Trial Chamber held that the objective approach to distinguishing the two categories focuses on the realization of one of the objective elements of the crime, thus labelling as (co-)perpetrators only those who physically perpetrate the crime.³⁸ The subjective approach, on the other hand, places the emphasis on the state of mind of the offender – those who have the shared intent are considered perpetrators.³⁹ The Chamber further argued that neither the objective nor the subjective criterion distinguishing principals and accessories could be reconciled with Article 25(3)(a). The former approach unjustly restricts indirect perpetration to those performing the *actus reus* of the offence, while the latter approach is already embodied in Article 25(3)(d), thus differentiating it from the co-perpetration within the meaning of Article 25(3)(a).⁴⁰

Consequently, the ICC came up with the third method of ‘control over crime’ for distinguishing between principals and accessories, which it said applies in ‘numerous legal systems’.⁴¹ This approach is based on the work of the German criminal law scholar Claus Roxin.⁴² The court argued “[t]he notion underpinning this third approach is that principals to a crime are not limited to

This formulation changed to “through another person regardless of whether that person is criminally responsible” in the Report of the ICC Preparatory Committee, DOCUMENT A/CONF.183/2, 14 April 1998, at 31.

³⁶ *Katanga* Judgment, § 1398.

³⁷ *Katanga* Decision, §§ 480-486, 490, 500-514, 527-539; *Lubanga* Decision, §§ 328-333; Prosecutor v. *William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-373, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012 (*Ruto* Decision), §§ 291-292.

³⁸ *Lubanga* Decision, § 328.

³⁹ *Lubanga* Decision, § 329. The *Lubanga* Pre-Trial Chamber attributed the subjective approach to the jurisprudence of the ICTY on the joint criminal enterprise or the common purpose doctrine. Van Sliedregt, however, points out that neither the ICTY nor ICTR have ever used the terminology of subjective/objective approach. See E. Van Sliedregt, 2012, at 84.

⁴⁰ *Lubanga* Decision, §§ 333-335.

⁴¹ *Katanga* Decision, §§ 502, 504; Thomas Weigend noted that the list of ‘numerous’ national jurisdictions that are claimed to be in favor of the concept of perpetration through an organization is limited to five (Argentina, Chile, Germany, Peru, Spain), in one of which (Argentina) the Supreme Court had overturned a lower court judgment proposing this theory. See T. Weigend, ‘Perpetration through an Organization: The Unexpected Career of a German Legal Concept,’ 9 *Journal of International Criminal Justice*, 2011, at 105.

⁴² See Chapter IV.

those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission by virtue of deciding whether and how the offence will be committed.”⁴³ In line with this approach, the principals are those who have control over the crime, and, while being aware of this control, either (1) physically carry out the crime (direct perpetration), or (2) control the will of those who carry out the objective elements of the offence (indirect perpetration), or (3) they have, along with others, control over crime by reason of the essential tasks being assigned to them (joint or co-perpetration).⁴⁴

The long awaited first ICC judgment in *Lubanga* corroborated the Pre-Trial Chambers’ approach.⁴⁵ The Chamber followed the Pre-Trial Chamber’s analysis of the scope of co-perpetration based on the control over crime theory and held that the prosecution must prove the following elements to secure Lubanga’s conviction for the ‘direct co-perpetration’:⁴⁶

- (i) an agreement or common plan between the accused and at least one other co-perpetrator that results in the commission the relevant crime in the ordinary course of events;
- (ii) an essential contribution of the accused to the common plan;
- (iii) an intent on part of the accused to commit a crime or his awareness that this crime is the consequence of the implementation of the plan in the ordinary course of events;
- (iv) awareness that the accused provides an essential contribution to the implementation of the common plan; and, finally,
- (v) awareness of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and the conduct of the accused.

The conclusion on the basis of this list of elements was that Lubanga did indeed satisfy the abovementioned criteria to qualify as a direct co-perpetrator in the meaning of Article 25(3)(a) for the crimes he has been charged with, namely enlisting children under the age of fifteen; conscripting children under the age of fifteen; and using children under the age of fifteen to actively participate in hostilities.⁴⁷ The Chamber established that the accused and his alleged co-perpetrators, including particularly Floribert Kisembo, Chief Kahwa and Bosco Ntaganda, worked together and each of them made an essential contribution to the common plan that resulted in the enlistment,

⁴³ *Lubanga* Decision, § 330.

⁴⁴ *Lubanga* Decision, § 332.

⁴⁵ Prosecutor v. *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I, Judgment pursuant Article 74 of the Statute, 14 March 2012 (“*Lubanga* Judgment”), § 976.

⁴⁶ *Lubanga* Judgment, § 1018.

⁴⁷ Articles 8(2)(b)(xxvi) or 8(2)(e)(vii) of the Rome Statute of the ICC.

conscription and use of children under the age of 15 to participate actively in hostilities.⁴⁸ The court treated the second element of co-perpetration - essential contribution to the common plan – as an indicator of control over the crime or lack thereof. The Chamber clarified that only those “to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks” have joint control over the crime.⁴⁹ The threshold for the essential contribution was therefore set at the capacity to frustrate the commission of the crime by withdrawing the contribution.

With regard to the mental elements, the Trial Chamber concluded that Thomas Lubanga acted with the intent and knowledge necessary to establish the charges pursuant to Article 30 of the Rome Statute. He was aware of the factual circumstances that established the existence of the armed conflict, and the nexus between those circumstances and his own conduct, which resulted in the enlistment, conscription and use of children below the age of 15 to participate actively in hostilities.⁵⁰ The definition of the mental element in *Lubanga* raises some critical points. The court claimed, “awareness that a consequence will occur in the ordinary course of events” involves consideration by the participants of the concepts of “possibility” and “probability”, which are inherent to the notions of “risk” and “danger”.⁵¹ This comes dangerously close to accepting *dolus eventualis*, or inadvertent recklessness, as the applicable fault requirement at the ICC.⁵² *Dolus eventualis*, on the other hand, is the lowest form of culpability and appears to be beyond what the drafters of the Rome Statute envisaged for the crimes in the court’s jurisdiction.⁵³

Without openly embracing inadvertent recklessness, the *Lubanga* Trial Chamber utilized the evidence more appropriate for this standard, rather than *dolus directus in the second degree*. Among the facts supporting the conclusion that Lubanga was aware that his conduct would result in the conscription and enlistment of children were the following: the accused’s speeches addressed to the population and aimed at recruiting youngsters; the use of soldiers below the age of 15 as his bodyguards; and Lubanga’s close contact with Mafuta, “who is said to have played an important role in recruiting children and advising the accused on policy.”⁵⁴ Consequently, the

⁴⁸ *Lubanga* Judgment, § 1271.

⁴⁹ *Lubanga* Judgment, § 925.

⁵⁰ *Lubanga* Judgment, § 1357.

⁵¹ *Lubanga* Judgment, § 1012. Cf. *Katanga* Judgment, § 775.

⁵² For criticism see Separate Opinion of Judge Fulford, § 15; Concurring Opinion of Judge van den Wyngaert, §§ 36-38.

⁵³ For the detailed discussion on the accepted fault requirement before the ICC see *Bemba* Decision, §§ 358-368.

⁵⁴ *Lubanga* Judgment, § 1277, 1278, 1356.

Chamber found that the accused's participation in a common plan to build an army for the purpose of establishing and maintaining political and military control over the Ituri region resulted, in the ordinary course of events, in the conscription and enlistment of boys and girls under the age of 15, and their use to participate actively in hostilities.⁵⁵ All of these facts do not seem to support the conclusion that the recruitment of children would have been an inevitable outcome in the ordinary course of events, but rather that there was a high risk of the crime to occur.⁵⁶

The notion of control over crime has been finalized in *Katanga* and took the shape of the so-called 'indirect co-perpetration'. The Pre-Trial Chamber upheld the idea of combining co-perpetration and indirect perpetration and held:

There are no legal grounds for limiting the joint commission of the crime solely to cases in which the perpetrators execute a portion of the crime by exercising direct control over it. Rather, through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises which allows the Court to assess the blame worthiness of "senior leaders" adequately.⁵⁷

Consequently, the *Katanga* Pre-Trial Chamber created a fancy structure made of the subjective and objective elements of indirect co-perpetration by combining the features of both doctrines:

- (i) the suspect must be part of a common plan or an agreement with one or more persons;
- (ii) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime;
- (iii) the suspect must have control over the organization;
- (iv) the organization must consist of an organized and hierarchal apparatus of power;
- (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect;
- (vi) the suspect must satisfy the subjective elements of the crimes;

⁵⁵ *Lubanga* Judgment, § 1351.

⁵⁶ The weak evidence supporting the fault requirement in *Lubanga* played an important role during the sentencing deliberations. The fact that Thomas Lubanga did not mean to conscript children, but was, rather, aware that this would occur in the ordinary course of events mitigated his sentence. Mr. Lubanga received the relatively lenient punishment of 14 years of imprisonment. See Prosecutor v. *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012 ('*Lubanga* Sentencing Decision'), §§ 52, 53 and 98. For more discussion on the sentencing policy of the ICC, see Chapter VI.

⁵⁷ *Katanga* Decision, § 492.

- (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and
- (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).⁵⁸

The Pre-Trial Chamber found that both co-accused in the case - Germain Katanga and Mathieu Ngudjolo - satisfied the numerous conditions for indirect co-perpetration crimes against humanity and war crimes committed during the attack on Bogoro village on 24 February 2003 and confirmed the charges.⁵⁹ The Chamber found grounds to believe that Katanga and Ngudjolo served as *de jure* and *de facto* commanders of the forces responsible for the attack on Bogoro.⁶⁰

At the trial stage, however, indirect co-perpetration as a mode of liability proved to be unsuccessful in respect to both accused in the *Katanga* case. After the closing arguments of the parties and the participants, the Trial Chamber proceeded with severing the charges against Mathieu Ngudjolo⁶¹ and subsequently acquitting him.⁶² The judges failed to find sufficient evidence that Ngudjolo served as a military commander, despite the important role he played in the region due to his high social status.⁶³ Furthermore, the Chamber did not establish that the accused gave military orders or attempted to secure their compliance.⁶⁴ Accordingly, at least two elements of indirect perpetration failed, leading to the acquittal of Ngudjolo.⁶⁵

With respect to Katanga, the Trial Chamber chose to change legal characterization of his mode of liability from indirect perpetration on the basis of Article 25(3)(a), which failed to provide basis for conviction, to complicity in the commission of a crime by a group of persons acting with a common purpose pursuant to Article 25(3)(d)(ii).⁶⁶ While a detailed investigation of the implications of this decision falls outside the scope of present analysis, it is sufficient to note that legal re-characterization of the liability mode at such a late stage of proceedings divided the Chamber. The majority considered legal re-characterization of the mode of responsibility

⁵⁸ *Katanga* Decision, §§ 495-539. See also *Ruto* Decision, § 292; *Bemba* Decision, §§ 350-351.

⁵⁹ *Katanga* Decision, §§ 573-580.

⁶⁰ *Katanga* Decision, §§ 540-541.

⁶¹ *Katanga* Severing Decision, § 9.

⁶² *Chui* Judgment of Acquittal;

⁶³ *Ibid*, §§ 491, 499, 501.

⁶⁴ *Ibid*, § 502.

⁶⁵ *Ibid*, § 110.

⁶⁶ *Katanga* Severing Decision, § 7.

compatible with the rights of the accused because it did not alter, in the view of the majority, the narrative of facts described in the Decision on the Confirmation of Charges.⁶⁷ Judge Van den Wyngaert dissented on this point.⁶⁸

The recent *Katanga* judgment indeed acquitted Germain Katanga as an indirect perpetrator, while convicting him pursuant to Article 25(3)(d)(ii).⁶⁹ In this case, the Trial Chamber confirmed the allegations that the accused facilitated the supply of weapons used by the local Ngiti militia in an attack on the village of Bogoro – a stronghold of the Union of Congolese Patriots (UPC).⁷⁰ The Hema-dominated UPC constituted a legitimate military target, but, in addition to the military casualties, a number of civilians died during the attack on Bogoro. The Majority regarded the operation in Bogoro as an attack against the civilian population.⁷¹ The argument was that Ngiti militia, driven by the ethnic hatred against Hema, regarded the UPC and the Hema civilians as one single enemy; hence the attack was primarily directed against the civilians.⁷²

Prior to dealing with Katanga's responsibility under Article 25(3)(d)(ii),⁷³ the Trial Chamber clarified the elements of indirect perpetration pursuant to the subparagraph (a) of the same article.⁷⁴ In analysing the provision, the Trial Chamber unanimously rejected the hierarchy of liability modes inherent in Article 25(3).⁷⁵ The judges correctly reasoned that neither the Rome Statute nor the Rules of Evidence and Procedure provide for a mitigation of punishment for the forms of responsibility other than 'commission', and there is no reason why an accomplice shall be accorded lesser guilt or receive lighter penalty than a perpetrator.⁷⁶ In the light of this welcome development, it is regrettable that the Majority decided to retain as a guiding principle for distinguishing perpetrators and accessories control over crime theory – a

⁶⁷ *Katanga* Severing Decision, §§ 23, 32.

⁶⁸ Prosecutor v. *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Trial Chamber II, Dissenting Opinion of Judge Van den Wyngaert to Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012 ('Dissenting Opinion of Judge van den Wyngaert'), § 11; See also Minority Opinion of Judge van den Wyngaert, section II.

⁶⁹ *Katanga* Judgement, §§ 23, 32.

⁷⁰ *Ibid.*, §§ 1147; 1671

⁷¹ *Katanga* Judgement, § 1150.

⁷² *Ibid.*, § 1144. *Cf.* Judge van den Wyngaert challenged the logic of equating the UPC and Hema civilians as one enemy subject to attack. See Minority Opinion of Judge van den Wyngaert, §§ 214, 255.

⁷³ Section vi. *Infra.*

⁷⁴ *Ibid.*, §§ 1381 et sq.

⁷⁵ *Katanga* Judgement, § 1387; Minority Opinion of Judge van den Wyngaert, § 279.

⁷⁶ *Katanga* Judgement, §§ 1386, 1387

theory closely linked to the idea of hierarchy.⁷⁷

The justification for upholding control over crime approach was the need to give full effect to Article 25(3), in the light of the distinction between the perpetrators and the accomplices inherent in this provision.⁷⁸ The judges reiterated already familiar arguments about the inapplicability of the objective and subjective approaches for differentiating crime participants.⁷⁹ The exercise of giving full effect to Article 25(3) through control over crime theory avoided either plain reading of this provision - its language does not contain any trace of the theory in question, - or interpreting the article in accordance with the rules established in international law.⁸⁰ The judges brushed away, unconvincingly, the arguments regarding the theory's recognition in various national legal systems or in the customary international law. Examining these sources of law would have likely resulted in the dismissal of the theory altogether.⁸¹

The Majority thus proceeded to define indirect commission on the basis of control over crime theory. The judges concluded that the indirect perpetrator exercises within the organization control over crime committed through another person.⁸² The organization in question must be a 'power structure' characterized by the automatic compliance - the link between the superior and the actual perpetrators is of little importance, making latter interchangeable.⁸³ The indirect perpetrator must hold real authority within the organization, including the power to decide whether or not to execute the crime.⁸⁴ Relying on this definition, the Trial Chamber acquitted Germain Katanga of the charges as indirect perpetrator upon finding that Ngiti militia lacked organization to qualify as a 'power structure'. In addition to that, the evidence was not conclusive as to the exact nature of relationships between the commanders and their subordinates.⁸⁵

ii. (b) 'Orders, solicits or induces the commission...'

Ordering, soliciting and inducing are different forms of participation, despite some overlap among them. Ordering pertains to an individual who is in a position of authority and uses his authority to compel another individual to

⁷⁷ Ibid, §§ 1382; 1388. Cf. Minority Opinion of Judge van den Wyngaert, § 281.

⁷⁸ *Katanga* Judgement, § 1395.

⁷⁹ Ibid, §§ 1391, 1392.

⁸⁰ See *infra* 2.i.

⁸¹ See *Katanga* Judgement, § 1395.

⁸² Ibid, § 1406.

⁸³ Ibid, § 1409.

⁸⁴ Ibid, § 1411.

⁸⁵ Ibid, § 1418.

commit a crime.⁸⁶ Thus, ordering implies a superior-subordinate relationship between one who orders and the agent. Views have been expressed that ‘ordering’ belongs to the category of perpetration by means, covered by subparagraph (a) of the same article⁸⁷ or responsibility of commanders and other superiors under Article 28 of the Rome Statute.⁸⁸ However, it appears that ‘ordering’ occupies its own niche among the various forms of complicity listed in the Statute. Perpetration through another person is a form of direct liability, even when it employs the doctrinal constructions, such as ‘control over crime’, used to assign liability to the perpetrator. In contrast, ordering is derivative in the sense that it depends on the liability of the actual perpetrator.⁸⁹

‘Ordering’ under subparagraph (b) differs from the liability of superiors pursuant to Article 28 because the legal requirements for proving these two forms of responsibility differ. In case of ‘plain’ ordering under Article 25(3)(b), one has to prove only the specific superior-subordinate relationship with the perpetrator, but not the offender’s effective control and command over the forces required to attract responsibility under Article 28.⁹⁰ The extra burden of proving superior’s effective control is compensated by a lower threshold for mental element under Article 28. Ordering as a form of complicity under Article 25(3)(b) has to comply with the general fault requirements set out in Article 30, namely intent and knowledge. In contrast, superior responsibility under Article 28 embodies specific fault requirement, which is looser than the general one, and includes *dolus eventualis*.⁹¹

In *Mudacumura*, the ICC provided its early interpretation of ordering, which will likely be subject to adjustment in future case law.⁹² The court relied on the jurisprudence of the ad hoc tribunals in defining the elements of ordering – the Pre-Trial Chamber held that to be responsible under article 25(3)(b) of the Statute it must be established that:⁹³

- (i) the person is in a position of authority;

⁸⁶ Report of the ILC, 48th session, at 20, § 8.

⁸⁷ K. Ambos, 2003, at 480.

⁸⁸ A. Eser, at 797.

⁸⁹ E. Van Sliedregt, 2003, at 107.

⁹⁰ Article 28(a) “A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces...” Emphasis added. Full text of the article is included in the Appendix I.

⁹¹ Article 28(a)(i) and (b)(i) provide for the following standard in respect of superior responsibility: “knew or, owing to the circumstances at the time, should have known” and “knew, or consciously disregarded information”

⁹² *Mudacumura* Arrest Warrant, § 63 et sq.

⁹³ *Ibid.*

- (ii) the person instructs another person in any form to either:
 - a. commit a crime which in fact occurs or is attempted or
 - b. perform an act or omission in the execution of which a crime is carried out;
- (iii) the order had a direct effect on the commission or attempted commission of the crime; and
- (iv) the person is at least aware that the crime will be committed in the ordinary course of events as a consequence of the execution or implementation of the order.

Accordingly, the arrest warrant stated that Mudacumura acted in a position of authority because he was the top military commander for the relevant period.⁹⁴ Mudacumura instructed others to conduct a military campaign resulting in the commission of war crimes. For example, he approved of a general order to pillage civilian property in order to sustain the military efforts.⁹⁵ Mudacumura's orders had a direct effect on the crimes due to his position of authority; and, finally, he was (i) was aware of the factual circumstances that established the existence of the armed conflict and (ii) was at least aware that by issuing said orders, crimes would be committed in the ordinary course of events as a consequence of the execution of his orders.⁹⁶

There are at least two problems with the Chamber's interpretation of ordering in *Mudacumura*. First, intent is nowhere to be found in the stipulation of elements of ordering and the analysis of Mudacumura's state of mind. The court appears to have abandoned the intent element of Article 30 of the Rome Statute, relying solely on the suspect's awareness of the situation. Moreover, his knowledge is inferred from the reports he allegedly received by virtue of his position. It is questionable whether such a low standard is acceptable for 'ordering', which, according to Article 30, requires the proof of intent to contribute and the knowledge of the consequences. This is in contrast with superior responsibility that allows for a lesser fault standard. In the case of superior responsibility, inferences could be drawn to some extent from the position of the accused. The other problem is that of the exact addressees of Mudacumura's orders. The Pre-Trial Chamber simply stated that he issued orders to the 'others'. However, the derivative nature of ordering requires at least some identification of those who were instructed to carry out the crimes.⁹⁷

⁹⁴ Ibid, § 64.

⁹⁵ Ibid, § 65.

⁹⁶ Ibid, §§ 66 – 67.

⁹⁷ Responsibility is derivative if it is not stand-alone but depends on the responsibility of the perpetrator. On the theory of derivative liability see G. Fletcher, 1978, at 581.

Soliciting and inducing in the Rome Statute largely correspond to instigation in the ICTY and ICTR Statutes.⁹⁸ As with ordering they are covered by the general mental element of Article 30.⁹⁹ These two forms of participation differ from ordering in that they don't require a superior-subordinate relationship.¹⁰⁰ Soliciting a crime means commanding, authorizing, urging, inciting, requesting, or advising another to commit a crime.¹⁰¹ Inducing denotes bringing on or about, affecting, causing or influencing an act or course of conduct.¹⁰² Inducing appears to be a broader term, covering soliciting, as the latter refers to a more specific conduct.¹⁰³

Inducing as a mode of liability has been invoked in the *Harun* case.¹⁰⁴ The court found grounds to believe that Ahmad Harun – a former Minister of Interior in the government of Sudan - personally incited militia to attack the civilian population on several occasions through delivering speeches and promising financial and governmental support to the militia. These actions resulted in looting of the villages.¹⁰⁵ The Pre-Trial Chamber established the fault requirement – intent and knowledge – on the basis of two factors: the content of Harun's speeches, and his position of authority, by virtue of which he received regular reports on rebel and counterinsurgent activities.¹⁰⁶ The Chamber held that there are grounds to believe that Harun not only knew about the militia's methods of attacking civilians and pillaged villages, but also personally encouraged the commission of such illegal acts.¹⁰⁷

iii. (c) '[A]ids, abets or otherwise assists in its commission...'

The conduct requirement under subparagraph (c) significantly expands the usual brief reference to aiding and abetting in the Statutes of the ad hoc tribunals. This provision of the Rome Statute contains a variety of conducts under the umbrella term 'assists' - aiding, abetting, and providing means for the commission of a crime. The qualifier 'otherwise' indicates that the list of possible forms of assistance presented in this article is not exhaustive. *Black's Law Dictionary* also treats aiding and abetting as a broad notion that includes all assistance rendered by words, acts, encouragement, support, or presence

⁹⁸ W. Schabas, 2010, at 432; E. Van Sliedregt, 2003, at 107.

⁹⁹ A. Eser, at 797.

¹⁰⁰ A. Eser, at 796.

¹⁰¹ Black's Law Dictionary, (6th edition), at 1392.

¹⁰² Black's Law Dictionary, (6th edition), at 775.

¹⁰³ K. Ambos, 2003, at 481.

¹⁰⁴ Prosecutor v. *Ahmad Harun and Ali Kushayb*, ICC-02/05-01/07, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007 ('*Harun Decision*'), § 78.

¹⁰⁵ *Ibid.*, § 90

¹⁰⁶ *Ibid.*, § 92

¹⁰⁷ *Ibid.*, § 93

actual or constructive.¹⁰⁸ Article 25(3)(c) does not require the assistance to contribute substantially to the commission of a crime. This is surprising because the ‘substantial effect’ or ‘substantial contribution’ standard is widely accepted by the ICTY and ICTR.¹⁰⁹ Moreover, the ILC Draft Code of Crimes contained even a stricter standard of a ‘direct and substantial’ contribution.¹¹⁰ Although it is premature at this stage to jump to a final conclusion regarding the requirement of substantial contribution in the context of the modes of participation enumerated in the Article 25(3)(b)-(c), the scarce case law seems to suggest that the ICC has cautiously adopted the ‘substantial contribution’ standard of the ad hoc tribunals.¹¹¹ The Chambers seem to infer this level of contribution relative to the essential contribution required under subparagraph (a).

Aiding and abetting is preceded by the words ‘for the purpose of facilitating the commission of a crime’. Consequently, the fault requirement of aiding and abetting under the Rome Statute is enhanced compared to that of the ad hoc tribunals – the accused must both have knowledge of the crime and act with *the purpose of its facilitation*.¹¹² This requirement goes beyond the general *mens rea* standard of Article 30 of the Rome Statute because it introduces a form of specific intent.¹¹³ It remains to be seen how the ICC interprets this requirement in the case law.

There is no scholarly agreement as to the place of aiding and abetting in Article 25(3). Ambos refers to it as the “weakest form of complicity”, Eser contends that aiding and abetting is assistance which falls short of instigation under subparagraph (b), but goes beyond other contributions according to subparagraph (d); Werle insists that assistance is a mode of participation that illustrates secondary responsibility and a rather low degree of individual guilt;¹¹⁴ while Van Sliedregt argues against categorizing liability and degrees of assistance but rather treating them as overlapping.¹¹⁵ The latter position

¹⁰⁸ Black’s Law Dictionary, (6th edition), at 68.

¹⁰⁹ *Blaskić* Appeal Judgement, § 48; *Vasiljević* Appeal Judgement, § 102; *Čelebići* Appeal Judgement, § 352; *Tadić* Appeal Judgement, § 229; *Gacumbitsi* Appeal Judgement, § 140. The same standard has been adopted by the hybrid tribunals. See *Duch* Trial Judgement, § 533; AFRC Trial Judgement, § 775. See also A. Clapham in P Sands, at 56; W. Schabas, 2001, at 448.

¹¹⁰ ILC Draft Code 1996, Article 2(3)(d).

¹¹¹ Concurring Opinion of Judge van den Wyngaert, § 44; *Mbarushimana* Decision, § 279; *Lubanga* Judgment, § 997.

¹¹² *Mbarushimana* Decision, § 281. Emphasis added. Cf. K. Ambos, 2003, at 483.

¹¹³ W. Schabas Commentary, at 435-436; K. Ambos, 2003 at 483.

¹¹⁴ G. Werle, ‘Individual Criminal Responsibility in Article 25 Rome Statute,’ in 5 *Journal of International Criminal Justice* 4, 2007, at 970.

¹¹⁵ K. Ambos, 2003, at 481; A. Eser, 798; E. Van Sliedregt, 2003, at 127;

best reflects the complex reality of a large-scale criminality.¹¹⁶

iv. (d) ‘In any other way contributes to the commission...’

Subparagraph (d) of the Rome Statute introduces a new category of criminal participation, namely “contributing to the commission of a crime by a group acting with a common purpose”. This provision was modelled on the 1997 International Convention for the Suppression of Terrorist Bombings,¹¹⁷ and was inserted in the Rome Statute during the last stage of negotiations.¹¹⁸ It replaced the earlier draft provisions on planning and conspiracy,¹¹⁹ which gave rise to divergent views during the negotiations.¹²⁰ Thus, notwithstanding the wide acceptance of planning as a form of criminal responsibility in international criminal law,¹²¹ neither planning nor conspiracy were included in the Rome Statute, paving the way to the novel category of criminal participation - ‘contribution to the commission of a crime’. This form of liability merits detailed analysis because it could be replacing (in)direction co-perpetration, which seems to be falling out of favour at the ICC. The recent conviction of Germain Katanga under Article 25(3)(d)(ii) exemplifies this trend.

The ICC practice so far established the following objective and subjective elements of the liability under article 25(3)(d) of the Statute:¹²²

- (i) a crime within the jurisdiction of the Court is attempted or

¹¹⁶ The ICTY jurisprudence appears to have adopted the view of liability modes as overlapping. See *Prosecutor v. Krnojelac*, ICTY Case No. IT-97-25-T, Trial Judgment, 15 March 2002 (‘*Krnojelac* Trial Judgment’), § 173.

¹¹⁷ Resolution, adopted by the General Assembly on the report of the Sixth Committee (a/52/653) 52/164, 15 December 1997, art. 2(3).

¹¹⁸ DOCUMENT A/CONF.183/C.1/WGPP/L3.

¹¹⁹ The earlier draft called for criminal responsibility of a person who either: (i) [Intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted; or [(ii) Agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifests their intent [and such a crime in fact occurs or is attempted];] See Working paper submitted by Canada, Germany, Netherlands and the United Kingdom, A/AC.249/1997/WG.2/DAT1; Report of the ICC Preparatory Committee, DOCUMENT A/CONF.183/2, at 31.

¹²⁰ Report of the ICC Preparatory Committee, DOCUMENT A/CONF.183/2, at 31, ft. 74.

¹²¹ Article 2(3)(e) of the International Law Commission's 'Draft Code of Crimes against the Peace and Security of Mankind' (1996). See Charter of the Nuremberg International Military Tribunal, Article 6; ICTY Statute, Article 7(1); ICTR Statute, Article 6(1).

¹²² *Katanga* Judgment, § 1620; *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010 (‘*Mbarushimana* Arrest Warrant’), § 39; *Prosecutor v. Muthuara et al*, ICC-01/09-02/11, Pre-Trial II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012 (‘*Muthuara* Decision’), § 421.

- committed;
- (ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose;
 - (iii) the individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (c) of the Statute;¹²³
 - (iv) the contribution shall be intentional; and
 - (v) shall either
 - a. be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime; or
 - b. in the knowledge of the intention of the group to commit the crime.

The first criterion presupposes that the objective, the subjective and the contextual elements of the specific crimes are established.¹²⁴ There is a difference between the requirements of the liability modes and the elements of crimes, and this particular criterion emphasizes this distinction.

The second condition relates to the commission of crime by the group. It is highly contested. In *Katanga*, the Trial Chamber used the concept of the joint criminal enterprise developed by the ad hoc tribunals in interpreting the notion of a group pursuant to Article 25(3)(d).¹²⁵ The judges held that while it is not necessary that the group pursues solely criminal aims, it is important that the participants of the group are aware that crimes will be committed in the ordinary course of events.¹²⁶ On the basis of these elements, the Majority in *Katanga* proceeded to the conclusion that Ngiti militia was a self-contained group acting with the primary purpose of regaining Bogoro through the attack on Hema civilians.¹²⁷ The Majority inferred the common purpose from the way in which Bogoro was attacked - in the early morning hours when the civilians were still sleeping. The assault involved looting and destruction of the property and violence against the civilian population.¹²⁸ Judge van den Wyngaert dissented on this point, arguing that there was no sufficient evidence to establish the existence of the common purpose to attack the Hema civilians.¹²⁹ She maintained that it is plausible that the UPC – the legitimate military target – was the primary object of the attack.¹³⁰ Judge van den

¹²³ The formulation in *Katanga* ‘the accused made a significant contribution to the crime’. *Katanga* Judgment, § 1620

¹²⁴ *Katanga* Judgment, § 1622.

¹²⁵ *Ibid.*, § 1625.

¹²⁶ *Ibid.*, § 1627; Minority Opinion of Judge van den Wyngaert, § 286.

¹²⁷ *Katanga* Judgment, §§ 1654 – 1659.

¹²⁸ *Ibid.*

¹²⁹ Minority Opinion of Judge van den Wyngaert, § 208.

¹³⁰ *Ibid.*, § 225.

Wyngaert questioned the Majority's assumption that the attack on the UPC equals the attack on the entire Hema population for it is one thing to regard them as an enemy, but quite another - to deny their right to exist.¹³¹

The group requirement was challenged on another two occasions. In *Muthaura*, the prosecution charged one of the accused - Mohammed Ali – with responsibility under Article 25(3)(d) for contributing to the commission of crimes in Kenya by instructing Kenyan police and ensuring their response to post-election violence was ineffective.¹³² The Pre-Trial Chamber held a prerequisite for Ali's criminal responsibility for crimes allegedly committed *through* the Kenyan police, would have been the finding that Kenyan police indeed carried out the objective elements of the crimes charged, but since the evidence in this regard was insufficient, the crimes could not be attributed to Ali.¹³³ Likewise in *Mbarushimana*, the Majority was unable to conclude that the armed group in question – the Democratic Forces for the Liberation of Rwanda (FDLR) - indeed pursued the policy of attacking the civilian population in the Kivu region of the Democratic Republic of Congo.¹³⁴ This conclusion led Majority to believe that the FDLR does not constitute a 'group of persons acting with a common purpose' as required by Article 25(3)(d).¹³⁵

In *Mbarushimana*, the defence raised another interesting point in respect to the group requirement: it argued that 25(3)(d) liability applies only to persons *outside* of the group acting with a common purpose.¹³⁶ The Chamber rejected this argument for two main reasons: first, adopting the essential contribution test for co-perpetration under subparagraph (a) and excluding from the ambit of paragraph (d) responsibility of group members making non-essential contribution would unfairly absolve a group of offenders of responsibility; and secondly, because of the enhanced mental element for aiding and abetting under the Statute – requiring the person to act with the purpose to facilitate the crime – Article 25(3)(d) is the only way to hold persons responsible for contributions made with knowledge but not necessarily intent. Thus, the court concluded that Article 25(3)(d) encompasses contributions from both members and non-members of the group.¹³⁷

The third criterion - the level of contribution to the crime – is far from being settled in the jurisprudence of the ICC. In *Mbarushimana*, the Pre-Trial

¹³¹ Ibid, §§ 255-256

¹³² *Muthuara* Decision, § 422.

¹³³ Ibid, §§ 424- 426.

¹³⁴ *Mbarushimana* Decision, § 291.

¹³⁵ Ibid.

¹³⁶ Ibid, § 272. See also *Katanga* Judgement, § 1631.

¹³⁷ *Mbarushimana* Decision, §§ 273-274.

Chamber felt that criminalizing *any* contribution to the group crime under subparagraph (d) would be inappropriate because:¹³⁸

Without some threshold level of assistance, every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes could satisfy the elements of 25(3)(d) liability for their infinitesimal contribution to the crimes committed.

At the same time, the judges referred to Article 25(3)(d) as a ‘residual’ form of accessorial liability, which is at the bottom of the value oriented hierarchy of participation in a crime.¹³⁹ Thus, “article 25(3)(d)'s contributions “[i]n any other way” must be less than that required for liability under article 25(3)(a)-(c).”¹⁴⁰ Keeping in mind these conflicting considerations, the Majority in *Mbarushimana* decided that a contribution to a commission of the crime acting with a common purpose must be at least significant. The Chamber drew its inspiration, when deciding on the appropriate threshold, from the jurisprudence of the ad hoc tribunals pertaining to the joint criminal enterprise.¹⁴¹ The Chamber used the similarity between these two forms of liability as a justification for borrowing the JCE’s ‘significant contribution’ requirement from the case law of the ICTY and ICTR.¹⁴² In *Katanga*, the Trial Chamber established a formula for what the ‘significant contribution’ implies: it has to either affect the occurrence of the crime or the way in which it was committed.¹⁴³

As to the methodology of determining the level of contribution, the judges in both *Katanga* and *Mbarushimana* rightly stressed that the assessment has to be done on a case-by-case basis, taking into account such factors as sustained participation after learning about group’s criminality, efforts made to prevent criminal activity, and the role of the accused vis-a-vis the crimes.¹⁴⁴

Factually speaking, the judges concluded that Germain Katanga’s contribution to the crimes committed in Bogoro was significant: his role in facilitating arms supply to the local Ngiti militia allowed it to gain military

¹³⁸ Ibid, §§ 276-277.

¹³⁹ Ibid, §§ 278-279.

¹⁴⁰ Ibid.

¹⁴¹ Ibid, § 283.

¹⁴² Nonetheless, the judges stressed the important differences between the JCE and responsibility under Article 25(3)(d): the nature of liability – principal or accessory; requirement for the membership in the group or absence thereof; contribution to the common purpose or crimes committed; and whether some form of intent or mere knowledge is sufficient. See *Mbarushimana* Decision, § 280. Cf. Views have been expressed that Article 25(3)(d) explicitly addresses the concept of the joint criminal enterprise. See A. Cassese, 2008, at 211-213; See also *Tadić* Appeal Judgement, § 222.

¹⁴³ *Katanga* Judgement, § 1633.

¹⁴⁴ *Mbarushimana* Decision, § 284. See also *Katanga* Judgment, § 634.

advantage over the UPC and carry out the plan to attack the civilian population in Bogoro.¹⁴⁵ The weapons and ammunitions arranged for by Katanga ensured the success of the operation in Bogoro.¹⁴⁶ In contrast, the Majority in *Mbarushimana* held that the accused, whose main responsibility was issuing press releases and who held no real authority within the FDLR, did not provide *any* contribution to the FDLR, not even less than significant.¹⁴⁷ The Pre-Trial Chamber's decision declining to confirm charges against Mbarushimana has been confirmed on appeal, and, while the Majority of the Appeals Chamber saw no need to delve into an academic discussion related to the level of contribution required under Article 25(3)(d),¹⁴⁸ Judge Fernández de Gurmendi considered it necessary to address this point in her separate opinion.¹⁴⁹

Judge Fernández de Gurmendi argued that Article 25(3)(d) does not envisage the minimum level of contribution to the crime.¹⁵⁰ She found unconvincing both the practice of attaching certain level of contribution to each liability mode and the 'import' of the 'significance contribution requirement' from the JCE jurisprudence of the ad hoc tribunals into Article 25(3)(d).¹⁵¹ Judge Fernández de Gurmendi correctly argued that the real issue is not the label of 'significance' ascribed to the contribution, but rather the so-called 'neutral contributions'.¹⁵² Unfortunately, the opinion does not elaborate on the meaning of this term, but one may suggest that it refers to the contributions that could be used for the legitimate military activities and crimes alike.

Indeed, measuring the smallest possible input under Article 25(3)(d) appears highly problematic. The impact of the same assistance may vary depending on the circumstances of the case – providing the ammunition to the soldiers may be a decisive factor in their potential criminality or it may equally have no impact at all if they are already in possession of weapons. The same criticism applies to the general idea of quantifying various contributions of the accused depending on their respective forms of participation.¹⁵³

¹⁴⁵ Ibid, §§ 1671, 1679.

¹⁴⁶ Ibid, § 1676.

¹⁴⁷ Ibid, §§ 292, 295, 299. Emphasis added

¹⁴⁸ Prosecutor v. *Mbarushimana*, Appeals Chamber, ICC-01/04-01/10 OA4, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012 ('*Mbarushimana* Appeal Judgment'), §§ 68, 70.

¹⁴⁹ Prosecutor v. *Mbarushimana*, Appeals Chamber, ICC-01/04-01/10 OA4, Separate Opinion of Judge Silvia Fernández de Gurmendi, 30 May 2012 ('Separate Opinion of Judge Fernández de Gurmendi').

¹⁵⁰ Ibid, § 9.

¹⁵¹ Ibid, §§ 13, 14.

¹⁵² Ibid, § 12.

¹⁵³ See 2.iii *infra*.

As an alternative to measuring the least possible input under Article 25(3)(d), Judge Fernández de Gurmendi suggested focusing on the “normative and causal” links between the contribution and the crime.¹⁵⁴ The factual situation in *Katanga* whereby the accused facilitated the supply of weapons, which could be used for criminal and non-criminal aims alike, prompted Judge van den Wyngaert to look for an instrument to assess such ‘generic’ contributions.¹⁵⁵ She proposed utilizing the ‘specific direction requirement’ - the element of the *actus reus* of aiding and abetting in jurisprudence the ad hoc tribunals - as such instrument.¹⁵⁶ These recommendations regarding ‘neutral’ or ‘generic’ input share in common the emphasis on the link between the crime and the assistance, rather than the amount of the contribution in question.

It seems that the relationship between the assistance and the offence is an important aspect of accomplice liability and needs to be taken into account. Using the ‘specific direction’ test is particularly helpful for the purposes of Article 25(3)(d) due to the fact that this provision deals with the group that could be simultaneously engaged in criminal and non-criminal activities, and not just singular perpetrators as is the case with aiding and abetting. However, any form of complicity presents a challenge for establishing a straightforward connection between the contribution and the offence because it falls outside the scope of the law on causation.¹⁵⁷ The link between the two elements is always cursory since it is interrupted by the freely chosen acts of other people – the immediate perpetrators. On this point, the Majority in *Katanga* noted that it is not necessary to establish the direct link between the conduct of the accomplice and the resulting harm, nor it is required that the assistance is proximate to the crime.¹⁵⁸

How to reinforce the connection between the contribution and the offence if the directness of the aid and its distance to the crime are not dispositive? The answer could be in enhancing the scrutiny of the accused’s mental state: generic assistance becomes culpable when there is knowledge about the crime as well as an understanding of the potential effects of the rendered help. Thus, the fault element appears to be central in determining the responsibility of accomplices.

¹⁵⁴ Separate Opinion of Judge Fernández de Gurmendi, § 12.

¹⁵⁵ Minority Opinion of Judge van den Wyngaert, § 287.

¹⁵⁶ For the detailed discussion on the ‘specific direction requirement’ see Chapter II.1.vii *supra*.

¹⁵⁷ For the detailed discussion on causation see Chapter II.2.ii *supra*.

¹⁵⁸ *Katanga* Judgement, §§ 1635, 1636.

The subjective element for Article 25(3)(d) responsibility consists of intentional contribution made either with the aim of furthering criminal activity of the group or knowledge of the intention of the group to commit the crime. Article 25(3)(d) liability represents an exception from the general rule on culpability stipulated in Article 30 of the Rome Statute.¹⁵⁹ Complicity as a ‘contribution to the group’ also differs from aiding and abetting under subparagraph (c) because it allows a lower fault requirement under both sub-clauses. The terms used in Article 25(3)(d) shall be nonetheless interpreted in the light of the general Article 30.¹⁶⁰

The Trial Chamber in *Katanga* defined ‘intentional contribution’ for the purposes of both subparagraphs (i) and (ii) of Article 25(3)(d) as a conscious and deliberate choice to engage in a certain behaviour with the knowledge that it contributes to the activities of the group.¹⁶¹ The Pre-Trial Chamber in *Mbarushimana*, contended that the ‘intentionality’ of the contribution must include an additional element, linking the contribution with the crimes alleged.¹⁶² It appears, however, that this extra requirement is superfluous in the light of the two qualifying clauses that do the job of linking the contribution to the criminal activity of the group.

‘Intentional contribution’ should be read together with two specific clauses characterizing the attitude towards group activity: the suspect or the accused should either aim to further the group’s purpose to commit a crime, or know about the intention of the group to commit the specific crimes. Judge van den Wyngaert noted the distinction between subparagraph (i), which requires more general understanding of the group’s purpose by referring to ‘a crime’, and a more specific knowledge under subparagraph (ii) referring to the ‘the crime’.¹⁶³ The Majority in *Katanga* also correctly focused on the specificity of the knowledge of the accused for the purposes of Article 25(3)(d)(ii): knowing about the general criminal intent of the group was not deemed sufficient since the accused must be aware of the specific crimes the group intends to commit, and that they will occur in the ordinary course of events.¹⁶⁴

The Majority in *Katanga* regrettably transferred the conflated vision of military and criminal activities of Ngiti militia into its analysis of the accused’s mental state. *Katanga*’s intent to contribute to the attack on Bogoro was established on the basis of his own testimony, despite the fact that the accused was referring to the attack on the UPC - a legitimate military

¹⁵⁹ Ibid, §1637.

¹⁶⁰ K. Ambos, 2003, at 485.

¹⁶¹ *Katanga* Judgement, § 1639.

¹⁶² *Mbarushimana* Decision, § 288; *Katanga* Judgement, § 1637.

¹⁶³ Minority Opinion of Judge van den Wyngaert, § 288.

¹⁶⁴ *Katanga* Judgement, §§ 1641, 1642.

target.¹⁶⁵ The Chamber further held that Katanga knew that the ammunition he supplied would be used during the attack. He was also aware that the methods of warfare *generally* implemented in the region included atrocities against the civilians. Finally, Germain Katanga knew that the UPC was a Hema militia and he shared a strong anti-Hema sentiment.¹⁶⁶ Judge van den Wyngaert fairly raised concerns about the way Germain Katanga's mental state was evaluated. She stressed that there was no evidence showing that Katanga's contributions were specifically directed to the crimes and not just reconquering Bogoro, or that he shared anti-Hema ideology.¹⁶⁷ The factual analysis of Katanga's mental state - similarly to the assessment of Lubanga's fault - appears to be close to the standard of *dolus eventualis*, which is rejected by the ICC doctrinally.

The *Lubanga* Trial Chamber referred to Article 25(3)(d) as a "residual form of accessory liability, which makes it possible to criminalize those contributions that cannot be characterized as ordering, soliciting, inducing, aiding, abetting or assisting."¹⁶⁸ This early interpretation of Article 25(3)(d) created some expectations that Article 25(3)(d) would play a minor role in the jurisprudence of the ICC.¹⁶⁹ It seems, however, that mounting discontent over (in)direct co-perpetration, pushed the court towards this residual form of liability. This was because in essence Articles 25(3)(a) and 25(3)(d) address the same type of situation – that of multiple offenders involved in the crime.¹⁷⁰ It has been established that the term 'common plan' under both provisions is functionally identical and must include an element of 'criminality'.¹⁷¹ So far, the ICC has drawn a line between the two provisions based solely on the level of contribution necessary to attract liability with Article 25(3)(a) embodying a higher threshold than Article 25(3)(d).¹⁷² If one rejects the premise that the level of contribution is dispositive in determining whether responsibility is principal or accessory, and that Article 25(3)(d) is a 'lesser' form of responsibility, one may come to the conclusion that contributing to the commission of a crime by a group is a suitable form of responsibility in many instances.

2. Hierarchy of the Participation Modes?

Will the recent rejection of the hierarchy of participation modes by the Trial

¹⁶⁵ Ibid, §1682.

¹⁶⁶ Ibid, §§ 1685, 1688, 1689, emphasis added.

¹⁶⁷ Minority Opinion of Judge van den Wyngaert, §§ 291, 304.

¹⁶⁸ *Lubanga* Decision, § 337. See also *Katanga* Decision, § 483, 'degrading' responsibility in Article 25(3)(d) on the basis of its accessory nature.

¹⁶⁹ See for example W. Schabas, Commentary, at 436.

¹⁷⁰ *Katanga* Severing Decision.

¹⁷¹ *Mbarushimana* Decision, § 271.

¹⁷² *Lubanga* Judgement, § 996.

Chamber in *Katanga* hold in a long run? The answer to this question is far from clear and largely depends on whether the assumptions underlying the ranking – control over crime theory and rigorous quantification of the contributions made by different crime participants - will continue to prevail.

There is no scholarly agreement as to whether the modes of participation are arranged in the hierarchical order within the Rome Statute. Olasolo, for example, views complicity as unsatisfactory in attributing liability to the senior figures within international law context because it does not reflect the same level of guilt as primary perpetration and provides, in his opinion, for more lenient sentences to those who are most responsible.¹⁷³ Likewise, Ambos argues that the correct view of Article 25(3) is that there is hierarchy, with contributions of the perpetrator being greater than that of the accessory.¹⁷⁴ Van Sliedregt, on the other hand, sees no reason why indirect perpetrations under Article 25(3)(a) deserve more severe punishment than instigators under subparagraph (b). She argues that the fact that Article 25(3)(a) provides for three forms of principal liability does not ‘reduce’ the other modes of liability or make them inappropriate for the senior level officials.¹⁷⁵ Schabas explains that some legal systems distinguish between the principal perpetrators who carry out the crimes and accessories or accomplices responsible as secondary parties for directing or organizing the principals. He clarifies, however, that there is nothing secondary about them.¹⁷⁶

The ICC raised the question of hierarchy on several occasions in its previous case law. The *Katanga* Pre-Trial Chamber implicitly confirmed the existence of the hierarchy of the modes of participation.¹⁷⁷ This is evident from the decision of the Pre-Trial Chamber to dismiss the alternative charge of accessorial liability for ‘ordering’ the commission of war crimes and crimes against humanity pursuant to Article 25(3)(b) as ‘moot’ upon finding sufficient grounds to believe the accused are responsible as principals pursuant to Article 25(3)(a).¹⁷⁸ The Trial Chamber’s subsequently changed its characterization of *Katanga*’s liability mode from ‘indirect co-perpetration’ pursuant to subparagraph (a) to ‘contribution to the commission of a crime by a group’ on the basis of subparagraph (d). In the Chamber’s view this change was not prejudicial to the rights of the accused, *inter alia*, because the elements of participation in a crime within the meaning of Article 25(3)(d) *are an integral part* of the material elements characterizing the commission

¹⁷³ H. Olasolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart publishing, 2009), at 3-4.

¹⁷⁴ K. Ambos 2012, at 146-147. See also G. Werle, 2007, at 970.

¹⁷⁵ E. Van Sliedregt, 2012, at 85. See also T. Weigend, at 102.

¹⁷⁶ W. Schabas, 2010, at 424.

¹⁷⁷ Cf. *Katanga* Judgement, § 1387.

¹⁷⁸ *Katanga* Confirmation of Charges, §§ 469-471.

of a crime within the meaning of Article 25(3)(a).¹⁷⁹ This logic follows from the assumption that principal liability ‘subsumes’ accomplice liability.¹⁸⁰

In *Mbarushimana*, the judges referred to Gerhard Werle’s argument that the modes of liability listed in article 25(3) of the Statute are arranged in accordance with a value-oriented hierarchy of participation in a crime under international law.¹⁸¹ Most importantly, the *Lubanga* judgment established a hierarchy between the perpetrator referred to in paragraph (a) and accessories mentioned in paragraphs (b) – (d).¹⁸² The Chamber found that article 25(3)(a) refers to the principal liability of someone committing a crime, as opposed to the secondary liability, dependent on the act of the perpetrator, enshrined in Article 25(3)(b) and (c).¹⁸³ With regard to Article 25(3)(d), the judges highlighted the greater level of contribution required for the ‘commission’ in a sense of Article 25(3)(a) and responsibility under Article 25(3)(d).¹⁸⁴ According to the majority reasoning, the level of contribution of the (co)-perpetrator has to be essential to properly express the blameworthiness of those persons who are most responsible for the most serious crimes of international concern.¹⁸⁵

Recently, the ICC witnessed some strong dissents on the question of the alleged hierarchy of the modes of responsibility. The latest example is the position taken by the *Katanga* Trial Chamber rejecting the ‘hierarchy of guilt’ implicit in Article 25(3), but maintaining that the distinction between principals and accomplices needs to be guided by the control over crime theory.¹⁸⁶ Judge Fulford in his separate opinion attached to the *Lubanga* judgment criticized on a number of grounds the Majority’s approach to modes of liability.¹⁸⁷ He disagreed with the majority in *Lubanga* that there is a need to establish a hierarchy between the modes of participation in the Rome Statute and also opposed the view that these modes of participation are mutually exclusive.¹⁸⁸ Judge Van den Wyngaert also refuted the hierarchy of

¹⁷⁹ *Katanga* Severance Decision, § 33. Emphasis added.

¹⁸⁰ Judge Van den Wyngaert disagreed with this point. She held, in her dissenting opinion, that the elements of Article 25(3)(d) are not subsumed by the elements of Article 25(3)(a) as being a ‘lesser offence’. The threshold for contributions is indeed greater for co-perpetration, rather than complicity, but co-perpetration implies contribution to a plan, while complicity under Article 25(3)(d) – to a crime. Thus, Article 25(3)(a) liability does not constitute a ‘higher’ mode of liability because it can be proven without proving Article 25(3)(d) liability. See Dissenting Opinion of Judge van den Wyngaert, § 42, 43.

¹⁸¹ Eg. *Mbarushimana*, Decision, § 279.

¹⁸² *Lubanga* Judgment, §§ 917-1018.

¹⁸³ *Ibid.*, § 998.

¹⁸⁴ *Ibid.*, § 996.

¹⁸⁵ *Ibid.*, § 999.

¹⁸⁶ *Katanga* Judgement, §§ 1387, 1393. For the detailed discussion see 1.i. *supra*.

¹⁸⁷ Separate Opinion of Judge Fulford.

¹⁸⁸ *Ibid.*, § 6.

the modes of participation in her concurring opinion to the judgment of acquittal of Mathieu Ngudjolo.¹⁸⁹ She failed to see a difference in blameworthiness between the accessory liability, such as aiding and abetting or ordering, and the principal liability for commission.¹⁹⁰ Her main argument was that guilt of the accused depends on the factual circumstances of the case rather than on abstract categories.¹⁹¹

The question regarding the existence of the hierarchy of the modes of participations is crucial to the development of the ICC case law on modes of responsibility. Acceptance of the hierarchy leads to the conclusion that principal perpetration is more blameworthy than complicity. This in turn puts pressure on the court to employ the modes of participation in subparagraph (a) to emphasize the gravity of crimes within the ICC's jurisdiction. However, the traditional understanding of commission in criminal law is not ideal in capturing the wrongdoing of the offender who is removed from the actual crime both in time and space. The ICC's reading of the control over crime theory into Article 25(3)(a) therefore artificially expanded the forms of commission under the Statutes to cover the widest variety of conduct.

If one removes the assumption that the modes of responsibility are arranged in a hierarchical order and reflect different degrees of blameworthiness, then control over crime theory does not seem to be functionally necessary for the ICC. The court can simply apply the various forms of complicity, provided in the remainder of the article, to address the situations of the accused removed from the scene of the crime. It is thus disappointing that the Trial Chamber in *Katanga* chose to hold on to control over crime theory, while rejecting the idea that the forms of participation are arranged in the order of seriousness.

There are three arguments against the hierarchy of the forms of participation within the ICC framework. First, control over crime theory underlying the hierarchy has no support in the Rome Statute and, even if it had, it is not the basis for reading a hierarchy of the liability modes into the Statute. Secondly, it is true that Article 25(3) represents a move towards the differential participation model.¹⁹² The forms of responsibility are distinguished in different subparagraphs of the article. This does not mean however that they are *ranked* in a particular order. Finally, the level of the accused's contribution is not the criterion for drawing the line between different modes

¹⁸⁹ Concurring Opinion of Judge van den Wyngaert.

¹⁹⁰ *Ibid* §§ 22, 24.

¹⁹¹ *Ibid*, §§ 24, 26. In this respect, Judge Van den Wyngaert mentioned the 50-year prison sentence against Charles Taylor, imposed for aiding and abetting. His position of leadership played the most important role at sentencing. For more on sentencing the accomplices, see Chapter VI.

¹⁹² See *Katanga* Judgement, § 1385.

of participation.

i. ‘Control over Crime’ is not a Basis for Hierarchy

According to Article 21(1)(a) of the Rome Statute, the court shall apply, in the first place, the Statute, Elements of Crimes and its Rules of Procedure and Evidence. Thus, it is important to determine whether the Statute supports Roxin’s control over crime theory and a hierarchy of the participation modes. In answering this question, one has to keep in mind Articles 31-32 of the Vienna Convention on the Law of Treaties that provides guidance on treaty interpretation. Article 31 of the Vienna Convention sets the general rule that treaty interpretation involves the assessment of three elements - the text, context and object and purpose of the treaty. These elements should be read together as one rule. There is no priority of one element over another.¹⁹³ Subsequent practice, mentioned in paragraph 3 of Article 31, is an additional element to be considered when interpreting a treaty.¹⁹⁴ Article 32 outlines supplementary means of interpretation - preparatory work (*travaux préparatoire*) and the circumstances of the treaty conclusion – to be utilized only if the meaning is not clear after the application of Article 31.¹⁹⁵

Article 25(3)(a) does not mention the control over crime theory, but rather contains the traditional forms of criminal responsibility – perpetration, co-perpetration and perpetration by means.¹⁹⁶ The only peculiarity is the possibility of holding a person accountable as an indirect perpetrator even in cases when the agent, through whom the crime is committed, is criminally responsible. This is in contrast with the majority of domestic legal systems that call the act ‘perpetration’ only if the agent is innocent, hence an ‘instrument’ in the hands of the perpetrator. Control over crime doctrine provides for the same feature – the physical perpetrator may or may not be criminally responsible – this similarity alone does not, however, automatically imply that the provision of the Rome Statute on perpetration shall be in read in the light of Roxin’s theory.

To that effect, Judge Fulford argued in his separate opinion that the German-based control over crime theory is not necessary to establish criminal responsibility for co-perpetration under Article 25(3)(a) of the Rome Statute, hence the five-prong test requiring, *inter alia*, an essential contribution on

¹⁹³ A. Aust, *Modern Treaty Law and Practice*, Cambridge, 2000, at 187.

¹⁹⁴ Aust cautioned against the extensive use of the subsequent agreements due to their capacity to modify the treaty without amending it, thus violating the rules of amendment. This could be the reason why subsequent agreements as regards interpretation are used quite rarely. A. Aust, at 193.

¹⁹⁵ I. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 1984, at 116.

¹⁹⁶ Concurring Opinion of Judge van den Wyngaert, § 14.

behalf of the accused, is superfluous.¹⁹⁷ The object and purpose of the Rome Statute embodied in its preamble - putting an end to impunity - does not justify overextension of the liability.¹⁹⁸ The *Katanga* justification for retaining control over crime theory for the purposes of giving effect to the distinction between perpetrators and accomplices already implicit in Article 25(3) does not seem very convincing.¹⁹⁹ The fault and conduct requirement for each form of responsibility seem to be sufficiently defined in the Rome Statute.

Article 25(3) also does not suggest, based on the plain or contextual reading of the provision, that the modes participation are arranged in a hierarchical order. Distinguishing the forms of responsibility in line with the differential participation model does not imply a particular ranking. Judges Fulford and Van den Wyngaert both contended that the plain reading of Article 25(3) does not suggest that ‘commission’ under Article 25(3)(a) is more serious than ‘ordering, soliciting and inducing’ under paragraph (b) of the same article, or that criminality of accessories (Article 25(3)(c)) is greater than those who participate within a group (Article 25(3)(d)).²⁰⁰

Travaux preparatoire demonstrate the compromise reached by the experts from different countries, each holding positions based on their domestic laws.²⁰¹ Neither the Working Paper, nor the Report of the Preparatory Committee on the Establishment of an International Criminal Court indicate any preference towards the German control over crime model or the intention of the parties to rank the modes of participation are arranged in the order of blameworthiness.²⁰² The general structure of the corresponding Article of the ILC’s Code of Crimes serves as the starting point.²⁰³ The initial Working Paper submitted to the Preparatory Committee in 1997 contained modes of responsibility largely resembling those in Article 2(3) of the ILC Code of Crimes. The changes to the initial draft followed debates on criminal responsibility of legal entities, *mens rea* for aiding and abetting and the

¹⁹⁷ Instead, he suggested a lesser test for co-perpetration: (i) the involvement of at least two individuals; (ii) coordination between those who commit the offence, which may take the form of an agreement, common plan or joint understanding, express or implied, to commit a crime or to undertake action that, in the ordinary course of events, will lead to the commission of the crime; (iii) a contribution to the crime, which may be direct or indirect, provided there is a causal link between the individual’s contribution and the crime; (iv) intent and knowledge, as defined in Article 30 of the Statute. See Separate Opinion of Judge Fulford, §§ 16, 21. See also Minority Opinion Judge van den Wyngaert, § 281.

¹⁹⁸ Concurring Opinion Judge van den Wyngaert, § 16.

¹⁹⁹ *Katanga* Judgement, §§ 1395.

²⁰⁰ Separate Opinion of Judge Fulford, § 8.

²⁰¹ P. Saland, at 198.

²⁰² Working Paper and Report of the Preparatory Committee.

²⁰³ *Ibid.*

definition of group crime (current subparagraph (d) of Article 25(3)).²⁰⁴ Control over crime theory or the hierarchy of the liability modes do not surface in the debates that shaped the article on individual criminal responsibility.

Customary law at the ICC does not play as prominent role as in the jurisprudence of the ad hoc tribunals.²⁰⁵ The court has referred, however, to an international custom when interpreting the notion of ‘common purpose’ contained in Article 25(3)(d). The Trial Chamber in *Katanga* found it reasonable to rely on the jurisprudence of the ad hoc tribunals pertaining to the joint criminal enterprise.²⁰⁶ Thus, it is worth mentioning that control over crime theory cannot be said to have materialized as a custom. The theory is supported only by the *Stakić* trial judgment of the ICTY and the *Eichmann* judgment of the Jerusalem court.²⁰⁷ Arguably, these authorities alone do not establish the existence of a customary rule. Nor can it be said that control over crime theory is recognized by the majority of legal systems to constitute a third source of international law – a general principle of law.²⁰⁸ Judge Fulford ‘blamed’ Article 21(1)(c) of the Rome Statute for the court’s reliance on a German concept in *Lubanga*.²⁰⁹ This provision permits drawing upon general principles of law derived from national legal systems. However, it does not appear from the reading of *Lubanga* judgment that the Trial Chamber justified its choice of the German control over crime theory by the fact that it derives from the general principles of law under Article 21(1)(c). Instead, the court interpreted the Rome Statute so as to infer the most suitable mode of responsibility.²¹⁰

²⁰⁴ The Working Paper included the following modes of responsibility: commission of the crime, individually, jointly or through another person who is not criminally responsible; ordering, soliciting or inducing the commission of a crime; failing to prevent or repress the commission of a crime (command responsibility); with intent to facilitate the commission of a crime, aiding, abetting or otherwise assisting in the commission; and finally either (i) planning to commit a crime, or (ii) agreeing with another person or persons that such a crime be committed and performing an overt act. The last paragraph was contentious because it embodied the common law notion of conspiracy, largely unknown to civil lawyers. It was later replaced by the provision of the Convention on the Suppression of Terrorist Bombings. See also P. Saland, at 199.

²⁰⁵ Article 21 of the Rome Statute ranks the sources of law to be applied by the ICC, giving priority to the Statute. See Concurring Opinion of Judge van den Wyngaert, § 9.

²⁰⁶ *Katanga* Judgement, § 1625.

²⁰⁷ *Stakić* Trial Judgment, §§ 468-498. This theory was overturned on appeal. Judgment against *Adolf Eichmann*, Case 40/61. See Chapter IV for more discussion of the case.

²⁰⁸ For more discussion on the general principles of law as the source of international criminal law, see Chapter IV.

²⁰⁹ Separate Opinion of Judge Fulford, § 10. He warned against the direct transposition of the domestic concept to the ICC because in German law the mode of liability is the prime factor determining the sentence, while the degree of participation is just one factor to be assessed by the ICC when ruling on the sentence of the accused.

²¹⁰ The Trial Chamber explained that the reasons for inferring the ‘control over crime’ theory from subparagraph 25(3)(a) of the Rome Statute is that neither the Romano-Germanic, nor

The final issue is that of the connection between control over crime theory and the hierarchy of the participation modes. The ICC has tied the liability under Article 25(3)(a) to the increased level of contribution, and that, in turn to the increased degree of blameworthiness. However, the original control over crime theory does not appear to imply a higher degree of guilt for the indirect perpetrator. The focus is not on the level of contribution of the accused but on the power to exercise control in the hierarchical system.²¹¹ Roxin admitted that accessory's or the instigator's behaviour need not be less reprehensible than that of the perpetrator; rather their lack of power to control can be one of the factors at sentencing.²¹² The Trial Chamber in *Katanga* appears to have returned the classical reading of control over crime theory: unlike its predecessors, the Majority in *Katanga* refused to link the theory with a higher degree of guilt.²¹³

ii. Modes of Responsibility – Distinguished but not Ranked

Article 25(3) of the Rome Statute represents a move towards the differential participation model that distinguishes different modes of liability, but not necessarily ranks them. Sentencing is the main reason for grading forms of responsibility at the national level. For example, the legislation of Finland, Estonia, Germany and Indonesia provide for sentencing discounts for the accessories as opposed to the perpetrators.²¹⁴ The Rome Statute does not contain similar sentencing provision. Article 78 of the Statute only directs the court to take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.²¹⁵ Thus, the liability label is not dispositive in determining the level of culpability of the offender. The factual circumstances of the case play a more important role at sentencing.²¹⁶ Moreover, there is nothing in the Rome Statute or *travaux préparatoire* that suggests that modes of liability are arranged in a particular order. Judge Fulford contended that the outcome of the finding that the modes of participation are not arranged in the hierarchical order is that a rigorous

the Common Law system has the equipment to deal with the enormous crimes under the jurisdiction of the ICC; hence the Rome Statute has to be interpreted in a way allowing properly expressing and addressing the responsibility of those who committed these crimes. See *Lubanga* Judgment, § 976.

²¹¹ See Chapter IV.2.ii *infra*. See also C. Roxin, 1963, at 202.

²¹² C. Roxin, 1963, at 202 *Cf.* S. Manacorda and C. Meloni arguing that control over the crime approach satisfies the need to consider high-level commanders and senior civilian leaders as perpetrators (i.e. principals); and accordingly to sentence their actions appropriately, at 171.

²¹³ *Katanga* Judgement, § 1386.

²¹⁴ See Appendix I.

²¹⁵ For more discussion on sentencing accomplices in international criminal law see Chapter VI.

²¹⁶ T Weigend, at 102.

distinction between principals and accessories is not justified.²¹⁷ There are reasons, however, to distinguish modes of participation, also at the international level.

The need to separate modes of liability stems from three different fields informing international criminal law – domestic criminal law, transitional justice and human rights law.²¹⁸ From the domestic law perspective, the distinction between differential and unitary perpetration models plays a role. Both models honour the principle of individual culpability, whereby a person is punished only for his own conduct. However, the two systems arrive at the same result in different ways. Differential participation presupposes the derivative nature of accomplice liability in that it depends on the wrongful act of the principal perpetrator.²¹⁹ The underlying rationale behind this approach is that there is one offence and many crime participants – each having a different role. In the unitary perpetrator model, on the other hand, the responsibility of a party to the crime is less, if at all, dependent on the responsibility of the principal. Plurality of persons implies a plurality of offences in the context of this model because the liability of each party stands on its own.²²⁰

The difference between the two systems is manifested in different pleading techniques and a different standard of causation. In the unitary participation model, any involvement whatsoever on the part of an actor in any offence establishes his connection to the crime,²²¹ while the differential model requires connecting the liability of accomplices to the conduct of the principal perpetrator. It appears that the Rome Statute has adopted the differential participation model and the dynamics of this model shall inform the interpretation of Article 25(3) of the Statute. In line with the derivative nature of liability inherent in this model, the link between the accomplice and the principal perpetrator needs to be spelled out in greater detail.

The human rights aspect of international criminal law requires the role of the offender to be defined in precise terms.²²² This follows from the right of the

²¹⁷ Separate Opinion of Judge Fulford, § 9.

²¹⁸ For the discussion on framing international criminal law see A. M. Danner and J. S. Martinez.

²¹⁹ A. Eser, at 782.

²²⁰ A. Eser, at 788; E. Van Sliedregt, 2003, at 61.

²²¹ U. Sieber, Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, A Comparative Analysis, *Expert Opinion by the Max Planck Institute for Foreign and International Criminal Law as Commissioned by the ICTY*, Freiburg, 2006, at 13. See also Chapter IV.I.iii *infra*.

²²² F. Megret, Prospects for "Constitutional" Human Rights Scrutiny of Substantive International Criminal Law by the ICC, with Special Emphasis on the General Part (paper presented at Washington University School of Law, Whitney R. Harris World Law Institute,

accused to be properly informed about the nature of charges against him or her. This right, recognized as a fundamental human right in the major human rights instruments, is part of the broader notion of ‘fairness’ in criminal proceedings.²²³ The European Court for Human Rights held, “in criminal matters the provision of full, detailed information concerning the charges against a defendant is an essential prerequisite for ensuring that the proceedings are fair.”²²⁴ In *Pélissier and Sassi*, the European Court for Human Rights looked specifically at the issue of changing the legal characterization of facts. The French court of appeal had convicted the claimants of aiding and abetting criminal bankruptcy as opposed to the commission of criminal bankruptcy, charged in the indictment. The court found a violation of Article 6(3)(a) of the Convention based on the consideration that “aiding and abetting did not constitute an element intrinsic to the initial accusation known to the applicants from the beginning of the proceedings.”²²⁵ The European Court for Human Rights acknowledged that the elements of aiding and abetting are different from those of the perpetration. Thus, the accused could have used different defence strategies if they knew they were being tried for aiding and abetting as opposed to principal perpetration.²²⁶ The reason for the existence of the rule to be properly informed about the charges stems from the notion of the equality of arms that is essential to the rights of the defence and underlies the concept of fairness.²²⁷ True equality of arms can only be achieved if the accused is properly informed about the charges and is able to defend him or her-self accordingly.

Finally, the transitional justice aspect of distinguishing between different modes of liability manifests itself in the need to avoid assigning collective guilt. International criminal trials are extremely complex - they involve multiple accused; the crime scenes are often spread out in time and space; and the evidence linking the accused to the particular offence is often insufficient or missing. The offences are grave and usually involve numerous victims seeking justice. It may seem tempting to circumvent the principles of

International Legal Scholars Workshop, Roundtable in Public International Law and Theory, Feb 4-6, 2010) cited by J. D. Ohlin, Joint Intentions to Commit International Crimes, 11 *Chicago Journal of International Law* 693, 2011, at 751-752.

²²³ ICCPR 14(3)(a); Articles 6(1) and 6(3)(a) of the ECHR.

²²⁴ *Mattoccia v. Italy*, 23969/94, Judgment, ECHR, 25 July 2000, § 59; *Pélissier and Sassi v. France*, Judgment, ECHR, G.Ch., 25 March 1999, §§ 50-52.

See also W. Jordash and J. Coughlan, ‘The Right to be Informed of the Nature and Cause of the Charges: A Potentially Formidable Jurisprudential Legacy,’ in S. Darcy and J. Powderly (ed.), *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press, 2010, at 287

²²⁵ *Pélissier and Sassi v. France*, Judgment, ECHR, G.Ch., 25 March 1999, § 61.

²²⁶ *Ibid.* § 62.

²²⁷ *Borgers v. Belgium*, Judgment, 214 Eur. Ct. H.R. (ser. A) (1999).

individual criminal responsibility. However, assigning guilt by association is a dangerous tendency. Addressing past atrocities and criminal law guarantees for the accused are not two competing considerations in international criminal law but go together hand in hand. This is so because international criminal trials are evaluated by subsequent generations based on their adherence to the strict legal principles.²²⁸ The Tokyo and Nuremberg tribunals are good examples of how international proceedings can be a labelled ‘victors justice’ because of jurisprudential shortcomings.²²⁹ The whole purpose of international criminal trials may be defeated if the principles of criminal law are not observed. Thus, honouring the principle of individual criminal responsibility is key to maintaining the perceived legitimacy of international and hybrid courts and tribunals.

iii. The Level of Contribution is not the Criterion for Differentiating Modes of Responsibility

The third and final argument against the hierarchy of the modes of participation has to do with the ‘anchor’ that the ICC chose to delineate different liability modes. Responsibility of the accused is measured by the amount of his or her contribution to the crime. Thus, there is a ladder of participation modes based on the level of contribution. The court requires an *essential* contribution by the accused to the common plan, in the sense of the ability to frustrate the commission of the crime by not performing the tasks, under subparagraph (a);²³⁰ a *substantial* contribution to the commission of a crime for aiding and abetting under subparagraph (c);²³¹ and a *significant* contribution to the commission of a crime by a group under subparagraph (d) of Article 25(3) of the Statute.²³² The *Lubanga* Trial Chamber reinforced the hierarchy based on the level of contribution by calling the latter provision a ‘residual’ form of liability, which makes it possible to criminalize those contributions that cannot be characterized as ordering, soliciting, inducing, aiding, abetting or assisting.²³³ The Pre-Trial Chamber in *Mbarushimana* adopted the same approach: it felt compelled on the basis of the hierarchy of participation modes to measure the magnitude of the accused’s contribution.²³⁴ An exercise proved to be challenging and was duly criticized

²²⁸ Minority Opinion of Judge van den Wyngaert, § 311.

²²⁹ See Chapter I.

²³⁰ *Lubanga* Judgment, § 925. K. Ambos agreed with the Majority in *Lubanga* that ‘essential’ is the most appropriate qualifier to delimit primary and secondary participation. See K. Ambos, 2012, at 147.

²³¹ *Mbarushimana* Decision, § 279; *Lubanga* Judgment, § 997.

²³² *Mbarushimana* Decision, § 280.

²³³ *Lubanga* Decision, § 337. See also *Katanga* Decision, § 483, ‘degrading’ responsibility in Article 25(3)(d) on the basis of its accessory nature.

²³⁴ *Mbarushimana* Decision, § 292.

by Judge Fernández de Gurmendi.²³⁵

However, there is a flaw in the reasoning based on the connection between the form of liability and the level of contribution because it is impossible to measure the precise degree to which the accused contributed to the crime in abstract terms. This is particularly true in respect of an ‘essential’, or *conditio sine qua non*, contribution that is a requirement for co-perpetration. This requirement goes against the distinction between nature and will, which Kadish accurately pointed out.²³⁶ In the physical world the events inevitably follow one another, but in the world of voluntary human action the outcome is the result of a freely chosen expressions of will.²³⁷ This distinction underlies the conception of responsibility in criminal law because it employs the doctrine of causation, for the realm of nature, and complicity, for the realm of will.²³⁸ Causation translates into the events happening in the physical world, while complicity results in another person’s voluntary action.²³⁹ The reason for this distinction is that every person is presumed to have a free will, and it cannot be said that another person *caused* him or her to act. The principal freely chose to commit a crime.

For example, it can be fairly said that the burglar caused the burglary by breaking into the house and appropriating the valuables. However, his accomplice, who provided the truck to transport the stolen goods with the knowledge of the crime being committed, cannot be said to have *caused* the burglary. His responsibility lies in the wrongful choice to assist the principal. Another example involving co-perpetrators would be two men simultaneously delivering blows to a third person. Both co-perpetrators cause grave bodily harm to the other person. This event is happening in the physical world. Thus, causation applies to cases that do not involve an intermediary between the crime and the offender – these are the classical cases of perpetration, co-perpetration and perpetration by means. The latter form of perpetration is somewhat an exception to the general causation rule because there is an intermediary between the crime and the principal. This intermediary, however, is innocent in a classical form of indirect perpetration. Thus, he lacks free will and becomes an instrument, in the physical sense of the word, in the hands of the primary perpetrator.

In case of ICC-developed doctrines of indirect or direct co-perpetration, the agents committing crimes are usually criminally responsible. Therefore, it

²³⁵ Separate Opinion of Judge Fernández de Gurmendi, § 12.

²³⁶ S. H. Kadish, at 326.

²³⁷ Ibid, at 327.

²³⁸ Ibid.

²³⁹ Ibid.

cannot be said that they are instruments in the hands of others - they retain their free will to choose the course of action. Thus, the contribution of a co-perpetrator to the crime cannot be *conditio sine qua non* if other persons who are criminally responsible carry out the crime. They possess free will and can choose not to carry out the elements of the crime. An essential contribution presupposes that the co-perpetrator caused, through his or her contribution, the crime to occur. This is impossible however if one treats individuals as sovereigns of their own acts. For example, the mayor of the city who publicly delivered hate speeches urging one ethnic group to take up arms against another ethnic group cannot be said to have *caused* the members of the former group to commit acts of persecution or genocide, but rather influenced their behaviour through incitement.²⁴⁰

Some quantification of contribution to the crime is nonetheless possible, or else even a marginal input would render a person criminally responsible, bringing about the unjust result of punishing only the guilty state of mind rather than the state of mind *and* the conduct.²⁴¹ However, it seems more appropriate to talk about establishing the nature of accomplice's assistance and its relevance to the crime rather than simply measuring it in the numerical terms. Two more factors from the realm of culpability have to be placed in the background of any consideration of accomplice's input: his intent to contribute and the level of specificity of his knowledge about the crimes.

The facts of a particular case usually permit an evaluation as to whether the contribution had *some* effect on the commission of the crime. This appears to be a reasonable approach. The *Mbarushimana* Pre-Trial Chamber and the *Katanga* Trial Chambers took a step in this direction by noting that determination as to which contributions are significant requires a case-by-case assessment in the proper context.²⁴² It seems, however, that the ICC is

²⁴⁰ Weigend criticized indirect perpetration along the same lines. He questioned the nature of domination as a factual or normative concept and whether the act of domination is sufficient to entirely control the will of the actual perpetrator. Weigend rightfully noted that one could only influence the other person to a certain extent. T. Weigend, at 100.

²⁴¹ The issue of 'guilt by association' was at the heart of the *Ezokola* case decided by the Supreme Court of Canada. In this case, the claimant – a senior Congolese official - was excluded from the protection of the Refugee Convention solely based on his membership in the government known to commit atrocities in Congo. The lower courts deemed 'the personal and knowing participation test' to be sufficient to establish claimant's complicity in international crimes, and, thus, deny him the protection as a refugee. The presumption was that a senior position in the public service makes it possible to commit offences. The Supreme Court disagreed with such an extensive interpretation of complicity when it comes to international crimes. It held that a contribution-based test for complicity – one that requires a voluntary, knowing, and significant contribution to the crime or criminal purpose of a group - is more appropriate. See *Ezokola v. Canada* (Citizenship and Immigration), 2013 SCC 40, [2013] 2 S.C.R. 678.

²⁴² *Mbarushimana* Decision, § 284. See also *Katanga* Judgement, § 634.

still in search of the right formula for evaluating the effect of accomplice's assistance on the crime. The *Mbarushimana* Chamber could not refrain from providing some indicators regarding what amounts to significant contributions. These included the role played by the suspect vis-à-vis the seriousness and scope of the crimes committed or the sustained nature of the participation after acquiring knowledge of the criminality of the group's common purpose.²⁴³ These indicators are useful in assessing the input of the suspect or accused, but can just as well be used to determine the contribution that is 'essential' and 'substantial', and not necessarily 'significant'.

Consequently, the level of contribution has to be at a certain level in order to attract *any* liability, but it cannot serve as an instrument for grading modes of liability and establishing a hierarchy. In particular, the essential contribution requirement is not the correct criterion to delimit indirect (co)-perpetration from complicity.²⁴⁴

Conclusion

This chapter outlined the main forms of responsibility accepted by the ICC. The Rome Statute, albeit, the most detailed contemporary statement of the modes of responsibility in international criminal law, still calls for some further interpretation. The ICC initially adopted the German-based doctrine of co-perpetration by means of control over crime as a default mode of responsibility dealing with collective criminality. It appears however that the fascination with the newly developed control over crime theory premised on the hierarchy of participation modes is fading away. The application of this form of liability creates conceptual and practical difficulties. There is no support for this doctrine in the Rome Statute, customary international law or the general principles of law. The doctrine operates on the basis of numerous highly theoretical criteria that are often difficult to apply to the facts.

Moreover, the particular requirement of 'essential' contribution of co-perpetrator to the crime committed by someone who is criminally responsible himself is at odds with the principle of free will. Contribution *sine qua non*

²⁴³ Ibid. In the *Ezokola* case, the Supreme Court of Canada came up with a similar list of criteria for establishing voluntary, significant and knowing contribution to international crimes committed by a group or an organization: the size and nature of the organization, the claimant's duties within the organization, the claimant's position in the organization, the methods of joining and leaving the organization, etc. It seems, however, that the Supreme Court focused primarily on the nature of the organization itself, rather than on providing guidance for assessing the significance of an individual contribution. See *Ezokola v. Canada* (Citizenship and Immigration), 2013 SCC 40, [2013] 2 S.C.R. 678, § 91.

²⁴⁴ Judge Van den Wyngaert suggested replacing the requirement of 'essential' contribution for co-perpetration with the requirement of 'direct' contribution. She also proposed assessing the direction of assistance in cases of complicity. See Concurring Opinion of Judge Van den Wyngaert, § 6; Minority Opinion of Judge van den Wynagert, § 287.

presupposes that the acts of the perpetrator directly cause the crime to occur. However, if the crime is committed by the intermediary, who possesses the ability to act voluntarily, it cannot be said that the principal perpetrator caused the crime. Rather, he influenced the agent, who, in turn, caused the result in the physical world. The better approach to contributions would be to assess them in the context of the case, without attempting to quantify the contributions and construct a ranking of responsibility modes based on this quantification.

Until recently, the ICC has used different forms of complicity - embodied in Article 25(3)(b)-(d) - scarcely and with reluctance. The explanation for this could be the alleged hierarchy of the modes of participation implicit in the Rome Statute. This assumption in turn created a pressure on the court to utilize the 'stronger' mode of participation – commission under Article 25(3)(a) – to reflect the gravity of the crimes in the jurisdiction of the ICC. The attitudes are slowly changing with the second conviction rendered by the court under Article 25(3)(d). Indeed, the supposition that the modes of participations are ranked is questionable because it is not supported by the Rome Statute or *travaux préparatoire*. The hierarchy does not follow from the original German control over crime doctrine or the sentencing provisions in the Statute, which do not distinguish between different liability modes for sentencing purposes. Thus, the form of liability – principal or accomplice – is not the deciding factor in assessing the degree of offender's blameworthiness. Rather, it is the combination of case-specific aspects that render the accused more or less culpable.

The main conclusion of the above discussion is that co-perpetration must not be used to the detriment of other forms of liability enshrined in the Rome Statute. Different forms of complicity do not amount to a 'lesser' form of responsibility because the forms of participation are not ranked in the Rome Statute. Complicity can serve an important role in addressing the issue of collective criminality because it is designed specifically to deal with cases involving multiple accused. The key challenge seems to be not the choice of the liability mode *in abstracto*, but rather faithfully assessing the facts of the case against the legal requirements of the chosen form of criminal participation.

IV. Origins of Complicity: Domestic Law Intake

Introduction

Examining the jurisprudence and the statutes of the ad hoc tribunals, hybrid courts and the ICC shows how international bodies employ complicity in their reasoning. However, this assessment is insufficient to understand complicity in its entirety, which is a concept deeply rooted in domestic criminal law.¹ It is thus worth going deeper to the level of national legal systems to understand complicity, a concept which exists in one form or another in countries with both common and civil law traditions.²

This chapter uses a comparative inquiry to examine complicity at a domestic level. The first section of the chapter shows the relevance of this study to international criminal law. It links the comparative method to the notion of the ‘of law recognized by civilized nations’, a source of international law. The same part discusses the particulars of the methodology used in this chapter. The next section examines the concept of complicity in domestic jurisdictions. This part strives to strike a balance between exploring complicity in depth and providing an overview of the range of legal systems. Appendix III to the thesis shall be read in conjunction with this chapter. It provides a schematic overview of complicity in 31 jurisdictions. The penultimate section of the chapter adduces some general principles associated with complicity resulting from the study of domestic law and evaluates their relevance at an international level. This section provides an interdisciplinary perspective on complicity including the limitations of transplanting the concept from national law into the international field. The chapter ends with some intermediate conclusions.

¹ Many scholars in the field of criminal law recognize the value of resorting to a comparative analysis of national legal systems for the purposes of developing international criminal law. See, for example, G. Fletcher, *The Grammar of Criminal Law*, Oxford University Press, 2007, at 340-341; A. Eser, ‘The Importance of Comparative Legal Research for the Development of Criminal Sciences’ in R. Blanpain (Hrsg.), *Law in motion: recent developments in civil procedure, constitutional, contract, criminal, environmental, family & succession, intellectual property, labour, medical, social security, transport law*, The Hague: Kluwer, 1997, at 496 and 505; P. Roberts, ‘Comparative Law for International Criminal Justice’ in (ed) E. Orucu and D. Nelken, *Comparative Law: A Handbook*, 2007, at 355-356. For the international law perspective: L.C. Green, ‘Comparative Law as a Source of International Law,’ 42 *Tulane Law Review* 52, 1967, at 66.

² See *Akayesu Trial Judgment*, § 527; M. D. Dubber, ‘Criminalizing Complicity. A Comparative Analysis,’ 5 *Journal of International Criminal Justice* 4, 2007, at 977; G. Fletcher, 1978, at 634-682.

1. Comparative Method in International Criminal Law

i. General Principles of Law as a Source of Law and Inspiration

Comparative studies of domestic legal systems assist in the discovery of one of the sources of international law, namely the ‘general principles of law’. Article 38(1)(c) of the Statute of the International Court of Justice lists “general principles of law recognized by civilized nations” as one of the sources of international law.³ The expression ‘general principles of law’ has been attributed different meanings in the context of public international law.⁴ Some academics consider that the expression refers primarily to general principles of international law and only subsidiarily to the principles embedded in the municipal law.⁵ Others, when speaking of ‘general principles of law’, choose to refer to legal principles recognized in national law.⁶ A third group, which includes Lauterpacht and Kelsen, almost denies the status of the ‘general principles of law’ as an independent source of law. Lauterpacht writes:

Experience has shown that the main function of ‘general principles of law’ has been that of a safety-valve to be kept in reserve, rather than a source of law of frequent application. As a rule, the two primary sources of law enumerated in Article 38 – treaty and custom – have provided a sufficient basis for decision.⁷

Equally, there does not seem to be an agreement on how many countries need to recognize a certain principle in *foro domestico* in order for it to qualify as a source of international law.⁸ Hans Kelsen posed this question as early as 1950,⁹ but the answer is not entirely straightforward even today. In the *Baumgarten* case, the UN Human Rights Committee satisfied itself with the “recognition of the general principle by the community of nations” standard when determining whether killings and attempted killings of those crossing

³ P. de Cruz, *Comparative Law in a Changing World*, 3rd Edition, Routledge-Cavendish 2007, at 26.

⁴ M. Shaw, *International Law*, Cambridge University Press, 2008, at 99; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, 1987, at 2; F. O. Raimondo, *General principles of law in the decisions of international criminal courts and tribunals*, Martinus Nijhoff, 2008, at 1.

⁵ D. Anzilotti, *Cours de Droit international*, 1929, at 117; Hudson, *The ATC.I.J. 1920-1942*, 1943, at 611.

⁶ F. Raimondo, 2008, at 1.

⁷ H. Lauterpacht, *The Development of International Law by the International Court*, London, 1958, at 166. Cf. Hans Kelsen argues “it is doubtful whether such as thing as ‘general principles of law recognized by civilized nations exists at all’. H. Kelsen, *The law of the United Nations: a critical analysis of its fundamental problems*, London: Stevens, 1950, at 533.

⁸ B. Cheng, at 25.

⁹ H. Kelsen, at 533.

the DDR's border were criminal offences in the 1980's.¹⁰ In Van Hoof's view, two conditions need to be satisfied in order for a principle to be considered a source of law: first, the principle needs to be accepted by *all* states in *foro domestico*, and secondly, there needs to exist the court-situation or situation of a third party decision, which calls for the application of this source of law.¹¹

Unlike public international law, international criminal law provides some guidance as to the hierarchy of sources of law. Article 21(1)(c) of the Rome Statute assigns "general principles of law derived from state laws of legal systems in the world" the role of a secondary source of law in the ICC. The Rome Statute is, thus, more specific than the Statute of the International Court of Justice on the content and the role of the 'general principles of international law': the role of the 'general principles of law' under Article 21(1)(c) is to be a subsidiary source of law when a gap exists in international law. It is essential that the 'general principle' is *representative* of the variety of nations; hence there is no call for a direct transposition of a certain concept from a *single* domestic legal system to international law. At the same time, the jurisprudence of the ad hoc tribunals does not require universal acceptance of the rule by all the states when abstracting legal rules from national systems.¹²

The *Lubanga* judgement of the ICC proves two issues that are crucially important for this discussion: (i) the modes of responsibility in international criminal law require more interpretation based on a solid methodology; (ii) there is a gap in understanding of the role and purpose of the 'general principles of law' in defining the modes of responsibility at an international level.¹³ While the Majority of the *Lubanga* Trial Chamber denied resorting to domestic law in the context of international proceedings, they introduced, through the back door, the German domestic law concept of 'control over crime'.¹⁴ Simultaneously, while Judge Fulford in his separate opinion criticized the Chamber's decision to use the German theory, he believed the

¹⁰ The Human Rights Committee held that "the disproportionate use of lethal force was criminal according to the general principles of law recognized by the community of nations already at the time when the author committed his acts." See the decision of the Human Rights Committee in *Baumgarten v Germany*, Communication No 960/2000, § 9.4.

¹¹ GJH Van Hoof, *Rethinking the Sources of International Law*, 1983, at 140-142, emphasis added.

¹² F. O. Raimondo, 'General Principles of Law, Judicial Creativity, and the Development of International Criminal Law,' in Darcy and Powderly (eds), *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press, 2010, at 52.

¹³ *Lubanga* Judgement, § 976.

¹⁴ *Ibid.*

Chamber took this decision based on the ‘general principles of law’ under Article 21(1)(c) of the Rome Statute.¹⁵

The ICC and the international criminal tribunals have been somewhat reluctant, in decisions and judgments, to resort to principles derived from the multitude of domestic legal systems, preferring instead to adopt a narrower perspective found in a single or few domestic legal systems.¹⁶ However, there are several instances, in which the general principles of law have assisted judges in finding the appropriate legal standard.¹⁷ In *Erdemović*, for example, Judges McDonald and Vohrah determined that duress is not a complete defence to charges of crimes against humanity and war crimes by surveying 30 national legal systems including civil law systems.¹⁸ Similarly, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia analysed several national legal orders in order to resolve the continuing debate between the prosecution and the defence relating to the extended form of the joint criminal enterprise.¹⁹ After having surveyed several national legal systems, the Trial Chamber concluded that this form of liability cannot be considered to have been a general principle of law between 1975 and 1979.²⁰

The approach developed in this thesis is that domestic law or, rather the results collected from examining several national legal systems, inform the ‘general principles of law’. The question arises whether and to what extent domestic law also assists in the interpretation of the ‘orthodox sources’ of international law enshrined in Articles 38(1)(a) and 38(1)(b) of the Statute of the International Court of Justice, namely treaty and custom.²¹ Arguably, one can best conceptualize the ‘general principles of law’ as an independent source of law *and* a framework for interpretation of the principles that already exist (often vaguely) in the two other sources of international law, namely custom and treaty.

It appears that domestic laws may be used to interpret these two sources of law. However, they cannot be the sole ‘informant’ of the treaty provision or the rule of customary law. Treaties, being classical examples of written international law, should in theory regulate the matters they address with sufficient clarity, thus eliminating the need to consult other sources. In many

¹⁵ Separate Opinion of Judge Fulford, § 10.

¹⁶ For an extended discussion of this issue, see F.O. Raimondo, 2010.

¹⁷ For more on the jurisprudence of international courts and tribunals resorting to general principles of law see F. Raimondo, 2008, at 71 sq.

¹⁸ Prosecutor v. *Erdemović*, ICTY Case No. IT-96-22-A, Appeal Judgement, 7 October 1997 (‘*Erdemović* Appeal Judgement’), Joint Separate Opinion of Judge McDonald and Judge Vohrah, Judgment, §§ 56-72.

¹⁹ *Ieng Sary* TC JCE Decision, §§ 29, 37.

²⁰ *Ibid.*

²¹ For the expression ‘orthodox sources’ of international law see RY Jennings, ‘The Identification of International Law,’ in B. Cheng, at 4.

instances however, treaty provisions require further elaboration and clarification.²² This is so because they are always a product of diplomatic negotiations.²³ This in turn implies compromises, deliberate gaps and omissions, as well reservations by some parties. A legitimate question that stems from this inconsistency was posed by Jennings: how can such a ‘package deal’ be reconciled with the progressive development of law?²⁴

The use of domestic laws to inform and clarify treaty provisions can be one answer to this question. This is especially true in respect of international criminal law, which, unlike other branches of public international law, is ultimately based on national criminal law with some international flavour to it. Consequently, national legislation fills in gaps in the statutes of international criminal courts and tribunals.²⁵ In particular, the ‘general part’ of international criminal law, including rules on punishment and the attribution of liability, benefits from the study of the underlying concepts in domestic legal systems.²⁶ Complicity as a concept belongs to the general part of criminal law as it denotes one of the forms of participation and forms the basis for the attribution of individual criminal responsibility. These concepts need to be developed in international criminal law. Ambos argues that, despite the fact that the concept of individual criminal responsibility for violations of humanitarian and human rights norms is universally recognized, the elements of this responsibility are not sufficiently discussed in the literature.²⁷

When it comes to the custom, it appears that courts on some occasions use the results of comparative analysis to support the existence of rules of customary law.²⁸ However, custom, arguably, is a problematic source of law, especially when it comes to human rights obligations or provisions of international criminal law.²⁹ The difficulty arises on several levels: first, it is difficult to identify a custom based on the past behaviour of the state because a uniform approach to an issue is rare and states often engage in behaviour negating the proposed rule.³⁰ Secondly, the courts often do not make a distinction between two constitutive elements of custom – state practice and *opinio juris*.³¹

²² B. Simma and P. Alston, at 82.

²³ RY Jennings, at 5.

²⁴ RY Jennings, at 5-7.

²⁵ Green elaborated on the gap-filling function of Comparative law. L.C. Green, at 65.

²⁶ See G. Fletcher, 2007, at 340.

²⁷ K. Ambos, 2000, at 6.

²⁸ M. Akehurst, Custom as a source of International Law, *British Yearbook of International Law*, 1976, at 9.

²⁹ “It is often difficult to determine what constitutes customary international law, who defines customary international law, and how firmly established a norm has to be to qualify as a customary international law norm.” *Hamdan v. United States*, USCA 11-1257 (2012), at 23.

³⁰ B. Simma and P. Alston, at 92-93.

³¹ L. van den Herik, at 101.

Finally, Kelsen also highlighted the self-fulfilling prophecy nature of a custom: it can hardly constitute ‘evidence’ of state practice because it is in itself a qualified practice of the states.³² In light of these problems, Bruno Simma and Phil Alston, when discussing the nature of some human rights obligations, suggested looking elsewhere to explain universally their universally binding nature. Instead of updating the concept of custom, they proposed to resort to another source of law, namely the general principles of law’.³³

There is some evidence in the jurisprudence of the ad hoc tribunals that domestic criminal law also serves to prove the existence of a customary rule.³⁴ It is important, however, to maintain a distinction between the two sources of law: custom represents “a general practice *among* States accepted by them as law” and general principles of law have recognition *in* the municipal law of states.³⁵ Both custom and general principles of law rely on the element of recognition of a certain rule. However, the emphasis is different: custom centres around the recognition of a legal character of a certain rule through state practice, while the general principles of law rely on the *existence* of a certain principle domestically.³⁶

From the perspective of international criminal law, there exists confusion surrounding the concept of customary international law in the jurisprudence of the ad hoc tribunals.³⁷ The two traditional elements of custom – state practice and *opinio juris* - take different forms and encompass different value in the context of international criminal law. Larissa van den Herik argued that the tendency to place extra emphasis on the *opinio juris* component of custom inherent to international law in general is further complicated by the fact that the ad hoc tribunals tend to be selective in the cases they use to support custom, which in turn may lead to a biased outcome.³⁸ This trend is due to the specific nature of human rights and international criminal law; state practice takes a ‘backseat’ because it frequently supports the ‘violation of the rule’ rather than state compliance with it. As with the ‘general principles of law’ the evidentiary standard required for the existence of custom differs according to the situation.³⁹

It follows that domestic law serves an interpretative function in relation to custom and treaty. This is in addition to being a source of international law

³² H. Kelsen, at 533. See also B. Simma and P. Alston, at 88-89.

³³ B. Simma and P. Alston, at 98-99.

³⁴ *Tadić* Appeal Judgment, §§ 214-220. See also L. van den Herik, at 102.

³⁵ B. Cheng, at 24-25 (emphasis added).

³⁶ *Ibid.*

³⁷ A. Zahar and G. Sluiter, at 224.

³⁸ L. van den Herik, at 99 and 102.

³⁹ L. van den Herik, at 104.

through the concept of the ‘general principles of law’. One can highlight two further beneficial aspects of exploring domestic laws for the purposes of international criminal law. First, comparative investigation can serve as a tool for discovering ‘best practices’ around the world and incorporating them in international criminal law.⁴⁰ Secondly, the study of domestic practices is a crucial step in the cross-fertilization of domestic and international criminal law with the prospect of developing uniform approaches.

The interplay between the two fields of law no longer works as a one-way street. International lawyers borrow concepts from national legal systems and there is a striking recent trend evolving of international criminal law enriching and altering state penal systems. For example, in the *Hamdan* case, the US Court of Appeal overturned Hamdan’s conviction for material support of terrorism because it was not an international law crime at the time Hamdan engaged in the relevant conduct.⁴¹ This is in contrast with, for example aiding and abetting terrorism.⁴² In arriving at this conclusion, the court looked into the sources of international law – custom and treaty law provisions, including the Rome Statute of the ICC.⁴³ This cross-fertilization is especially relevant in the context of the complementarity principle at the ICC, whereby national jurisdictions have primacy over the ICC, subject to their inaction, unwillingness or inability.⁴⁴ Thus, the ICC has a clear interest in enhancing the national criminal systems. There are initiatives promoting this exchange.⁴⁵ The implementation of the Rome Statute into the domestic legislation of the countries that are parties to the statute is one example of this trend.

ii. Critique of the Comparative Method

There are different levels of criticism against using the results of comparative studies of domestic penal legislation in international criminal law. On a more general level, De Cruz raised concerns about the transferability of national law concepts into international law decisions. He stressed that the comparative method does not replace judicial functions but rather facilitates,

⁴⁰ P. Roberts, at 355.

⁴¹ *Hamdan v. United States*, USCA 11-1257 (2012), at 27.

⁴² *Ibid.*, at 26. Note: The US Court of Appeal treats ‘aiding and abetting terrorism’ as one substantive crime without distinguishing the mode of participation – aiding and abetting – and the crime itself. This is in contrast with the approach adopted in international criminal law.

⁴³ *Ibid.*, at 23-25.

⁴⁴ H. Olasolo, *Essays on International Criminal Justice*, Oxford, Portland and Oregon, 2012, at 74-75.

⁴⁵ For example, the ICC Legal Tools project provides for a platform to disseminate legal information related to core international crimes, including their incorporation into domestic law. The Forum for International Criminal and Humanitarian Law (FICHL) promotes academic research in the same area. See M. Bergsmo, M. Harlem and N. Hayashi (ed.) *Importing Core International Crimes into National Law*, 2nd edn., Torkel Opsahl Academic EPublisher, 2010.

informs and clarifies them.⁴⁶ De Cruz advocated for the cautious use of the results of comparative studies in international law. This chapter underscores and embraces De Cruz's concern: direct transposition of the concepts from national law into international criminal law or downright analogies do not serve the purpose of uncovering the scope of complicity, nor do they provide space for accommodating the specific features of international criminal law. At the same time, this caution shall not serve as a barrier to the exploration of the national law.

When it comes to international criminal law specifically, Tallgren argued against drawing an analogy between international criminal justice and national law in light of the particular circumstances of criminality involved in the former.⁴⁷ She pointed towards an extraordinarily complex relationship between war, crime and criminology, and the interests protected by international criminal law differ from the interests protected by state criminal law.⁴⁸ In response to this general concern about the incomparability of domestic and international criminal law, one may argue that indeed these fields of law deal with crimes committed on different scales and under different circumstances. However, the principle of individual criminal responsibility unites both fields of law.

Finally, Dubber questioned the value of a comparative method in relation to complicity specifically. He suggested, after having studied in some detail the concept of complicity in German and American law, that national legal systems should serve as no more than a mere signpost for the development of the concept of accomplice liability in international criminal law. This has to do with the need to strike a balance between a broader view of accomplice liability urged by the enormity of the crimes involved and a more narrow view of complicity based on considerations of the principle of legality.⁴⁹ It is hard to argue against the view that national law concepts should not be directly transported into the sphere of international criminal law.⁵⁰ Brownlie noted on this point that it would be incorrect to assume that tribunals mechanically borrow from national law, instead they use elements of legal reasoning.⁵¹ Nonetheless, international criminal law needs to refine its theory of individual criminal responsibility. One way of doing this is by exploring national legislation of different countries to discover the divergence or

⁴⁶ P. De Cruz, at 25.

⁴⁷ I. Tallgren, 'The Sensibility and Sense of International Criminal Law,' 13 *European Journal of International Law* 3, 2002, at 571-572.

⁴⁸ *Ibid.* at 575, 586.

⁴⁹ M. Dubber, at 1001.

⁵⁰ For example, Judge Cassese opposed mechanical transposition of national law concepts into international criminal law. See *Erdemović Appeal Judgment, Separate and Dissenting Opinion of Judge Cassese*.

⁵¹ I. Brownlie, at 16.

conformity of domestic legal systems in the field of criminal participation.⁵² This exercise leads to one adducing certain principles of law that can assist in the formulation of international principles of individual criminal responsibility.

The following section considers the approach to analysing complicity adopted in this chapter.

iii. Methodology

The literature devoted to comparative law places great significance on methodology.⁵³ This is particularly relevant for the purposes of adducing certain principles to be later used as a source of international law. Thus, it is essential to justify the perspective of the comparative study, the scope of the study and the choice of legal systems. This chapter relies on several key considerations in this regard.

First, the true meaning of complicity and its function in various domestic legal systems is at heart of this research. Zweigert and Koetz suggest that the basic working hypothesis of all comparative studies is that of functionality, meaning that incomparable notions cannot be contrasted.⁵⁴ One way to verify the role of a particular legal concept is to establish the ‘common core’ – the highest common factor of an area of substantive law.⁵⁵ This chapter focuses on finding this common core for complicity by, first describing the types of participants in the crime that can be found in different national legal systems and, then by separating one mode of participation from the other. The study goes beyond the linguistic distinction between principals and accomplices⁵⁶ and tries to establish the consequences of holding someone accomplice to the crime, as opposed to finding him or her to be the perpetrator.

The second essential consideration of the present study is the range of countries to be examined. In this respect it is important to note that the results of the study will form the basis of the notion of complicity as a ‘general principle of law’. Consequently, it is vital to ensure wide representation of countries in terms of numbers and geographical coverage. It is tempting to explore as many jurisdictions as possible. However, this is not practically feasible. Moreover, as explained below, many legal systems resemble each other – this reduces the number of domestic legal orders under scrutiny.

⁵² For more on the development of law and Comparative perspective see Green, at 54.

⁵³ K. Zweigert and H. Koetz, *An Introduction to Comparative Law*, 3rd ed, Clarendon Press Oxford, 1998, at 33,

⁵⁴ *Ibid*, at 34.

⁵⁵ P. De Cruz, at 26.

⁵⁶ Translation of the terms without exploring the meaning attached to them often leads to confusing results because different languages have different capacities to express various forms of liability. It follows from this study, however, that the underlying rationale for distinguishing different participants in the crime is often the same.

Fabian Raimondo provided some practical guidance in adducing ‘general principles of law’. He divided this process into two parts, namely a ‘vertical move’ and a ‘horizontal move’. The ‘vertical move’ distils an underlying legal principle from the variety of national legal systems, while the horizontal move corroborates its acceptance by the generality of states.⁵⁷ An example of the ‘horizontal move’ is the study by Judges McDonald and Vohrah of the national law on duress in 30 jurisdictions in support of their separate opinion in *Erdemović*.⁵⁸ The present report on complicity is similar to *Erdemović* in that it examines briefly (in a table format) the concept in 31 jurisdictions. However, it is also supplemented and reinforced by the in-depth analysis of a select number of legal systems in line with Raimondo’s ‘vertical move’.⁵⁹

Another notable methodological issue is the choice of legal systems to be compared.⁶⁰ On a more general level, Zweigert and Koetz suggest choosing representatives of the major parent legal systems as a rule of thumb: English and American law of the Anglo-Saxon family, French and Italian law as examples of the Romanistic family, Germany and Switzerland of the Germanic system, and, finally, Denmark and Sweden to showcase the Nordic system.⁶¹ René David holds a similar view, although he grouped major legal families slightly differently: the Romano-Germanic family, the common law family and the family of socialist law. He made it clear, however, that there are other systems situated outside of these three traditions or sharing only a part of their concepts and practices.⁶² Raimondo noted that only exploring systems that represent the legal families might lead to a certain bias. He proposed utilizing a test based on equitable geographic distribution to ‘even out’ the legal systems under consideration.⁶³ Regardless of the general cataloguing, there is agreement among academics that the suitability of any classification depends on the subject matter of the research and the perspective (regional or world-wide).⁶⁴

When it comes to criminal law, Fletcher’s analytical structures of thinking about criminal offence are useful for the purposes of a comparative exercise. Fletcher identified *bipartite*, *tripartite*, and *quadripartite* systems.⁶⁵ The common law countries, as well as France and Francophone countries, adhere

⁵⁷ F. O. Raimondo, 2010, at 52.

⁵⁸ *Erdemović* Appeal Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, §s 40, 55-72 as cited by F. O. Raimondo, 2010, at 54-55.

⁵⁹ See section 2 *infra* and Appendix III.

⁶⁰ K. Zweigert and H. Koetz, at 40; P. De Cruz, at 25.

⁶¹ K. Zweigert and H. Koetz, at 41.

⁶² R. David, J. E.C. Brierley, *Major legal systems in the world today: an introduction to the Comparative study of Law*, London - Stevens, 1985, at 22.

⁶³ F. Raimondo, 2010, at 55.

⁶⁴ R. David, at 21.

⁶⁵ G. Fletcher, 2007, at 43.

to the bipartite mode. This system distinguishes between *actus reus* and *mens rea*. Smith and Hogan held *actus reus* to be made up of conduct (which includes acts or omissions) and sometimes its consequences, as well as the circumstances in which the conduct took place.⁶⁶ An example of the ‘circumstances’ would be the lack of the consent of the rape victim.⁶⁷ For the crime to attract criminal liability, *actus reus* must be committed with the requisite state of mind. The term ‘*mens rea*’ denotes the state of mind, intent or recklessness required by the specific crime. The Rome Statute adopted the bipartite system in that it distinguishes between ‘material elements’ and ‘intent or knowledge’.⁶⁸

The quadripartite system is a framework developed in the communist literature on criminal liability.⁶⁹ It features the following categories: the subject of the offence, the object of the offence, the subjective side of liability, and the objective side of liability. The subjective and objective sides are similar to *mens rea* and *actus reus*. The subject of the offence is the person liable for violating the criminal norm, and the object - is the social harm caused by the offence.⁷⁰ This system is unlikely to persist at an international level because of the general demise of the Soviet legal family in the post-communist period.⁷¹

Finally, the tripartite system denotes the German way of thinking about the offence. This approach surfaces in the German- and Spanish-speaking countries, as well as in the Far East (for example, Japan).⁷² Conduct only attracts criminal liability if it satisfies the definition of the offence, is wrongful and blameworthy.⁷³ The three elements incorporate the notions of justification and excuses that exist as separate categories in the bipartite and quadripartite systems. Killing a human being in self-defence satisfies the definition of the offence but is not wrongful because it is justified; stealing under duress is wrongful but not blameworthy because it is excused.⁷⁴

When one moves to the specific level of criminal participation, there is an additional consideration for selecting the case studies. Some jurisdictions, such as Italy and Austria, adhere to the ‘unitary perpetrator model’, while the majority of other states recognize ‘the differential participation model’.⁷⁵ The ‘unitary perpetrator model’, also referred to as the model of ‘individual

⁶⁶ J.C. Smith and B. Hogan, at 30.

⁶⁷ Ibid, at 31.

⁶⁸ Rome Statute Article 30(1) as cited by G. Fletcher, 2007, at 46.

⁶⁹ G. Fletcher, 2007, at 47.

⁷⁰ Ibid, at 47-48.

⁷¹ Ibid, at 48.

⁷² Ibid, at 54.

⁷³ Ibid, at 51.

⁷⁴ Ibid, at 52.

⁷⁵ A. Eser, in Cassese et al (ed), 2002, at 781-783, E. Van Sliedregt, 2003, at 61-62.

agency', characterizes every person who contributes to the carrying out of a crime in whatever way as the author of the offence, without distinguishing, at least at the statutory level, between direct perpetrators and accomplices.⁷⁶

The 'differential participation model' sets perpetratorship apart from mere participation. The underlying rationale behind this model is that causal contributions to the commission of the offence vary in terms of weight and closeness.⁷⁷ Thus, it would be unfair to treat all persons involved in the same way.⁷⁸ There are two implications of the 'differentiated participation model'. First, this approach creates the possibility for sanctioning perpetrators and accessories in a different way by allowing more lenient punishment for accomplices or by excluding the liability of accomplices for less serious crimes.⁷⁹ This does not mean however that every country following this model provides for such a distinction at the level of legislation. Second, this model connects the principal and the accessory in that the liability of the latter depends on the principal act and is consequently 'derivative' or 'accessorial' in nature. This is in contrast with the 'unitary model', in which each causal contributor to the crime is separately accountable for his own actions.⁸⁰ The unitary model adheres to a looser standard of causality in that any contribution that has effect on the crime is sufficient to establish the link between the individual and the offence.

Based on the above discussion this chapter strives to strike an uneasy balance between being comprehensive, in line with the 'vertical move' and representative as in the 'horizontal move'. There is an in-depth analysis of the samples of various parent legal families: Germany of the Germanic legal system; France and Italy that showcase the Romanistic family; Russia for Soviet law; the United States and England as the examples of the common law; finally, India and China belong to the category of mixed or 'other' legal systems in the world. These countries also neatly reflect different ways of thinking about the criminal offence as discussed by Fletcher. Finally, Italy represents the 'unitary perpetrator model', while all other countries are the adherents of the 'differential participation model'.

Appendix III to the thesis is a table containing a survey of the modes of participation in 31 legal systems around the world. It supplements the in-depth analysis of various legal systems discussed in the following section.⁸¹ The table in Appendix III covers a wide geographical area and corresponds to Raimondo's 'horizontal move' in that it verifies the existence of common

⁷⁶ A. Eser at 781.

⁷⁷ For the analysis of causation in criminal law, see Chapter II.2.ii *supra*.

⁷⁸ *Ibid*, at 782.

⁷⁹ *Ibid*, at 782.

⁸⁰ *Ibid*, at 783. See also E. Van Sliedregt, 2012, at 65.

⁸¹ Section 2 *infra*.

trends across jurisdictions. The table systemizes crime participants for each country and reflects any sentencing considerations that attach to finding someone complicit in a crime as opposed to having directly perpetrated it. The table refers, at times, to conspiracy - a distinct offence somewhat similar to complicity – in order to mark the borders of complicity.

2. Complicity in Domestic Law

i. General Remarks on the Attribution of Liability

Prior to discussing different national legal systems, it is necessary to take one last brief detour to establish the difference between the attribution of responsibility and wrongdoing.⁸² Fletcher drew this distinction, pointing out that the question of wrongdoing is dealt with under the set of primary legal norms, prohibiting or requiring particular acts, while the question of attribution, “is resolved under an entirely distinct set of norms, which are directed not to the class of potential violators, but to judges and jurors, charged with the task of assessing whether individuals are liable for their wrongful acts.”⁸³

There exists a tension between the normative theory of attribution, which views the process of attribution as a judgment about whether the accused can be fairly held accountable for his wrongful act and the descriptive theory, which implies that there is some single feature of all criminal conduct that serves to link the actor to the wrongful act thus justifying liability.⁸⁴ Fletcher noted that countries with an Anglo-American tradition have sought to suppress the normative aspect of accountability and pack the problems of attribution into the concept of responsibility by focusing on the status and capacity of the actor, while the German tradition has favoured the normative approach to attribution.⁸⁵ Causation in the pattern of harmful consequences caused by ones own behaviour or by the acts of others lies at heart of the German normative theory of attribution.⁸⁶

Complicity is a field of attribution that falls outside the standard of causation in the narrow sense of this term.⁸⁷ At first glance, it may seem illogical to infer the accomplice’s culpability based on the actions of the principal when it is presumed that the principal’s actions are fully voluntary, and the accomplice may not be said to have caused these actions.⁸⁸ Kadish explained this phenomenon by the derivative (or indirect) nature of accomplice liability.

⁸² G. Fletcher, 1978, at 491-492.

⁸³ Ibid.

⁸⁴ G. Fletcher, 1978, at 492-495.

⁸⁵ G. Fletcher, 1978, at 496-497.

⁸⁶ G. Fletcher, 1978, at 492.

⁸⁷ See Chapter II.2.ii *supra*.

⁸⁸ S. H. Kadish, 1985, at 327.

He argued that an accomplice is culpable not because he caused certain events (as would be the case with the primary perpetrator) and not because he caused the perpetrator to commit a crime, but because the accomplice is to be blamed for the conduct of another person.⁸⁹

The sections below illustrate the place of complicity in the context of particular legal systems.

ii. Complicity in Germany

The German Penal Code retained its conceptual structure, despite having been regularly amended since its initial adoption in 1871.⁹⁰ German criminal law relies heavily on the doctrine. It is based on the application of logic and well-developed methods of interpretation. German law is deductive in nature in that it favours coherence and overarching principles to the greatest extent. This is in contrast with the inductive common law approach that relies primarily on the facts of the particular case.⁹¹ The deductive approach informs the German Penal Code – an instrument that attaches conceptual importance to differentiating among different actors involved in the commission of the crime.

The following crime participants can be identified based on the provisions of the German Penal Code:

- A primary perpetrator (*unmittelbarer Täter*) is an actor who commits the criminal act himself;⁹²
- A co-perpetrator (*Mittäter*) is a person who commits the offence jointly with others;⁹³
- An indirect perpetrator (*mittelbarer Täter*) is a principal who commits the offence through another (as per the German definition);⁹⁴
- An instigator (*Anstifter*) is “any person who intentionally induces another to intentionally commit an unlawful act;”⁹⁵
- A facilitator (*Gehilfe*) is “any person who intentionally assists another in the intentional commission of an unlawful act.”⁹⁶

In German law the offences have to be committed with intent unless otherwise provided for by law.⁹⁷ There are three forms of intent: 1. *dolus*

⁸⁹ Ibid, at 332. On the nature of derivative liability see also G. Fletcher, 1978, at 583.

⁹⁰ M. Dubber and K. Heller, ‘Introduction,’ *The Handbook of Comparative Criminal Law*, M. Dubber and K. Heller (ed.), Stanford Law Books, 2011, at 6.

⁹¹ M. Bohlander, *The German Criminal Code: A Modern English Translation*, Hart Publishing, 2008, at 1-2.

⁹² Article 25(1) German Penal Code.

⁹³ Article 25(2).

⁹⁴ Article 25(1) German Penal Code.

⁹⁵ Article 26 German Penal Code.

⁹⁶ Article 27(1) German Penal Code.

directus or direct intent; 2. *dolus directus* of the second degree; and 3. *dolus eventualis* (or ‘advertent recklessness’ in common law).⁹⁸ Direct intent refers to the carrying out of the acts and omissions by the offender with the knowledge that these actions will bring about the material elements of the crime and the desire or purposeful will (intent) for this to happen.⁹⁹ *Dolus directus* of the second degree means awareness that the crime will be the almost inevitable outcome of the acts or omissions of the accused – the actual will is not necessary.¹⁰⁰ *Dolus eventualis* consists of the knowledge of the risk or likelihood that the effect will occur and the will to bring it about - at least in the form of the acceptance.

Modern German criminal law relies heavily on the doctrine of *Tatherrschaft* in determining the line that separates principals from accessories. *Tatherrschaft* could be translated as ‘control over crime’ or, as Fletcher put it, ‘hegemony over the act’.¹⁰¹ Accessory is defined negatively as someone who does not have control over the execution of the crime.¹⁰² An influential German criminal law scholar Claus Roxin devised this doctrine in 1960’s as a compromise between two competing liability theories – the objective theory and the subjective theory, both of which have fallen out of favour with German legal scholars.¹⁰³

The objective theory holds only those who have partially or entirely committed the offence, described in the special part of the penal code, as perpetrators. All others are instigators and aiders.¹⁰⁴ The subjective theory, on the other hand, distinguishes between perpetration and mere participation based on the internal cognitive processes of the individual, such as will, motives and intentions. There is a division within the subjective theory between those who consider that the factor distinguishing perpetration and participation is individual will and those who stress the importance of acting in one’s own interest or someone else’s interest.¹⁰⁵

Since the end of the 19th century, German courts have consistently taken the subjective approach. The great majority of German academics criticized the courts’ subjective approach due to its lack of rational criteria in distinguishing

⁹⁷ Article 15 German Penal Code.

⁹⁸ See AT Cramer and G. Heine, in A. Schoenke, H. Schroeder et al. *Strafgesetzbuch:Kommentar* (27th edn., Munich: C.H. Beck, 2006), at 277 64-87b as cited by K. Hamdorf, ‘The Concept of a JCE and Domestic Modes of Liability for Parties to a Crime,’ *5 Journal of International Criminal Justice*, 2007, at 214.

⁹⁹ W. Schabas, 2010, at 475.

¹⁰⁰ *Ibid*, at 475.

¹⁰¹ G. Fletcher, 1978, at 656-656.

¹⁰² *Ibid*.

¹⁰³ M. Dubber, at 982.

¹⁰⁴ C. Roxin, *Täterschaft und Tatherrschaft*, 6th ed, 1994, at 34. The ICC adopted Roxin’s approach to criminal participation. See Chapter III.

¹⁰⁵ *Ibid*, at 51.

between perpetrators and accessories.¹⁰⁶ The case of *Stashynsky*, decided by the German Supreme Court (*Bundesgerichtshof* or BGH) in 1962,¹⁰⁷ demonstrates the weakness of the subjective approach. Stashynsky was a KGB agent who in 1957 committed two murders of exiled Soviet dissidents, on the direct orders of the head of the KGB. In 1961, he fled to West Berlin, where he was apprehended and tried for murder. The court sentenced Stashynsky to eight years imprisonment for merely aiding the head of the KGB, who was perceived as the real principal. This ruling of the court was widely criticized for being too lenient. This outcome was a consequence of the court's result-oriented approach.¹⁰⁸ Roxin's theory of a perpetrator who 'dominates' the execution of the criminal offence - in cases when a person does the relevant act himself, jointly with others, or uses another person as his tool - supplied the BGH with a much longed-for ingredient of objectivity. The legislature welcomed this approach by incorporating it in Article 25 of the German Penal Code, in the late 1960's.¹⁰⁹

The other case to inspire Roxin to develop his theory of crimes as part of organized structures was the *Eichmann* case, decided by the district court of Jerusalem in the early 1960's.¹¹⁰ According to Roxin, it is in fact the structure of an apparatus that continues to operate - unconcerned with the loss of any particular individual - that distinguishes the behaviour of those behind the scenes from instigation and turns it into perpetration.¹¹¹ The Jerusalem court first established Eichmann's responsibility as an accomplice to the general crime of the 'Final Solution'.¹¹² However, the court did not content itself with finding the traditional liability mode in respect of Eichmann's deeds. It held that the specific nature of crimes involved warrants specific approach to responsibility:¹¹³

In such an enormous and complicated crime as the one we are now considering, wherein many people participated at various levels and in various modes of activity - the planners, the organizers and those executing the acts, according to their various ranks - there is not much point in using the ordinary concepts of counselling and soliciting to commit a crime. For these crimes were committed en masse, not only in regard to the number of the victims, but also in regard to the numbers of those who perpetrated the crime, and the extent to which any one of the many criminals were close to, or remote from, the actual killer of the victim, means nothing as far as the measure of his responsibility is concerned. On the contrary, in general, the degree of responsibility increases as we draw further away from the

¹⁰⁶ T. Weigend, at 94-95; M. Bohlander, *Principles of German criminal law*, Hart Publishing, 2009, at 162.

¹⁰⁷ BGHSt18, 87 as cited by Bohlander, 2009, at 162.

¹⁰⁸ M. Bohlander, 2009, at 162.

¹⁰⁹ T. Weigend, at 95.

¹¹⁰ C. Roxin, 1963, at 193. See also Judgment against *Adolf Eichmann*, Case 40/61.

¹¹¹ C. Roxin, 1963, at 200.

¹¹² Judgment against *Adolf Eichmann*, Case 40/61, no. 195.

¹¹³ *Ibid*, no. 197.

man who uses the fatal instrument with his own hands and reach the higher ranks of command, the "counsellors" in the language of our Law.

Thus, Eichmann was treated not just as a mere implementer but also, with regard to his subordinates, as the one giving orders.¹¹⁴ This complex interrelationship between the participants in the crime inspired Roxin's theory of perpetration through an organized power structure.

The doctrine of *Tatherrschaft* serves to differentiate between co-perpetrators and accomplices. As long as the participant is willing to influence the actual mode of commission and offers a contribution that has an impact on how the common agreement is shaped or enforced, he will be classified as a co-perpetrator.¹¹⁵ The common plan is the foundation of the cooperation of the participants. Each of them must perceive his actions as furthering those of others and theirs as furthering his.¹¹⁶ The court infers the intent from the objective participation in the execution of the crime and the interest of the individual members of the venture in its outcome.¹¹⁷

The effect of establishing the existence of co-perpetration is the attribution of the offences committed by each co-perpetrator to all other perpetrators in this joint venture.¹¹⁸ The mutual attribution has limits, however. The rule is that if one of the participants lacks a certain quality necessary for the particular offence or lacks the necessary *mens rea*,¹¹⁹ he cannot be a joint principal of that offence. In this respect, the BGH has held that co-perpetrators will be liable for any acts that "lie within a range of typical offences that one can expect to be committed given the circumstances of the case, namely if these (acts) will reach the aim of the other co-perpetrator to a similar extent, e.g. if one steals goods instead of money, if the goods can easily be sold."¹²⁰ The deviation of a joint principal from a common plan cannot be attributed to the other participants.¹²¹ The BGH refused to infer intent in the form of *dolus eventualis* in the cases when crimes committed by the co-perpetrator were outside the agreed plan. For example, A and B decide to rob a bank, and B carries a gun without telling A. A and B have to run from the police and B shoots a policeman C, who dies. In this case, A will not be liable for murder.¹²²

¹¹⁴ C. Roxin, 1963, at 200.

¹¹⁵ M. Bohlander, 2009, at 162.

¹¹⁶ BGH NSTZ 1988, 406 as cited by M. Bohlander, 2009, at 163.

¹¹⁷ BGHSt 47, 383; BGH StV 2003, 279; BHG NSTZ-RR 2004, 40 as cited by M. Bohlander, 2009, at 164.

¹¹⁸ M. Bohlander, 2009, at 163.

¹¹⁹ M. Bohlander, 2009, at 165.

¹²⁰ BGH, Monatsschrift fuer Deutsches Recht (1966) 197 as cited by K. Hamdorf, at 216.

¹²¹ BGH NSTZ 1997, 82 as cited by Bohlander, at 165.

¹²² See *Reichsgericht* RGSt 44, 321 as cited by Hamdorf at 215.

German law recognizes two types of secondary participation: instigating and facilitating, which both have to be intentional (at a minimum in the form of *dolus eventualis*)¹²³ and dependent on an unlawful act committed by the principal. The instigator has to cause another to commit an unlawful act.¹²⁴ The causal link is established based on whether the instigator's acts significantly increase the likelihood of the principal committing the offence.¹²⁵ With regard to the aider, the standard linking the act of the aider and the offence is lower. The German courts are of the view that it is sufficient that the aider furthers the actions of the principal.¹²⁶ There is a limited dependence of the accessory liability on the principal offence: the principal need not be criminally liable for the act. It is sufficient that the act is unlawful.¹²⁷ This peculiarity makes the line between indirect perpetration and accessory liability murky. The determination of the appropriate liability mode depends on the degree of control that the instigator or aider exercise over the actions of the principal.¹²⁸

Finally, German law recognizes some kind of criminal conspiracy: "a person who declares his willingness or who accepts the offer of another or who agrees with another to commit or abet the commission of a felony shall be liable under the same terms."¹²⁹ Withdrawal from the plan or an earnest attempt to prevent the completion of the crime suffices to exempt such a participant from liability.¹³⁰

iii. Complicity in France

French criminal law, unlike civil law, is not strongly influenced by Roman law. Its structure has developed from medieval roots in royal law.¹³¹ The first French Penal Code was adopted in 1791. It borrowed heavily from the ideas of Enlightenment, and in particular, the ideas of Cesare Beccaria.¹³² The second Penal Code came into existence in 1810 and was commonly referred to as the 'Napoleonic Code'. In 1992, France adopted its third Penal Code after unsuccessful attempts to reform the Napoleonic Code.¹³³ French

¹²³ BGH NJW 1998, 2835 as cited by Bohlander, at 169.

¹²⁴ 'Causing' here may be understood in a broader sense of the word. See Chapter II.2.ii *supra* for the discussion on causation.

¹²⁵ M. Bohlander, 2009, at 168-169.

¹²⁶ RGSt 58, 113; BGHSt2, 130; BGH NJW 2001, 2410 as cited by Bohlander, at 172.

¹²⁷ M. Bohlander, 2009, at 168.

¹²⁸ C. Roxin, 1963, at 196. For a critical perspective on the degree of control see Chapter III *supra* and T. Weigend, at 100.

¹²⁹ StGB, Articles 30(2) and 31.

¹³⁰ *Ibid.*

¹³¹ J. Bell, S. Boyron, S. Whittaker (eds), *Principles of French law*, Oxford University Press, 2008, at 201.

¹³² G. A. Bermann and E. Picard, *Introduction to French Law*, Kluwer Law International, 2008, at 104.

¹³³ M. Dubber and K. Heller, at 5.

criminal law relies heavily on three basic principles: the principle of legality requiring codification of conduct that is subject to criminal law; the requirement of a 'material' criminal act, as opposed to a mere intention; and the 'mental responsibility' of the actor - the law does not punish individuals lacking mental capacity.¹³⁴

The French Penal Code recognizes only two participants in crime: perpetrator (*auteur*) and accomplice (*complice*). The perpetrator commits the prohibited act. The accomplice either (1) facilitates its preparation or commission by aid and assistance, or (2) incites the commission of an offence by means of a gift, promise, threat, order, or an abuse of authority or powers, or gives the directions to commit it.¹³⁵ In French law, the instigator is an accomplice, and he does not occupy a separate place in the system of crime participants.¹³⁶

Criminal liability of accomplices presupposes that the underlying act is objectively punishable. French authors refer to this phenomenon as 'borrowed criminality' (*emprunt de criminalité*). This means that the accomplice's actions derive their criminality from the existence of the principle offence.¹³⁷ For example, in *Schieb and Benamar*, Schieb tried to procure Benamar to murder Schieb's wife. Schieb paid Benamar sums of money and supplied him with a gun. Benamar took the money and the gun, but then told a friend who informed the police. Benamar claimed he never intended to kill Schieb's wife. The court acquitted both defendants of attempted murder, finding that Schieb cannot be an accomplice since there was no attempt.¹³⁸ Under French law, incitement is addressed to a specific person with the view of inducing him to execute a particular offence; and the advice is followed by an effect. Consequently, Schieb was not held liable for incitement where Benamar had not committed any acts in furtherance of the offence.¹³⁹ Complicity exists, on the other hand, in cases when the perpetrator cannot be punished because he is insane or minor. However it does not exist when there is a legitimate reason why the perpetrator did not commit an offence, why, in other words, the perpetrator's conduct is excused by law.¹⁴⁰

In principle, the act of complicity must be positive and intentional and occur at the time of the offence. However, Bell noted that the courts do not follow the strict approach when it comes labelling certain act as a 'positive act' or determining the time when complicity occurred.¹⁴¹ For example, in *Coutant*

¹³⁴ G. A. Bermann, at 106.

¹³⁵ Articles 121.4-121.7 French Penal Code.

¹³⁶ G. A. Bermann, at 118.

¹³⁷ G. A. Bermann, at 118; Bell, at 230.

¹³⁸ Crim. 25 Oct. 1962, D 1963.221 as cited by Bell, at 231- 233.

¹³⁹ J. Bell et al, at 233.

¹⁴⁰ J. Bell et al, at 231.

¹⁴¹ J. Bell et al, at 232.

the court found that the failure of a company's board member to report fraudulent actions of the chairman amounts to active collusion and renders the board member complicit.¹⁴²

The *mens rea* of complicity under French consists of the knowledge of the intended crime and the intention to assist (meaning there cannot be aiding and abetting negligent offences). In *Paemelabre*, the court failed to infer complicity in the unlawful slaughter of animals solely based on the fact that a man drove a truck containing pigs to a place where they were slaughtered and afterwards removed the dead animals' carcasses.¹⁴³

The performance of the *actus reus* of the offence is the line that divides co-perpetrators and accomplices under French law. The co-perpetrators perform the actions, which constitute an offence, while the accomplices carry out ancillary acts with the view of assisting the offence.¹⁴⁴ This distinction does not however lead to differentiated punishment. The accomplice is punished as a primary actor.¹⁴⁵

Complicity in French law allows the attaching of responsibility in the situations where a group of people is involved in the commission of the offence but where it is not possible to identify the primary offender. Under this scenario, it is possible to convict all as accomplices to the most serious offence committed by the member of the group without identifying the exact perpetrator.¹⁴⁶

Complicity under the French Penal Code is a liability mode and not an offence. French law is also equipped with specific substantive offences tackling participation by several accused. These offences are called collective offences (*infractions collectives*), and they involve a plurality of persons.¹⁴⁷ Examples of such offences are 'plotting to execute an attack' (*complot*) or 'criminal association' (*association de malfaiteurs*) established with a view to the preparation for the crime. In both cases, the steps need to be taken in furtherance of the agreement.¹⁴⁸ The concept of the *association de malfaiteurs* served as the inspiration in devising the concept of criminal organizations at Nuremberg.¹⁴⁹ French law as recently amended penalizes 'participation in a group formed or an understanding reached for the perpetration of one of the felonies specified in Articles 211-1, 212-1 and 212-2 (genocide, crimes

¹⁴² Crim. 29 Jan 1936, DH 1936.134 as cited by J. Bell et al, at 215.

¹⁴³ Crim. 1 Dec. 1944, D 1945.162 as cited by J. Bell et al, at 232.

¹⁴⁴ J. Bell et al, at 233.

¹⁴⁵ Article 121.6 French Penal Code.

¹⁴⁶ Crim. 19 May 1978, D 1980.3 as cited by J. Bell et al, at 233.

¹⁴⁷ G. A. Bermann, at 118.

¹⁴⁸ Articles 412-2 and 450-1 French Penal Code.

¹⁴⁹ Articles 265-268. See Sliedregt, 2003, at 105.

against humanity and war crimes), when evidenced by one or more overt acts.¹⁵⁰

iv. Complicity in England

Despite efforts at codification the criminal law of England still relies heavily on the common law and judicial decisions, especially when it comes to the general part of criminal law.¹⁵¹

The principle of individual autonomy underlies the concept of complicity as a form of responsibility in English law. Ashworth clarifies that at the heart of the principle of autonomy lies the idea for respect of individuals as rational, choosing persons¹⁵² who are “sovereigns of their own actions”.¹⁵³ Consequently, the decision to support another in the commission of the crime and the realization of this decision in the form of assisting is culpable and deserves a criminal sanction.¹⁵⁴ This is in line with the derivative view of complicity adopted in English law.¹⁵⁵ It may seem that complicity casts its net too wide by not requiring that the act of the accomplice caused the principal to act. Ashworth however points out that the loose conduct requirements of complicity are narrowed by more stringent fault requirements: a small act of assistance may suffice but only if done with intent to assist or encourage the commission of the principal’s crime.¹⁵⁶

English law recognizes two types of parties to a crime: principals and accomplices.¹⁵⁷ The principal under English law is someone whose act is the most immediate cause of the *actus reus*.¹⁵⁸ English law allows the holding of two or more persons as co-principals (co-perpetrators) if each of them satisfies some part of the conduct element of substantive crime, and if each of them has the necessary mental element.¹⁵⁹ If two persons attack the third person, and the combined effect of their blows kills the victim, they are both guilty of murder as co-perpetrators because they both caused the *actus*

¹⁵⁰ Article 212-3, § 1 French Penal Code as cited by E. Van Sliedregt, at 105.

¹⁵¹ A. Ashworth, ‘UK Criminal Law,’ *The Handbook of Comparative Criminal Law*, M. Dubber and K. Heller (ed.), Stanford Law Books, 2011, at 532.

¹⁵² A. Ashworth, 1995, at 83.

¹⁵³ S. H. Kadish, 1985, at 330.

¹⁵⁴ A. Ashworth, 1995, at 409.

¹⁵⁵ K.J.M. Smith, at 3.

¹⁵⁶ A. Ashworth, 1995, at 409. K.J.M. Smith noted in the same vein “the more limited the causal requirement the stronger the claim for a closer connection between the accessory’s mental state and the principal’s action. [...] because an accessory, particularly the one not present at the commission of the offence, is one stage removed or detached from active criminality, the opportunity and ability to reflect on the consequences of actions is liable to be greater.” K.J.M. Smith, at 153-154.

¹⁵⁷ See generally J. C. Smith and B. Hogan, chapter 8.

¹⁵⁸ J. C. Smith and B. Hogan, at 142.

¹⁵⁹ A. Ashworth, 1995, at 411.

reus.¹⁶⁰ Indirect perpetration manifests itself in English law in the doctrine of ‘innocent agency’. An innocent agent brings about the *actus reus* without being a participant in the crime due to infancy or insanity. The indirect perpetrator will be the one whose act is the most immediate cause of the innocent agent’s act.¹⁶¹

Unlike civil law, the common law does not maintain a distinction between different types of accessories.¹⁶² The accomplice in English law (sometimes called ‘an accessory’ or a secondary party) is anyone who aids, abets, counsels or procures a principal.¹⁶³ Accessories in English law are punished as a principal offender in accordance with the principle of equal punishment.¹⁶⁴

‘Procuring’ implies bringing about an offence, such as by deceiving another so that the other commits an offence.¹⁶⁵ This is the only term of the four that implies some form of causal relationship between the act of procurement and the execution of the offence.¹⁶⁶ The remaining three categories do not require such a causal connection.¹⁶⁷ The word ‘counsels’ presupposes that the accused is responsible if he *persuades* the principal to commit an offence, not by threats or bribes, but by pointing to the advantages of the proposed course of action or by giving advice to the principal offender.¹⁶⁸ Abetting involves some encouragement of the principal to commit the offence.¹⁶⁹ There must be some connection between abetting or counselling and the execution of the crime, but it does not have to be causal in a sense of being *conditio sine qua non* for the crime.¹⁷⁰

Abetting and counselling may require a meeting of minds of secondary party and principal. In contrast, aiding does not seem to require either causal link or the agreement with the primary perpetrator. Aiding implies intentionally providing means and opportunity for the principal to act.¹⁷¹ Encouragement, which is distinct from providing an opportunity, may also amount to ‘aiding’.

¹⁶⁰ *Macklin and Murphy’s Case* (1838) 2 Lew CC 225.

¹⁶¹ J. C. Smith and B. Hogan, at 142.

¹⁶² G. Fletcher, 1978, at 644.

¹⁶³ A. Ashworth, 1995, at 410. See also Accessories and Abettors Act 1861, as amended by s.65(4) Criminal Law Act 1977.

¹⁶⁴ Accessories and Abettors Act 1861. See also K.J.M. Smith, 73; H.L.A. Hart and T. Honoré, at 379.

¹⁶⁵ A. Ashworth, 2011, at 539.

¹⁶⁶ J.C. Smith and B. Hogan, at 145; A. Ashworth, 1995, at 422.

¹⁶⁷ The term ‘causal connection’ is used in this section in the strict sense of the word, implying a ‘but-for’ relationship between the conduct of the accused and the harm that it caused. For more discussion on the broad notion of causation in complicity, including the position of English law, see Chapter II.2.ii *supra*.

¹⁶⁸ H. L. A. Hart and T. Honoré, at 380.

¹⁶⁹ A. Ashworth, 1995, at 414.

¹⁷⁰ *Wilcox v. Jeffery* [1951] 1 All ER 464 as cited by Ashworth, 1995, at 416.

¹⁷¹ *R. v. Laverty*, [1970] 3 All ER 432 as cited in H. L. A. Hart and T. Honoré, at 385.

For example, the presence of the accused at the time when the offence is committed may have an encouraging effect on the principal.¹⁷² Unlike abetting or counselling, assistance may be unwanted and unexpected.¹⁷³

Complicity requires proof of intention, not purpose; and *dolus eventualis* (or ‘adverted recklessness’) may be sufficient.¹⁷⁴ The test of specificity of accessorial knowledge is whether the offence committed was within the contemplated range of offences, if not, then was it of the same type as any of those offences contemplated.¹⁷⁵

The distinction between the co-principals and accessories is often a subtle one.¹⁷⁶ Presumably it is based on the causality principle and common agreement. If the offender causes the *actus reus* of the offence and was in agreement with the other co-principals, he is deemed to be a perpetrator. If the acts of the accused amount to simply assisting or encouraging the commission of the crime, he is the secondary party.¹⁷⁷

From the perspective of English law, Ashworth notes that most complicity cases involve some kind of agreement. However, historically it is unclear whether common purpose, or joint enterprise, amounts to an additional form of complicity liability (beyond aiding, abetting, counselling or procuring), or if it is simply attached to each of them. The English courts tend to use the doctrine to address the question of unexpected turn of events.¹⁷⁸ The courts, relying on the *Chan Wing-Siu* case,¹⁷⁹ seem to hold the member of the joint enterprise responsible if the jury is satisfied that the defendant contemplated that there was a real possibility that one member of the joint enterprise might go beyond the agreement. Marianne Giles argued that the basis of liability for secondary participation, developed in *Chan Wing-Siu*, is premised on a defendant's realisation of the risk that the principal will act with the required *mens rea*, and his acceptance of that risk. Giles suggests that such liability follows from the ‘principle of implied authorization’.¹⁸⁰ Consequently, the basis of liability is *subjective* foresight of a significant possibility of the conduct. This approach appears to be consistent with extended joint criminal

¹⁷² *R v. Coney* (1882) 8 QBD 534 as cited in H. L. A. Hart and T. Honoré, at 386.

¹⁷³ J. C. Smith and B. Hogan, 2002, at 147.

¹⁷⁴ *Blakeley and Sutton v Chief Constable of West Mercia* [1991] R.T.R. 405 as cited by A. Ashworth, 2011, at 539.

¹⁷⁵ K.J.M. Smith, at 167-169 referring to *Maxwell v. DPP* [1978] 1 WLR 1350 and *R v. Bainbridge* (1960) 1 QB 129.

¹⁷⁶ J. C. Smith and B. Hogan, at 143.

¹⁷⁷ J. C. Smith and B. Hogan, at 145.

¹⁷⁸ A. Ashworth, 1995, at 429; See also J. C. Smith and B. Hogan, at 162.

¹⁷⁹ *Chan Wing-Siu v. The Queen* (1985) A.C. 168.

¹⁸⁰ M. Giles, ‘Complicity - the problems of joint enterprise’, *Criminal Law Review*, 1990, 383, at 383-393.

enterprise in international criminal law, which emphasizes the risk-taking behaviour on behalf of the accused.

It is worth noting however that English law has changed on this point.¹⁸¹ The test used to be a stricter *objective* test of foreseeability with a strong element of prior agreement or ‘authorization.’¹⁸² This was discussed, for example, in *Anderson and Morris* (1966), where it was decided that “[i]f one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorized act (and) it is for the jury in every case to decide what was done in part of a joint enterprise, or went beyond it and was in fact an act unauthorized by that joint enterprise.”¹⁸³ The doctrine applied by English courts before *Chan Wing-Siu* therefore established liability only for crimes that were expressly ‘authorized’ by the joint enterprise. This form of liability resembles the first form of the joint criminal enterprise rather than the extended form.

v. Complicity in United States

The US criminal law originally started as the ‘common law’ of England as adopted by the American colonies in the eighteenth century but has evolved continuously since.¹⁸⁴ First the courts and, later, the legislature developed criminal law on the state and federal levels. Nowadays almost every state has a criminal code as a primary source of law, while the courts merely interpret it.¹⁸⁵ A large portion of the states introduced or reformed their criminal codes on the basis of the 1962 Model Penal Code, promulgated by the American Law Institute as a part of the major criminal law revision (MPC).¹⁸⁶

The Model Penal Code defines each crime participant:

- A direct perpetrator who personally engages in the proscribed conduct;¹⁸⁷
- An indirect perpetrator who causes an innocent or irresponsible person to engage in the proscribed conduct;¹⁸⁸
- An accomplice who, with the purpose of promoting or facilitating the commission of the offence,

¹⁸¹ E. Van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, TMC Asser Press, 2003. See also K. Hamdorf, at 221.

¹⁸² E. Van Sliedregt, 2003, at 104.

¹⁸³ *Anderson and Morris* (1966) 2 QB 110.

¹⁸⁴ P. H. Robinson, ‘Comparative Summary of American Criminal Law,’ in *The Handbook of Comparative Criminal Law*, M. Dubber and K. Heller (ed.), Stanford Law Books, 2011, at 564.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*, at 565.

¹⁸⁷ Model Penal Code Section 2.06(1).

¹⁸⁸ Model Penal Code Section 2.06(2)(a).

- Solicits such other person to commit it;¹⁸⁹
- Aids or agrees or attempts to aid such other person in planning or committing it;¹⁹⁰
- Having a legal duty to prevent the commission of the offense, fails to make proper effort so to do.¹⁹¹

The MPC draws a fundamental distinction between someone who commits an offence ‘by his own conduct’ and someone whose criminal liability derives from “the conduct of another person for which he is legally accountable.”¹⁹² Consequently, the perpetrator satisfies the objective conduct requirement through his own conduct or the conduct of an innocent agent, while the accomplice satisfies the objective element of an offence through the perpetrator’s conduct by facilitating it via solicitation, aiding or failing in a legal duty to prevent the commission of the offence.

From the wording of the Model Penal Code it follows that mere knowledge of the crime is not sufficient to satisfy the fault requirement for complicity; it is essential that they intend to participate in it.¹⁹³ This is not to say that the US courts never applied a lower standard to establish fault. In *Backun v. United States*,¹⁹⁴ the court upheld the seller’s conviction for complicity in the interstate transportation of the stolen merchandise based on his mere knowledge that the goods are stolen and the buyer will go to the other state to sell them. The judge in this case did not require that the seller “had a stake in the outcome of the case” or specifically desired the buyer to leave the state. A different approach was adopted in *United States v. Peoni*.¹⁹⁵ The court held that the complicity doctrine requires the defendant to “in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed.”¹⁹⁶ The Model Penal Code upheld the higher standard of the *Peoni* case, which is now widely accepted as the predominant test for the accomplices’ guilty state of mind in the United States.¹⁹⁷

The conduct requirement for complicity under the Model Penal Code is less stringent than the fault requirement. The accomplice’s assistance need not be

¹⁸⁹ Model Penal Code Section 2.06(2)(c) & (3)(a)(i).

¹⁹⁰ Model Penal Code Section 2.06(2)(c) & (3)(a)(ii).

¹⁹¹ Model Penal Code Section 2.06(2)(c) & (3)(a)(iii).

¹⁹² Model Penal Code Section 2.06(1).

¹⁹³ Model Penal Code Section 2.06(2)(3)(a) provides that an accomplice acts with “the purpose of promoting or facilitating the commission of the offence.” The same standard had been previously confirmed in *U.S. v. Nye & Nissen*, 336 U.S. 613 (1947).

¹⁹⁴ 112 F.2d 635 (4th Cir. 1940).

¹⁹⁵ 100 F.2d 401, 402 (2d Cir. 1938).

¹⁹⁶ *Ibid.*

¹⁹⁷ R. Weisberg, *The Model Penal Code Revisited: Reappraising Complicity*, 4 *Buff. Crim. Law Review*, 2000, at 239.

necessary for the successful completion of the offence, nor need it be substantial, the least degree of assistance sufficing.¹⁹⁸ Moral encouragement qualifies as assistance.¹⁹⁹ The accomplice can be prosecuted even though the direct perpetrator has not been prosecuted or convicted, provided the fact of commission of the offence is proven.²⁰⁰ Recent case law has summarized the requirements for complicity as a two prong test: “first, there must be evidence that the person intended to aid or promote the underlying offence, and second, there must be evidence that the person actively participated in the crime by soliciting, aiding, or agreeing to aid the principal.”²⁰¹

All crime participants - accomplices included - are treated as principals for punishment purposes under the Section 2 of Title 18 of the United States Code.²⁰² Consequently, the distinction between crime participants has no impact on the sentence.²⁰³ This is so because the centrepiece of the US system of criminal participation is the principle of individual culpability. According to Dubber, the MPC drafters - that laid the basis for the criminal codes of most states - embraced the peno-correctional vision of criminal law that prioritized deterrent punishments over the proportionate ones. The individual assessment of culpability, i.e. dangerousness of the offender, was central to this approach. Accordingly, what mattered for punishment purposes is the abnormal dangerousness of an individual rather than the way in which he or she was involved in the offence.²⁰⁴ The approach whereby accomplices and principals are punished alike is consistent with the traditional common law, although rooted in a different rationale.²⁰⁵ The case law confirms that the accomplice is subject to the same punishment as the principal.²⁰⁶

¹⁹⁸ *People v. Durham* (1969) 70 Cal.2d 171, 185; *Commonwealth v. Murphy*, 844 A.2d 1228, 1234 (Pa.2004); *Commonwealth v. Gladden*, 665 A.2d 1201, 1209 (Pa.Super.1995).

¹⁹⁹ P. H. Robinson, at 577.

²⁰⁰ Model Penal Code Section 2.06(7).

²⁰¹ *Commonwealth of Pennsylvania v. Rega*, 933 A. 2d 997 (2007);

²⁰² 18 USC § 2 (2012) reads as follows: Principals: (a) [w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal; (b) [w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.” See also, United States Sentencing Commission, Guidelines Manual, §2.X2.1 (Dec. 2012) stating that the offense level for aiding and abetting is the same level as that for the underlying offense.

²⁰³ R. Weisberg, at 225.

²⁰⁴ M. Dubber, at 987-989.

²⁰⁵ *Ibid.*

²⁰⁶ N.J.Super.A.D.2001, 767 A.2d 976, 337 N.J.Super. 493.

In contrast with complicity, which is not a distinct crime but a means way of committing an offence,²⁰⁷ conspiracy exists in both English and American law as a distinct offence, consummated upon entering into the agreement to commit criminal acts. Conspiracy also generates a standard for holding each conspirator complicitous in the crimes of fellow conspirators but unlike complicity, which is a category of accessorial liability, conspiracy functions as a test of what it means to be a co-perpetrator.²⁰⁸ Conspiracy typically requires an agreement between two or more conspirators that at least one of them will commit a substantive offence.²⁰⁹ Modern American codes have adopted a unilateral conspiracy requirement, which permits the conspiracy liability as long as the person agrees with another person, without regard for whether the other person is returning the agreement. An overt act performed in furtherance of the agreement is typically also required to maintain the conviction.²¹⁰

In *Pinkerton v. United States*, the US Supreme Court held that each member of a conspiracy can be liable for substantive offences carried out by co-conspirators in furtherance of the conspiracy, even when there is no evidence of their direct involvement in – or even knowledge of such offences – provided they were “reasonably foreseen as a necessary or natural consequence of the unlawful agreement.”²¹¹ The practical outcome of the *Pinkerton* rule is that conspiratorial complicity destroys the distinction between accomplices and perpetrators since the effect of finding membership in the conspiracy is making the defendant a co-perpetrator of substantive offences committed in furtherance of the conspiracy.²¹²

The form of liability developed in *Pinkerton* strongly resembles the extended form of the joint criminal enterprise as defined in *Tadić*.²¹³ The *Pinkerton* case has been widely criticized both in the US and abroad.²¹⁴ The rule has never been incorporated in the MPC.²¹⁵

vi. Complicity in Italy

The Italian Penal Code of 1930 extends liability to all participants of the criminal offence.²¹⁶ This is in line with the unitary approach to participation

²⁰⁷ *U.S. v. Roan Eagle*, 867 F.2d 436, 445 (8th Cir. 1989); *United States v. Causey*, 835 F.2d 1289, 1291 (9th Cir. 1987); See also R. Weisberg, *The Model Penal Code Revisited: Reappraising Complicity*, *Buff. Crim. Law Review*, No. 4, 2000, at 224.

²⁰⁸ G. Fletcher, 1978, at 646.

²⁰⁹ Section 5.03(1) Model Penal Code.

²¹⁰ P. H. Robinson, at 579-580.

²¹¹ *Pinkerton v. United States* (1946) 328 US 640.

²¹² G. Fletcher, 1978, at 674.

²¹³ E. Van Sliedregt, 2012, at 132.

²¹⁴ H.V.D. Wilt, 2007.

²¹⁵ G. Fletcher, 1978, at 634 et sq.

²¹⁶ A. di Amato, *Criminal Law in Italy*, Wolters Kluwer, 2011, at 109.

in crime discussed above.²¹⁷ The idea is that each form of participation is autonomous and depends on the respective role of each participant. The responsibility is distinguished on the basis of the facts of the case; the difference between the perpetrator and the accomplice is predetermined by objective characteristics of the case.²¹⁸

Article 110 of the Penal Code reads as follows: “When more than one person participates in the same offence, each of them shall be subject to the punishment prescribed, except as provided in the following articles.” The all-encompassing term ‘participation’ (*concorso di persone*) expresses the notion that any involvement whatsoever on the part of an actor in any offence establishes his connection to the crime.²¹⁹ Participation, as envisaged by Article 110 embraces all the acts of the co-participants. Thus, the acts of each co-participant are their own acts, which are attributed to all the others. The latter statement is true only if two conditions are met:

- An objective condition: there must be a causal link between the acts and the criminal result; and
- A subjective condition: each participant must be aware of the final purpose of all the actions; in other words, each participant must deliberately and consciously give his or her contribution – material or intellectual – to the commission of the crime (that is sought by everyone).²²⁰

Thus, for a person to qualify as a party to crime in Italy it is sufficient that the person willingly contributes to the commission of the offence with the general knowledge about the factual situation, and his input constitutes necessary support for carrying out the crime.²²¹ The contribution need not be *conditio sine qua non* for carrying out the crime.²²²

The adoption of the unitary approach to criminal participation does not preclude doctrine and judgments from discussing the ways in which the persons become involved in crimes. The contribution may take different forms. Doctrine distinguishes between (co-) perpetrators (*autore* or *coautori*) and accomplices (*complice*).²²³ The difference between the two lies in the fact that co-perpetrators take the decision to carry out the offence, while accomplices aim at the realization of the decision taken by others. The

²¹⁷ See Section 1.iii. *supra*.

²¹⁸ Diritto Penale, Parte Generale, Quarta Edizione, Giovanni Fiandaca and Ezno Musco (eds), Zanichelli Editore, 2005, at 450.

²¹⁹ U. Sieber, at 13.

²²⁰ CCC, 1st division, n. 8084, 4 July 1987.

²²¹ Codice penale: annotato con la giurisprudenza, a cura di Sergio Beltrani, Raffaele Marino, Rossana Petrucci, Napoli, Simone, 2003 (‘Codice penale annotato’), at 429

²²² CCC, 1st division, n. 8084, 4 July 1987.

²²³ Codice penale annotato, at 429; CCC, 2nd division, n. 5522, 12 May 1992.

accomplice's willingness to carry out an offence manifests itself in instigating (*sollecitare*) co-perpetrators to make a decision to commit a crime or in facilitating the commission of the offence.²²⁴ Nonetheless, regardless of the form of the contribution, the judge is still required to establish the causal link between the contribution and the offence. The judge must identify the specific way in which the contribution manifested itself.²²⁵

As discussed above, the Italian system is based on a 'monist' or unitary theory of crime, rejecting at the level of attribution of responsibility different degrees of participation, primary and secondary parties, accomplices, etc. This implies that the end result is caused by the combination of the actions of various actors and is imputable to each of co-participants who have contributed to the crime. In principle, the equal treatment of the crime participants leads to their equal punishment. Nonetheless, Italian penal law found some way to adjust the sentences based on the mode of participation using the provisions on the mitigating and aggravating circumstances.²²⁶ For example, Article 112 Italian Penal Code allows an increase in penalty if the number of offenders contributing to the crime is more than five or for those who exercised authority, direction and supervision that led others to commit the crime. Similarly, Article 114 Italian Penal Code provides for the decrease in a sentence in cases of minimal contribution to the commission of the offence.

As a general rule, Italian penal law does not penalize the agreement and incitement to commit a criminal offence if it is never committed.²²⁷ Conspiracies to commit certain crimes constitute an exception to this rule and are punishable as such.²²⁸

vii. Complicity in Russia

The new Russian Penal Code was adopted in 1996 and entered into force on 1 January 1997.²²⁹ It is the fourth Penal Code in the history of Russia following the Penal Codes of 1922, 1926 and 1960. The new Penal Code represents a progressive legislative development and is aimed at abandoning the ideological overtones that characterised the Penal Codes of the Soviet era. The 1996 Penal Code does however retain the quadripartite approach to offence featuring the four categories - the subject of the offence, the object of

²²⁴ Ibid.

²²⁵ CCC, Sezioni Unite, n. 45276, 24 November 2003.

²²⁶ Codice penale annotato, at 430.

²²⁷ Article 115 Italian Penal Code.

²²⁸ See, for example, Article 304 Italian Penal Code that punishes conspiracies to commit crimes against the State.

²²⁹ Article 33(2) Russian Penal Code.

the offence, the subjective side of liability, and the objective side of liability - typical of Communist legal theory.²³⁰

The Penal Code recognizes the following types of crime participants:²³¹

- A perpetrator
 - A primary perpetrator ‘directly or ‘at first hand’ commits the criminal act;
 - A co-perpetrator ‘directly’ or ‘at first hand’ participates in the commission of the offence together with other perpetrators;
 - An indirect perpetrator is “the person who committed the offence by using other persons, not subject to criminal responsibility due to their age, insanity or other factors;”²³²
- An organizer is someone who “organized the crime or directed its execution, as well as the person who created an organized group or criminal organization, or supervised them;”²³³
- An instigator is “a person who induced another to commit a crime through persuasion, bribery, threat or any other means;”²³⁴
- An aider is “a person who assisted in the commission of the offence by supplying counsel, directions, information or the means for the commission”.²³⁵

The Penal Code labels all modes of participation listed above as ‘complicity’. However, a more accurate translation of this umbrella term would be ‘co-participation’ (*souchastije*). The commentaries to the Penal Code discuss the ‘subjective’ and the ‘objective’ features of co-participation.²³⁶ The objective side of co-participation implies that two or more persons take part in the commission of the offence and their acts are complementary of each other and cause a certain effect to occur. The subjective side of co-participation is intent in the form of *dolus directus* (direct intent) or *dolus eventualis* (indirect intent). The co-participants need to be ‘subjects’ of the offence, namely sane individuals who have reached the age of maturity.²³⁷ There exist two forms of co-participation –simple co-participation involves co-perpetration, while

²³⁰ See Section 1.iii *supra*.

²³¹ Article 33 Russian Penal Code.

²³² Article 33(2) Russian Penal Code.

²³³ Article 33(4) Russian Penal Code.

²³⁴ Article 33(4) Russian Penal Code.

²³⁵ Article 33(5) Russian Penal Code.

²³⁶ Commentary on Article 32 Russian Penal Code in *Kommentarii k Ugolovnomu Kodeksu Rossii*, Chekalin (ed) (2006); *Kommentarii k Ugolovnomu Kodeksu Rossii*, Gromov (ed) (2007).

²³⁷ *Ibid*.

complex co-participation implies different roles assigned to different actors.²³⁸

The core difference between perpetratorship and other modes of criminal involvement lies in that the (co-)perpetrator (*soispolnitel*) always performs the objective side of the offence or a part thereof, whereas none of the other crime participants perform the objective side of the offence.²³⁹ This line is not always clear-cut, especially in the complex crimes. For example, in the case of *D.* the Supreme Court had to qualify the contribution of *D.* to the theft. *D.* – on the basis on the prior agreement - brought other crime participants to the flat, broke the door of the flat and, later, disposed of the stolen goods. The Court decided that the role of *D.* in the theft is significant enough to render him a co-perpetrator and not a mere aider.²⁴⁰

In addition to aiding and instigating – the traditional modes of accessory liability found in many legal systems around the world – Russian law recognizes an additional form of participation in crime, namely, ‘organizing’. The commentary to the Penal Code considers organizing the most dangerous form of co-participation in crime because the organizer is usually the leader who coordinates all other participants and represents the ‘soul of the group’.²⁴¹ Organizers are sometimes wrongly convicted as perpetrators, as in the case of *N. and T.* In this case, the two accused agreed to murder *N.*’s wife and hired *M.* for that. The accused - *N.* and *T.* - brought the victim to the forest, where *M.* strangled her. *N.* and *T.* were first convicted as co-perpetrators but the Supreme court later ruled that *N.* and *T.* are organizers and not perpetrators as they did not perform the objective side, or *actus reus*, of the offence.²⁴²

Instigating is somewhat similar activity to organizing a crime. The difference between the two lies in that an instigator induces the offender-to-be to commit a crime, while the organizer ‘works’ with the actual perpetrators.²⁴³ An instigator always aims at convincing a person to commit a specific crime (not any crime) and there is always a causal link between the acts of the

²³⁸ Commentary on Article 32 Russian Penal Code in *Kommentarii k Ugolovnomu Kodeksu Rossii*, Chekalin (ed) (2006);

²³⁹ Ruling of the Plenum of the Supreme Court of Russia No. 1, dated 27 January 1999, clause 10.

²⁴⁰ Bulletin of the Supreme Court of Russia, 1997, No. 11, at 20.

²⁴¹ Commentary on Article 33 Russian Penal Code in *Kommentarii k Ugolovnomu Kodeksu Rossii*, Lebedev (ed) (2005).

²⁴² Bulletin of the Supreme Court of Russia, 1997, No. 4, at 14.

²⁴³ Commentary on Article 33 Russian Penal Code in *Kommentarii k Ugolovnomu Kodeksu Rossii*, Chekalin (ed) (2006);

instigator and the crime committed. The law requires the same causal link between the aider's acts and the result.²⁴⁴

Instigators and organizers are considered more dangerous than aiders; hence the latter category is usually punished less severely.²⁴⁵ However, there is no explicit provision in the Penal Code reducing the penalty for aiders. The principle is that each participant is punished in accordance with the level of his contribution, taking into account the intensity of his criminal activities that were aimed at achieving a common criminal result.²⁴⁶

Russian law is similar to German law in that it punishes conspiracy only in the form of an agreement to commit a felony (and not in relation to minor offences). The commission of an offence with a prior agreement is also an aggravating factor at sentencing.²⁴⁷ Under Russian law, the co-perpetrators are not liable for the so-called 'excess of the perpetrator', when the principal commits crimes not intended by other members.²⁴⁸

viii. Complicity in India

Macaulay's Indian Penal Code of 1860 draws its inspiration from three sources: English criminal law, the French Penal Code, and Edward Livingston's Benthamite draft Louisiana Penal Code.²⁴⁹ The Indian Penal Code draws a crucial distinction between a person committing an offence and a person who 'abets the doing of a thing'. The entire Chapter V of the Indian Penal Code is devoted to abetment. The Indian Penal Code provides for three types of abettors:²⁵⁰

- An instigator- a person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done;
- A conspirator – a person who engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy;
- An aider – a person who, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof.

²⁴⁴ Commentary on Article 33 Russian Penal Code *Kommentarii k Ugolovnomu Kodeksu Rossii*, Lebedev (ed) (2005).

²⁴⁵ Ibid, Commentary on Article 34.

²⁴⁶ Ibid.

²⁴⁷ Articles 30(2), 35(7) Russian Penal Code.

²⁴⁸ Article 36 Russian Penal Code.

²⁴⁹ M. Dubber and K. Heller, at 6.

²⁵⁰ Section 107 Indian Penal Code.

Indian law treats abetment as an offence in its own right that in principle is not dependent on the person actually committing an offence.²⁵¹ While this holds true for the cases of abetment by instigation and abetment by conspiracy, the courts have held that aiding requires that the act aided was committed.²⁵²

The *actus reus* of abetment by instigation amounts to provoking, inciting, urging on or bringing about by persuasion the commission of the crime. It is essential that the instigation relates to a specific act. The fact that the husband had mistreated his wife, who later committed a suicide, is not enough to constitute an abetment of suicide.²⁵³ There must be proof of direct or indirect acts of incitement leading to the commission of a particular offence.²⁵⁴ The *actus reus* of abetment by conspiracy entails two parts – engaging in the conspiracy and an illegal act or omission following from such conspiracy. Abetting by aiding involves facilitating the commission of the offence. Mere presence near the scene of the crime is not sufficient to attract liability of the aider.²⁵⁵

With regard to the *mens rea*, the abettor must have intended that the actual perpetrator carry out the conduct abetted, and must have known that such conduct amounted to a crime.²⁵⁶ ‘Intention’ in these circumstances seems to be interpreted broadly to incorporate knowledge - the Commentary on the Indian Penal Code provides that there is no abetment without knowledge *or* intention.²⁵⁷ The mere giving of aid without knowing that the offence is being committed does not amount to intentional aiding.²⁵⁸ For example, it is essential to prove that the accused knew that the actual murderer intended to commit the murder – mere presence of a person while another is committing the offence is not sufficient.²⁵⁹ What is clear is that mere negligence on the part a person who facilitated the commission of an offence by another is not abetment.²⁶⁰ The law does not require that the actual perpetrator has the

²⁵¹ Explanation 2 to Article 108 Indian Penal Code, Stanley Yeo, ‘Comparative Summary of Indian Criminal Law’, in *The Handbook of Comparative Criminal Law*, M. Dubber and K. Heller (ed.), Stanford Law Books, 2011, at 296.

²⁵² *Jamuna Singh v State of Bihar*, AIR 1967SC 553.

²⁵³ *Kishori Lal v. State of M.A.T* AIR 1999 SCW 1115; *Sohan Raj Sharma v. State of Haryana* AIR 2007 SCW 1464.

²⁵⁴ *Ranganayaki v. State by Inspector of Police* AIR 2003 SC 1505.

²⁵⁵ *Harji v. State of Rajasthan* 1978 Raj LW 1.

²⁵⁶ *Mohd Jamal v Emperor* AIR 1930 Sind 64.

²⁵⁷ *Law of Crimes: Exhaustive Commentary on Indian Penal Code, 1860*, (‘Commentary on the Indian Penal Code’), Justice V.V. Raghavan (eds), 5th ed, 1999, Vol 1 (Secs. 1 to 300) citing *Mahomad Janab*, AIR 1930 Sind 64 : 30 Cr LJ 1077, at 269.

²⁵⁸ *Ram Nath*, 26 Cr LJ 362 : AIR 1925 All 230 as cited Commentary on the Indian Penal Code, at 273.

²⁵⁹ In re, *Nenur Ram Reddi*, 17 Cr LJ 175 : AIR 1917 Mad 351 as cited by the Commentary on the Indian Penal Code, at 269.

²⁶⁰ Commentary on the Indian Penal Code, at 272.

requisite intent or state of mind for the offence. The direct perpetrator can be innocent.²⁶¹

The distinction between abettors and principals does not affect the punishment – both those who are deemed to have committed the offence and those who abetted are punished for the offence actually committed.²⁶²

Abettors are liable for the result, namely for the effect that occurred as an outcome of the abetment regardless of the abettor's intention provided he was aware of the likelihood of causing the result by his actions.²⁶³ By the same token, the abettor is liable for the act done, even if it is different from what he intended, provided that the act done was a probable consequence of the abetment.²⁶⁴ In this regard, the Indian Penal Code uses the example of the child who is instigated to put poison in the food of one person but accidentally gives the poison to another person. The instigator is nevertheless liable.²⁶⁵

ix. Complicity in China

Criminal law has always been an important branch of law in the Chinese legal system.²⁶⁶ Historically, criminal law was dominant in China because it was used as the instrument of the ruling class.²⁶⁷ Nonetheless, except for several discrete regulations, there had never been a penal code in China before the commencement of the legal reconstruction following the death of Mao Zedong. The Criminal Law of the People's Republic of China ('PRC') was adopted 1979 and was one of the first laws enacted as a part of the legal reconstruction.²⁶⁸

Chinese criminal law resembles Soviet law and adopts the quadripartite framework of thinking about the offence.²⁶⁹ The subject is the person who is capable of bearing criminal responsibility; the subjective aspect is that crimes must be committed intentionally, unless otherwise provided by law; the objective aspect includes an act of an offence, a harmful consequence and causation between them; finally, the object amounts to the social values violated by the offence.²⁷⁰

²⁶¹ Explanation 3 to Article 108 Indian Penal Code.

²⁶² Section 109 Indian Penal Code.

²⁶³ Section 113 Indian Penal Code.

²⁶⁴ Section 111 Indian Penal Code.

²⁶⁵ Ibid.

²⁶⁶ J. Chen, *Chinese Law: Towards an Understanding of Chinese Law, Its Nature and Development*, Kluwer Law International, 1999, at 167.

²⁶⁷ W. Chenguang and Z. Xianchu, *Introduction to Chinese Law*, Sweet and Maxwell Asia, 1997, at 107.

²⁶⁸ Ibid, at 108.

²⁶⁹ See Section 1.iii *supra*.

²⁷⁰ W. Chenguang and Z. Xianchu, at 110 -114.

Article 25 of the Criminal Law of the PRC stipulates: “[a] joint crime is an intentional crime committed by two or more persons jointly.” The following categories of actors can take part in the joint crime:

- A principal offender is one who organizes and leads a criminal group in conducting criminal activities or plays a principal role in a joint crime. He is responsible for all the crimes he participated in, organized, or directed;²⁷¹
- An accomplice is one who plays a secondary or supplementary role in a joint crime;²⁷²
- Someone who is compelled or induced to participate;²⁷³
- An instigator.²⁷⁴

Knowledge of the circumstances of the offence is a mandatory prerequisite to attract liability of any of the joint participants. If knowledge cannot be proved, the offender is not liable.²⁷⁵ The provisions describing crime participants include indications on the punishment appropriate for this form of participation demonstrating the importance Chinese law places on distinguishing different types of offenders for sentencing purposes. The Criminal Law of the PRC prescribes that accomplices and persons coerced into participating shall either receive a more lenient sentence, in contrast with that received by the principal offender, or be totally exempt from the punishment.²⁷⁶ Instigators are punished in accordance with the role they played in the commission of the crime. An accomplice’s sentence is mitigated when the crime has not been carried out. In cases of instigation of underage persons, the sentence is more severe.²⁷⁷

The case of *Dai Jun and Others* demonstrates the disparity in sentences given to the perpetrators and the accomplice. In *Dai Jun and Others* the three defendants robbed a tourist. The first defendant, recognized by the court as an accomplice, kept watch, while the other two, labelled as joint perpetrators, injured the tourist with one defendant using a stone and the other a knife. The accomplice received three years of imprisonment, while the other two defendants received fifteen years of imprisonment and the death penalty respectively.²⁷⁸

The Criminal Law of the PRC provides for a variety of criminal enterprise, namely the criminal gang, which it defines as “a more or less permanent

²⁷¹ Article 26 Criminal Law of the PRC.

²⁷² Article 27 Criminal Law of the PRC.

²⁷³ Article 28 Criminal Law of the PRC.

²⁷⁴ Article 29 Criminal Law of the PRC.

²⁷⁵ *He Liannu* (1991) China L.R.348.

²⁷⁶ Articles 27 and 28 Criminal Law of the PRC.

²⁷⁷ Article 29 of the Criminal Law of the PRC.

²⁷⁸ *Dai Jun and Others* (1991) 1 China L.R.

crime organization composed of three or more persons for the purpose of jointly committing crimes”.²⁷⁹ The criminal gang does not amount to conspiracy as it does not constitute a separate offence but it does provide for a form of liability similar to that of joint perpetration.²⁸⁰ The leader of the gang bears criminal responsibility for all crimes committed by the gang.

3. Lessons Learned from Comparative Studies

i. Trends in Domestic Legal Systems: In search of a Common Dimension

The analysis of complicity in domestic jurisdictions resulted in a fully-fledged study of all modes of participation recognized by the respective domestic legislation.²⁸¹ This is so because it is difficult to separate complicity from other modes of participation. Semantic peculiarities also frequently impede a clear understanding of the term ‘complicity’ until it is placed in the appropriate context. Fletcher’s view of complicity as falling outside the standard of causation has been adopted as the starting point of the study. Both Fletcher and Kadish emphasize the derivative, or indirect, nature of accomplice liability, falling outside the standard of causation.²⁸² Following the analysis of various jurisdictions, it appears reasonable to suggest that most jurisdictions adopt a broader view of causation in respect of complicity.

The reason for going beyond the paradigm traditionally associated with complicity is that in many jurisdictions the difference between perpetrators and accomplices is often not set in stone. It shifts depending on the level of the offender’s contribution, the type of crime and the general approach to criminal involvement adopted in the respective jurisdiction. At times, the actions of accomplices have a direct effect on the crime. Following the analysis of various national legal orders, it cannot be said that only those offenders whose acts *do not* have a causal connection to the crime are accomplices. Complicity is multidimensional. In many instances, there is some causal connection, especially in cases of incitement or leadership. For example, in German law, an instigator’s acts have to increase the likelihood of the commission of the offence. ‘Procuring’ under English law implies a causal relationship between the act of procurement and the execution of the offence. Italian law provides that there must be some causal link between the acts of any crime participant and the criminal result.

As mentioned in the previous paragraph, the distinction between perpetrators and accomplices fluctuates depending on many factors. In search of a general

²⁷⁹ Article 26 Criminal Law of the PRC.

²⁸⁰ W. Chenguang and Z. Xianchu, at 115 -116.

²⁸¹ This section relies on the findings from section 2 *supra* and Appendix III.

²⁸² See Chapter II.2.ii *supra*.

theory of complicity, this chapter attempted to find some common approaches to the differentiation of crime participants. German law separates perpetrators from accomplices based on the semi-objective doctrine of ‘control over the crime’. Under Russian and French law and the US Model Penal Code, a perpetrator always performs the objective side of the offence or a part thereof, while all other crime participants do not. English law places most weight on causality – the principal is the one who causes the crime to occur. The Italian doctrine holds as co-perpetrators those, who take the decision to carry out the crime, and as the accomplices those, who aim at the realization of the decision taken by others. Norway does not endorse the difference between the attribution of liability and the particular crime.²⁸³ Modes of participation form part of the description of the substantive offences in the Norwegian Penal Code. Indian law treats ‘abetment’ as an offence in its own right, which in principle is not dependent on the person actually committing an offence.

Such a divergence of approaches to criminal participation requires distinguishing the constituent elements of the offence and the constituent elements of the mode of liability used in conjunction with this offence. In cases when the offence is committed solely by the primary perpetrator (the principal), it is not necessary to examine his mode of liability separately because his conduct fully satisfies the actus reus for the defined crime and he acted with the requisite mens rea. In Norway, it would be sufficient to stop at this point also with regard to other modes of participation because the mode of liability is already enshrined in the description of the substantive offence. However, in all other jurisdictions, when discussing various forms of complicity one needs to distinguish the actus reus and mens rea of the substantive crime committed by the principal and *the way* in which the accomplice was involved in this act. Consequently, there exists a separate set of requirements for the various forms of complicity

Thus, one should not be guided purely by the accepted terms and their translations in search of the boundary distinguishing complicity from its counterparts. Linguistics has its limitations, and often the term that is translated from different languages as ‘complicity’ would refer to different types of conduct in the respective jurisdictions. For example, the translation of the Penal Code of Bosnia and Herzegovina refers to joint perpetrators as ‘accomplices’. By the same token, Indonesian law places instigator (‘provoker’) in the category of principals. Consequently, it is necessary to understand the anatomy of each form of criminal involvement accepted in the respective jurisdiction, the constituent elements of this mode of participation,

²⁸³ In Norway, modes of participation are not listed in the general part of the code; rather they form a part of the description of specific offences in the special part of the code. See Appendix III for the summary of the Norwegian criminal participation model.

the general principles of attribution of liability and the mechanisms whereby criminal responsibility attaches to substantive crime.

Despite the disparities evident from the comparison of national orders, there exist elements of criminal participation that are common to most legal systems:

- All of the legal systems reviewed in this study acknowledge complicity in one form or another;
- The functional value of complicity can be reduced to the common formula: complicity determines the circumstances when one party (accessory) by virtue of prior simultaneous activity or association is held criminally responsible for another's (the perpetrator's) wrongful behaviour;²⁸⁴
- Criminal liability of accomplices presupposes that the underlying act is objectively punishable. This does not imply that the primary perpetrator has to be punished by law as he may be exempt from criminal liability due to infancy or insanity, or his actions may be excused;²⁸⁵
- Most legal systems provide for different types of accomplices, even if it is not specially mentioned in their criminal law. Italy, for example, adheres to the 'unitary perpetrator' model, but the doctrine still distinguishes between those who take the decision to commit an offence and those who help in the realization of this offence through facilitation or instigation, which happen to be the most common types of complicity;
- In addition to 'instigator' and 'facilitator' (or 'aider') some legal systems have additional types of accomplices. Russian, Georgian and Italian law recognize an 'organizer' as a menacing figure leading the group. India, Bangladesh and UAE place 'conspirators' in the category of accomplices. China, on the other hand, introduced 'someone coerced to participate' – usually a less culpable offender, compared to all the other crime participants. Polish law punishes those who ordered the execution of the crime or directed it. However, these two participants are placed in the 'perpetrator' category;

²⁸⁴ K.J.M. Smith, at 1-2. Smith noted, "[d]ue to this very general function, the opportunities for extreme complexities have been considerable."

²⁸⁵ France, Germany, Italy, US. Cf. India, Bangladesh.

- 16 out of 31 reviewed jurisdictions provide for sentencing discounts for some types of accomplices. Typically, the law stipulates that only minor contributions qualify for a more lenient sentence. For example, the legislation of Latin American countries provides for a sentencing discount only for those accomplices whose aid was not indispensable for the commission of the crime.²⁸⁶ It is noteworthy that only Chinese law envisages a discretionary sentencing reduction for instigators. Other jurisdictions regard instigation as extremely dangerous.²⁸⁷ Some accomplices are treated even more severely than the perpetrators. For example, Italian law provides for the increase in punishment for those who ‘lead others to cooperate’.
- The most influential factor in determining the sentence of accomplices across jurisdictions appears to be the principle of individual culpability.²⁸⁸ Many penal codes provide for the punishment of each crime participant according to his guilt or for the result he intended, regardless of the outcome;²⁸⁹
- Most legal systems covered in this study envisage legal solutions for cases with multiple accused. Penalizing group participation as substantive crime of conspiracy is one response of the legislature to organized criminality. For example, Albanian law punishes the creation and participation in a criminal organization, terrorist organization, armed gang, or structured criminal group. Other responses to mass crimes include mutual attribution of acts of the accused under the doctrine of co-perpetration (Germany), punishing the person who ‘masterminded’ the offence as principal (Japan), holding individuals accountable as organizers (Russia), attributing all crimes committed by the criminal gang to the leader of this gang (China), increasing the severity of punishment for leaders (Italy).

ii. Applicability of the Findings to International Criminal Law

The summary of the general trends in the previous sub-section shows that, despite the visible disparity of the legal systems in setting the boundary between complicity and perpetration, common grounds as well as a common functional core of complicity can be identified.²⁹⁰ The summary also shows

²⁸⁶ Argentina, Bolivia, Venezuela.

²⁸⁷ Russia, India.

²⁸⁸ Austria, US, Russia, Poland, Georgia.

²⁸⁹ Argentina, UAE, Bulgaria, Bosnia and Herzegovina.

²⁹⁰ *Cf.* Concurring Opinion of Judge Van den Wyngaert, § 17. Judge Van den Wyngaert refers to the “the radical fragmentation of national legal systems when it comes to defining

that there exists more than one solution offered by different legal systems for crimes committed by several accused or by an accused that did not physically perform the *actus reus* of the offence.

International criminal courts and tribunals frequently prefer ‘custom-made’ forms of responsibility in addressing collective criminality. The *ad hoc* tribunals employ the doctrine of the joint criminal enterprise, adapted primarily from the English law, while the ICC reinvented the German law theory of ‘(in)direct co-perpetration’.²⁹¹ It is remarkable that in international law both theories have been extended beyond what they were originally intended to mean in their original domestic jurisdictions. The joint criminal enterprise in English law and the theory co-perpetration based on ‘control over crime’ in German law are both limited to cases where crimes have been envisaged by co-participants.²⁹² International criminal law, arguably, takes a step further and extends liability, pursuant to these specifically crafted doctrines, to cases where the crimes were committed outside of the scope of the agreement as its consequence.²⁹³

This chapter argues that as an alternative to inventing new modes of participation to accommodate international criminality, it is also advisable to look at the traditional forms of criminal responsibility accepted in the majority of legal orders. Looking at a range of domestic legal systems could assist in refining and improving the part of international criminal law that deals with criminal participation. Reliance on the variety of legal orders, as opposed to just one, is valuable for two main reasons – legitimacy and accuracy. First, grounding the doctrine of criminal participation in “general principles of law derived from state laws of legal systems in the world” increases the perceived legitimacy of international criminal law, especially in countries outside the Western Hemisphere. For example, there are currently 121 state parties to the Rome Statute. This fact alone supports a comparative inquiry into different domestic legal systems as it allows adducing principles representative of the legal systems from the various regions of the world. Through this exercise legal doctrine becomes a reliable source of international law pursuant to Article 21(1)(c) of the Rome Statute. Second, the synergy of legal systems allows one to identify the best solutions for a variety of complex legal and factual situations arising from international criminality.

Thus, there is no need to rush into adopting a concept devised by the domestic law of one single country. Perhaps it is wiser to learn what various legal

modes of liability.”

²⁹¹ Chapters II.1 and III.1 *supra*.

²⁹² Sections 2.ii and 2.iv *supra*.

²⁹³ *Ibid*.

systems have to offer, identify some common trends, and utilize the mechanisms that best address the nature of international wrongdoing. Comparing different jurisdictions is already a reasonable exercise in itself because it gives a perspective and a deeper understanding of the rationales behind the doctrine of criminal participation.

There are some concerns associated with using the comparative method with the prospect of developing international law in general, and international criminal law in particular.²⁹⁴ One of the main sources of unease is the impossibility of directly transplanting domestic concepts into international law. This is a valid concern. However, there is no problem in general in relying on the principles enshrined in a multitude of legal orders, provided the methodology is rigorously defined and the limitations of international criminal law are accounted for.²⁹⁵ Despite the unique nature of international criminality,²⁹⁶ the principle of individual criminal responsibility guides the process of attribution of responsibility in both domestic and international criminal law. This principle also embodies the phenomenon of organized criminality and multi-party crimes at the level of domestic law, which offers many solutions addressing group participation in the crimes and varying degrees of indirect participation.

Complicity as a traditional mode of liability, once defined and delineated from the neighbouring concepts can be an indispensable tool in dealing with the accused removed from the scene of the crime. There is a general concern in international criminal law that holding someone accomplice to a certain crime, as opposed to primary perpetrator does not reflect the inherent gravity of the crimes committed by the accused.²⁹⁷ However, as has been shown in the comparative sections of this chapter, domestic law does not often treat accomplices as less culpable parties to the crime. If an accomplice receives mitigation in punishment, this is usually due to his minimal contribution to the crime rather than the label attached to his behaviour. Instigators and organizers are treated at least as severely as the principals. Thus, labelling certain conduct as ‘complicity’ does not automatically imply a lesser degree of responsibility.

²⁹⁴ Section 1.ii *supra*.

²⁹⁵ For the discussion on limitations of international criminal law, see Chapter VII.1 *infra*.

²⁹⁶ For the detailed study of the unique features of international criminality, see M. Heikkilä, *Coping with International Atrocities through Criminal Law: A Study into the Typical Features of International Criminality and the Reflection of these Traits in International Criminal Law*, Åbo Akademi University Press, 2013.

²⁹⁷ S. Manacorda and C. Meloni, ‘Indirect Perpetration versus Joint Criminal Enterprise. Concurring Approaches in the Practice of International Criminal Law’, *Journal of International Criminal Justice*, 2011, no. 9, vol 1, at 161. *Cf.* Prosecutor v. Taylor, SCSL-03-1-T, Sentencing Judgment, 30 May 2012 (*Taylor Sentencing Judgment*), § 40. For more discussion on this see Chapter VI.

One of the major strengths of complicity in comparison with the other forms of responsibility designed to address international criminality is that it offers a more nuanced approach to criminal participation: under one heading – ‘complicity’ – there exist several sub-modes of participation. The other strong point of complicity is its firm grounding in academic literature and domestic legal philosophy, both of which are useful interpretative tools in the complex factual situations that characterize international criminal law.

Conclusion

Complicity is a traditional form of criminal liability. Each legal system reviewed in this chapter defines complicity in one way or another and attaches certain consequences to its application. Complicity comprises of different subcategories, including aiding and instigating. In cases with several accused are removed from the scene of the crime – a typical international criminal law scenario – it can be difficult to distinguish complicity from co-perpetration. However, the main problem is not the distinction itself, but rather providing a comprehensive definition of both modes of responsibility. It is argued in this chapter that complicity, once properly defined, is an excellent tool for international criminal law. It is also argued that the definition of complicity, as well as of all other forms of criminal participation, shall preferably rely on principles derived from a range of legal systems. This is essential for two reasons. First, any legal concept developed methodologically with the view of the ‘general principles of law recognized by civilized nations’ has a more solid foundation as a source of international law than a concept borrowed from just one single legal system. Second, exploring the variety of legal systems allows discovering the best solutions for the complex factual and legal situations that undeniably mark international criminal law.

V. Complicity in International Criminal Law and Law of State Responsibility: Comparative Analysis

Introduction

There is an emerging trend among academics and practitioners to view international crimes such as genocide, war crimes and crimes against humanity in their complexity, implying a multiplicity of actors at different levels, including states, organizations, corporations and separate individuals.¹ The responsibility of one actor does not exclude the responsibility of another but rather complements it.² Nollkaemper, for example, employed the term ‘system criminality’,³ which he described as the allocation of responsibility for international crimes to ‘the level of the system, in its various manifestations, rather than to the individual level’.⁴ This view challenges the traditional paradigm established by the Nuremberg Tribunal, whereby ‘crimes against international law are committed by men, not by abstract entities’.⁵ Similarly, during the negotiations of the Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission in 1996,⁶ some countries expressed the hope that in the future the provisions of the Draft Code would apply to all perpetrators, not just individuals, because, in their view, the difference between treating individuals and states is merely procedural.⁷

One possible consequence of this complex approach to the allocation of responsibility is that certain criminal law concepts, such as complicity, are applied to various actors, including states and individuals.

‘Complicity’ has many meanings depending on the context in which one uses it. From the theoretical perspective, Kutz described ‘the domain of complicity’ as “cultural and legal practices, surrounding relations of an agent

¹ A. Clapham in P Sands (2003), at 50; A. Nollkaemper in A. Nollkaemper and H.V.D. Wilt, 2009, at 4; C. Harding in R. Havemann and O. Olunsanya (2006), at 82-83; W. Schabas, 2001.

² L.S. Sunga, *The Emerging System of International Criminal Law*, Martinus Nijhoff Publishers, 1997,, at 246; A. Nollkaemper in A. Nollkaemper and H.V.D. Wilt, 2009, at 8.

³ This term was first introduced by Dutch scholar and judge B.V.A. Roeling. See A. Cassese, 2008, at 54.

⁴ A. Nollkaemper in A. Nollkaemper and H.V.D. Wilt, 2009, at 3.

⁵ Ibid. quoting *The Trial of the Major War Criminals before the International Military Tribunal Sitting at Nuremberg Germany*, Part 22, at 447.

⁶ Report of the ILC to the General Assembly, Forty-Eighth Session, U.N. GAOR, 51st Sess., Suat No. 10 U.N. A/51/10 (1996).

⁷ N.H.B. Jorgensen, *The Responsibility of States for International Crimes*, Oxford University Press, 2000, at 142.

to a harm that are mediated by other agents”.⁸ The *Oxford English Dictionary* defines ‘complicity’ as ‘the fact or condition of being involved with others in an activity that is unlawful or morally wrong’.⁹

The law of state responsibility and international criminal law share the legal concept of ‘complicity’. Previous chapters discussed in some detail the components of complicity in international criminal law¹⁰ and domestic criminal law.¹¹ The ambition of this chapter is to define the legal requirements of complicity in the law of state responsibility and contrast them with those of international criminal law. While, a more detailed discussion will follow in the following sections, it is sufficient to note at this point that the legal requirements used for holding states and individuals complicit in a crime are very similar. In the memorandum submitted to the UK Parliament’s Joint Committee on Human Rights (‘UK Parliament’s Committee’), Professor Sands suggests using the international criminal law test to determine UK’s alleged complicity in torture.¹²

The main objective of the analysis in this chapter is to determine whether the level of approximation of the content of complicity in the two legal fields – international criminal law and law of state responsibility - has reached the point where complicity as a legal term can be used interchangeably across the two disciplines. In other words, the chapter aims at establishing the limitations (if any) of comparing individual complicity to state complicity.

The analysis is based on four legal cases, two of which deal with state complicity (judgments delivered by the International Court of Justice (ICJ) and the UK domestic courts) and two with individual complicity in the context of international criminal law.¹³ The judgments selected focus on the same substantive crimes – genocide and torture. This approach eliminates the divergence in substantive crimes and allows a comparison between state and individual complicity in the same type of offence. Such a method leads to a

⁸ C. Kutz, *Complicity: Ethics and Law for a Collective Age*, Cambridge University Press, 2000, at 3.

⁹ OED Online, retrieved on 18 February 2011, <http://oxforddictionaries.com/definition/complicity>.

¹⁰ Chapters II and III.

¹¹ Chapter IV.

¹² Memorandum Submitted by Professor Philippe Sands QC to Joint Committee on Human Rights, retrieved from the UK Parliament on 18 February 2011, <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152we22.htm>.

¹³ These cases exemplify the practical application of complicity in international criminal law and law of state responsibility. The cases are selected with the narrow aim to contrast the legal concept of complicity in two different fields of law. Admittedly, the review of the jurisprudence of the human rights courts could broaden the analysis presented in this chapter, however it would go beyond the scope of the thesis. For the comprehensive treatment of complicity in the law of state responsibility, see H. Aust, *Complicity and Law of State Responsibility*, Cambridge University Press, 2013.

deeper understanding of complicity in the context of the two disciplines and illustrates the interplay between primary (substantive) and secondary (framework) rules of international law.

This chapter builds on the analysis of complicity and its legal requirements in international criminal law provided in Chapters II and III. The first part of this chapter provides an analogous description of complicity in law of state responsibility. Section two focuses on state complicity in genocide and torture. The focal point of the discussion in this chapter is two judgements from the sphere of state responsibility - *Genocide* and *Binyam Mohamed*. These judgements are contrasted with two international criminal law judgements and deal with similar crimes – *Furundžija* and *Akayesu*. Section three explores the similarities and differences of complicity in the of law state responsibility and in international criminal law. Conclusions as to the applicability of the concept to both fields of law are drawn in the final section of this chapter.

1. Complicity in Law of State Responsibility

i. Historical Perspective

The *Nuremberg* and *Tokyo* trials and subsequent prosecutions of former Nazis provided abundant opportunity to shape the principles of individual criminal responsibility in international law.¹⁴ The Nuremberg and Tokyo Charters were unquestionably international instruments resulting from political compromise. However, they embodied basic domestic criminal law principles with which the drafters, coming from different jurisdictions and political systems, were nonetheless familiar.¹⁵ Prosecuting individuals for crimes, albeit international crimes, was nothing new to the community of lawyers and the IMT and IMTFE applied these principles during the proceedings. The main difference with domestic prosecutions was the scale of offences and the complexity of interrelationship between various actors.¹⁶ Further trials of war criminals in the aftermath of the IMT and IMTFE also relied on domestic criminal law to a large extent. Mechanisms for dealing with the collective aspect of crimes including complicity and conspiracy were therefore borrowed from national law and modified to suit international proceedings.

On the other hand, state responsibility did not develop along the same lines.¹⁷ As it was impossible to rely on domestic law, the rules for attributing

¹⁴ See Chapter I for the detailed discussion.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ This is the case notwithstanding the comments by the ILC that “the question of the criminal responsibility of States as well as that of individuals acting on behalf of the State [...] may be considered in conjunction with the codification of the principles of the Nurnberg Charter and judgment.” *Survey of International Law in Relation to the Work of Codification*

responsibility to the state had to be created *de novo*. Beginning soon after World War II, the International Law Commission worked on a draft of Articles on State Responsibility for several decades.¹⁸ Complicity of states was not part of the initial discussion by the ILC.¹⁹ However, by 1978 it held that complicity in the sense “of participation in the internationally wrongful act of another by providing ‘aid or assistance’” had gained acceptance in international law, and by 1996, the Law Commission considered the rule of “refraining from assisting wrongdoing states” as a well-established practice.²⁰ In 2007, the ICJ confirmed the customary nature of this norm.²¹

Historical divergence in the development of state responsibility and individual criminal responsibility can be explained by the conceptual difference between these two forms of responsibility: state responsibility is governed by a separate set of secondary rules, which establish the consequences of the violation of primary rules located elsewhere - in international treaties or customary international law.²² Aust highlighted the conceptual difficulty with such a distinction, especially when it comes to complicity.²³ The distance between primary and secondary rules in the law of state responsibility generates uncertainty as to whether international law includes the rule against complicity or whether it is merely a secondary rule contained in the Articles on State Responsibility.²⁴ In contrast, individual criminal responsibility is governed by a narrower set of norms, namely substantive and procedural criminal law.²⁵

of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the of the International Law Commission, Memorandum submitted by the Secretary-General, 1949, A/CN.4/1/Rev.1, at 56. See also N.H.B. Jorgensen, at 27.

¹⁸ The topic of state responsibility was selected for codification at the 6th meeting of International Law Commission on 20th April 1949. See *Yearbook of the International Law Commission, 1949*, vol. I, pp 49-50, § 32.

¹⁹ K. Nahapetian, 2002, at 102.

²⁰ Report of the ILC to the General Assembly, Thirtieth Session, U.N. GAOR, 33d Sess., Suat No. 10, U.N. Doc. A/33/10 (1978), at 103, par. 16 and Report of the ILC to the General Assembly, Forty-Eighth Session, U.N. GAOR, 51st Sess., Suat No. 10, U.N. Doc. A/51/10 (1996), p, 72, par. 2.

²¹ Genocide Judgement, § 419. Aust came to the same conclusion after examining available state practice and *opinio juris*. See H. Aust, *Complicity and Law of State Responsibility*, Cambridge University Press, 2013, at 97-191.

²² A. Gattini in A. Nollkaemper and H.V.D. Wilt (2009), at 105.

²³ H. Aust, 2013, at 51.

²⁴ *Ibid*, at 91. Aust noted that Article 16 of the Articles on State Responsibility is that it does not neatly fit the ‘primary’/‘secondary’ dichotomy. H. Aust, 2013, at 6.

²⁵ *Ibid*.

ii. Legal Requirements of Complicity

The International Law Commission adopted Articles on State Responsibility in 2001.²⁶ They contain at least one provision dealing with complicity. Article 16 of the Articles on State Responsibility provides:²⁷

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

The ILC Commentary to Articles on State Responsibility discusses in full detail the two explicit and one implicit condition for state responsibility for aiding and assisting.²⁸ The first explicit requirement is knowledge of the circumstances of the internationally wrongful act.²⁹ The ILC Commentary is not however entirely clear on the necessary fault requirement: on some occasions it mentions aid and assistance provided to another state with the *view to facilitating* the commission of an internationally wrongful act; on another occasion the ILC speaks of the state organ *intending*, by aid and assistance, to facilitate the commission of a wrongful act;³⁰ while on a third occasion it discusses the state being held responsible for assisting in human rights violations if it was *aware* of and *intended* to facilitate these acts.³¹

The second explicit condition is that the assisting state itself must be bound by the obligation. This criterion loses its relevance in relation to serious breaches of peremptory, or *jus cogens* norms, which are binding on all states.³² Articles 40 and 41 of the ILC Articles on State Responsibility deal

²⁶ Report of the ILC on the Work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10, UN Doc. A/56/10.

²⁷ Aust noted that despite the recognition of the customary status of this provision, the contours of this rule remain unclear. H. Aust, at 3.

²⁸ Report of the ILC on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001), Fifty-sixth session, UN Doc A/56/10, ('ILC Commentary'), at 66. See also A. Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts.' 7 *International Organizations Law Review*, 2010.

²⁹ ILC Commentary, at 66.

³⁰ Aust argued in favor of 'intent' as being the correct standard for state responsibility for aiding and assisting because otherwise the provision would move very close to responsibility for lawful behavior. H. Aust, 2013, at 239.

³¹ ILC Commentary, at 66, 67 [emphasis added]. See also K. Nahapetian, A. Reinisch.

³² The Vienna Convention on the Law of Treaties defines *jus cogens* in Article 53 as "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." The content of *jus cogens* norms is, however, a subject to

with this type of obligation. Article 40 describes the breach as serious “if it involves a gross or systematic failure by the responsible State to fulfil the obligation.” Article 41 provides that the states shall co-operate to bring to an end any serious breach, as well as not recognize nor render any aid or assistance in maintaining the situation created by this breach. It is not clear from Article 41 whether knowledge or intent is required to hold a state responsible for assisting in the breach of peremptory norm.³³

The previous draft of the Articles on State Responsibility contained Article 19, which drew a distinction between international crimes and international delicts in the context of the law of state responsibility.³⁴ Violations of peremptory norms are qualified as crimes. This distinction prompted an extensive debate as to the meaning of state crime and the consequences attached to its commission.³⁵ However, the contentious nature of this provision prompted the ILC to change its approach and to substitute Article 19 with Articles 40 and 41, which do not mention the word ‘crime’.³⁶

One of the main controversies surrounding the notion of state crime was the difficulty of punishing a state.³⁷ The ILC envisaged that the commission of an international crime should vest other states with some remedial rights, without specifying the exact scope of these rights and the mechanisms for their enforcement.³⁸ Consequently, the debate around sanctioning the state turned away from the general preventative side of the concept and focused on the technicalities of defining precise remedies.³⁹ This, in turn, led to the deletion of Article 19 in favour of Articles 40 and 41 of the ILC Articles on State Responsibility.

An opinion that has received some scholarly support simply leaves aside the label ‘criminal’ and holds that, for practical purposes, Article 40 ‘serious

academic debate. Verdross provided the following definition: “they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community.” A. Verdross, ‘Jus Dispositivum and Jus Cogens in International Law,’ 60 *American Journal of International Law* 57, 1966, at 58.

³³ See K. Nahapetian.

³⁴ Text of Draft Articles Provisionally adopted by the Commission on First Reading, Report of the ILC to the General Assembly, Forty-Eighth Session, U.N. GAOR, 51st Sess., Suat No. 10 U.N. A/51/10 (1996), at 60.

³⁵ See e.g. A. Pellet, ‘Can a State Commit a Crime? Definitely, Yes!’ 10 *European Journal of International Law*, 1999, at 425 et esq.

³⁶ M. Shaw, at 807 - 808; A. Nollkaemper in A. Nollkaemper and H.V.D. Wilt, 2009, at 19.

³⁷ N.H.B. Jorgensen, at 184.

³⁸ Article 52 of the Draft Articles adopted in 1996 outlined the specific consequences attached to the commission of a state crime, as opposed to a mere delict. They included the removal of limitations on restitution and satisfaction. The mechanisms of the implementation of this provision were not explained, however. Report of the ILC to the General Assembly, Forty-Eighth Session, U.N. GAOR, 51st Sess., Suat No. 10 U.N. A/51/10 (1996), at 71-72. See also N.H.B. Jorgensen, at 180.

³⁹ N.H.B. Jorgensen, at 185.

breach responsibility' is equivalent to the international criminal responsibility of states.⁴⁰ The important aspect is not the labelling, but rather the enactment of a proper enforcement mechanism currently lacking in the law of state responsibility. Zimmermann and Teichmann argued in favour of introducing punitive damages and an obligation to alter one's domestic legal system as new, effective remedies in the context of state crimes.⁴¹

The final condition of state responsibility for aiding and assisting is not expressly mentioned in Article 16 of the Articles on State Responsibility but is discussed in the ILC Commentary. The aid and assistance must contribute significantly to the commission of internationally wrongful conduct.⁴² The contribution need not however be essential to the performance of the act.⁴³ When the ILC covers the possible ways in which the state may assist human rights violations it speaks of the 'material aid'.⁴⁴

The ILC Commentary also expressly distinguishes aiding and assisting as recorded in Article 16 of the ILC Articles on State Responsibility from co-perpetratorship (regulated by articles on the attribution of the Articles on State Responsibility) and the substantive rules prohibiting aid or assistance contained in different international instruments.⁴⁵

Aside from the ILC Articles on State Responsibility, 'complicity in genocide' is explicitly outlawed by Article 3(e) of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 ('Genocide Convention'). Article 4(1) of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984 ('Torture Convention') calls on the state parties to criminalize, *inter alia*, "an act by any person which constitutes complicity or participation in torture." Both provisions are discussed in more detail in the section discussing the case law.

Other international instruments dealing with human rights and humanitarian law such the International Covenant on Civil and Political Rights of 1966 or the Geneva Conventions for the Protection of Victims of War of 1949 do not explicitly mention 'complicity'. There is an emerging view among some

⁴⁰ C. Harding in R. Haveman and O. Olunsanya, 2006, at 82; A. Zimmermann and M. Teichmann in A. Nollkaemper and H.V.D. Wilt, 2009, at 312-313.

⁴¹ A. Zimmermann and M. Teichmann in A. Nollkaemper and H.V.D. Wilt, 2009, at 312-313.

⁴² Aust pointed towards the lack of clarity on what constitutes relevant 'aid and assistance' because the ILC is silent on the matter. He concluded, "[i]nstead, 'aid or assistance' is a normative and case-specific concept." H. Aust, 2013, at 197, 230.

⁴³ ILC Commentary, at 66. Here the parallel can be drawn with the similar requirement for 'aiding and abetting' in international criminal law: many ICTY and ICTR Chambers contended that the contribution of the accused need not be *conditio sine qua non* for the crime to occur. For more discussion, see Chapter II.1.vii and II.2.ii *supra*.

⁴⁴ ILC Commentary, at 67.

⁴⁵ ILC Commentary, at 66.

scholars⁴⁶ that states can, nonetheless, be complicit in the failure to comply with the positive obligation to respect and ensure rights contained in these instruments.⁴⁷ Cerone, for example, argued for a wider understanding of state complicity, which, in his view, can manifest itself in three ways: first, as a state responsibility for the violation of negative obligations on the basis of attributing the conduct of the organs of one state to another state; second, as a derivative state responsibility for the violation of negative obligations within the meaning of Article 16 of the Articles on State Responsibility; and third, as responsibility for the failure to respect positive obligations contained in primary rules.⁴⁸ It remains to be seen whether this approach will be adopted in the future. In the meantime, both cases on state responsibility discussed in this article reject this broad view of state complicity.

2. Comparative Analysis of Complicity in International Criminal Law and Law of State Responsibility

i. Complicity in Genocide

a) *The Akayesu Case*

Jean-Paul Akayesu, a father of five, served as a teacher in the Rwandan municipality of Taba. He was a well-respected leader of his local commune and held the position of mayor for some time in 1993 and 1994, overseeing the local economy, police and law in the village. After the commencement of the Rwandan genocide, Akayesu actively urged the population to kill Tutsis. As mayor he must have known about the atrocities taking part in his municipality but nevertheless failed to punish the perpetrators. Moreover, he was present when sexual violence was committed against Tutsi women, encouraging by his presence further perpetration of crimes.⁴⁹

The *Akayesu* judgment is one of the most significant judgments rendered by the international tribunals as it contains the world's first conviction for the crime of genocide.⁵⁰ It is noteworthy that while the Prosecution charged Akayesu, *inter alia*, with both genocide and complicity in genocide,⁵¹ the Trial Chamber disagreed with the Prosecutor's decision to charge both modes of participation, stating that an individual cannot be at the same time the

⁴⁶ A. Clapham in P Sands (2003), at 62; J. Cerone, 'Re-examining International Responsibility: 'Complicity in the Context of Human Rights Violations.' 14 *ILSA Journal of International and Comparative Law*, 2008; K. Nahapetian.

⁴⁷ Article 1 of the Geneva Conventions, Article 2 of the ICCPR.

⁴⁸ J. Cerone.

⁴⁹ *Akayesu* Trial Judgment, §§ 12-23.

⁵⁰ US Holocaust Memorial Museum, Washington DC at <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007157>.

⁵¹ Articles 2(3)(a) and 2(3)(e).

principle perpetrator of a particular crime and the accomplice thereto.⁵² The Chamber reasoned that the accomplice can be tried even if the principle perpetrator has not been identified.⁵³ Consequently, the Trial Chamber analysed whether the actions of Akayesu were merely a manifestation of an accomplice liability, or whether they constituted an actual commission.⁵⁴ The court drew the distinction between complicity in genocide pursuant to Article 2(3)(e) of the Statute and aiding and abetting genocide in accordance with Article 6(1) of the Statute.⁵⁵

The Trial Chamber established that for the purposes of the substantive provision on complicity in genocide (Article 2(3)(e) of the Statute, which prohibits genocide, conspiracy to commit genocide, incitement to commit genocide, attempt to commit genocide and complicity in genocide),⁵⁶ ‘complicity’ is to be defined as per Rwandan Penal Code, and includes procuring means, aiding and abetting and instigation. Most importantly, for this crime an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. It is sufficient that the accused knew of the genocidal plan and participated in its execution.⁵⁷ Aiding and abetting, covered under Article 6(1) of the Statute is, in the view of the Trial Chamber, similar to the material elements of complicity in genocide. However, by virtue of being linked to the substantive crimes listed in Articles 2-4 of the Statute, aiding and abetting genocide requires the person to have acted with specific genocidal intent.⁵⁸

The Trial Chamber held that Akayesu’s acts constitute factual elements of the crime of genocide. He incurred individual criminal liability for ‘having ordered, committed, or otherwise aided and abetted in the preparation or execution of the killing of and causing serious bodily or mental harm to members of the Tutsi group.’⁵⁹ Such an extensive participation in genocidal acts led the Chamber to conclude that Akayesu possessed specific genocidal intent and was thus responsible for genocide and not merely for complicity in

⁵² *Akayesu* Trial Judgment, §§ 468, 532 as discussed by K. Kittichaisaree (2002), at 237.

⁵³ *Akayesu* Trial Judgment, § 531.

⁵⁴ For the discussion of ‘complicity’ in *Akayesu* see W. Schabas, 2006, at 305-306.

⁵⁵ For the views expressed by other ICTY and ICTR Chambers on the distinction between these two provisions, see Chapter II.1.viii *supra*.

⁵⁶ This provision reproduces Article 3 of the Genocide Convention.

⁵⁷ *Akayesu* Trial Judgment, §§ 537-544.

⁵⁸ *Akayesu* Trial Judgment, §§ 546 – 547. For a slightly different point of view on the interplay between the procedural and substantive provisions on complicity in the ICTR Statute see C. Eboe-Osuj.

⁵⁹ *Akayesu* Trial Judgment, §§ 705-706 as discussed by A. Cassese, 2008, at 217.

genocide.⁶⁰ The Trial Chamber sentenced Akayesu to life imprisonment for genocide.⁶¹

b) The Genocide Case

In 2007 the ICJ ruled on Bosnia's claim that Serbia had committed genocide during various events that occurred in Bosnia between 1991 and 1995. Bosnia maintained that the pattern of atrocities committed against the non-Serbian population over a long period of time demonstrated that Serbia possessed the specific intent within the meaning of the Genocide Convention. The court rejected this all-encompassing approach by stipulating that specific intent can only be shown by reference to particular circumstances.⁶² Consequently, the ICJ established that members of the VRS (army of the Republika Srpska)⁶³ committed genocide only in and around Srebrenica starting from about 13 July 1995.⁶⁴ In its finding the ICJ referred extensively to the ICTY jurisprudence on genocide.⁶⁵

The ICJ reviewed the different ways in which Serbia could be held accountable for the atrocities committed by the VRS in Srebrenica. In particular, the court examined three issues: first, whether the acts of genocide were committed by persons or organs whose conduct is attributable to Serbia; second, whether the acts enumerated in Article 3 of the Genocide Convention other than genocide itself (for example, complicity in genocide) were committed by persons or organs whose conduct is attributable to Serbia; and finally whether Serbia complied with its obligation as they derived from Article 1 of the Genocide Convention to prevent and punish genocide.⁶⁶

With regard to the first question, the ICJ held that actions of the VRS cannot be attributed to Serbia on the basis that neither the Republika Srpska, nor the VRS were *de jure* organs of the FRY nor did they have the status of an organ

⁶⁰ *Akayesu* Trial Judgment, § 734. In addition to convicting Akayesu of genocide, the Trial Chamber found him guilty of ordering the killings of several refugees and civilians, acts of torture committed in his presence, aiding and abetting sexual violence by allowing it to happen close to his office and saying the words of encouragement. See *Akayesu* Trial Judgment, §§ 651 – 696.

⁶¹ Prosecutor v. *Akayesu* ICTR Case No. 96-4-T, Sentencing transcript, 2 October 1998 ('*Akayesu* Sentencing Transcript'), at 6. In contrast Radislav Krstić and Dragan Nikolic has been sentenced by the ICTY to 35 years of imprisonment for aiding and abetting the genocide. See *Krstić* Appeal Judgment, § 97.

⁶² *Genocide* Judgment, § 373.

⁶³ Republika Srpska is the Serbian-populated enclave within Bosnia and Herzegovina, where the atrocities occurred.

⁶⁴ *Genocide* Judgment, § 297.

⁶⁵ For more discussion on this point see D. Turns, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide. Bosnia and Herzegovina v. Serbia and Montenegro,' 8 *Melbourne Journal of International Law*, 2007.

⁶⁶ *Genocide* Judgment, § 379.

of that state under its internal law.⁶⁷ Similarly, the ICJ rejected Bosnia's argument that the conduct of the VRS is attributable to Serbia based on Article 8 of the ILC Articles on State Responsibility as a conduct directed or controlled by the state.⁶⁸ In resolving this issue, the ICJ refused to apply the test of 'overall control' introduced by the ICTY Appeals Chamber in *Tadić* and instead applied a stricter test of 'effective control' developed by the ICJ in the *Nicaragua* case.⁶⁹ The ICJ explained that while it attached great weight to the ICTY's finding relating to the events that happened during the conflict, it could not use the ICTY's legal test of 'overall control' because it was developed for a purpose not related to the attribution of state responsibility for acts committed by paramilitary units.⁷⁰

In relation to the second question, namely responsibility for various acts enumerated in Article 3 of the Genocide Convention, the court rather quickly ruled out all possible forms of committing genocide apart from 'complicity in genocide'.⁷¹ The ICJ then made several important pronouncements relating to state complicity in general and complicity in genocide in particular.

Firstly, the ICJ held that 'complicity' needs to be distinguished from the acts of perpetrators acting on the instructions of or under the direction or effective control of Serbia. If such conduct is proved, it is directly attributable to the state without using the concept of complicity.⁷² Secondly, the court clarified that for the purposes of Article 3 of the Geneva Convention, 'complicity' entails 'the provision of means to enable or facilitate the commission of the crime'.⁷³ Thirdly, the ICJ held that although there is no notion of 'complicity' in the terminology of the law of international responsibility, it is similar to the notion of 'aid and assistance' that constitutes the customary rule found in the law of state responsibility and embodied in Article 16 of the ILC Articles on State Responsibility.⁷⁴ Consequently, the ICJ found it appropriate to examine Serbia's potential accomplice liability in genocide through the prism of Article 16 of the ILC Articles on State Responsibility.⁷⁵ Fourthly, the court refused to answer the question of whether the accomplice needs to share the specific intent of the principle perpetrator, but affirmed that it is essential

⁶⁷ *Genocide Judgment*, § 386.

⁶⁸ *Genocide Judgment*, § 412.

⁶⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Reports 1986, §65.

⁷⁰ *Genocide Judgment*, § 402-404. See M. Shaw, at 791.

⁷¹ *Genocide Judgment*, § 416-417.

⁷² *Genocide Judgment*, § 419.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Genocide Judgment*, § 420.

that the person or an organ furnishing ‘aid and assistance’ to the principle perpetrator needs, at the very least, to be aware of such intent.⁷⁶

This latter point was the sole basis for failing to hold Serbia responsible for complicity in genocide. The ICJ held that it was not satisfied beyond reasonable doubt that Serbia supplied resources to the perpetrators of the genocide with the clear awareness of their genocidal intent - the intent to destroy, in whole or in part, a human group, as such. In other words, the court did not find conclusive evidence that the Belgrade authorities were aware that their aid and assistance would be used to commit genocide, especially where the decision to commit genocide had been taken shortly before the act was actually carried out.⁷⁷ Judges Keith and Bennouna disagreed with the court on this point, stating in their separate declarations that Serbia must have known about the specific intent of the VRS and provided it with aid and assistance with that knowledge.⁷⁸

Finally, two implicit points emerge from the ICJ’s discussion relating to complicity: the state can potentially be an accomplice to the genocide committed by certain entities (and not the other state) and complicity in genocide is possible even when the genocide as a principle wrong has not been attributed to any state.

With regard to the third question relating to Serbia’s potential failure to comply with its positive obligation under Article 1 of the Genocide Convention to prevent and punish genocide, the ICJ held that Serbia had indeed violated its obligation in this respect.⁷⁹ While a detailed analysis of this finding is not required for the purposes of this chapter it is worth noting that the ICJ did not award any compensation to Bosnia as result of finding this breach.⁸⁰

ii. Complicity in Torture

a) *The Furundžija Case*

Anto Furundžija served as a local commander of the Croatian Defence special unit in one of the municipalities in Bosnia and Herzegovina. At one point during the conflict the accused subjected a Bosnian Muslim woman to interrogation in the nude in front of forty soldiers. After this interrogation the woman was taken to another room where she was raped in the presence of the accused, who did nothing to stop the sexual violence.

⁷⁶ *Genocide Judgment*, §421.

⁷⁷ *Genocide Judgment*, §§ 422 - 423.

⁷⁸ *Genocide Judgment* (Declarations of Judge Keith and Bennouna) as cited by D. Turns.

⁷⁹ *Genocide Judgment*, § 440.

⁸⁰ A. Gattini in A. Nollkaemper and H.V.D. Wilt, 2009, at 124.

The Prosecution charged Furundžija with one instance of rape and torture without specifying the mode of liability, thus leaving the question to the Trial Chamber.⁸¹ This lack of clarity regarding the nature of the participation of the accused prompted the Trial Chamber to examine the difference between participating in the joint criminal enterprise and aiding and abetting a crime, using torture and rape as examples for its analysis. Based on a review of the post-Second World War jurisprudence, the Trial Chamber concluded that the *actus reus* for aiding and abetting consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime, whereas the *mens rea* required is the knowledge that these acts assist the commission of the offence.⁸² In contrast to aiding and abetting, the notion of common design presupposes the *actus reus* consisting of participation in a joint criminal enterprise and that the required *mens rea* is intent to participate.⁸³

When applying these principles to the case, the Chamber concluded that to be guilty of torture as a co-perpetrator, the accused must have participated in an integral way in the torture and with the intent to obtain a confession or to punish and humiliate the victim.⁸⁴ In contrast, to be guilty as aider and abettor, the accused must assist in some way and this assistance must have a substantial effect on the torture. The accused must also have the knowledge that torture is taking place.⁸⁵ Following this line of argument, the Chamber noted that aiding and abetting torture may only occur in very limited instances.⁸⁶

Based on these considerations the Trial Chamber concluded that the interrogation of a Bosnian woman was an integral part of torture. The accused was therefore guilty of torture as a co-perpetrator.⁸⁷ At the same time, the accused was only found guilty of aiding and abetting rape. He himself did not commit the act but by virtue of being present at the scene of the crime and holding the position of authority, he encouraged the sexual violence.⁸⁸

The Trial Chamber noted that varying degrees of participation may be a matter to consider at sentencing thereby implying that aiding and abetting may attract a more lenient sentence.⁸⁹ Consequently, the Trial Chamber

⁸¹ *Furundžija* Trial Judgment, § 189.

⁸² *Furundžija* Trial Judgment, § 191 as cited by A. Cassese, 2008, at 217.

⁸³ *Furundžija* Trial Judgment, § 249 as cited by W. Schabas, 2006, at 307.

⁸⁴ *Furundžija* Trial Judgment, § 249.

⁸⁵ *Furundžija* Trial Judgment, § 245 as cited by W. Schabas, 2006, at 307.

⁸⁶ *Furundžija* Trial Judgment, § 257.

⁸⁷ *Furundžija* Trial Judgment, § 267.

⁸⁸ *Furundžija* Trial Judgment, §§ 273-275 as discussed by A. Cassese, 2008, at 218.

⁸⁹ *Furundžija* Trial Judgment, par 257. This is a highly contested topic. For more discussion, see Chapter VI.

sentenced Anto Furundžija to ten years of imprisonment for torture and eight years of imprisonment for aiding and abetting rape, with both sentences to be served concurrently.⁹⁰ The Chamber did not explicitly discuss the effect of the mode of participation on sentencing. It did however make clear that, as he is as responsible for the crime as the person actually inflicting pain, the accused's role in torture as a fellow perpetrator is an aggravating factor.⁹¹ Given that both torture and rape are equally reprehensible crimes, the slightly more lenient sentence for aiding and abetting rape confirms the relative weight the Trial Chamber assigned to the mode of the accused's participation in the crimes.

b) The Binyam Mohamed Case

In 2009 the UK Parliament's Committee issued a report relating to the allegations that UK security services had been complicit in the torture of UK nationals held in Pakistan and elsewhere.⁹² The case of Binyam Mohamed was one of the alleged 'torture cases' reviewed by the UK Parliament's Committee.

Binyam Mohamed was a UK resident of Ethiopian nationality arrested in 2002 in Pakistan under the US extraordinary rendition program on suspicion of alleged links with Al-Qaeda. He was detained and questioned in Pakistan, Morocco, Afghanistan and, finally, in Guantanamo, where he was held for more than four years until his release in 2009.⁹³

While detained in Guantanamo, Mohamed brought a claim in a UK court seeking the disclosure of evidence held by the UK government and intelligence services confirming that he was subjected to torture in 2002-2004. Mohamed needed this information to render his confessions inadmissible in proceedings before the US military commission in relation to charges of terrorist activity. On 21 August 2008 the Divisional Court of the Queen's Bench Division granted his claim and ordered the release of evidence subject to redactions (if any) requested by the Foreign Secretary.⁹⁴

⁹⁰ *Furundžija* Trial Judgment, at 112.

⁹¹ *Furundžija* Trial Judgment, par 281-282 as discussed by K. Khan and R. Dixon (2005), at 822.

⁹² *Joint Committee on Human Rights - Twenty-Third Report*. Retrieved 19 February 2011, from United Kingdom Parliament: <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/15202.htm>.

⁹³ See *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* (2008) EWCH 2048 (Admin) and *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (Guardian News and Media Ltd and others intervening)* (2010) EWCA Civ 65, EWCA Civ 158 ('*Binyam Mohamed case*').

⁹⁴ *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* (2008) EWCH 2048 ('*Binyam Mohamed Judgment*').

Consequently, at the Foreign Secretary's request seven paragraphs of the *Binyam Mohamed* Judgment, summarizing the US reports sent to the UK authorities regarding Mohamed's mistreatment while he was held in Pakistan, were redacted. Both Mohamed and the media representatives who joined the proceedings questioned whether these redactions were justifiable on appeal. In the meantime the documents sought by Mohamed were made available to him in the US proceedings meaning the only question before the Court of Appeal was whether to restore the seven paragraphs initially redacted from the *Binyam Mohamed* judgment. In February 2010 the Court of Appeal ordered the redacted paragraphs to be restored.⁹⁵ The court held that where the judgment is concerned with such a 'fundamental and topical issue as the mistreatment of detainees' and involvement of the UK Government in this mistreatment, public interest overrides other considerations.⁹⁶

Neither of the two judgements described above relate directly to the question of UK complicity in torture. The *Binyam Mohamed* judgment does however make several points that are important for understanding the scope of the concept in the law of state responsibility.

In *Binyam Mohamed*, the court granted disclosure on the basis of a test developed in the earlier case of *Norwich Pharmacal*.⁹⁷ One of the questions that the court had to answer in order to apply the *Norwich Pharmacal* principles was whether there was a wrongdoing and whether the UK Government had facilitated such wrongdoing through the security service or its agents being involved in, or participating in the alleged wrongdoing.⁹⁸

The court established that in May 2002 the UK security services received reports containing information relating to Mohamed's mistreatment in Pakistan by the US authorities. The court then ruled that the UK Government facilitated the interrogation of Mohamed in the knowledge of the reports, which contained information relating to his detention and treatment in the circumstances where Mohamed's detention incommunicado was unlawful under the law of Pakistan.⁹⁹ Consequently, the *Binyam Mohamed* judgment concluded that by seeking to interview Mohamed in such circumstances "the relationship of the UK Government to the US authorities in connection with BM was far beyond that of a bystander or witness to the alleged wrongdoing."¹⁰⁰

⁹⁵ *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (Guardian News and Media Ltd and others intervening)* (2010) EWCA Civ 65, EWCA Civ 158 ('Appeal Judgment').

⁹⁶ Appeal Judgment, §184.

⁹⁷ *Binyam Mohamed* Judgment, § 61.

⁹⁸ *Binyam Mohamed* Judgment, § 71.

⁹⁹ *Binyam Mohamed* Judgment, § 147.

¹⁰⁰ *Binyam Mohamed* Judgment, § 88.

Another important issue discussed in *Binyam Mohamed* judgment is Mohamed's argument that the UK breached its obligation of disclosure flowing from the particular status of the prohibition on torture in international law as a rule of *jus cogens* binding on states *erga omnes*.¹⁰¹ Without questioning the *jus cogens* nature of the prohibition of torture, the court rejected Mohamed's argument, stating that at that time there existed no rule of customary international law obliging the UK to make a disclosure to Mohamed.¹⁰²

In arriving at this conclusion the court examined Article 41 of the ILC Articles on State Responsibility imposing on all states a two-fold obligation resulting from the breach of obligations under peremptory norms of international law: a positive obligation to co-operate to bring an end to the breach, and a negative duty not to render aid or assistance in maintaining the situation created by a breach of a peremptory norm. With regard to the former obligation, the court referred to Professor Crawford's commentary on Article 41, where he stated that it is an open question whether international law at present prescribes a positive duty of co-operation.¹⁰³ The court also noted that currently there is no authority that purports to provide a comprehensive statement of the legal consequences flowing from the *jus cogens* status of the primary rule.¹⁰⁴

The UK Parliament's Committee elaborated on the notion of state complicity, using the *Binyam Mohamed* case as one of the instances of the UK's alleged complicity in torture. The Committee was confronted with the question whether certain conduct by the UK Government, such as asking foreign intelligence known to use torture to detain and question an individual, constitutes complicity in torture. In order to answer this question the Committee had to define what constitutes 'complicity in torture'. Consequently the Committee members drew a distinction between 'complicity in torture' for the purposes of individual criminal responsibility and state responsibility. The former required proof of three elements in accordance with *Furundžija*: (1) knowledge that torture is taking place, (2) a direct contribution by way of assistance that (3) has a substantial effect on the perpetration of the crime; while the latter, based on the interpretations provided by the UN Committee Against Torture, meant 'simply one State giving assistance to another State in the commission of torture, or acquiescing

¹⁰¹ *Binyam Mohamed* Judgment, § 162.

¹⁰² *Binyam Mohamed* Judgment, § 183.

¹⁰³ Appeal Judgment, § 173.

¹⁰⁴ Appeal Judgment, §179.

in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place.’¹⁰⁵

The UK Parliament’s Committee concluded, relying on the opinion of Professor Sands, that a narrower meaning of complicity is likely to be adopted in the context of individual criminal responsibility, whereas determination of state responsibility calls for a wider definition of complicity.¹⁰⁶ The Committee made such a conclusion on the basis of Sand’s explanation that ‘complicity’ within the meaning of Article 4(1) of the Torture Convention has a broader meaning than ‘aiding and abetting’ within the meaning of Article 7(1) of the ICTY Statute. Despite this difference in the scope of complicity for the purposes of two different legal instruments, Sands advised the UK Parliament’s Committee to use the three-prong test developed by the ICTY Trial Chamber in *Furundžija* in order to determine whether UK incurs liability for complicity in torture.¹⁰⁷ Based on these considerations, the Committee concluded that the Government’s turning a blind eye, systematically receiving or relying on the information originating from the country known to torture “might well cross the line into complicity”.¹⁰⁸

In the *Ahmed & Anor v R* case, the Court of Appeal of England and Wales had an opportunity to test this ‘wider’ understanding of complicity in the law state responsibility.¹⁰⁹ The two appellants were convicted of terrorism offences. One of the appellants, Rangzieb Ahmed, claimed that the prosecution against him should have been stayed on the basis of, *inter alia*, the UK’s alleged complicity in torture.¹¹⁰ The appellant claimed that he was held in captivity and tortured in Pakistan before being brought to the UK to stand trial. During his time in Pakistan, the UK intelligence officers interviewed Rangzieb on at least one occasion. Rangzieb’s argument was that complicity is demonstrated where State A has any settled practice of information- or intelligence-sharing with State B which is known or believed to use torture. Furthermore, according to the argument wherever such complicity by settled practice is demonstrated and information has been shared in respect of a man prosecuted in England who has been interrogated

¹⁰⁵ UK Parliament’s Report, §§ 31, 32, 35.

¹⁰⁶ UK Parliament’s Report, § 34.

¹⁰⁷ Supplementary memorandum submitted by Professor Philippe Sands QC following oral evidence on 28 April 2009. (‘Sand’s Memorandum’) Retrieved 19 February 2011, from United Kingdom Parliament: <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/152we23.htm>.

¹⁰⁸ UK Parliament’s Report, Conclusions and Recommendations, § 3.

¹⁰⁹ *Ahmed & Anor v R* [2011] EWCA Crim 184 (25 February 2011).

¹¹⁰ *Ibid.*, § 23.

in State B under conditions involving torture, there is a sufficient connection between the complicity and the trial to justify staying the prosecution.¹¹¹

On the face of it, this position appears to be consistent with the broader view of complicity advanced by the UK Parliamentary Committee. However, the court rejected the appellant's claim. It drew the line between the use of materials obtained under torture by the executive and the courts. The court regarded the use of materials obtained under torture by the executive as permissible with a view to the policy objective of protecting citizens. In contrast, the use of such materials by courts should not be allowed. Despite this rule, court proceedings involving a prosecution must only be stayed if there is a connection between the alleged wrongdoing and the trial. In the case at issue it was not demonstrated that the torture impacted upon the trial.¹¹² Moreover, the court rejected the extended view of complicity as 'aspirational'.¹¹³ It held:

On ordinary principles of English law, if A aids or abets (ie assists) B to commit torture, or if he counsels or procures (ie encourages or arranges) torture by B, then A is no doubt guilty, as is B. But simply to receive information from B which is needed for the safety of A's citizens but which is known or suspected to be the product of torture would not, without more, amount in English law to either of these forms of secondary participation.¹¹⁴

3. Treatment of Complicity in Two Areas of Law: Common Trends and Divergences

There is a connection between the law of state responsibility and international criminal law. As has been discussed above, the two fields complement each other. Article 58 of the ILC Articles on State Responsibility reassures us that "these articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of the State." Similarly, *Furundžija* confirms that under current international humanitarian law, individual criminal liability may be supplemented by state responsibility.¹¹⁵

Complicity is a concept utilized by the law of state responsibility and international criminal law in a very similar manner. Complicity in both areas of law has both broader and narrower meanings. Complicity in international criminal law can encompass all modes of direct criminal participation apart from commission, while at the same time it can be equated solely with aiding

¹¹¹ Ibid, § 26.

¹¹² Ibid, §§ 33-40.

¹¹³ Ibid, § 44.

¹¹⁴ Ibid, § 42.

¹¹⁵ *Furundžija* Trial Judgment, par 142. See for further discussion L. Sunga (1997), at 246.

and abetting.¹¹⁶ Similarly, complicity in law of state responsibility can be understood merely as one state aiding and assisting another state to commit an internationally wrongful act within the meaning of Article 16 of the ILC Articles on State Responsibility, or it can also entail the state's failure to respect positive obligations under the *jus cogens* primary rules of international law. In the latter case, the procedural threshold set by Article 16 for holding the state responsible may arguably be circumvented. However, in *Binyam Mohamed*, the court refused to recognize as binding the positive obligation to disclosure flowing from the prohibition of torture and refused to acknowledge complicity on the part of the UK in torture on this basis.¹¹⁷

It is evident from the case law analysis that complicity as a form of participation in both the law of state responsibility and international criminal law is intimately linked to the substantive rules defining the prohibited conduct. The scope of complicity is pre-defined by the nature of conduct it is attached to. The Trial Chamber in *Furundžija* was able to establish that the accused perpetrated torture, and not merely aided and abetted the one, only after having reviewed the elements of torture and the accused's role in relation to these elements. Similarly, Sand's Memorandum discusses complicity in torture from the perspective of the Torture Convention (primary rules) and the ILC Articles on State Responsibility (secondary rules). Both the *Genocide* and the *Akayesu* cases focus on the notion of genocidal intent, or *dolus specialis*, in their reasoning relating to complicity.

On a more general note, the cases discussed in this chapter show that the law of state responsibility and international criminal law use complicity in the context of identical crimes – torture and genocide. Clearly, the present study is limited in scope and the cases reviewed here have been specifically selected to contrast state and individual complicity in torture and genocide. However, the similar subject matter of the cases examined in this study is not entirely accidental as complicity is particularly prevalent in relation to these particular offences.

Similar principles relating to complicity seem to emerge in both fields of law. Firstly, in the law of state responsibility and international criminal law it is possible to hold an individual and a state complicit in crime even without a conviction of the principal perpetrator. The *Furundžija*, *Genocide* and *Binyam Mohamed* cases fall under this principle and *Akayesu* explicitly discusses it. Secondly, both fields of law draw a dividing line between perpetration and

¹¹⁶ See Chapter II.1.

¹¹⁷ Cerone also suggested that complicity in the law of state responsibility can fall under the doctrine of attribution, when the conduct of an organ of one state is attributed to another. The *Genocide* case has rejected this wide interpretation of complicity, by holding that in such case the acts of organs are directly attributable to the state without the doctrine of 'complicity'.

complicity. *Furundžija* clearly demonstrates the difference between perpetrating the crime as a part of the joint criminal enterprise and aiding and abetting the crime. Similarly, the ILC Commentary and the *Genocide Judgment* explicitly mention the distinction between the two modes of participation.

Finally, the legal requirements of complicity in the law of state responsibility and international criminal law are very similar. The fault requirement of complicity for the purposes of both state responsibility and individual criminal responsibility seems to be at least knowledge that the acts assist in the commission of the specific crime. However, the mental element is better defined in international criminal law. The ad hoc tribunals require at least ‘knowledge’,¹¹⁸ while the ICC has adopted a higher threshold; aiding and abetting must occur “for the purpose of facilitating the commission of a crime.”¹¹⁹

The law of state responsibility offers limited insight on the issue of the fault element. Article 16 of the ILC Articles on State Responsibility incorporates the requirement of ‘knowledge’ in the definition of aiding and assisting, the ILC Commentary mentions both knowledge and intent, and the *Genocide Judgment*, regrettably, falls short of discussing whether intent shared with the principle perpetrator is required to hold a state complicit in genocide. Such a finding would have dealt with the discrepancies in the ILC Commentary, but could have been highly controversial because without the conviction of the primary perpetrator it seems very difficult, if not impossible, to establish the ‘shared intent’ of the accomplice. In *Binyam Mohamed* the UK Parliament’s Committee suggested, relying on the international criminal law standards, that knowledge is sufficient to hold a state complicit in torture.

The conduct requirement of complicity is also comparable to some extent in the law of state responsibility and international criminal law. The Trial Chamber held in *Furundžija* that *actus reus* of complicity (in a narrow sense) consists of the assistance having a substantial effect on the perpetration of the crime. The Rome Statute omits the requirement of substantial contribution but it appears that the ICC Chambers have slowly acknowledged that assistance must meet a certain threshold.¹²⁰ Both the *Genocide* and the *Binyam Mohamed* describe complicity as a certain conduct that ‘facilitates’ the commission of the wrongdoing. In addition, the ILC Commentaries require that in the context of state complicity the aid and assistance must contribute significantly to the commission of internationally wrongful conduct. Thus, the

¹¹⁸ For the discussion see Chapter II.1.vii. *supra*.

¹¹⁹ Article 25(3)(c) of the Rome Statute. For the discussion see Chapter III.1. *supra*.

¹²⁰ Concurring Opinion of Judge van den Wyngaert, § 44; *Mbarushimana* Decision, § 279; *Lubanga Judgment*, § 997. See Chapter III.1.i. *supra*.

impact of assistance has to reach a certain level in order to attract responsibility of both states and individuals.

Despite the close connection between complicity in law of state responsibility and international criminal law, the present study revealed a number of important differences between complicity of states and complicity of individuals. These distinctions showcase the limits of the cross-disciplinary comparison furnished in this chapter.¹²¹

One of the main differences between complicity in the law of state responsibility and international criminal law is that complicity of individuals, as opposed to state complicity, implies more or less clear consequences. The mode of participation is one of the factors that affect sentencing in international criminal law.¹²² State complicity, in contrast, has no specific implications attached to it. The question arises whether state complicity entails less severe or simply different countermeasures than those taken against the state primarily responsible for an internationally wrongful act.

One would assume that the general rules regarding the consequences of finding a state responsible for breach of an internationally wrongful act would be applicable to complicit states.¹²³ Using these provisions in conjunction with state complicity presents some difficulty, however. The main source of the problem is that these consequences have been modelled on the bilateral relationship between one wrongdoing state and one injured state.¹²⁴ Complicity obscures the matters by introducing an additional legal relationship.¹²⁵ Matters are further complicated by the fact that responsibility for aiding and assisting does not require the complicit state to have committed a wrongful act, but that it associates itself with the wrongful conduct of another state.¹²⁶

This distinction between the two fields lies in the fact that international criminal law in general has developed mechanisms for enforcing the individual criminal responsibility as opposed to the law of state responsibility, which still lacks such mechanisms, particularly when dealing with responsibility of states for grave breaches of peremptory norms. The

¹²¹ Aust argued that intra-disciplinary comparisons will not provide for ready-made answers to problems related to the interpretation of Article 16 of the Articles on State Responsibility. H. Aust, 2013, at 194.

¹²² See Chapter VI *infra*.

¹²³ Articles 29-41 of the Articles on State Responsibility.

¹²⁴ H. Aust, 2013, at 269 citing Samantha Besson, 'La pluralité d'Etats responsable – Vers une solidarité internationale?', *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 17.

¹²⁵ On the impossibility of exercising ICJ jurisdiction in multiparty disputes without the consent of the third party, see *Case of the Monetary Gold Removed from Rome in 1943* (Italy v France, United Kingdom and United States) (Preliminary Question) I.C.J. Rep 1954.

¹²⁶ H. Aust, at 272.

absence of clear guidelines on enforcing the responsibility of states for failure to respect positive obligations of *jus cogens* nature was one of the reasons for the ILC's rejection of the notion of 'state crimes.' The same reason prompted the court in *Binyam Mohamed* to deny UK responsibility for violating the Torture Convention. Similarly, the ICJ did not grant Bosnia compensation following the finding that Serbia violated the Genocide Convention by failing to prevent genocide.

Another important distinction between state and individual complicity is that the link between complicity and substantive rules is more evident in the area of individual criminal responsibility. International criminal law usually provides for one comprehensive legal instrument- the relevant statute – that contains both the general rules on attribution of responsibility and the specific provisions relating to crimes. In contrast, the law of state responsibility defines complicity as a mode of participation in the ILC Articles on State Responsibility, while the rules outlining prohibited conduct are found elsewhere in various international treaties. It is true that the Genocide and the Torture Conventions explicitly mention 'complicity'. However, in the context of these instruments 'complicity' is treated more as a substantive crime itself rather than a mode of participation. This peculiarity prompted the judges in the *Genocide* case to turn to the ILC Articles on State Responsibility for the proper definition of 'complicity'. The UK Parliament's Committee in *Binyam Mohamed* drew inspiration from the definitions provided by international criminal law.

Yet another difference between complicity in law of state responsibility and international criminal law resides in the definition of legal requirements of complicity. As discussed above, it is well established in the case law of international criminal tribunals that 'knowledge' is sufficient to hold an individual responsible for aiding and abetting the crime if other criteria are met.¹²⁷ The ICC has a higher threshold for the fault requirement – acting with a purpose of facilitating the commission of the crime.¹²⁸ The situation is much less clear in the law of state responsibility. The ILC Commentaries mention both knowledge and intent as a requirement for aiding and assisting. Similarly, the ICJ has adopted a very careful approach to the fault requirement in the context of state complicity. It did not rule on whether shared intent is necessary for complicity in genocide and it fell short of even establishing Serbia's awareness of the genocide about to be committed. This caution can be explained by the general difficulty of ruling on the fault of a collective entity such as the state. The legal dilemma lies in the fact that fault is established in relation to state agents who are nonetheless acting in their

¹²⁷ See Chapter II.1 *supra*.

¹²⁸ Article 25(3)(c) of the Rome Statute.

official capacity. They are implementing state policy in an unlawful manner. The ensuring separation of their individual responsibility as moral agents as a result of their unlawful actions from the responsibility of a state brings about certain level of discomfort.¹²⁹

Consequently, in contrast with the UK Parliament's Committee conclusions, it appears that complicity for the purposes of law of state responsibility has a narrower scope than complicity for the purposes of international criminal law. The threshold for holding a state responsible for complicity is higher than the threshold established for complicity in the context of individual criminal responsibility. Of course, this could be partially explained by the lack of relevant cases in the field of law of state responsibility but the general principles of complicity developed by both disciplines are nonetheless sufficiently clear to point in the direction of a higher threshold for state complicity.

At first it may seem counter-intuitive that it is more difficult to hold a state guilty as an accomplice rather than an individual. A rich jurisprudence relating to individual criminal responsibility clearly dominates the remarkably few cases dealing with state complicity. International criminal law has developed the concept of complicity to a much greater extent than the law of state responsibility. However, this does not imply that the standards accepted for states are more relaxed than the standards for the individuals. The case of *Ahmed & Anor v R* supports this contention. The Court of Appeal of England and Wales, in contrast with the conclusions of the UK Parliament's Committee, rejected the wider notion of state complicity.

One can furnish a number of explanations as to why there is a higher threshold for state complicity. One reason could be the tension that is still present in the law of state responsibility between the traditional state-centred approach that implies primarily bilateral relations between states and the community oriented approach that is currently on the rise.¹³⁰ In this respect, Aust referred to the prominent international lawyer Roberto Ago, who in 1939 stated that it was exactly this bilateral structure of international law which made it impossible to think of state responsibility for complicity.¹³¹

¹²⁹ P. Allott noted, "the moral effect of the law is vastly reduced if the human agents involved are able to Separate themselves personally both from the duties the law imposes ad from the responsibility which it entails." P. Allott, 'State Responsibility and the Unmaking of International Law,' 29 *Harvard Journal of International Law*, 1998, at 14.

¹³⁰ H. Aust, 2013, at et sq.

¹³¹ H. Aust, 2013, at 5 citing R. Ago, 'Le délit international', *Recueil des Cours* 68, 1939-II, at 415-554, at at 523.

From a strictly legal point of view, criminal law, from the moment of its conception, was aimed at individuals rather than collective entities.¹³² Consequently, applying certain criminal law principles to the state poses challenges. For example, the *Genocide* judgment demonstrated the difficulty of defining the fault requirement for the state.¹³³ Another challenge is the question of punishment and its enforcement. Domestic criminal law usually provides for a developed criminal justice system encompassing various types of punishment backed up by the state enforcement mechanism. International criminal law is similar to domestic criminal law in that it empowers courts and tribunals to hand down sentences, enforced through state cooperation. Therefore, finding an individual accomplice to a crime brings about a very tangible outcome. No equivalent exists at the level of state responsibility.

On a more general level, the reluctance to accept a stricter standard of state criminality, and in particular state complicity, can be caused by the need to protect states from the stigmatization that inevitably follows from a finding of criminal responsibility. Arguably, the consequences of holding an individual complicit in international crimes are less severe than the same finding in relation to a state. This is so because the nationals incur their punishment individually, while criminally responsible states have to bear the consequences as a collective entity. The criminal responsibility of a state, including criminal complicity, opens the door to severe reputational implications, as well as many legal actions, including individual claims for damages originating in foreign countries. These effects could in turn undermine the very essence of statehood – sovereignty, which holds that a state is not subject, within its territorial jurisdiction, to governmental, executive, legislative, or judicial jurisdiction of a foreign state.¹³⁴

In this respect, a parallel can be drawn with corporate complicity, and the caution that the state courts exercise in holding corporations complicit in human rights violations in another state. The recent case law of the US Supreme Court appears to uphold the presumption against extraterritorial application of the US Statutes.¹³⁵ For example, in *Kiobel*, the US Supreme Court rejected the claim that Alien Torts Statute covered conduct occurring in a foreign sovereign's territory, even if the corporation is present in the US.

¹³² International criminal law lies at the intersection of domestic criminal law and public international law. It embraces to some extent the collective aspect of international crimes. For more discussion, see Chapter VII.2 *infra*.

¹³³ The question of the subjective element of state responsibility for aiding and assisting divided states and was already raised during the preparatory work on the provision for the Articles on State Responsibility. H. Aust, 2013, at 231-235.

¹³⁴ R. Bernhardt, *Encyclopaedia of Public International Law*, Amsterdam; Lausanne; New York, 2003, at 512.

¹³⁵ *Kiobel v. Royal Dutch Petroleum*, 2013 WL 1628935; *Morrison v. National Australia Bank Ltd.*, 561 U. S. 2010.

The court insisted that for the presumption against extraterritoriality to be set aside the claims must “touch and concern the territory of the United States [...] with sufficient force.”¹³⁶ The reasons for this conservative approach to corporate complicity are similar to the concerns related to state complicity – the reluctance to jeopardize another state’s sovereignty.

Conclusion

International crimes are very complex in nature and involve a variety of actors, including states and individuals. It is very important to address the question of responsibility for mass atrocities at each level of perpetration. This is possible because state and individual responsibility are not mutually exclusive and complement each other. In general, individual criminal responsibility and state responsibility are mutually enriching and share many concepts. Consequently, some theories from one field of law travel to another field of law. Complicity is one example of such a shared notion. However, care needs be applied when comparing responsibility of a state and responsibility of an individual. It has been demonstrated in this chapter, using the example of complicity, that there are limits to such a comparison.

It is due to the specific features of the law of state responsibility and international criminal law that the threshold for state complicity is higher than the threshold for individual complicity. At present the threshold for state complicity arguably remains at this high level in order to preserve the integrity of ‘complicity’ as a concept in both areas of law. The system of state responsibility at the moment lacks proper enforcement mechanisms when it comes to certain types of violations. It also lacks proper articulation of some criminal law concepts, such as the fault of a state. Complicity of individuals in the commission of international crimes is far more developed than complicity of states. Following the Nuremberg trials, the principle of individual criminal responsibility, including complicity, has gained wide international acceptance and support. The same cannot be said about state complicity.

Consequently, direct transposition of the concept of complicity from one area of law to another is not the most desirable approach. It is arguably more efficient to furnish proper analysis and articulation of this principle separately in the context of each discipline, relying on the realities of the particular area. The case law of the international criminal tribunals relating to individual complicity is a useful tool in developing the notion of state complicity, but it can only serve as a reference point and not as a substitute. The *Furundžija* case illustrates this point. The *Furundžija* Trial Chamber found the accused guilty of perpetrating torture (and not merely aiding and abetting the crime)

¹³⁶ *Kiobel v. Royal Dutch Petroleum*, 2013 WL 1628935;

solely on the basis of the accused being behind the purpose of torture, namely obtaining the information through interrogation. By directly applying the same test to *Binyam Mohamed* case, one may come to the conclusion that the UK was not merely complicit in torture but rather perpetrated it because it appears from the facts of the case that UK's purpose was precisely that of obtaining the information from Mohamed. However, such a conclusion would arguably be too controversial and far-reaching.

VI. The Correlation between Complicity and Sentencing

Introduction

The question of responsibility is closely intertwined with the question of punishment. It is difficult to perceive actions as criminal if they are not subject to punishment.¹ In the dialogue between the offender and the community, punishment is an instrument of communication to the wrongdoer of public reprobation.² The pain that the punishment inflicts, or the ‘hard treatment elements of punishment’, ensures that the offender does not ignore the message that society is trying to deliver to him or her.³

This dialogue between the offender and the community becomes even more intense at an international level: the outrageous nature of international crimes and the amount of suffering sustained by the victims enhance public desire to subject the offender to legal censure. Therefore, sentences handed down by the ICTY, ICTR, ICC, ECCC and SCSL have a huge impact on the accused, the victims and the society.⁴ The punishment becomes the measure of responsibility of the convicted person and it is usually widely publicized and discussed. Paradoxically, international criminal law lacks proper guidance on sentencing.⁵ There are no appropriate tools to help ‘translate’ the totality of criminal conduct of the accused into a numerical value. Therefore, it comes as no surprise that some legal commentators highlight the difficulty of predicting the length of the sentences to be handed down by the international courts.⁶

Complicity as a mode of participation is an important indicator determining the degree of culpability of the accused during sanctioning in national law. As discussed in some detail in chapter four, most domestic legal systems distinguish between primary and secondary perpetrators for sentencing purposes. Mitigation of the sentence is one practical outcome of finding someone complicit in crime, as opposed to rendering him or her the primary perpetrator. National legal orders are quite explicit in this respect and can be

¹ G. Fletcher, 2007, at 12.

² RA Duff ‘Punishment, Retribution and Communication’ in A. von Hirsch et al (eds), 2009, at 129.

³ Ibid.

⁴ M. B. Harmon and F. Gaynor, ‘Ordinary Sentences for Extraordinary Crimes,’ 5 *Journal of International Criminal Justice*, 2007, at 707.

⁵ N. Bernaz, ‘Sentencing and Penalties,’ in W. Schabas and N. Bernaz (ed.), *Routledge Handbook on International Criminal Law*, Routledge, 2009, at 289; R. D. Sloane, ‘Sentencing for the ‘Crime of Crimes’, The Evolving ‘Common Law’ of Sentencing of the International Criminal Tribunal for Rwanda,’ in 5 *Journal of International Criminal Justice*, 2007, at 714; R. Cryer et al, at 494.

⁶ G. Mettraux, 2005, at 356.

roughly divided into two camps: those that recognise more lenient sentences for accessories and those that treat all crime participants alike.⁷ Common law countries, as well as France, punish principals and accomplices alike at the legislative level. However, analysis of jurisprudence and doctrine reveals a more nuanced approach in individual cases. Other national legal systems, such as Germany, Spain or Russia, are more explicit in distinguishing between complicity and primary participation and their statutes stipulate that accomplices should receive more lenient sentences than primary perpetrators.⁸ The justification for a sentencing discount for an accessory is that his or her act is less wrongful, their state of mind is less culpable, or they lack the requisite hegemony over act.⁹ These explanations however raise questions even in the domestic law context. For example, should the accessory still receive a sentencing discount if his or her motive was worse than that of the primary perpetrator?¹⁰

As international law targets senior leadership figures, often far removed from the scene of the crime, it presents even greater difficulty with respect to punishing accomplices. In many instances, the conduct of these individuals fits the legal definition of complicity. Can one safely assume that their culpability is less, simply because they did not directly perpetrate the crime? The statutes of ICTY, ICTR, SCSL, ECCC and ICC do not answer this question or explain the consequences attached to the distinct modes of liability they contain.¹¹ The matter is further complicated by the introduction in international criminal law of various concepts constituting ‘borderline’ cases that lie between complicity and the actual commission of an offence. Joint criminal enterprise and co-perpetration often denote a level of involvement that, while not exactly amounting to perpetration, does not belong under the heading of complicity either.

The purpose of this chapter is to explore the impact of complicity on sentences in international criminal law. This is done in two ways. First, there is an in-depth analysis of the sentencing considerations contained in several judgements that are thought to be representative of sentencing decision-making process at an international level. This is intended to elucidate the factors affecting the final outcome. Secondly, the table contained in Appendix IV reflects the correlation between the modes of participation and sentencing at the ICTY, ICTR, ECCC and SCSL in a more schematic way. The table

⁷ G. Fletcher, 1978, at 637; H. Olasolo in R. Haveman and O. Olusanya (eds), at 54.

⁸ A. Cassese, 2008, at 188.

⁹ G. Fletcher, 1978, at 654-656.

¹⁰ G. Fletcher, 1978, at 651.

¹¹ Antonio Cassese notes the rudimentary nature of international criminal law when it comes to explaining the consequence attached to different classes of participation. See A. Cassese, 2008, at 188.

lists all persons convicted by the ad hoc tribunals and hybrid courts, the crimes that they were convicted of, their mode of liability and their respective sentences. The aim of this table is to show that the ‘final number’ largely depends on the type of crime charged and the scope of the indictment. Moreover, many convictions rely on several forms of participation and not just one.

This chapter seeks to demonstrate three main points. First, that the processes of attributing responsibility and the imposition of a sentence are two distinct processes and should continue to be treated as such, especially in the context of international criminal law. This is in line with HLA Hart’s separation of conviction and punishment, which will be discussed in the section dealing with judicial discretion.¹²

Secondly, the mode of liability under which the accused is convicted bears more weight at the stage of the attribution of responsibility than at the punishment stage. Empirical research of the sentencing practice in international criminal law supports this conclusion and shows that complicity by no means warrants a lesser sentence in international criminal law. Rather, it has some impact on the sentence along with other considerations.¹³ This is so because of the peculiar nature of international criminal law that targets primarily senior perpetrators who are not present at the scene of the crime. Thus, it is the totality of factors that judges take into consideration, and not one particular aspect.¹⁴ Consequently, in contrast with domestic law, the mode of participation does not speak so much to the gravity of the offence.

Finally, in the absence of the sentencing regime in international criminal law, judicial discretion in determination of penalties is essential. The judges’ freedom to decide on the appropriate penalty after having taken into consideration the totality of factors, including the mode of participation of the accused, is one of the peculiarities of contemporary international criminal law. This is not necessarily a negative feature. However, it is important to establish a ‘cap’ on the exercise of this discretion by international judges. The most obvious way to do this is to define and rank the aims of punishment in international criminal law and to elaborate on a scale of crimes according to their gravity.

The first part of this chapter outlines few sentencing principles contained in the Statutes of the ad hoc tribunals and the ICC. The same section explores the effect of the forms of participation, in particular complicity, on

¹² H.L.A. Hart and J. Gardner, at 185.

¹³ Appendix IV. For the quantitative study of the ICTY sentencing practice see also B. Hola, A. Smeulers and C. Bijleveld, ‘Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice,’ 22 *Leiden Journal of International Law*, March 2009, at 79-97.

¹⁴ *Taylor Appeal Judgement*, § 670.

sentencing. This is done by looking at selected judgements emanating from the ad hoc tribunals, the hybrid courts and the ICC. The second part discusses punishment goals in international criminal law – any discussion on sentencing is incomplete without an elaboration of these goals. This section attempts to link the traditional justification for punishment utilized by domestic legal systems with the reality of international criminal law. In addition to that, the section strives to find a place for the mode of participation within the framework of each sentencing goal. The final third part of the chapter examines judicial discretion at sentencing. This section draws a distinction between the two stages of criminal trial – the stage leading to conviction, which places much emphasis on the mode of responsibility of the accused person, and the sentencing stage that focuses on the totality of factors in determining the punishment. Some conclusions are provided in the final part of this chapter.

1. The Correlation between Complicity and Sentencing

i. Statutory Sentencing Principles

Before turning to the impact of complicity on punishment in the case law, it is important to identify some sentencing principles developed by the international criminal tribunals and the ICC. The Statutes of the ICC, ICTY, ICTR, and SCSL and the ECCC constituent documents provide minimum guidance on this aspect, allowing for wide judicial discretion.¹⁵ One can summarize a few general principles common to all of the abovementioned courts:¹⁶

1. International criminal tribunals cannot impose the death penalty;
2. There is a limited dialogue with the national criminal justice systems: The ICTY, ICTR and SCSL may have a recourse to the general practice regarding prison sentences in the courts of the respective state, while the ICC may refer to national sentencing provisions in the complementarity analysis;
3. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person, as well as mitigating and aggravating circumstances.

The first principle limits the Trial Chambers' discretion to imposing custodial sentences only, supplemented by the option of ordering the forfeiture of

¹⁵ A. Cassese, 2008, at 51.

¹⁶ See Articles 24 ICTY Statute, 22 ICTR Statute, Article 78 Rome Statute, Article 19 SCSL Statute, Articles 38-39 of the ECCC Law, Article 10 of the ECCC Agreement, Rule 101 ICTY, ISTR and SCSL Rules of Procedure and Evidence, Rule 98(5) of the ECCC Internal Rules, and Rule 145 ICC Rules of Evidence and Procedure, attached in the Appendix I.

unlawfully acquired assets. In relation to the ICTY, ICTR and SCSL,¹⁷ this excludes other types of punishment such as the death penalty, fines or community service.¹⁸ The Rome Statute provides for an option of a fine, in addition to the imprisonment.¹⁹ With regard to the length of imprisonment, neither ICTY nor ICTR Statutes prohibit life imprisonment,²⁰ while the Rome Statute sets the maximum term at 30 years, allowing in exceptional cases for life imprisonment if justified by the extreme gravity of crimes and the individual circumstances of the convicted person.²¹ The SCSL Statute requires that the imprisonment be for a limited number of years.²²

The second principle - the recourse to domestic sentencing practice at the ICTY, ICTR and SCSL- received some acclaim.²³ However, it is generally not considered to be mandatory.²⁴ The Appeals Chamber in *Tadić* noted “while the law and practice of the former Yugoslavia shall be taken into account by the Trial Chambers for the purposes of sentencing, [...] a Trial Chamber’s discretion in imposing sentence is not bound by any maximum term of imprisonment applied in a national system.”²⁵ National law plays a greater role when it comes to the enforcement of sentences of the convicted persons.²⁶ The Rome Statute, on the other hand, does not suggest that the ICC should consider the scale of penalties of the relevant states.²⁷

Finally, the third principle, namely the factors to be considered at sentencing, received a detailed, albeit somewhat mechanical, explanation in the case law of international tribunals. The first part of the determination, the ‘gravity of offence’ has been referred to as “the litmus test for the appropriate sentence.”

¹⁷ The ECCC regime differs from that of the SCSL, ICTY ICTR and the ICC in that “[t]he ECCC Agreement, the ECCC Law and the Internal Rules are otherwise silent as regards the principles and factors to be considered at sentencing. In particular, they do not indicate whether sentencing before the ECCC is governed by international or Cambodian legal rules, or some combination of each.” See *Duch* Judgment, § 575. The ECCC Supreme Court Chamber established the prevalence of international law over national sentencing provisions by holding that “in accordance with the principle of *lex specialis*, the ECCC Law shall govern the range of penalty in proceedings before the ECCC.” *Prosecutor v KAING Guek Eav alias Duch*, ECCC, Case 001/18-07-2007-ECCC/SC, Appeal Judgment, 3 February 2012 (*‘Duch Appeal Judgment’*), § 348.

¹⁸ G. Mettraux, 2005, at 343.

¹⁹ Article 77 (2) (a) Rome Statute.

²⁰ Articles 23(1) ICTR Statute and 24(1) ICTY Statute.

²¹ Article 77 (1) Rome Statute.

²² Article 19 (1) SCSL Statute.

²³ For example, in *Muhimana* ICTR Trial Chamber, prior to arriving at its own conclusion on sentencing, examined in detail the sentencing ranges provided by the Rwandan law for murder, genocide and crimes against humanity. See Judgement, *Muhimana* (ICTR 95-1B-T), Trial Chamber, 28 April 2005, § 592.

²⁴ A. Cassese, 2008, at 51- 52.

²⁵ *Tadić* Third Sentencing Judgment, § 21.

²⁶ N. Bernaz, at 289.

²⁷ A. Cassese, 2008, at 52.

²⁸ Despite its apparent importance, this notion is not sufficiently clear in the jurisprudence of the tribunals,²⁹ especially in the absence of a formal hierarchy of the offences in the statutes of the courts and tribunals.³⁰ The courts describe ‘gravity of offence’ in a number of generic terms: the ICTR, for example, stated that in assessing the gravity of offences for which the accused has been found guilty, the Chamber takes into account the particular circumstances of the case as well as the nature and degree of his participation in the crimes.³¹

The ICTY Appeals Chamber adopted a similar approach to understanding the gravity of the crime. It held in *Krnojelac* “the starting point in any consideration of the appropriate sentence is the gravity of the conduct of the accused in the case in question” and clarified that the determination of this issue requires analysis “of the particular circumstances of the case, as well as of the form and degree of the participation of the accused in the crime.”³² In the RUF Sentencing Judgment, the SCSL has been more explicit in holding that the following factors need to be taken into account when assessing the seriousness of the offences for sentencing purposes: the scale and brutality of the offences, the role played by accused in their commission, the degree of suffering inflicted on victims as well as the number of victims.³³

The ICC, in the *Lubanga* sentencing decision, held that the ‘gravity of the crime’ is one of the principal factors to be considered in the determination of sentence. It should be in proportion to the crime and reflect the culpability of the convicted person.³⁴ It is peculiar that the court inferred the requirement of proportionality from Article 81(2)(a) of the Rome Statute that provides for the possibility to appeal the sentence if it is disproportionate to the crime. Proportionality also played a major role in the jurisprudence of the other international courts: the ICTR Trial Chamber in *Akayesu* held that “sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender.”³⁵ The SCSL

²⁸ *Akayesu* Appeal Judgment, § 413.

²⁹ R. D. Sloane, at 722; M. B. Harmon and F. Gaynor, at 696-698; R. Cryer et al, at 498.

³⁰ R. Cryer et al, at 498.

³¹ Prosecutor v. *Muhimana*, ICTR Case No. 95-1B-T, Trial Judgement 28 April 2005, (*‘Muhimana Trial Judgement’*), § 591.

³² *Krnojelac* Trial Judgment, § 522 as discussed by K. Khan and R. Dixon (eds), *Archbold: International Criminal Courts. Practice, Procedure and Evidence* (Sweet and Maxwell, 2005), at 815. See also *Čelebići* Appeal Judgement § 731; *Blaskić* Appeal Judgment § 683; *Aleksovski* Appeal Judgment § 182.

³³ Prosecutor v. *Sesay, Kallon and Gbao*, SCSL-04-15-T, Sentencing Judgment, 8 April 2009 (*‘RUF Sentencing Judgment’*), § 18.

³⁴ *Lubanga* Sentencing Decision, § 36.

³⁵ *Akayesu* Sentencing Transcript, at 8;

in RUF also pointed out that sentences should be individual and proportionate to the severity of conduct of the offender.³⁶

In addition to the gravity of the offence, the judges consider mitigating and aggravating circumstances. Instruments of the ICTY, ICTR and SCSL do not include the list of such circumstances, deliberately leaving them to the discretion of the judges.³⁷ Examples of the aggravating factors include the role of the accused in the commission of crimes, that is his position of leadership, his discriminatory intent and the length of time during which the offence continued.³⁸ The ICC's Rules of Evidence and Procedure contain a non-exhaustive list of mitigating and aggravating factors to be considered at sentencing, such as the extent of the damage caused, the degree of participation of the convicted person, abuse of power and official capacity and others.³⁹

The example of the aggravating factor newly introduced in international criminal law is the 'extraterritoriality of the acts of the convicted person' in the *Taylor* case. The judges felt compelled to account for the fact that Taylor caused damage and suffering on the people of the neighbouring country and not simply his own.⁴⁰ This freshly discovered aggravating factor reinforces two key points. First, the sentencing practice at an international level is still evolving. Second, individualization of sentences in international criminal law requires that the judges enjoy freedom in the imposition of sentences for the purposes of reflecting the unique set of facts surrounding each case. This stands in contrast with the majority of domestic criminal cases that are usually easier to place in a certain category.

The three sentencing principles discussed above provide little guidance on the punishment of convicted persons.⁴¹ While there exist some fundamental sentencing rules, such as the exclusion of the death penalty, the specific length of incarceration is determined by relying on the generic notions, such as the gravity of the offence and the individual circumstances of the accused. The judges thus enjoy broad discretion in crafting the content of these broad terms on a case-by-case basis. The next section demonstrates how

³⁶ RUF Sentencing Judgment, § 18.

³⁷ RUF Sentencing Judgment, § 25; Prosecutor v. *Obrenović*, ICTY Case No. IT-02-60/2, Sentencing Judgement, 10 December 2003, § 91; *Blaskić* Appeal Judgement, § 685.

³⁸ *Blaskić* Appeal Judgement, § 686.

³⁹ Rule 145 (1) (c) and (2) ICC Rules of Evidence and Procedure; See also W. Schabas, 2010, at 902-906.

⁴⁰ *Taylor* Sentencing Judgment, § 98.

⁴¹ The lack of statutory guidance as to the specific penalties, led some commentators to conclude that the principle of legality of penalties (*nulla poena sine lege*) is not applicable at an international level. See A. Cassese, 2008, at 51; K. Ambos, "Nulla Poena Sine Lege in International Criminal Law, in R. Haveman and O. Olusanya (ed.), *Sentencing and Sanctioning in Supranational Criminal Law*, Intersentia, Antwerp-Oxford, 2006, at 32.

judges approach one of the ‘ingredients’ of sentencing considerations – the form of participation of the convicted person, which is a constituent element of ‘gravity of offence’. It appears to play only a limited role in sanctioning.

ii. Case Law

In the absence of the rigid statutory guidance, there are a number of factors that international criminal judges take into account at sentencing and it is difficult to single out one aspect that is dispositive. Where does complicity fit in the equation? The mode of participation of the convicted person appears to be one of those factors. The SCSL in RUF noted that the mode of liability under which the accused is convicted may serve as an indication of his role in the crime, and “aiding and abetting as a mode of liability generally warrants a lesser sentence than that imposed for a more direct form of participation”⁴² Many ICTY and ICTR Chambers made similar pronouncements to that effect.⁴³ For example the *Šljivančanin* Appeals Chamber acknowledged the practice of treating aiding and abetting as a lower form of responsibility attracting a lesser sentence. However, it held that it is the gravity of the underlying crimes that remains an important consideration in assessing the *totality* of the criminal conduct.⁴⁴ The Appeals Chamber in *Taylor* took a different approach. It held that “there is no hierarchy or distinction for sentencing purposes between forms of criminal participation.”⁴⁵

In practice, the form of participation of the accused bears a relative value.⁴⁶ The table on the impact of the liability mode on sentencing at the ICTY, ICTR, SCSL, ICC and the ECCC contained in Appendix IV shows that a combination of factors affects the length of the sentence of the accused. First, it is clear from the table that the ICTY has on average a more lenient sentencing policy than the ICTR, while the ICTR is in turn more lenient than the SCSL. Secondly, the types of crime as well as the number of criminal acts underlying the conviction play an important role at sentencing. Genocide usually attracts heavier penalties; the more crimes that the individual is found responsible for, the longer is his sentence.⁴⁷ Finally, on the basis of the cumulative sentencing principle, internationally convicted persons frequently receive a single sentence for different criminal acts and different modes of

⁴² RUF Sentencing Judgment, §§ 19-21.

⁴³ See, for example, *Vasiljević* Appeal Judgment, § 102; A. Cassese, 2008, at 211.

⁴⁴ *Šljivančanin* Appeal Judgment, § 407, emphasis added.

⁴⁵ *Taylor* Appeal Judgment, § 670.

⁴⁶ The aims of punishment in international criminal law are discussed in the subsequent section.

⁴⁷ This aspect raises important, charged policy questions. What is the implication of a prosecutorial decision to charge the accused only with a specific type of offence – when evidence on other crimes is abundant - solely for the matters of judicial efficiency?

participation that attach to these acts. This peculiarity makes it difficult, if not impossible, to distil the exact impact of complicity on the ‘final figure’.

The empirical research of the ICTY sentencing dynamics conducted by Hola, Smeulers and Bijleveld pointed to interesting conclusions. It showed that the final average sentence for perpetrators, 17.3 years of imprisonment, is very close in value to the final average sentence for aiders and order-givers – 16.2 and 16.8 years of imprisonment, respectively. Moreover, the other types of accomplices receive an even more severe punishment than the actual perpetrators – 18.5 years is the average sentence for planners, and 20.7 – for instigators.⁴⁸ On the other hand, members of a joint criminal enterprise receive a lenient average sentence of 14.6 years of imprisonment. This is despite the fact that participation in the joint criminal enterprise counts as a primary mode of responsibility.⁴⁹

Therefore, one can conclude that it is the combination of factors that predetermines the final sentence, and the mode of responsibility plays only a limited role. In this respect, it is also instructive to look at several cases across the tribunals with the prospect of establishing how complicity, or the mode of participation in general, fits into the pattern of judicial thinking at sentencing. This exercise has the benefit of including the factual component in the discussion on sentencing that is missing from the statistical overview provided in the Appendix IV.

Tadić, the first international criminal law trial in the modern era, provides a compelling example of the limited significance of complicity and the importance of the other factors at sentencing. Duško Tadić was a member of the Serbian Democratic Party in the town of Kosarić. He was convicted of various acts of violence against the non-Serb population in this district, including aiding and abetting prisoner beatings and killing two Muslim police officers.⁵⁰ Tadić’s initial sentence of twenty years of imprisonment was largely motivated by the fact that the accused could not be considered to have played a significant leadership or organizational role in the events that occurred in Prijedor.⁵¹

Tadić’s sentence has been revisited twice after that: once by the Trial Chamber after the Appeal Judgment came out,⁵² and again by the Appeals

⁴⁸ B. Hola, A. Smeulers and C. Bijleveld, at 91.

⁴⁹ *Vasiljević* Appeal Judgment, § 95; *Tadić* Appeal Judgement, § 188; *Krnojelac* Appeal Judgement, § 29; G. Mettraux, 2005, at 288.

⁵⁰ First Sentencing Judgment, *Tadić* (IT-94-1-T), Trial Chamber, 14 July 1997, §§ 20, 74, 75.

⁵¹ *Ibid* § 60.

⁵² For the discussion of the ICTY Appeal’s Chamber decision to convict Tadić of murders as results of his participation in the joint criminal enterprise see W. Schabas, 2006, at 297.

Chamber itself.⁵³ Upon the first review, the Trial Chamber increased Tadić's sentence to twenty five years imprisonment following the finding that Tadić was responsible for the killing of five men pursuant to the notion of 'common design' of the joint criminal enterprise, as opposed to aiding and abetting these crimes.⁵⁴ Tadić appealed both the initial sentencing judgment and the subsequent one, on the basis that the gravity of the offence and his culpability were not sufficiently reflected in the sentence. The Appeals Chamber agreed with the accused that the sentence of twenty-five years failed to reflect the relative insignificance of his role in the broader context of the conflict in the former Yugoslavia. The Appeals Chamber reduced Tadić's sentence to twenty years, holding that while the conduct of which the accused stood convicted was heinous, his level in the command structure of the whole ethnic cleaning campaign was relatively low.⁵⁵

In contrast with Tadić, Aleksovski was found guilty of aiding and abetting and not guilty of membership in the joint criminal enterprise. The ICTY held that Aleksovski's presence during the maltreatment of hundreds of non-Croat prisoners in Bosnia in his capacity as commander of the prison represented a tacit encouragement of the crimes.⁵⁶ This maltreatment qualified as outrages upon personal dignity as violations of the laws and customs of war.⁵⁷ The Trial Chamber sentenced Aleksovski to two and a half years imprisonment based on the consideration that his direct participation in the commission of the acts of violence was relatively limited.⁵⁸ The Prosecution appealed, arguing that the sentence of two and a half years custody failed to achieve the two main purposes of sentencing in international criminal law, it being disproportionate to the magnitude of the offence⁵⁹ and lacking a sufficient deterrent effect.⁶⁰

The Appeals Chamber was not especially influenced by the deterrence rationale and used the test developed by previous tribunals in order to assess whether the gravity of the offence was given due consideration. It discussed whether the circumstances of the case as well as the form and degree of participation of the accused in the crime justify such a lenient sentence.⁶¹ It concluded that while the accused may have had a secondary role in the

⁵³ Prosecutor v. *Tadić*, Case No. IT-94-1-Tbis-R117, Second Sentencing Judgment, 11 November 1999 ('*Tadić* Second Sentencing Judgment'); Prosecutor v. *Tadić*, ICTY Case No. IT-94-1-A and IT-94-1-Abis, Third Sentencing Judgment, 26 January 2000 (*Tadić* Third Sentencing Judgment)'.

⁵⁴ *Tadić* Second Sentencing Judgment as discussed by A. Cassese, 2008, at 207.

⁵⁵ *Tadić* Second Sentencing Judgment as discussed by A. Cassese, 2008, at 208.

⁵⁶ *Aleksovski* Trial Judgment, par 87 as discussed by A. Cassese (2008), at 218, *footnote* 6.

⁵⁷ *Aleksovski* Trial Judgment, at 89.

⁵⁸ *Aleksovski* Trial Judgment, §§ 235 and 244.

⁵⁹ For more discussion on proportionality see K. Kittichaisaree (2002), at 316.

⁶⁰ *Aleksovski* Appeal Judgment, § 179.

⁶¹ *Aleksovski* Appeal Judgment, § 182.

commission of crimes in prison, the Trial Chamber failed to give sufficient weight to the gravity of his conduct because Aleksovski was a commander and as such the person in authority who had the power to prevent crimes in the prison. The Appeals Chamber therefore increased the sentence of the accused to seven years of imprisonment.⁶²

Aleksovski is one of the infrequent instances when the Appeals Chamber felt compelled to increase the sentence of the accused.⁶³ It appears that when initially delivering a lenient sentence of two and half years, the Trial Chamber was guided by recognition of Aleksovski's peripheral position in the commission of the crimes and the fact that he was not perpetrating them but merely aiding and abetting. The mode of liability of the accused was therefore central in the Trial Chamber's reasoning. The Appeals Chamber re-established that *a number* of factors must be evaluated in order to determine the gravity of the crime, not only the degree of the participation of the accused but also his role in the context of the conflict and circumstances of the case.

The *Vasiljevic* case is a rare example of when a sentencing discount was based almost exclusively on the mode of participation of the convicted person. Mitar Vasiljevic was a member of Serbian paramilitary unit operating in Eastern Bosnia.⁶⁴ The Trial Chamber established that around 7 June 1992 the accused, together with several other paramilitaries, forcibly transported seven Bosnian Muslim civilians to the eastern bank of the Drina River, where five of the victims were executed while two men managed to escape.⁶⁵ Prior to transporting the civilians to the execution site, Vasiljevic held them at gunpoint in the nearby hotel. The Trial Chamber convicted Vasiljevic as a co-perpetrator in the joint criminal enterprise. To incur liability as a member of the joint criminal enterprise, the accused must share a criminal intent with the principal offender.⁶⁶ The Trial Chamber in *Vasiljevic* inferred intent from the acts of the accused, holding that 'the only reasonable inference available on the evidence is that the accused, by his actions, intended that the seven Muslim men be killed, whether or not he actually carried out any of those

⁶² *Aleksovski* Appeal Judgment, §§ 183, 184 and 191 as discussed by K. Khan and R. Dixon, at 821.

⁶³ *Galić* demonstrates another example of the dramatic increase in the length of the accused's sentence on appeal. The Appeals Chamber in this case stroke down the sentence of twenty years of imprisonment imposed by the Trial Chamber for ordering the shelling of Sarajevo and sentenced the accused to life imprisonment. The exceptional degree of brutality and cruelty with which the crimes were committed, their prolonged nature and Galić's position of authority rendered, in the view of the Appeals Chamber, the initial sentence of twenty years unreasonable and unjust. See *Galić* Trial Judgment, § 769; *Galić* Appeal Judgment, § 455.

⁶⁴ ICTY case information sheet at <http://www.icty.org>.

⁶⁵ *Vasiljević* Trial Judgment, § 97.

⁶⁶ See Chapter II.1.iii *supra*.

killings himself.’⁶⁷ The Trial Chamber convicted Vasiljevic of murder in respect of five men and inhumane acts in respect of two survivors.⁶⁸ Vasiljevic was sentenced to twenty years of imprisonment.⁶⁹

The Appeals Chamber, on the other hand, held that it has not been established beyond reasonable doubt that the accused shared a criminal intent to kill.⁷⁰ However, the Appeals Chamber recognized that the accused knew that his actions would assist the killings because he guarded the victims prior to the shootings, walked them to the place of the executions, and was present at the time when the killings took place. His actions had significant effect on the commission of the crime. Based on these considerations, the Appeals Chamber reversed the finding that Vasiljevic was a co-perpetrator in the joint criminal enterprise and found him guilty of aiding and abetting murder and inhumane acts.⁷¹ The new finding in relation to Vasiljevic’s form of liability prompted the Appeals Chamber to adjust his sentence.⁷² The Chamber reversed the sentence from twenty to fifteen years imprisonment based on the view that aiding and abetting generally warrants a lesser sentence than is appropriate for responsibility as a co-perpetrator.⁷³ Such a sentence, in the view of the Appeals Chamber, reflected the inherent gravity of the criminal conduct of the accused, the form and the degree of his participation, and the circumstances of the case.⁷⁴

The ICTR judges also chose between primary and secondary participation on a number of occasions. For example, in the *Akayesu* case the trial bench analysed whether the actions of the local teacher in the Taba municipality of Rwanda were merely a manifestation of an accomplice liability, or whether they constituted an actual commission.⁷⁵ The judges held that Jean-Paul Akayesu incurred individual criminal liability for “having ordered, committed, or otherwise aided and abetted in the preparation or execution of the killing of and causing serious bodily or mental harm to members of the Tutsi group.”⁷⁶ Such an extensive participation in genocidal acts led the

⁶⁷ *Vasiljević* Trial Judgment § 113.

⁶⁸ *Vasiljević* Trial Judgment §§ 211 and 240.

⁶⁹ *Vasiljević* Trial Judgment § 309.

⁷⁰ *Vasiljević* Appeal Judgment, § 115.

⁷¹ *Vasiljević* Appeal Judgment, §§ 133 – 135 as cited by G. Mettraux, 2005, at 284.

⁷² *Vasiljević* Appeal Judgment, § 149.

⁷³ *Vasiljević* Appeal Judgment, § 102 as discussed by A. Cassese, 2008, at 211.

⁷⁴ *Vasiljević* Appeal Judgment, § 182.

⁷⁵ For the discussion of ‘complicity’ see W. Schabas, 2006, at 305-306.

⁷⁶ *Akayesu* Trial Judgment, §§ 705-706 as discussed by A. Cassese, 2008, at 217.

Chamber to conclude that Akayesu was responsible for genocide and not merely for complicity in genocide.⁷⁷

The Trial Chamber sentenced Akayesu to life imprisonment for genocide and incitement to commit genocide, fifteen years of imprisonment for rape and fifteen years of imprisonment for murder.⁷⁸ In arriving at such a conclusion, the judges assessed his personal role in the crimes committed in Taba. In particular, the tribunal noted Akayesu's position of authority in the local municipality and his duty to protect the population whose confidence he had betrayed.⁷⁹ The Trial Chamber pointed out that Akayesu's relatively low ranking in the government of Rwanda could serve as a mitigating factor at sentencing, whereas his deliberate choice to participate in killings and rapes of Tutsi population through orders and tacit encouragement constituted a powerful aggravating factor, one which clearly outweighed the mitigating one.

At the sentencing stage, the tribunal placed the magnitude of the crime at the centre of its considerations. Life imprisonment for genocide stands in contrast to the fifteen years of imprisonment for all other crimes committed by Akayesu, including murder and rape.⁸⁰ Despite the fact that the judges went to some length in specifying the mode of participation of the accused, this consideration seems to have occupied a rather peripheral role at sentencing, with the gravity of the crime of genocide taking centre stage.

The SCSL sentencing judgment in *Taylor* exemplifies sentencing practice for complicity in war crimes and crimes against humanity. It is not particularly lengthy and builds on the past jurisprudence of the ad hoc tribunals and the SCSL. From the beginning the Trial Chamber acknowledged that in the case law of the ad hoc tribunals aiding and abetting attracts a lesser sentence than that to be imposed for primary forms of participation. Despite recognising this, the Chamber highlighted that the unique circumstances of the case are the dominant factor in its sentencing considerations.⁸¹ Charles Taylor's factual contribution to the crimes committed in Sierra Leone appeared to be significant. The Chamber found that the RUF/AFRC heavily and frequently relied on the material aid supplied and facilitated by the convicted person, who also provided other forms of practical assistance that substantially contributed to the commission of the crimes while fully aware of

⁷⁷ Ibid, § 734. In addition to convicting Akayesu of genocide, the Trial Chamber found him guilty of ordering the killings of several refugees and civilians, acts of torture committed in his presence, aiding and abetting sexual violence by allowing it to happen close to his office. See *Akayesu* Trial Judgment, §§ 651 – 696.

⁷⁸ *Akayesu* Sentencing Transcript, at 6.

⁷⁹ Ibid.

⁸⁰ Sentences were ordered to be served concurrently.

⁸¹ *Taylor* Sentencing Judgment, § 21.

the essential elements of these crimes.⁸² The ‘label’ of secondary participation did not alleviate the gravity of Charles Taylor’s acts in the eyes of the Trial Chamber.

Two main aggravating factors appeared to attract the most weight for penalty purposes: Taylor’s presidency and the extraterritoriality of his acts. The court placed him “in a class of his own” when deciding upon the penalty, while stressing that, as president of Liberia and a member of ECOWAS committee, Charles Taylor held a position of public trust with inherent authority that he abused.⁸³ The fact that Taylor intervened in the affairs of another state by supporting the violence in the neighbouring Sierra Leone and not in his own country, thus violating the principle of customary international law, further aggravated his sentence.⁸⁴ Consequently, it was Charles Taylor’s leadership position as the former president of Liberia as well as the extraterritorial nature of his crimes and not the means of his involvement in the crimes that played the key role at sentencing and resulted in him receiving a lengthy sentence of fifty years of imprisonment.⁸⁵

The *Taylor* Appeals judgement upheld Charles Taylor’s conviction and 50-year sentence for aiding and abetting and planning murders, rapes and other acts of violence committed during the Sierra Leonean civil war.⁸⁶ However, the appellate panel disagreed with the Trial Chamber that aiding and abetting generally warrants a lesser sentence than that imposed for primary participation.⁸⁷ The judges held that it is unwise to assess the gravity of participation modes in abstract as it precludes the individualized assessment of cases.⁸⁸ Instead, the better approach is to evaluate the totality of factors:

In light of the foregoing, the Appeals Chamber holds that the totality principle exhaustively describes the criteria for determining an appropriate sentence that is in accordance with the Statute and Rules, and further holds that under the Statute, Rules and customary international law, there is no hierarchy or distinction for sentencing purposes between forms of criminal participation. The Appeals Chamber concludes that the Trial Chamber erred in law by holding that aiding and abetting liability generally warrants a lesser sentence than other forms of criminal participation.⁸⁹

The RUF case closely resembles *Taylor* both factually and legally. In this case, the SCSL convicted three high profile members of the Revolutionary United Front (RUF) - Sesay, Kallon and Gbao - of war crimes and crimes

⁸² *Taylor* Trial Judgment, §§ 6920, 6952, 6956.

⁸³ *Taylor* Sentencing Judgment, §§ 29, 97.

⁸⁴ *Ibid*, §§ 27, 98.

⁸⁵ *Ibid*, § 40.

⁸⁶ *Taylor* Appeal Judgment.

⁸⁷ *Ibid*, § 667.

⁸⁸ *Ibid*, § 666.

⁸⁹ *Ibid*, § 670.

against humanity, stemming from their participation in a single joint criminal enterprise with a broadly defined common criminal purpose to take power and control of Sierra Leone through committing crimes such as terrorism, rape, enslavement, murder, attacks on UN personnel, forced marriages and recruitment of child soldiers.⁹⁰ The Chamber held that Sesay and Kallon contributed significantly to the furtherance of the common purpose in the knowledge that their actions were part of the widespread and systematic attack against the civilian population. In contrast, the bench largely inferred Gbao's participation and contribution to the joint criminal enterprise from his "important role and oversight functions".⁹¹ This resulted in the conviction of Gbao pursuant to the basic form of joint criminal enterprise for crimes that he did not intend to commit.

Both the Trial and Appeals Chambers held that so long as the accused had agreed to the common criminal purpose, he is responsible for all the natural and foreseeable consequences flowing from the execution of that purpose, however remote they might have been from the defendant's own intentions.⁹² This finding represented an unjustified extension of the joint criminal enterprise concept through abandoning the 'intent' requirement for *mens rea*. Ultimately, Gbao's sentence of twenty-five years of imprisonment, as opposed to fifty-two and forty years for the co-accused, reflects his lower level of participation in the joint criminal enterprise. The Trial Chamber found Gbao's involvement in the overall scheme to be more limited than that of his co-defendants, thus decreasing his degree of culpability for sentencing purposes.⁹³ In particular, the Chamber noted that Gbao was a functionary of the RUF whose chief contribution to the joint criminal enterprise was ideological inspiration and enslavement of civilians.⁹⁴ If one compares Charles Taylor's role with the role of the accused in the other SCSL cases, such as the RUF case, Taylor's overall contribution to the crimes in Sierra Leone appears more comparable to the contributions of Sesay and Kallon, who received a punishment of fifty-two and forty years of imprisonment respectively, rather than that of Gbao, whose knowledge and intent were largely inferred.

The ICC has yet to define the role of complicity at sentencing. The only available sentencing judgement in *Lubanga* provides, however, some important insights on the modes of participation. It reinforces the point that it

⁹⁰ RUF Trial Judgment, §§ 1979-1985.

⁹¹ RUF Sentencing Judgment, § 266.

⁹² Prosecutor v. *Sesay, Kallon and Gbao*, SCSL-04-15-A, Appeal Judgement, 26 October 2009 ('RUF Appeal Judgment'), § 492; RUF Trial Judgment, § 2109.

⁹³ RUF Sentencing Judgment, § 271.

⁹⁴ *Ibid.*, §§ 268, 270.

is the totality of factors that shape the punishment of the accused. Thomas Lubanga was convicted as a direct co-perpetrator pursuant to Article 25(3)(a) of the Rome Statute for his role in the implementation of the common plan to build an army for the purpose of establishing and maintaining political and military control over the Ituri region of the Democratic Republic of Congo that resulted in the enlistment, conscription and use of children below the age of fifteen to participate actively in hostilities.⁹⁵ Following a defence request, the *Lubanga* Trial Chamber held a separate sentencing hearing and delivered a separate sentencing decision, assessing the factors relevant to the sentence of the accused.⁹⁶ Thomas Lubanga was sentenced separately for conscripting, enlisting and using children under the age of fifteen to participate in the hostilities (thirteen, twelve and fourteen years, respectively).⁹⁷ His joint sentence amounted to 14 years' imprisonment.⁹⁸

Lubanga's relatively low sentence reflects several considerations by the Trial Chamber. On the one hand, the judges acknowledged that the crimes of conscripting, enlisting and using children are very serious, especially with the view of the vulnerability of the victims.⁹⁹ In the context of the discussion on the gravity of offences, the panel stressed that the sentence should be proportionate to the crime,¹⁰⁰ reinforcing the retributive rationale at sentencing. The Chamber rejected as disproportionate the approach suggested by the prosecution to set the "baseline" or starting point for all sentences at approximately 80% from the statutory maximum of 30 years of imprisonment.¹⁰¹ On the other hand, the Trial Chamber did not find any aggravating factors in the case at issue, while Lubanga's continuous cooperation despite multiple failures of the prosecution was considered a mitigating factor.¹⁰² Moreover, when discussing the degree of participation of the convicted person, the judges attributed particular importance to the fact that the Chamber did not find that Thomas Lubanga *meant* to conscript and enlist boys and girls under the age of fifteen into the army and use them to participate actively in hostilities, but that instead he was *aware* that, in the ordinary course of events, this would occur.¹⁰³ Therefore, Lubanga was found to possess indirect intent in the meaning of Article 30 of the Rome Statute.¹⁰⁴

⁹⁵ *Lubanga* Judgment, §§ 1355-1357. For the detailed discussion of the *Lubanga* Judgment, see Chapter III *supra*.

⁹⁶ *Lubanga* Sentencing Decision, § 20.

⁹⁷ *Ibid*, § 98.

⁹⁸ *Ibid*, § 99.

⁹⁹ *Ibid*, §§ 37 – 44.

¹⁰⁰ *Ibid*, § 36.

¹⁰¹ *Ibid*, §§ 92-93.

¹⁰² *Ibid*, §§ 91 and 96.

¹⁰³ *Ibid*, §§ 52 - 53. Emphasis added.

¹⁰⁴ For the discussion of the different forms of intent inherent in Article 30 of the Rome Statute, see M. E. Badar, 'Dolus Eventualis and the Rome Statute Without it?' 12 *New*

Thus, without discussing the mode of participation as such, the Trial Chamber acknowledged that the fault requirement is an important factor in the determination of sentences.

What follows from *Tadić*, *Aleksovski*, *Akayesu*, *RUF*, *Lubanga* and *Taylor* is that the mode of liability has limited impact on the sentences of the convicted persons. There are a number of factors affecting the judicial determination of penalties. In *Tadić*, the finding that Dusko Tadić is not a mere aider and abettor but a perpetrator in the joint criminal enterprise led to a slight increase in his sentence. However, the Appeals Chamber felt compelled to reduce this sentence and return to the original length of imprisonment, placing most significance on the fact that Tadić was a low-level perpetrator, and not on his membership in the joint criminal enterprise. In *Akayesu*, the gravity of the crime of genocide occupied a central role at sentencing. The ICC convicted Thomas Lubanga as a direct co-perpetrator, yet he received a relatively lenient punishment of fourteen years of imprisonment due to his lesser mental state (indirect intent), the absence of aggravating factors, and his cooperation with the court as a mitigating factor.

The cases discussed in this section also demonstrate that the relationship between the mode of participation and the severity of punishment is not straightforward. Complicity does not necessarily warrant a lesser sentence. Charles Taylor received a harsh penalty of fifty years of imprisonment for aiding and abetting war crimes and crimes against humanity. This is a plausible approach: an adequate sentence in international criminal law does not hinge on the abstract label attached to the conduct of the convicted person, but stems from the overall assessment of the various factors on a case-by-case basis – something that can only be performed if enough flexibility is afforded to the judges. However, judicial discretion may have a downside when judges resolve problems associated with the attribution of liability at the stage of sentencing. The latter seems to be the case in *RUF*, where the Trial Chamber struggled to convict the accused Gbao of some of the crimes charged under the heading of the joint criminal enterprise – a mode of liability that requires proof of intent. As a result, the Chamber compensated for the tenuous connection between Gbao and some of the crimes in the indictment by imposing a more lenient sentence.

2. Sentencing Objectives at Crossroads: Domestic and International Law

i. Sentencing Objectives in International Criminal Law

It follows from the cases discussed in the previous section that complicity, as opposed to primary perpetration, has some impact on the sentence of the accused, yet it is hard to measure this impact due to a number of other factors that affect judicial decision-making. Punishment objectives or goals help to systemize these considerations. They may determine the length and the form of punishment imposed upon the offender as well as the weight of the liability form at sentencing. Despite the importance of articulating sentencing rationales, the ICTY, ICTR, SCSL Statutes do not specify the aims of sentencing.¹⁰⁵ The Rome Statute also fails to take a stance on the issue, aside from stating in the preamble: “Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”¹⁰⁶ The first sentencing judgement of the ICC in *Lubanga* embraces this statement but does not elaborate further on sentencing aims, preferring to focus on the specific sentencing principles instead.¹⁰⁷

Upon examination the case law of international tribunals appears to point towards retribution and deterrence as the primary aims of punishment.¹⁰⁸

As early as 1996, the *Erdemović* Trial Chamber of the ICTY adopted “retribution, or ‘just deserts’, as legitimate grounds for pronouncing a sentence for crimes against humanity, the punishment having to be proportional to the gravity of the crime and the moral guilt of the convicted.”¹⁰⁹ The *Erdemović* Chamber also acknowledged the limited value of deterrence at sentencing by reiterating that general prevention is ‘intimately related’ to the reprobative function of legal punishment.¹¹⁰ The *Tadić* Appeals Chamber confirmed that deterrence must not be accorded undue prominence in the overall assessment of the sentences to be imposed on the convicted persons.¹¹¹ Finally, *Erdemović* mentioned the rehabilitative function of

¹⁰⁵ K. Khan and R. Dixon, 2005, at 808.

¹⁰⁶ W. Schabas, 2010, at 898.

¹⁰⁷ *Lubanga* Sentencing Decision, § 16.

¹⁰⁸ *Čelebići* Appeal Judgement, § 806; *Kordić and Čerkez* Appeal Judgement, § 1074; *Popović* Trial Judgment, § 2128; Prosecutor v. *Erdemović*, ICTY Case No, IT-96-22-T, Sentencing Judgment, 29 November 1996 (*Erdemović* Judgment), § 64.

¹⁰⁹ *Erdemović* Judgment, § 64.

¹¹⁰ *Erdemović* Judgment, § 65.

¹¹¹ *Prosecutor v. Tadić*, Case No.: IT-94-1-A and IT-94-1-Abis, Appeals Chamber, 26 Jan. 2000, § 48. See also Judgment, *Aleksovski* (IT-95-14/1-A), Appeals Chamber, 24 March 2000, § 185; *Čelebići* Appeal Judgment, § 801.

punishment, which in the context of international criminal law, should be subordinate to the other two rationales.¹¹²

Since *Erdemović* case law of the tribunals has not elaborated significantly on sentencing goals.¹¹³ The rehabilitation rationale does not seem to be accepted as relevant at the level of international criminal law, despite occasional passing references.¹¹⁴ The general discussions relating to the gravity offence reinforce the principle of retribution in international criminal law. The judgments, however, do not provide any further guidance on how retribution as a punishment aim ‘works’ within the ambit of international criminal law, nor do they explain the consequences of holding retribution and deterrence as the main sentencing goals.

When it comes to deterrence, the courts have been even less explicit. The 2004 appeal judgement in *Kordić and Čerkez* made an unsuccessful attempt to define retribution and deterrence for the purposes of international criminal law.¹¹⁵ Citing the Supreme Court of Canada, it held that retribution should be seen as

“an objective, reasoned and measured determination of an appropriate punishment which properly reflects the [...] culpability of the offender, having regard to the *international* risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender’s conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment [...]”¹¹⁶

There is a misquotation in the above passage – the original paragraph referred to the ‘intentional’ and not ‘international’ risk-taking of the offender. Therefore, there is nothing in the definition originally provided by the Canadian Supreme Court that explains retribution in *international* context.¹¹⁷ In fact, the combination ‘international risk-taking of the offender’ does not entirely ‘fit’ within the retributive rationale. Inhibition of risk-taking behaviour in potential perpetrators through the fear of punishment is precisely

¹¹² *Erdemović* Judgment, § 66.

¹¹³ Eg. *Čelebići* Appeal Judgement, § 806; *Kordić and Čerkez* Appeal Judgement, § 1074; *Popović* Trial Judgment, § 2128.

¹¹⁴ In *Popović*, for example, the Trial Chamber acknowledged that rehabilitation, which is another sentencing objective in addition to retribution and deterrence, does *not* play a predominant role in international criminal law due to the serious nature of the crimes committed under the Tribunal’s jurisdiction. *Popović* Trial Judgment, § 2130. See also *Čelebići* Appeal Judgment, § 806. Cf. *Miroslav Bralo* Trial Judgment, §§ 20, 60, 67, 69.

¹¹⁵ *Kordić and Čerkez* Appeal Judgement, §§ 1075-1078.

¹¹⁶ *Kordić and Čerkez* Appeal Judgement, § 1075 (referring to Supreme Court of Canada judgement *R. v. M. (C.A.)* [1996] 1 S.C.R. 500, § 80. Emphasis added.

¹¹⁷ *R. v. M. (C.A.)* [1996] 1 S.C.R. 500, at 6.

the attribute of the deterrent, not just deserts, philosophy.¹¹⁸ In the original version, however, the domestic court stressed not the risk-taking per se, but rather the *intentional* risk-taking as an indication of the culpability of the offender. If the word ‘intentionally’ is omitted or replaced by another word, the description of retribution no longer holds. Moreover, even overlooking the misquotation, one should bear in mind that the quote is taken out of the context: in the original paragraph, the court was not concerned with providing a comprehensive definition of the ‘retributive’ rationale.¹¹⁹ It is unfortunate that both *Krajišnik* appeal judgement and *Popović* trial judgements copied the above definition verbatim,¹²⁰ despite the mistake.

The *Kordić and Čerkez* appeals panel also relatively unsuccessfully elaborated on the meaning of deterrence. First, the court rightfully pointed out that individual deterrence aims at disheartening the offender from reoffending. However, it then continued to state that general deterrence “refers to the attempt to integrate or to reintegrate those persons who believe themselves to be beyond the reach of international criminal law”¹²¹, thereby conflating the rehabilitative sentencing purposes,¹²² which aims precisely at reintegration of the offender, with the concept of general deterrence. The subsequent *Krajišnik* and *Popović* appeal judgements, despite citing the original *Kordić and Čerkez* judgment, managed to remedy this confusion by restating that international penalties “should be adequate to deter the convicted person from committing any future violation, it must also have the effect of discouraging other potential perpetrators from committing the same or similar crimes.”¹²³

The ECCC and ICC pioneered an important new development in international sentencing - an attempt to incorporate victims’ rights, including the rights to reparation and compensation, within the international criminal justice paradigm.¹²⁴ This attempt corresponds to the restorative justice philosophy of punishment. The ICC reinforced the restorative rationale in its recent decision in *Lubanga* setting out the principles on reparation pursuant to Article 75(1) of the Rome Statute and ordered the registry to transmit the individual

¹¹⁸ A. von Hirsch et al (eds), at 40.

¹¹⁹ The original case dealt with a purely domestic issue of the sentencing cap on cumulative sentencing for multiple convictions. The Supreme Court found this cap to be unjustified. judgement R. v. M. (C.A.) [1996] 1 S.C.R. 500,

¹²⁰ *Popović* Trial Judgment, § 2128; *Krajišnik* Appeal Judgment, § 804.

¹²¹ *Kordić and Čerkez* Appeal Judgment, §§ 1077-1078.

¹²² A. von Hirsch et al (eds), at 2.

¹²³ *Popović* Trial Judgment, § 2129; *Krajišnik* Appeal Judgment, § 805.

¹²⁴ Articles 43, 54, 64, 68, 75, 79 of the Rome Statute; Article 33 new, of the Law on the Establishment of the ECCC.

applications to the Victims Trust Fund.¹²⁵ The court held “[t]he Statute and the Rules introduce a system of reparations that reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognizes the need to provide effective remedies for victims.”¹²⁶

The court in *Lubanga* named a few of the functions of reparations: relieving the suffering caused by the offences; affording justice to the victims by alleviating the consequences of the wrongful acts; deterring future violations; contributing to the effective reintegration of former child soldiers, as well as reconciling the offender, the victim and wider community.¹²⁷ The court failed, however, to explain the process whereby all of these goals could be achieved, especially the scope of the process. The ICC noted that reparations should not be limited to ‘direct’ harm or the ‘immediate effects’ of the crimes of enlisting and conscripting children under the age of 15, and that the standard of ‘proximate cause’ must be adopted. It failed, however, to provide a definition for this standard.¹²⁸

In contrast with the ICC, the ECCC did not issue a separate decision on reparations, preferring to include the relevant section in the judgment, immediately after the section on sentencing.¹²⁹ Despite keeping reparations and sentencing separate in the trial chamber judgment, the restorative justice discourse affected KAING Guek Eav’s final sentence of life imprisonment. The Supreme Court Chamber held that the initial sentence of 35 of years of imprisonment does not appropriately reflect the gravity of his crimes. The underlying rationale for imposing a harsher penalty was the need to cure the sufferings of the victims. The Supreme Court Chamber clarified: “[a]lthough the punishment of KAING Guek Eav does not completely cure their suffering, the victims’ fair and reasonable expectations for justice deserve to be fulfilled. KAING Guek Eav’s crimes were an affront to all of humanity, and in particular, to the Cambodian people, inflicting incurable pain.”¹³⁰

It follows that since *Erdemović*, international criminal law has not made much progress in elaborating punishment goals. The *Lubanga* reparation decision is one exception. But even this decision lacks clarity with respect to

¹²⁵ Prosecutor v. Prosecutor v. *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012 (*Lubanga* Reparation Decision), § 289.

¹²⁶ *Ibid*, 177.

¹²⁷ *Ibid*, § 179.

¹²⁸ *Ibid*, § 249.

¹²⁹ *Duch* Trial Judgment, section 4.1 et sq.

¹³⁰ *Duch* Appeal Judgment, §§ 381-383.

the process and the standard of causation. Its main function is to shift the burden of reparations onto the shoulders of the Victims Trust Fund.

When reading the short accounts of punishment goals -explicitly or implicitly mentioned in the international judgements- one gets the impression that they are directly borrowed from domestic law. There is no accompanying assessment of how these goals can be accommodated in an international criminal law context. This state of affairs in sentencing is quite distinct from the situation that exists in relation to the stage leading to conviction that is quite autonomous. The latter defines the modes of liability and the substantive crimes with a reference to international treaties and customs; domestic law only serves secondary purposes. For example complicity, albeit being widely accepted as a form of criminal participation in all domestic legal systems, frequently gives way to the new, 'custom-made', modes of liability, such as the joint criminal enterprise and the co-perpetration, specifically designed for the purposes of international criminal law.¹³¹

One should be careful, however, with borrowing domestic law punishment rationales and transplanting them directly into international criminal law. As with any other municipal law concept, it should first be first reduced to the level of a general principle and then transposed into international law in a way that addresses the reality of the international legal order.¹³² This is particularly true when it comes to punishment, if only because sentencing objectives designed for the offenders within the domestic penal system may not have the same content or produce the same effect in international criminal law.¹³³ This does not mean, however, that national sentencing goals are irrelevant for international law. Quite the opposite, international criminal law requires a profound understanding of the domestic philosophy of punishment in order to formulate sentencing goals at an international level.

ii. Sentencing Objectives in Domestic Law

It seems that international criminal law embraces two main rationales – retribution and deterrence. Rehabilitation also surfaces in some judgements, although its role is limited. The ICC is pioneering the restorative justice philosophy in international criminal law. Below is short account of these punishment aims as they are understood in the of context of domestic law. Special emphasis is placed on the treatment of accomplices within each rationale.

¹³¹ For an overview of the liability modes in international criminal law, see Chapters II and III *supra*.

¹³² F. O. Raimondo, 2010, at 52.

¹³³ N. Bernaz, at 297; Mark B. Harmon and Fergal Gaynor, at 692. More on this topic, see Chapter VII *infra*.

The philosophy of retribution finds its support in the work of Immanuel Kant.¹³⁴ In 1797, Kant treated the law of retribution (*ius talionis*) as the only suitable sentencing principle of pure and strict justice, free from extraneous considerations. In Kantian philosophy, the principle of punishment is a categorical imperative.¹³⁵ Those who commit crimes violate the public order by treating themselves as exceptions to the law.¹³⁶ They become unworthy citizens and need to be punished for the sake of re-establishing the equilibrium that they broke. Punishment becomes the instrument of justice, and justice is essential for functioning of the society, “for if justice goes, there is no longer any value in men's living on the earth.”¹³⁷

Kant's theory embraces the idea of unqualified punishment. He wrote that “whatever underserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.”¹³⁸ In case of murder, for example, the offender must die because “there is no substitute that will satisfy justice”.¹³⁹ The modern account of the retributive, or ‘just deserts’, philosophy is less categorical; it no longer requires that the suffering of the offender is *equal* to the harm done.¹⁴⁰ Rather, it calls for the punishments that are individual and *proportionate* to the seriousness of criminal conduct.¹⁴¹

This philosophy implies that punishment for crime must be proportionate to its relative seriousness, which is measured by the harm produced by the crime and the culpability of the offender.¹⁴² Retribution is about treating the wrongdoer as a moral agent. Punishment conveys blame through the deprivation.¹⁴³ Two contemporary proponents of this rationale, Andrew von Hirsch and RA Duff both maintain that the main function of the criminal

¹³⁴ For the contemporary discussion on I. Kant's view of punishment, see G. Fletcher, ‘Law and Morality,’ 87 *Columbia Law Review*, 1987, at. 533 et sq.

¹³⁵ I. Kant, 1797, at 141.

¹³⁶ *Ibid*, at 140.

¹³⁷ *Ibid*, at 141.

¹³⁸ *Ibid*, at 140.

¹³⁹ I. Kant, 1797, at 142.

¹⁴⁰ Andrew von Hirsch observed as troublesome the fact that that Kant “simply asserts that talionic equality should be the criterion for deserved punishment, ruling out less draconian criteria such as the principle of proportionality.” See A. von Hirsch, ‘Proportionality in the Philosophy of Punishment’, 16 *Crime and Justice*, 1992, at 61.

¹⁴¹ A. von Hirsch in A. von Hirsch et al (eds), at 117.

¹⁴² *Ibid*, at 116.

¹⁴³ *Ibid*, at 117.

sanction in the retributive sentencing framework is to communicate to the offender public disapprobation of his past deeds.¹⁴⁴

The gradation of sentences depending on the mode of participation is the best fit within this sentencing objective as it is intrinsically linked to offender's level of culpability. The understanding that accomplices - as opposed to primary perpetrators - receive a more lenient sentence rests on the assumption that accomplice's culpability is lower than that of the perpetrator.

In contrast with retribution that looks back at the past deeds of the offender, the deterrent rationale is forward-looking. It aims at reducing crime through the fear of punishment.¹⁴⁵ Jeremy Bentham and Cesare Beccaria's works account for this philosophy. Beccaria wrote "the purpose of punishment [...] is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same."¹⁴⁶ Like the retributivists, Beccaria referred to proportionality, putting, however, a different meaning in this term. He maintained that proportionality between the crime and punishment is observed if the obstacles that deter men from committing a crime are more formidable, the more those crimes are contrary to the public good and the greater the incentives to commit them.¹⁴⁷

Beccaria argued against cruel punishments because, in his view, for the punishment to achieve its objective it is only necessary that the harm that it inflicts outweighs the benefit that derives from the crime and that the punishment is certain.¹⁴⁸ Beccaria also reasoned in favour of punishing accomplices. He drew parallels between those who attempt to commit crimes and accomplices to a crime, not all of whom are its direct perpetrators. Beccaria's claim was that the action preceding the commission of a crime shows a clear intent to carry it out (be it an attempted crime or an act of complicity) and deserves punishment, albeit less severe than what is prescribed for the actual execution of the crime. The punishment is justified by the need to prevent the execution of the crime and the lesser penalty motivates the offender to withdraw from the risk-taking enterprise before its commission.¹⁴⁹

Jeremy Bentham developed Beccaria's ideas.¹⁵⁰ He argued that in order to prevent reoccurrence of the offence it is important to make the offender afraid

¹⁴⁴ RA Duff, 'Punishment, Retribution and Communication', in A. von Hirsch et al (eds), at 127 -135.

¹⁴⁵ J. Bentham, 'Punishment and Deterrence', in A. von Hirsch et al (eds), at 53-57.

¹⁴⁶ C. Beccaria, *On Crimes and Punishments and Other Writings* (1764), ed. by A. Thomas, University of Toronto Press, 2008, at 26.

¹⁴⁷ *Ibid*, at 17.

¹⁴⁸ *Ibid*, at 50.

¹⁴⁹ *Ibid*, at 73.

¹⁵⁰ G. Fletcher, 2007, at 15.

of offending. This can be achieved by making the pain of punishment outweigh the pleasure of offending. Bentham held that excessive penalties are justified because they deter a particular offender from re-offending (specific deterrence) and instigate fear of offending in all members of the public (general deterrence).¹⁵¹ With regard to different ways in which individuals get involved in crimes, Bentham noted that there shall be some general convergence as to the quantity of punishment intended for similar offenders, but individual circumstances need to be taken into account.¹⁵²

In addition to deterrence, the reform and rehabilitation of the offender represents another utilitarian sentencing goal in domestic law. As Bentham put it, one of the ways to prevent crime is to take away the desire to offend.¹⁵³ The rehabilitative model focuses on reforming the offender's character and motivation to commit crimes by tackling the root causes of offending. The rehabilitative model acknowledges that the majority of offenders come from disadvantaged backgrounds, and it is the state's duty to provide programs to support them.¹⁵⁴ The mode of participation of the offender could be indicative of his or her proneness to rehabilitation but this largely depends on the circumstances of the case.

Finally, there is the restorative justice paradigm, with the emphasis on compensation for the harm suffered. The restorative approach as a punishment applies only to the direct or primary victims, while restorative justice in a broader sense also affects secondary victims.¹⁵⁵ In the latter case, punishment may be a side effect, but the main goal of the restorative approach is restitution and compensation.¹⁵⁶ This rationale is similar to retribution in that it is backward looking, but it shifts the focus from the offender to the harm caused by the crime and the ways in which this harm can be repaired.¹⁵⁷ The process whereby amends are made is as important as the outcome.¹⁵⁸ Domestic criminal justice systems face a great challenge in combining restoration and retribution in a single punishment. The two sentencing aims are not however irreconcilable.¹⁵⁹ There are at least three ways of facilitating restoration through retribution: first, through imposing the 'suffering' on the offender by subjecting him to censure; second, by having the offender feel remorse; and, finally, by vesting on the offender an

¹⁵¹ J. Bentham, at 53-56.

¹⁵² *Ibid*, at 56.

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid*, at 28-32.

¹⁵⁵ A. von Hirsch et al (eds), at 164.

¹⁵⁶ *Ibid*.

¹⁵⁷ RA Duff in A. von Hirsch et al (eds), at 178, 187.

¹⁵⁸ *Ibid*, at 182.

¹⁵⁹ L. Zedner, 'Reparation and Retribution: Are They Reconcilable?' A. von Hirsch et al (eds), at 189 et sq.

obligation to make reparation to the victim.¹⁶⁰ If one views restorative justice as a punishment goal it is essential that there is a causal link between the actions of the offender, and the harm suffered by the victims.

The mode of participation of the offender, arguably, does not play an important role within the restorative paradigm *stricto sensu*. This is because the focus is on the harm done and the relationships broken by the offence, and not merely on the offender. However, this philosophy gives complicity a broader meaning. Kutz, for example, argued that our current practices of accountability (the term he uses to refer to responsibility) are relational and positional rather than individualistic and retributivist. He claimed that accountability should be understood through the relationship between an agent (an individual causing harm) and the respondent (the victim).¹⁶¹ The individualistic approach to accountability fails to reflect the special nature of associative wrongdoing, in particular the culpability of the agent in the context of his relationship with the respondent. For Kutz, criminal responsibility of accomplices for their confederates' acts is defensible only if viewed in relation to the actions of the respondent and if the individual differences in culpability are taken into account.¹⁶²

iii. Challenges of Adapting the Sentencing Objectives to International Law

Looking at the sparse account of sentencing aims in international judgments, one gets the impression that punishment rationales are not properly discussed in the context of international criminal law. At times, the judges lean towards one specific philosophy, without properly justifying it. For example, Taylor's political leadership placed him in a special category for deterrence purposes: the severe penalties in his case highlight the abuse of power and the violation of the duty of care by the former head of state,¹⁶³ thereby sending out a powerful message to potential perpetrators. The idea behind such a harsh punishment would be that not even the highest-ranking state official enjoys impunity for international crimes. However, there is no elaborate discussion related to the deterrent rationale in the *Taylor* judgment. Likewise, despite rejecting the importance of rehabilitative function of punishment, the *Erdemović* Trial Chamber considered the young age of the accused, his family status and cooperation with the Tribunals as "a series of traits characterising a corrigible personality."¹⁶⁴ Thus, there is a need in international criminal law to develop a more coherent account of sentencing

¹⁶⁰ RA Duff in A. von Hirsch et al (eds), at 182.

¹⁶¹ C. Kutz, 2000, at 17-19.

¹⁶² Ibid, at 8 and 16.

¹⁶³ See *Taylor* Sentencing Judgment, § 97.

¹⁶⁴ *Erdemović* Judgment, § 111.

goals. Below, I discuss some aspects pertaining to retribution, deterrence and restoration in international context.

When it comes to transplanting retributive philosophy from domestic to an international level, the major stumbling block is the application of its central element - the principle of proportionality. It is difficult to make international punishment fit mass crimes.¹⁶⁵ Jens Ohlin developed a theory adapting the conventional principle of proportionality to sentencing in international law.¹⁶⁶ He noted that the sentences handed down by the ICTY suffer from a conflict between two types of proportionality: the offence-gravity proportionality and the defendant relative proportionality; the former refers to the traditional consideration that the punishment is proportionate to the gravity of the offence, while the latter denotes the trend among judges to ensure that less culpable defendants are punished less severely than more culpable ones.¹⁶⁷ While offence-gravity proportionality is normatively superior, the defendant-relative proportionality often overtakes judges' reasoning when they hand down unacceptably lenient sentences to 'reserve space' for those allegedly more responsible.¹⁶⁸

As a solution, Ohlin suggested reinforcing the offence-gravity rationale by treating punishment in international criminal law as a vindication of the rule of law. He based his theory of international punishment as a vindication of the rule of law in the contemporary formulation of Immanuel Kant's categorical imperative, a principle of moral action whereby one should not act on a maxim unless one can will that maxim to be a universal law.¹⁶⁹ When someone violates morality, they treat themselves as an exception to universal laws and act against morality. The legal system (or international community), in such circumstances, is allowed to impose harsh treatment on the offender to vindicate the rule of law over criminality.¹⁷⁰ According to Ohlin, international sentences ought to reflect the inherent gravity of the offence in a way that even moderate participation in international crimes would yield a life sentence equal to that received by the highest offenders.¹⁷¹

Ohlin's uneasiness with the application of the central consideration of retributive sentencing rationale, the principle of proportionality, to international sentences is well grounded. However, the defendant-relative

¹⁶⁵ N. Bernaz, at 298.

¹⁶⁶ J. Ohlin, 'Proportional Sentences at the ICTY,' in B. Swaart, A. Zahar and G. Sluiter (eds) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2011A, at 322 et sq.

¹⁶⁷ Ibid, at 324-326.

¹⁶⁸ Ibid, at 326 -331. Cf R. D. Sloane, at 719.

¹⁶⁹ G. Fletcher, 'Law and Morality,' 87 *Columbia Law Review*, 1987, at 537.

¹⁷⁰ J. Ohlin, 2011A, at 334 -335.

¹⁷¹ Ibid, at 337.

proportionality does not appear to be the main area of concern. Both the ICTY and ICTR Appeals Chambers stressed that comparison of one case with another is often of limited assistance, and the differences between two accused convicted of similar crimes in similar circumstances are often more significant than the similarities.¹⁷² Rather, the problem stems from the limitations of international criminal law as such, targeting only a fraction of offenders, namely those most responsible for the mass crimes.

It is conceivable to apply the proportionality principle when punishing those few selected for prosecution, but it is impossible at an international level to ensure that the punishment is distributed equally among *all* the offenders for their offences. This is in stark contrast with domestic criminal law, which, at least at the level of statute, presupposes its universal application. Fletcher refers to this requirement that the law punish the guilty, all the guilty, as ‘positive legality’.¹⁷³ Therefore, the essential component of the retributive theory – retribution in the distribution of punishment – is distorted *a priori* through artificially limiting the pool of potentially accused. HLA Hart highlighted the difference between retribution as a justifying aim and retribution in the distribution of punishment, the latter having a value independent from the former.¹⁷⁴ Perhaps, embracing the fact that international criminal law does not, *a priori*, ensure proportionality in distribution of punishment could remove some of the concerns related to the dominance of the defendant-relative considerations in the judges reasoning. It remains equally important to define the gravity of offence in international criminal law for the purposes of observing the offence-gravity proportionality, as well as to assign weight to other sentencing rationales, such as deterrence, rehabilitation and restorative justice.

As with the retributive perspective, deterrence requires further justification within the context of international criminal law. There are views that more weight should be attributed to deterrence when deciding on the sentences of the accused in international trials.¹⁷⁵ This initiative deserves credit. However, some important considerations must be taken into account. First, there is a need to address the main criticism of the deterrence philosophy, namely the difficulty of measuring the effectiveness of sanctions designed to prevent offending.¹⁷⁶ To date, there is no solid empirical basis supporting the idea

¹⁷² *Čelebići* Appeal Judgement, § 719; Prosecutor v. *Musema*, ICTR Case No. 96-13-A, Appeal Judgement, 16 November 2001 (*Musema* Appeal Judgement), § 387.

¹⁷³ G. Fletcher, *Basic Concepts of Criminal Law*, Oxford University Press, 1998, at 207.

¹⁷⁴ H.L.A. Hart and J. Gardner, at 9-12.

¹⁷⁵ Mark B. Harmon and Fergal Gaynor, “Ordinary Sentences for Extraordinary Crimes”, *Journal of International Criminal Justice* 5, 2007, at 683 et sq.

¹⁷⁶ A. von Hirsch et al (eds), at 43 et sq.

that potential perpetrators are intimidated by the international indictments and penalties.¹⁷⁷

Secondly, it is important to establish the limits of the applicability of the deterrent rationale in international criminal law and the ‘target audience’ for the harsh penalties. This is so because, deterrence in domestic law targets both the general public (general deterrence) and the particular offender (specific deterrence), whereas international criminal law is particularly concerned about the former, not the latter.¹⁷⁸ When it comes to specific deterrence, many national criminal law provisions reflect the idea that there is a robust connection between the crime and the prior record: offenders with a prior record are more likely to re-offend.¹⁷⁹ Such offenders pose a higher risk to society, and thus extra measures should be taken against them. In a purely utilitarian account, persistent offenders shall be sentenced based on the cumulative model with each new offence increasing the severity of the sentence.¹⁸⁰ Thus, recidivists are one of the main addressees of the deterrent sanctions at the domestic level. Escalation of punishment and the impossibility of establishing the correlation between harsher penalties and desistance is the classical counter-argument against escalating the punishment based on consequentialist thinking model.¹⁸¹

From an international criminal law perspective, however, this latter argument loses some of its power because the ‘audience’ that it targets is different from the ‘audience’ affected by the escalated sanctions in domestic law. International criminal law deals with a highly specific category of offenders – usually high-level first-time perpetrators responsible for the commission of the gravest crimes. The deterrent effect of harsh penalties in relation to these offenders is far from clear.¹⁸² One can, however, presume that the sanctions imposed at an international level gain much publicity, at least alerting potential perpetrators of the risks associated with offending.

¹⁷⁷ M. Mennecke, ‘Punishing Genocidaires: A Deterrent Effect or Not?’ 8 *Human Rights Law Review*, 2007, 323 et sq.

¹⁷⁸ R. Cryer et al, at 497.

¹⁷⁹ J. Roberts, *Punishing Persistent Offenders. Community and Offender Perspectives*, Oxford University Press, 2008, at 31.

¹⁸⁰ A. Ashworth, *Sentencing and Criminal Justice*, 5th ed. Oxford University Press, 2010, at 198.

¹⁸¹ A group of scholars analysed the studies relating to the deterrent effect of punishment and came to the conclusion that the existence of criminal sanctions helps prevent crime, but there is no conclusive evidence that extra deterrence can be achieved by increasing the severity of criminal sanction. See A. von Hirsch, A. E. Bottoms, E. Butney, P-O. Wikstrom, *Criminal Deterrence and Sentence Severity*, Oxford: Hart Publishing, 1999; See also M. Bagaric, ‘Double Punishment and Punishing Character – The Unfairness of Prior Convictions’, in: *Punishment and Sentencing: A Rational Approach*, London: Cavendish Publishing, 2001.

¹⁸² M. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, 2007, at 169 et sq.

Finally, there a large question mark exists regarding the restorative justice rationale. International criminal law has gradually recognized victims' rights, including the right to reparation. The ICC and ECCC include restorative elements in their discourse. It is crucial, however, to distinguish between restoration as a punishment goal and restoration in a broader sense. The former requires the causal link between the acts of the accused and the harm that he or she caused to the victims. The broader notion of restorative justice implies reparations to the wider community. However, if one accepts that restoration in a broader sense is one of the purposes of international criminal law, it is crucial to define its relationship to the cornerstone legal principles, such as that of individual criminal responsibility. Can the latter be jeopardized in favour of the former?¹⁸³

Restoration as a punishment goal is not entirely inconceivable nor is it at odds with the traditional retributive approach of international criminal law. There are two challenges, however: first, emphasizing the causation - the offender is responsible for those wrongs that he/she inflicted upon the victims. By expressing remorse, suffering hard treatment (punishment) and reprobation by international community, he or she makes amends; second, wider harms/grievances need to be addressed outside of the criminal trial, possibly through outreach, fact finding and truth and reconciliation commissions. This broader restorative justice function of international criminal law, albeit extremely important, cannot fit strictly into the punishment of the accused and needs to be achieved in a different way. The court's only contribution towards this goal should be its adherence to strict legal rules.¹⁸⁴

Darryl Robinson explored in-depth the challenges ensuing from adopting victim-based reasoning in international criminal law.¹⁸⁵ He pointed out the fact that the tendency to adopt victim-focused teleological interpretations often comes at the expense of the fundamental principles of a liberal criminal justice system.¹⁸⁶ Robinson's argument is that teleological methods of interpretation inherent in human rights law may not always be compatible with the principle of legality and other criminal law principles designed to protect the rights of the accused.¹⁸⁷

¹⁸³ For more discussion on this issue, see Chapter VII.2 *infra*.

¹⁸⁴ Unfortunately, the ICC in the reparations decision failed to define the standard of the 'proximate cause' or to distinguish between different the broader meaning of reparations and the more narrow restorative justice considerations that affected Lubanga's responsibility in the strict meaning of criminal law.

¹⁸⁵ D. Robinson, at. 933.

¹⁸⁶ *Ibid*.

¹⁸⁷ *Ibid*.

It appears that a teleological interpretation as such can be reconcilable with the liberal aims pursued by international criminal law. When the court chooses to apply a provision from an international treaty, the process of validation includes interpretation of a treaty in the light of the rules reflected by Articles 31-32 of the Vienna Convention on the Law of Treaties (VCLT). A teleological method of interpretation is compatible with the rules stipulated in the VCLT – it simply prioritizes the object and purpose of a treaty over the intent of the parties.¹⁸⁸ The challenge then becomes providing an evolving interpretation compatible with the fundamental principles of criminal law. One way to do this would be to recognize that human rights law and criminal law share the same basic notions - fairness, individual autonomy and legality. Consequently, the courts have to strive to apply human rights law in a consistent manner without prejudicing the rights of the accused.

Robinson's concern is, nonetheless, well founded to the extent that the interests of the accused are often balanced against the interests of the victims, whereas a principled approach is required.¹⁸⁹ This unqualified balancing act leads to results that compromise the ideals of the liberal criminal justice system. The reason for this outcome appears to stem from confusion about the aspirations of international criminal law and what it is able to achieve through the individual sentences meted out to the accused.

3. Embracing Judicial Sentencing Discretion in International Criminal Law

It has been over ten years since the Appeals Chamber in *Furundžija* refused to accept the existence of an 'emerging sentencing regime' in international criminal law.¹⁹⁰ Arguably, there is remarkably little evidence that any consensus has been reached on this issue since then. As discussed in the previous sections, international judges rely solely on the broad provisions of the statutes of international criminal courts and tribunals and the generic case law clarifying these provisions. There are no penalty ranges for the specific crimes or the hierarchy of articulated sentencing rationales.¹⁹¹ Unfettered judicial discretion leads to the certain level of disparity in sentencing in

¹⁸⁸ The *Golder* case explicitly refers to these rules. *Golder v. United Kingdom*, Judgment of 21 February 1975, Series A, no. 18.

¹⁸⁹ Jürgen Habermas advised against balancing values, which are relative and subject to change. Instead, he suggested adjudication oriented by principles to decide which claim and which action is right. J. Habermas, 'Between Facts and Norms: Contributions to a Discourse Theory Between Law and Democracy,' *Studies in Contemporary German Social Thought*, 1998, at 253-261.

¹⁹⁰ *Furundžija* Trial Judgment § 237. See also *Krnojelac* Trial Judgment, § 526.

¹⁹¹ There is no agreement as to the sentencing objectives in international criminal law. During the drafting of the Rome Statute, the issue of objectives in sentencing was rarely considered, except for the discussions of death penalty. See W. Schabas, Commentary, at 899.

international criminal law.¹⁹² Disparity occurs when similar cases are dealt with differently, and where different cases are treated without reference to those differences.¹⁹³ Disparity in sentencing is a form of injustice, yet the choice of techniques to promote consistency is not an easy matter even at the domestic level.¹⁹⁴

National legal traditions recognize different techniques for ensuring that sentencing complies with the rule of law principles.¹⁹⁵ The most obvious way to reduce disparity is to articulate and prioritize sentencing aims. As Andrew Ashworth pointed out “without an explicitly and well-articulated guiding aim, consistency is a forlorn hope”.¹⁹⁶ The other technique of promoting consistency is establishing sentencing tariffs for particular crimes. In England and Wales, for instance, judges are required to follow guidelines that provide for a penalty range for each particular crime and a set of the mitigating and aggravating factors to move up and down the scale. If judges decide to depart from the guidelines, they have to give reasons.¹⁹⁷ In fact, most national jurisdictions follow the principle *nulla poena sine lege* by stipulating sentencing tariffs in the statutes or formal sentencing guidelines. The more precise the provisions on penalties, the more the national system leans towards order and regularity at the expense of the individualized justice. However, the tension between these two values is always present in domestic jurisdictions.¹⁹⁸

International criminal law prioritizes individualized justice. International judges stress the importance of individualized sentences reflecting the totality of the criminal conduct of the particular accused.¹⁹⁹ This is so because there are barely any limits on judicial discretion in international sentencing. It appears that in the absence of proper guidance at the level of statutes and case law, maximum flexibility is granted to international judges at sentencing. While the current practice of favouring individualized justice and the totality of factors should not be underestimated we should not deny the benefits of improving the current system. As discussed in the previous sections of this chapter, parts of the judgments dealing with sentencing are often very brief and generic, leaving the reader with much uncertainty as to how judges arrive at a particular punishment. This deficiency can be remedied by adjusting the

¹⁹² See Appendix IV.

¹⁹³ A. Ashworth, ‘Techniques for Reducing Sentencing Disparity,’ A. von Hirsch et al (eds), at 253.

¹⁹⁴ Ibid.

¹⁹⁵ A. Ashworth in A. von Hirsch et al (eds), at 254.

¹⁹⁶ Ibid, at 251.

¹⁹⁷ For example, the sentencing range for non-aggravated robbery is 1 to 3 years’ custody. See A. Ashworth A. von Hirsch et al (eds), at 245.

¹⁹⁸ G. Fletcher (1978), at 503.

¹⁹⁹ *Blaskić* Appeal Judgement, §§ 683-685.

sentencing goals to an international level and by providing more elaborate reasoning in the sentencing parts of international judgements.²⁰⁰

There are two main reasons why judicial discretion at an international level should be defended. First and foremost, there is no established penal regime in international criminal law. In the absence of legal traditions, such as those that aid domestic criminal judges in their sentencing deliberations, judges at an international level face a difficult task of developing the sentencing regime at the same time as determining how to transform the culpability of the accused into a number of years of imprisonment. This duty requires an extra degree of discretion. The final sentence must reflect traditional sentencing goals, such as retribution and deterrence, as adjusted to the international criminal law context. Thus, the sentence has to send out a strong message of reprobation addressed to the potential perpetrators and members of the international community without violating the principle of proportionality.

Secondly, the final punishment needs to embrace the unique considerations characteristic of international criminal law. One limitation of international criminal law bearing heavily on sentencing is the inevitable jurisdictional hurdle *ratione personae* – it restricts prosecutions to senior leadership figures, most responsible for the atrocities. In these circumstances, the pressure to convict and render a harsh penalty is very high. This is so because the punishment is not distributed equally among *all* those responsible, but is focused on selected few. In these circumstances the judges are tasked with recognizing not only the mode or participation of the accused and the particular crime for which they stand convicted, but also a number of other factors, including the leadership position of the convicted person.

At this point, it is essential to clarify how ‘complicity’ as a mode of participation fits within the discourse relating to the judicial discretion. Frequently, domestic law provisions on sentencing levels or aims of punishment explain the relative weight (if any) to be attributed to the mode of participation of the convicted person.²⁰¹ In international criminal law on the other hand, complicity bears a relative weight on sentences. In the absence of sentencing scales or articulated punishment aims in international law, the pronouncement that aiding and abetting generally warrants lesser sentences than that to be imposed for more direct forms of participation is effectively unenforceable. Judges have no guidance in identifying the starting point, from

²⁰⁰ For more on the adjustment of sentencing goals, see Chapter VII.2 *infra*.

²⁰¹ Kai Ambos stresses the difficulty of reaching agreement among states as to what concrete penalties should be. For example, during the negotiation process of the ICC Statute, delegations made the case for more precise penalties, yet no agreement was reached. Ambos continues that striving for more precision in the definition of the *nulla poena* principle in international criminal law would enhance the credibility and legitimacy of international criminal justice. See K. Ambos, in R. Haveman and O. Olusanya (ed.), at 25 -33.

which to mitigate the sentence.²⁰² This observation, coupled with the need to take into account the totality of factors and not just the mode of participation of the accused, renders complicity less useful as an indicator of the culpability of the accused at the sentencing stage. However, this is not to claim that the mode of participation is irrelevant in international criminal justice or should have no bearing on the sentence of the convicted person. Quite the opposite, the concept of individual criminal responsibility requires the establishment of the precise way in which the accused became involved in the alleged crimes.

The key distinction to be drawn here is between the two stages of a criminal trial – the stage leading to conviction and the one of sentencing. HLA Hart highlighted the importance of separating these two stages. According to him, responsibility has a value quite independent of retributive or denunciatory theories of punishment.²⁰³ At times, the principle of responsibility may be sacrificed when the social cost of maintaining it is too high, thus violating the principle of proportionality in the distribution of punishment.²⁰⁴ This, however, cannot affect the principle of proportionality inherent to the punishment *itself*. International criminal law with its limitations *ratione personae* is the best example of how the principle of responsibility may be sacrificed due to the practical impossibility of prosecuting all those responsible at an international level.

There is an implicit recognition of the duality of responsibility and punishment in international criminal law: the parts of international judgements that deal with the factual background, liability modes and the definition of crimes are explicit and lengthy, while the sentencing parts are often curtailed and appear somewhat detached from the findings leading to conviction. At times, questions of the guilt of the accused and their sentences are even dealt with in separate hearings.²⁰⁵ Therefore, complicity as a mode of participation has two independent functions in each of the two stages: first, it serves as an instrument of attaching liability to the accused, provided the legal requirements for complicity are met; secondly, it becomes one of the indicators of the appropriate sentence.

²⁰² *Taylor Sentencing Judgment*, § 257; *Muhimana Trial Judgement*, § 593; *Vasiljević Appeal Judgment*, § 182. The ‘baseline’ approach was explicitly rejected in *Lubanga Sentencing Decision*, §§ 92-93.

²⁰³ H.L.A. Hart and J. Gardner, at 185.

²⁰⁴ *Ibid.*

²⁰⁵ This was the initial practice of the ICTY, until the Rules of Evidence and Procedure were amended to allow for unified trials, which is now the practice in both ad hoc tribunals. The Rome Statute provides for unified trials, but the possibility of bifurcation if one of the parties so requests. The *Lubanga Trial Chamber* followed the bifurcation path, following the request by the defence. See Rules 85 and 87 of the ICTY and ICTR Rules of Evidence and Procedure; Article 76 of the Rome Statute and 143 of the ICC Rules of Evidence and Procedure; *Lubanga Sentencing Decision*, § 20; R. Cryer et al, at 502-503.

Although at times it may be very tempting, these two functions of complicity should not be conflated. At the stage of attribution of liability, it is essential to adhere to the strict principles of individual criminal responsibility and due process. The ‘fair labelling’ is important because this is the only way that the bodies applying international criminal law gain legitimacy.²⁰⁶ In instances when there is insufficient evidence to meet the legal requirements for the most commonly used modes of liability – joint criminal enterprise or co-perpetration, it is advisable to resort to alternatives, such as various forms of complicity. This approach ensures that the acts of the accused receive the most accurate description in the judgment. Using less stringent criteria for attaching liability undermines the cause of international criminal law by creating the image of ‘collective punishment’. This in turn negatively affects its public perception and has a detrimental impact on victims’ rights, depriving them of proper recognition.²⁰⁷

Modes of liability at sentencing serve a different function – they form part of the picture in assessing the gravity of the conduct of the convicted person. While there is pressure to convict and render a harsh penalty, this should not be done at the cost of circumventing the stringent criteria for the attribution of liability. It is not an adequate solution to grant a convicted person a more lenient sentence due to a lack of evidence as appears to be the case with the accused Gbao in RUF. Evidentiary problems need to be addressed at the stage of the attribution of responsibility by, for example, using a mode of liability that best describes the conduct of the accused, and not at sentencing.

The question is whether it is more realistic to employ modes of participation that accurately reflect the contribution of the accused, and then determine the appropriate sentence taking all relevant factors into account. It appears that the Trial Chamber in the *Taylor* and *Lubanga* cases preferred the latter solution. The court in *Taylor* refused to convict Charles Taylor under the joint criminal enterprise doctrine due to insufficient evidence regarding his alleged participation in the common plan.²⁰⁸ Instead, the judges held the accused accountable as an aider and abetter, or someone who knowingly contributed to the commission of crimes.²⁰⁹ However, despite the fact that Taylor ‘merely’ aided and abetted and planned crimes in Sierra Leone, his sentence duly recognized other factors such as his overall leadership role and the impact of his actions on the conflict. Likewise, the

²⁰⁶ Judge van den Wyngaert stressed the importance of ‘fair labeling’ in her concurring opinion to Judgment Pursuant to Article 74 of the Statute, She referred to J. Ohlin (2011) citing F. Mégret. See Judge Van den Wyngaert Concurring Opinion, § 28.

²⁰⁷ See Chapter II.2.i *supra*.

²⁰⁸ *Taylor* Trial Judgment, § 6906.

²⁰⁹ *Ibid.*, §§ 6907 et sq.

Lubanga Trial Chamber handed down a relatively lenient sentence notwithstanding the finding that Lubanga is a direct co-perpetrator. What mattered to the court is the combination of the mitigating factors, absence of the aggravating factors and a lesser form of intent on part of the convicted person. Therefore, the forms of liability of both accused took a backseat when it came to imposing the penalty. This approach seems reasonable.

Conclusion

This chapter dealt with the role of complicity at sentencing. International judges have declared on a few occasions that aiding and abetting generally warrants a lesser sentence than that rendered for perpetration. The case law and the statutory sentencing principles reveal, however, that primary perpetration through the joint criminal enterprise or the concept of ‘co-perpetration’ does not automatically warrant a more severe sentence than that rendered for aiding and abetting (or any other forms of complicity), nor does it imply a higher degree of culpability. Rather, the mode of participation forms part of the discussion of the appropriate punishment, along with a number of other factors.

In contrast with many domestic legal systems that already include a sentencing discount for aiding and abetting at the statutory level, complicity in international criminal law is fully compatible with lengthy sentences at the level of primary perpetration. This is so for the two main reasons. First the lack of a coherent sentencing regime in international criminal law. The exercise of judicial discretion in international criminal law is only limited by a small number of generic formulas stemming from the statutes and case law. This guidance establishes some broad principles such as the prohibition of the death penalty but is hardly sufficient to attribute any value to the modes of participation or to set scales of punishment for each particular crime. On a theoretical level, international criminal law does not rank or properly define the goals of punishment that could indicate the role of an accomplice for sentencing purposes. Therefore, international judges are left with the freedom to decide on the appropriate punishment in each case, taking into consideration the combination of factors and not the mode of participation alone.

The second reason why complicity is compatible with longer sentences in international criminal law is the unique nature of international criminal law: *a priori* limitation of international prosecutions to the senior leadership figures reduces the pool of primary perpetrators in the dock and increases the number of accomplices and ‘masterminds’ removed from the scene of the crime. In this situation, only individualized assessment of circumstances and particular

facts of the case allows one to determine whether the culpability of the accomplice is less or more than that of the actual perpetrator.

It is essential to recognize the duality of criminal proceedings. The mode of participation serves different purposes at trial and sentencing. At trial, complicity or any other form of participation is used for 'labelling' the conduct of the accused. The goal is to provide the most accurate description of individual's role in the commission of the crime. This is in line with the principle of individual criminal responsibility. At the sentencing stage, the mode of participation is one out of several indicators for measuring the level of culpability of the accused for punishment purposes. Depending on the factual circumstances of the case, complicity may or may not indicate the lesser involvement of the convicted person. As the case law has shown, the mode of participation usually plays a peripheral role in sanctioning due to the presence of other factors that account for harsher penalties, such as an individual's leadership role or the grave nature of crimes.

VII. Conclusion: the Place of Complicity in International Criminal Law

Introduction

Previous chapters analysed complicity from different angles. Chapter I showed that historically one of the main challenges of international criminal law was attributing individual criminal responsibility for collective wrongdoings. It became apparent that different mechanisms were employed to solve the problem – from ignoring the distinctions between crime participants in favour of a fact-based approach to holding the accused responsible under the broad umbrella of conspiracy. Under the influence of continental lawyers, in particular those coming from France, complicity also made its way into international criminal law as one of several means for attaching liability to those removed from the scene of the crime.

Chapters II and III focused on contemporary international criminal law and the jurisprudence emanating from the ICC, ICTY, ICTR, SCSL, and the ECCC. The analysis in these chapters showed that forms of participation occupy a distinct place in the statutes and case law of international courts and tribunals, all of which recognize different forms of complicity. However, there are several problematic areas pertaining to the law on complicity that require attention. Among these issues is the frequent ‘mismatch’ between the facts of the case and the legal labels attached to them, a failure to distinguish between the elements of the substantive offence and the legal requirements of liability modes, the introduction of competing concepts for dealing with collective criminality that are not firmly grounded in international law, shifting standard of causation, and finally the ‘downgrading’ of complicity by unduly associating it with a lower degree of blameworthiness.

Chapter IV explored complicity in domestic law. The study of the liability modes covered 31 domestic jurisdictions. It showed that complicity in its various forms is rooted in all of the legal systems under consideration. Even countries adhering to the unitary model of participation – i.e. not distinguishing between different forms of participation at the legislative level – recognize in both doctrine and case law the different roles of those involved in offending. The boundary between primary perpetration and secondary liability shifts from country to country, and within a single system, depending on the factual circumstances. However, the functional core of complicity does not depend on this shifting border; complicity is a legal construction that serves to determine the circumstances in which liability is attributed to those who do not physically perpetrate the crime. Because of the wide recognition that complicity enjoys in national law, it is fair to assume that it has the status

of a general principle of international law recognized by ‘civilised nations’ and therefore constitutes a source of law.

Chapter V compared complicity in the law of state responsibility and international criminal law. The chapter established certain limits of cross-fertilization between the two fields of law. The difference between the objectives and methods of the two fields of law places a limit on the transferability of legal notions from one domain to another. However, despite this divergence, both disciplines share a number of problems with the application of the concept of complicity, such as linking the form of liability to the substantive crime or defining the fault requirement.

Finally, Chapter VI explored the consequences of complicity. It assessed critically the statement made by several Chambers that aiding and abetting generally warrants a lesser sentence than primary perpetration. This statement was dismissed as mechanical on the basis of the analysis of individual cases, supplemented by the table on the correlation between the modes of participation and sentencing in Appendix IV. The study in this chapter revealed that it is the totality of factors that influence the sentence rather than the liability mode alone. Moreover, the chapter distinguished the two stages of the criminal process – the stage of attribution of responsibility and the sentencing stage. It was argued that the principle of fair labelling requires describing the conduct of the accused in precise terms; hence complicity occupies a prominent role during the first stage. At the same time, forms of participation are not dispositive at the second stage, that of sentencing, which is characterized by a high degree of judicial discretion.

The analysis in the previous chapters outlined various aspects of complicity in international criminal law – its historical origin,¹ roots in domestic law,² philosophical underpinnings,³ and problems with its application in international context.⁴ However, the predominant question of how we deal with collective criminality remains. Is complicity an adequate construction to describe the conduct of international offenders? Does the context of mass atrocities affect the way legal concepts are interpreted and applied by international courts and tribunals?⁵ Do we even need to ‘fine-tune’ the forms of liability in international criminal law? Osiel posed an important question in

¹ Chapter I.

² Chapter IV.

³ Chapter II.2.ii.

⁴ Chapters II.2 and III.2.

⁵ Mark Osiel noted that the law “has been largely content to rely on fictions remote from the empirical reality of mass atrocity discerned by historians and social scientists.” Osiel’s observation served as an impetus for the full-fledged study of the ‘empirical reality of mass atrocity’ by Mikaela Heikkilä. See M. Osiel, ‘The Banality of Good: Aligning Incentives Against Mass Atrocities,’ 105 *Colum. L. Rev.* 1751, 2005, at 1752; M. Heikkilä, at 356.

this respect: “[D]oes a preoccupation with individual culpability prevent proper recognition of the collective origins and nature of mass atrocity?”⁶

The answer to these questions lies in the sphere of the objectives of international criminal justice. This concluding chapter argues that the main and overarching purpose of international criminal law is its symbolic significance as the flagship of values shared by humanity. The symbolism manifests itself procedurally – international criminal law strives to be an exemplary justice mechanism; and substantively – through setting the threshold of behaviour that is no longer accepted by the international community. This overarching goal allows for the limitations of international criminal law – its aspirational character, lack of supranational enforcement powers, the dissonance between targeting individual perpetrators and the collective nature of offending, and, finally, the distinct and complex criminological reality of mass atrocities.

The need to distinguish among various forms of participation and as a consequence, the need for complicity, stems from the procedural aspect of the symbolic value of international criminal law. If we accept that international trials aspire to set an example of how justice must be administered, then the principles of fairness and individual criminal responsibility require us to define the precise way in which the accused is connected to the crime. International criminal law often targets those most responsible – those removed from the scene of the crime, the leaders and the ‘masterminds’. This focus of international criminal justice makes secondary forms of liability indispensable.

Part one of this chapter briefly defines the limitations of international criminal law – this exercise lays the ground for the second part of the chapter that discusses symbolism as an overarching objective of international criminal justice. It is argued that conceptualizing international criminal law as symbolic serves a dual purpose: firstly, attaining a certain standard of justice and defining the type of conduct that humanity rejects is an objective in its own right, and, secondly, it allows us to embrace the limitations in respect of the plethora of other goals pursued by international criminal law. Finally, the third part of the chapter schematically outlines a number of areas in the law on complicity requiring attention.

1. Limitations of International Criminal Law

As the name suggests, international criminal law combines the features of two disciplines - public international law and domestic criminal law. They form

⁶ M. Osiel, 2005, at 1753.

the skeleton of international criminal law.⁷ This is not to suggest that other disciplines do not have any influence – international humanitarian law and international human rights law inform the content of international criminal law. They serve as its ‘flesh’. The fundamental principles upon which international criminal law operates, however, come from the two founding disciplines. For example, the principles of individual criminal responsibility, legality and equality of arms, fundamental for international criminal justice, all derive from domestic criminal law.⁸ However, reliance on national concepts has its limits. At times, the principles emerging at an international level conflict with the fundamental principles of domestic criminal law, as in the case with selective prosecutions, for instance. There is a strong political and international element embedded in international criminal law that cannot be ignored. International criminal law tends to fall back on its public international law origins in difficult situations. The limitations of international criminal law can thus be revealed through the tensions between the two different fields of law.

i. Conservative vs Progressive

Domestic criminal law is a highly conservative institution aiming to preserve the social order and enforce social norms through criminal sanctions.⁹ It exemplifies the conflict between individual autonomy and collective interests.¹⁰ In Mill’s philosophy, self-protection is the sole end for which mankind is allowed to interfere with the individual liberty of any of their number. Consequently, the only purpose for which power can be exercised is to prevent harm to others.¹¹ The definition of harm depends on the values embedded in society. Usually the ruling classes define these values over time; and the threat of penal sanctions protects the equilibrium attained in a particular society.¹²

Durkheim explained the traditionalist nature of penal law by the fact that it denotes the feelings collectively shared by the society.¹³ The authority of the penal rule is thus a societal custom formed over time.¹⁴ Domestic criminal law has an indispensable regulatory function because by guarding dominant values shared by its citizens it may be said to preserve the identity of the

⁷ Eg. R. Cryer et al, at 16.

⁸ The first international trials at Nuremberg and Tokyo represented a compromise between different domestic legal systems.

⁹ A. Ashworth, 1995, at 15.

¹⁰ Ibid, at 29.

¹¹ J. S. Mill, ‘On Liberty’ in L. May and J. Brown (eds) *Philosophy of Law: Classic and Contemporary Readings*, 2011, at 369.

¹² A. Ashworth, 1995, at 16.

¹³ E. Durkheim, *The Division of Labour in Society*, 1984, at 37.

¹⁴ Ibid, at 35.

state. Punishment in domestic law is administered in a systematic fashion because all members of the society are presumed to share the values and agree to submit the offender to censure.¹⁵ Society can be said to ‘outsource’ the imposition of penalty to an organized body, which administers this process in a consistent way.

In contrast, international criminal law is a relatively new field of law that dates back just a few decades to the establishment of the International Military Tribunal in Nuremberg.¹⁶ International criminal law does not limit itself to the values shared by the citizens of a particular state, but claims universality and adherence to the project of protection of the fundamental legal values of humanity as a whole.¹⁷ It is highly aspirational – many customs are not yet embedded in the international community and are still in the process of being formed. Despite its great importance for the development of humanity, international criminal law, unlike its domestic counterpart, has arguably not yet achieved the status of being an indispensable regulatory instrument in international affairs as it lacks consistency in the imposition of punishment that domestic criminal law offers. International trials are just ‘samples’ of justice in the situations when political reality and the international climate allow for prosecution and conviction.

ii. Deviance vs Conformity

Domestic and international offending differ from a behavioural point of view. Criminology offers a number of theories explaining why people commit traditional crimes. These explanations vary significantly. Some criminologists believe that people offend due to being exposed to an unfavourable environment; others claim that economic inequality prompts criminality, while the third group believes that humans act as rational beings and seize any suitable opportunity to offend.¹⁸ What unites these approaches is that criminality is regarded as a form of deviance from the norm. The responses of the domestic criminal justice system are consequently geared towards ensuring conformity and preventing deviance.¹⁹

International criminal law deals with a different type of criminality. It stems from obedience rather than from deviance.²⁰ Political violence usually

¹⁵ E. Durkheim, at 45.

¹⁶ London Agreement, 8 August 1945, 82 U.N.T.C. 280.

¹⁷ K. Ambos, 2013, at 65.

¹⁸ G. B. Vold, T. J. Bernard and J. B. Snipes, *Theoretical Criminology*, 4th ed, Oxford University Press, 1998, at 4.

¹⁹ In the words of Hart, the criminal law sets up, in its rules, standards of behaviour to encourage certain types of conduct and discourage others. See H.L.A. Hart and J. Gardner, *Punishment and Responsibility: Essays on Philosophy of Law*, 2009, at 6.

²⁰ For the sociological perspective see S. Milgram.

changes the context in which humans operate and authority is exercised to induce offending rather than desistance. Its responses have therefore to be attuned to breaking the patterns of compliance rather than ensuring conformity. Mass violence requires structure and organization because its continuation depends on human cooperation within the system. The only way to induce individuals to be part of the enterprise that commits crimes is to instil in their minds that they are simply small cogs with no responsibility.²¹ It is almost as if persons submit their individual autonomy, their freedom of choice, to a higher authority, and in return they expect to feel absolved of responsibility. Hanna Arendt explored this phenomenon by asking how was it possible for the individual and collective conscience to disappear, with some notable exceptions, in Nazi Germany?²² She looked at the example of Eichmann – a Nazi bureaucrat whose trial she observed. He did not enter the criminal system for sadistic motives but to pursue a career and his conscience functioned in the expected way for about four weeks until it began to function abnormally.²³ The reason behind this shift was the effect of a substitution of values promoted by the Nazi party. Instead of perceiving themselves as murderers, the functionaries felt that they were involved in something historic, grandiose, and unique.²⁴ The duty to obey orders overshadowed any possible conscientious objections.²⁵

Stanley Milgram conducted a number of experiments designed to test individuals' capacity to defy authority when put under pressure to perform acts that went against their conscience. The participants were instructed by an authoritative figure to gradually administer electric shocks to another individual (actor) in cases when the latter gave the wrong answers to the predetermined questions. The declared goal of the experiment was to test the effects of punishment on learning, but the real aim was to see how far individuals could go in inflicting pain on another human being. The results were shocking: while people were experiencing severe strain and discomfort following the orders from the person in charge, very few participants found the strength to resist the authority and stop the experiment. This is despite the fact that they perceived their acts as immoral. This outcome led Milgram to conclude that values are not the only forces that drive a person in an on-going situation – context is equally important. Milgram argued that the level of obedience can be altered and defiance can be stimulated when multiple authority figures are not in agreement with each other (diffusion of authority)

²¹ H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, 1965, at 57.

²² *Ibid*, at 91.

²³ *Ibid*, at 95.

²⁴ *Ibid*, at 105.

²⁵ *Ibid*, at 91.

or when an individual is exposed to a group pressure (someone else refuses to obey).²⁶

iii. Legitimacy Through Enforcement vs Legitimacy Through Fairness

Domestic criminal law and international criminal law gain their legitimacy in a different way. National criminal law is the product of the separation of powers: the legislators enact positive law in the form of statutes; courts apply the law as a principle and determine whether a technical violation of law constitutes a wrongdoing; while the executive branch frames public discussion about criminalization or de-criminalization of certain conduct. What is extremely important is that domestic law does not need to legitimize itself. The state system provides for a basic rule of recognition that allows us to determine *before* a rule is actually made, that it will be valid *if* it conforms to the requirements of the rule of recognition.²⁷ If a criminal law provision fulfils these requirements it is automatically valid, and citizens are obliged to obey. The state machinery ensures compliance through its enforcement powers.

International criminal law functions in an entirely different way. It is a branch of public international law that benefits neither from a basic rule providing general criteria of validity for its norms nor from an enforcement apparatus akin to that of the state. International law is not entirely without 'teeth' as it envisages coercion, just not in the form of criminal sanctions.²⁸ Its persuasive force is of political nature. For meaningful executive powers international criminal justice must rely on states.²⁹ The dialogue with national governments is thus essential to maintain the functioning of the discipline as failure to perform enforcement functions may lead to the denial of justice, as for instance, with the pending ICC arrest warrant against the president of Sudan - Omar Al Bashir. How do international courts achieve full cooperation of domestic institutions? The key is to be perceived as legitimate. This can be accomplished through enhancing the quality of international criminal justice. International trials should be a matter of quality not quantity. The legitimizing effect of exemplary justice cannot be understated.

International courts and tribunals are essential mechanisms for bringing to life international legal norms through interpreting its sources - treaty, custom and

²⁶ S. Milgram, at 107, at 118.

²⁷ H.L.A. Hart, at 235.

²⁸ M. Shaw, at 7.

²⁹ Eg. Article 27 of the ICTY Statute and Article 26 of the ICTR Statute (enforcement of sentence).

the general principles of law. They validate the law post-factum.³⁰ This is in contrast with domestic courts that apply the law that is already valid and binding. This particularity underscores the importance of the rigorous approach of international courts and tribunals in dealing with the sources of international law. Shklar drew attention to the propensity of the analytical legal mind for thinking of the law as ‘there’ or ‘not there’ at all times and in all places when it is rather a question of degrees of legalism in politics of complex social orders.³¹ The truth is that international criminal law began in a legal vacuum – the International Military Tribunal in Nuremberg was created when there was no law, no government and no political order.³² The principle of legality had to be circumvented to some extent as the law was gradually created. Consequently, the quality of work of international courts predetermines the perceived legitimacy of the outcome.

iv. Individual vs Collective Aspect

Liberal domestic criminal law theories are built upon the principle of individual autonomy, which respects an individual’s freedom to act as a rational being.³³ Pursuant to this principle, an individual can only be held liable for voluntary conduct.³⁴ International criminal law recognizes this central rule. The challenge lies in reconciling the individual nature of criminal responsibility and the group aspect of crimes: how does one attribute responsibility for mass atrocities? International criminal law has struggled over this problem since its inception. The difficulty arises from the enormity of crimes in question, the collective nature of offending that involves many individuals at the different levels within the state hierarchy and the strong organizational element inherent in international criminality.

Robert Jackson, the chief prosecutor for the US at Nuremberg, in his opening address to the tribunal, summarized the challenges of opening the first trial in history for crimes against peace: ‘Never before in legal history has an effort been made to bring within the scope of a single litigation the developments of a decade, covering a whole continent, and involving a score of nations, countless individuals, and innumerable events.’³⁵ This statement underscores the difficulty of dealing with enormous crimes through judicial proceedings.

³⁰ H.L.A. Hart, at 235-236.

³¹ J. Shklar, at 148.

³² Ibid, at 153.

³³ A. Ashworth, 1995, at 26; D. Robinson, at 926.

³⁴ H.L.A. Hart, at 174.

³⁵ The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg, Germany, 21 November 1945 (1946), accessed 6 December 2013, available online at <http://avalon.law.yale.edu/imt/11-21-45.asp>

2. Symbolism as an Overarching Aim

In 2004 report to the Security Council, the UN Secretary General claimed that the objectives pursued by the special criminal tribunals include bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.³⁶ These goals, which were never formalized or ranked, have different timeframes but are all equally ambitious: some look backwards at ‘establishing a record of past events’; others dwell on the present-day concern of ‘bringing to justice those responsible’, while a third type of objectives are focused on the future of ‘preventing the recurrence of violations’ and ‘promoting national reconciliation, re-establishing the rule of law and securing peace’.³⁷

The desire to fulfil all of the stated goals without clearly defining them – the desire for an ultimate success in achieving each stated objective - also became the weakness of international criminal justice. A unifying principle that limits our expectations and curtails the multiple ambitious objectives can make international criminal law more coherent. Without such a principle or an overarching aim the system is prone to provoking disappointment, disapproval or even abuse. The criticism ranges from the ineffectiveness of international courts and tribunals to their over-politicization and the selectivity of prosecutions.

It seems that one of the most important, tangible achievements of international criminal law is changing the way in which the world community perceives political violence.³⁸ This is significant progress for a field of law that was created relatively recently. International crimes are no longer tolerated as the ‘necessary evil’. Rape, for instance, is no longer perceived as one of the ‘spoils of war’ but as a crime against humanity deserving of condemnation along with other hideous acts. Thus, this thesis nominates symbolism as the leading objective of international criminal justice. The term ‘symbolism’ is meant to refer to the mission of international criminal law in

³⁶ The Secretary-General, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, U.N. Doc. S/2004/616 (2004), at 38.

³⁷ It is essential to point out that not all of the objectives can be achieved through criminal punishment. While ‘bringing to justice those responsible’ corresponds to the retributive punishment rationale, preventing the reoccurrence of the violations of human rights and humanitarian law corresponds to logic of deterrence, and to some extent securing justice and dignity for victims to restoration. There are broader goals that cannot be achieved through punishment *stricto sensu* such as reconciliation, setting the historical record, and re-establishing the rule of law.

³⁸ D. Luban.

creating a space for shared, immutable values of the international community through the administration of exemplary justice. Symbolism seems to be the best fit because it denotes the strengths of international criminal justice to transcend state borders and serve as a reminder that mass atrocities do not go unpunished. At the same time, this objective also stresses the peculiarities of international criminal law discussed in the previous section that stem from its dualistic nature.

Perceiving international criminal justice as symbolic helps to manage expectations bestowed on the international criminal justice system while maintaining a sense of coherence. For example, because of the collective nature of mass atrocities as well as a frequent lack of enforcement powers, international criminal law is capable of addressing only a limited number of situations and reaching only a handful of perpetrators. This is in stark contrast with domestic criminal law, which, at least at the statutory level, presupposes its universal application.³⁹ Viewed through the lens of retribution or deterrence (typical domestic sentencing rationales) that require the law to punish the law to punish all the guilty and not just a selected few, there is a problem with this discrepancy in international criminal law.⁴⁰

However, if one accepts that the role of international criminal law is symbolic, this caveat no longer appears problematic. The very few instances when the responsible individuals stand trial in the context of international criminal law become representative of a broader consensus amongst the international community that rejects political violence as a threat to international peace and security. They serve as a symbol of condemnation and the mature status of international society. In the criminological reality of mass atrocities, in the midst of which individuals tend to abandon their will and follow a manipulative higher authority when put under pressure, international criminal law has no other choice but to focus primarily on breaking the patterns of obedience when violence is about to happen or even eliminate the circumstances that would induce violence and manipulation in the first place. One way to achieve this is to conceptualize international criminal law as an alternative source of authority or an instrument of group pressure – a loudspeaker for transmitting universal values with the view of preventing criminal obedience.⁴¹ This is precisely the symbolic function of international criminal law.

The rhetoric of symbolism also emphasizes the limited scope of legal inquiry

³⁹ Fletcher refers to this requirement that the law punish the guilty, all the guilty as ‘positive legality’. G. Fletcher, 1998, at 207. For the discussion of this limitation, see Chapter VI.2.iii *supra*.

⁴⁰ For the detailed analysis, see Chapter VI.2.iii *supra*.

⁴¹ I. Tallgren, at 592.

for the purposes of setting the historical record. Acknowledging that international criminal law is symbolic in that it allows for prosecuting only a handful of perpetrators releases some pressure from courts to uncover all the truth about the conflict.

The symbolic function also tackles the limitations of the deterrence rationale in international criminal law – namely, the lack of a solid empirical basis supporting the idea that potential perpetrators are intimidated by the international indictments and penalties.⁴² Symbolism allows us to think about international criminal law as a showcase of the emerging values of international community. Those few judgments that are issued at an international level gain a lot of publicity and at least alert potential perpetrators of the general risks associated with offending. In addition to that, international criminal law triggers ‘pre-deterrence’ in a sense of establishing universal moral minima.⁴³ Pre-deterrence implies creating the conditions under which individuals do not even contemplate taking part in the political violence because of certain assumptions instilled in their minds.

When it comes to the considerations of restorative justice that receive increased recognition in international criminal law, the main problem seems to be the fact that the rights of the accused are often balanced against the rights of the victims.⁴⁴ For example, Judge Odio Benito in her separate and dissenting opinion to the *Lubanga* judgement argued that it is incumbent on the ICC to regard the interests of victims, and, as a result, provide comprehensive legal definitions that go beyond the circumstances of each individual case.⁴⁵ This view seems to extend the powers of the Trial Chamber beyond those envisaged in Article 64(2) of the Rome Statute.⁴⁶ Furthermore, overexpansive legal definitions are at odds with the rights of the accused, in particular the right to be informed about the charges, to have adequate time for preparation and to be tried without delay.⁴⁷ The approach that seeks to counterpoise the rights of the accused and the victims’ rights entirely transforms the focus of a criminal trial. The question remains whether such shift faithfully serves the end goal of bringing justice to the victims.

⁴² M. Mennecke, at 323.

⁴³ M. Damaška, at 347.

⁴⁴ Chapter VI.2.iii *supra*.

⁴⁵ Prosecutor v. *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Separate and Dissenting Opinion of Judge Odio Benito to the Trial Chamber I, Judgment pursuant Article 74 of the Statute, 14 March 2012 (‘Separate and Dissenting Opinion of Judge Odio Benito’), § 7.

⁴⁶ Article 64(2) reads as follows: “The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”

⁴⁷ Article 67(1)(a)-(c) of the Rome Statute.

A more coherent approach would be to strive for the quality of individual judgments by strict adherence to the principles of liberal criminal justice. The rights of the accused have to be respected to the fullest extent possible and not sacrificed in favour of other considerations.⁴⁸ This way the perceived legitimacy of the tribunals would increase and with it, hopefully, victim satisfaction and the potential for reconciliation. If international justice is viewed as legitimate, it is easier to use it as a tool of empowering local communities to pursue accountability at the national level, through, for example, the principle of complementarity promoted by the ICC.⁴⁹ Increased accountability at the local level should result in a ‘change from within’ – the sign of true reconciliation.

The symbolic function has received some recognition by legal academics. Mirjan Damaška referred to this goal of international criminal law as the didactic objective. He argued that international criminal courts should place more emphasis on persuasion and strengthening a sense of accountability for international crime by exposure and stigmatization of these extreme forms of inhumanity.⁵⁰ The purpose is to establish moral minima that are universal.⁵¹ The socio-pedagogic function of international criminal law in the Damaškian sense can be roughly equated with the symbolic function presented in this chapter. The new name does however denote an additional element – symbolism should also be conceptualized as a tool of coming to terms with the limitations of international criminal law.

Mark Drumbl called this goal ‘expressivism’ and has maintained that an expressivist punishes to strengthen faith in the rule of law among the general public, as opposed to punishing simply because the perpetrator deserves it or because potential perpetrators will be deterred by it.⁵² However, this reasoning is very close to retribution, that is treating the wrongdoer as a moral agent and in which punishment conveys blame through deprivation.⁵³ The communicative function is a valid attribute of the retributive rationale.⁵⁴ This is somewhat different from the broader symbolic function of international criminal law as a flagship of shared values.⁵⁵ The distinctive objective of symbolism is delivering a certain message to the community as a whole rather than to a certain offender. Harmen Van der Wilt’s view is possibly the closest to the one advocated in this chapter - he contends that the role of the

⁴⁸ Minority Opinion of Judge van den Wyngaert, § 311.

⁴⁹ Article 1 of the Rome Statute of the ICC.

⁵⁰ M. Damaška, at 345.

⁵¹ *Ibid*, at 347.

⁵² M. Drumbl, at 173.

⁵³ A. von Hirsch in A. von Hirsch et al (eds), at 117. See Chapter VI.2.ii *supra*.

⁵⁴ RA Duff in A. von Hirsch et al (eds), at 127 -135.

⁵⁵ For the detailed account of retribution see section 3.1 *infra*.

expressive theory is to imbue the general public with core values and with faith in the rule of law.⁵⁶

Symbolism receives patchy coverage in the case law of the ad hoc tribunals, hybrid courts or the ICC. The judgments acknowledge to some degree that there is something different about international crimes and the need to punish them but this is done more on an intuitive level rather than explicitly integrating the emblematic value of international criminal law in the reasoning.⁵⁷ The tendency of international judges is to concentrate on the punishment rationales as they appear in the domestic context – retribution and deterrence, with some attention to victims’ rights and reconciliation.⁵⁸ The following passage from *Aleksovski* is sometimes cited in support of a limited recognition of the symbolic function of international criminal law.⁵⁹

[...] [A] sentence of the International Tribunal should make plain the condemnation of the international community of the behaviour in question and show that the international community was not ready to tolerate serious violations of international humanitarian law and human rights.⁶⁰

This rhetoric is indeed very powerful. However, there is no separation of retribution and symbolism in this judgment that speaks in the preceding phrase about the fact that *retribution* is not fulfilling the desire for revenge but an expression of the outrage of international community.⁶¹ Reference is made to the function of retribution as a medium for voicing public disapprobation of the deeds of the offender. This is slightly different from symbolism because the channel of communication is with the particular offender and not the general public.

The *Krstić* Appeal judgment recognized to some extent the symbolic function of international criminal law by singling out one particular offence, genocide, as deserving “special condemnation and opprobrium”.⁶² The reasoning is that genocide “is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.”⁶³ Similarly, the only sentencing judgment of the ICC in the *Lubanga* case made no direct

⁵⁶ H.V.D. Wilt, 2007, at 99.

⁵⁷ Heikkilä noted “From the point of view of the phenomenology of international criminality, it is noteworthy that many other typical features of international criminality are not considered at attribution.” at 366.

⁵⁸ See Chapter VI.2 *supra*.

⁵⁹ H.V.D. Wilt, 2007, footnote 39; M. Damaška, footnote 17.

⁶⁰ *Aleksovski* Appeal Judgment, § 185.

⁶¹ *Ibid*, emphasis added.

⁶² *Krstić*, Appeal Judgement, § 36.

⁶³ *Ibid*.

reference to the function of international criminal law in propagating values shared by humanity, but incidentally pointed towards the unacceptable nature of crimes against children.⁶⁴ The considerations in *Krstić* and *Lubanga* are crime-specific but they show how international judgments become the point of reference for the behaviour that is not tolerated by the humankind.

The recent *Taylor* Appeal judgment came closest to an express recognition of the symbolic function of international criminal law. The Appeals Chamber upheld Charles Taylor's conviction and a 50-year sentence for aiding and abetting and planning murders, rapes and other acts of violence committed during the Sierra Leonean civil war.⁶⁵ As the former president of Liberia, Taylor was involved in organizing and funding the attacks on the civilian population in the neighbouring country. The appellate judges held that the sentences imposed by the court reflect "the revulsion of mankind, represented by the international community, to the crime and the convicted person's participation in the crime."⁶⁶ Thereby, they recognized that culpable involvement of the heads in political violence in another state is no longer accepted. Justice in this case serves as a yardstick of the shared global values.

The reason for the scarcity of the express acknowledgment of the symbolic function of international criminal law in the jurisprudence is twofold: firstly, there is a thin line between proclaiming the symbolic value of international justice and sliding to rhetorical restatements devoid of legal content; secondly, this aim is something unique for international criminal law – it is hard to find a corresponding objective within the domestic domain. Consequently, there is a need to construct this purpose *de novo* – a task that is more challenging than simply borrowing the rationale from the national legal system.

It follows that accepting the symbolic role of international criminal law helps in containing expectations and bringing some coherence to the plethora of the proclaimed objectives of international criminal law. The question is how does one integrate this overarching aim into judicial reasoning? One way to do this is to see the symbolic function of international criminal law as a substantive and procedural consideration. From the substantive point of view, international criminal law plays a crucial role in defining the forms of political violence that are not accepted by international community. It shapes our perception of the shared values that must be upheld universally.⁶⁷ For

⁶⁴ *Lubanga* Sentencing Decision, §§ 37-44.

⁶⁵ *Taylor* Appeal Judgment.

⁶⁶ *Ibid*, at 663.

⁶⁷ The Committee of French jurists participating in setting up the ICTY, suggested that the proposed tribunal "must be universal, because the crimes it is to punish are an affront to the conscience of all humanity." *Report of the Committee of French Jurists*, § 23 (b).

example, the Rome Statute represents an up-to-date codification of international crimes. Arguably, the role of the ICC is not only to provide the jurisdictional framework for international prosecutions but also to spread the values embedded in the Statute through enhancing national legislation. Pursuant to the complementarity principle, the ICC promotes the implementation of the Rome Statute into the domestic legislation of the countries that are parties to the Statute.⁶⁸

The symbolic function of international criminal law can also be seen as a procedural tool for interpreting the administration of justice. It appears that international criminal justice attains legitimacy not only through delivering the final outcome – the conviction or acquittal – but also through the way in which it reaches this outcome. Justice becomes a matter of outcome *and* process. If we conceive international trials as symbols of exemplary justice, then the principles of fairness and due process must inform every step of the way.

The role and place of complicity in international criminal law becomes evident if one looks at it through the lens of procedural symbolism. Ashworth wrote that fairness demands that offenders are labelled and punished in proportion to their wrongdoing.⁶⁹ He stressed that the principle of fair labelling requires us to maintain the distinctions “to ensure a proportionate response to law-breaking, thereby assisting the law’s educative and declaratory function in sustaining and reinforcing social values.”⁷⁰ This is precisely the symbolic function of law discussed above. Ashworth referred to the definitions of the substantive offences, but the same consideration applies to the modes of responsibility - the notion of fairness insists that we describe the conduct and the mental state of the accused in the most precise terms.

Ohlin argued in favour of the distinction between principals and accessories in international criminal law because collapsing this distinction sends the wrong message to the world – it inflates the culpability of accessories and deflates the culpability of principals.⁷¹ Perhaps, the main problem with attaching the same label to all crime participants is not necessarily ‘evening out’ their level of culpability - since this primarily depends on the factual circumstances rather than the mode of participation - but the violation of the principle of legality. Labels are important for reinforcing this principle – an individual must be fairly warned prior to any demands on his liberty and have

⁶⁸ There are initiatives facilitating the implementation.

⁶⁹ A. Ashworth, 1995, at 87.

⁷⁰ *Ibid*, at 86.

1. ⁷¹ J. Ohlin, ‘LJIL Symposium: Names, Labels, and Roses’, *Opinio Juris Blog*, 23 March 2012, available at <http://opiniojuris.org/2012/03/23/ljil-names-labels-and-roses/> visited 6 December 2013.

a crystal clear idea as to why and how he incurs individual criminal responsibility. Another argument for maintaining the distinction is that an accurate description of the conduct and mental state of the accused contributes to the perceived legitimacy of international courts and tribunals. Damaška claimed - in respect of setting the lower limits of superior responsibility - that “[o]rdinary people do not lump together intentional perpetrators of heinous crimes and those who failed to bring them to justice.”⁷²

Judge Van den Wyngaert invoked the principle of fair labelling when she criticized the emerging hierarchy of the participation modes at the ICC – principal perpetration being considered the most blameworthy.⁷³ This highly questionable position reinforces the tendency to make the conduct of political and military leaders “fit the mould of principal liability” by using implied theories such as the one of ‘control of the crime’.⁷⁴ Judge Van den Wyngaert accurately observed that the drafters of the Rome Statute have not elaborated forms of criminal responsibility for this specific category of offenders, and characterizing them as principals is problematic from the legal and conceptual point of view.⁷⁵ The legal difficulty is precisely the violation of the principle of fair labelling – the juridical description of the conduct has to match the facts of the case rather than be based on an artificially constructed notion. If the leader is removed from the scene of crime, then he may just as easily be held complicit in the crimes occurring in the field rather than ‘perpetrating’ them.

3. Improving Current Practices of Attaching Liability for Complicity

The previous section argued in favour of distinguishing between different forms of participation in international criminal law. The reason for this is to uphold the principle of legality and to send the message of a fair trial to the world community. It seems that different forms of complicity – explicitly provided in the statutes of international courts and deeply rooted in domestic legal systems – are often the most appropriate mechanisms for attaching the liability to the offenders removed from the scene of the crime. The remaining question is how does one improve the current practices on accomplice liability in international criminal law? The following list outlines a number of considerations in this regard:

⁷² M. Damaška, at 350.

⁷³ For more on the hierarchy of participation modes at the ICC, see Chapter III *supra*.

⁷⁴ Concurring Opinion of Judge Van den Wyngaert, § 29.

⁷⁵ *Ibid*, § 15.

1. Legal requirements of complicity – conduct and fault requirements – need to be sufficiently clear and linked to the facts of the particular case. It is essential to treat these two elements not as two autonomous units but as parts of the same whole.
2. Because of its evolving nature, international criminal law is characterized by a high degree of judicial discretion – not only at the sentencing stage, but also at the stage of the attribution of responsibility. However, there must be limits to judicial creativity. It is advisable to adopt a more rigorous methodology when it comes to processing the sources of international criminal law. Decisions to create new forms of liability beyond those expressly provided for in the statutes or to introduce new elements to the existing forms call for further justification.
3. Complicity is an intricate balancing exercise. It may seem that it casts its net too wide by not requiring that the act of the accomplice caused the principal to act. The lack of causation loosens the conduct requirement. The equilibrium is restored by an enhanced fault requirement: the knowledge of the crime and the intent to assist or encourage the commission of the principal's crime.⁷⁶ The Rome Statute demands that the aider and abettor acts with a purpose of facilitating the commission of the crime.⁷⁷
4. The practical implication of the balancing exercise is that the further the accomplice is removed from the scene of the crime, the more emphasis must be placed on his mental state. From the evidentiary point of view, this may imply avoiding a fully inferential analysis when it comes to assessing accomplice's culpability. Knowledge that the crime is being committed is an essential element of complicity.⁷⁸ If the accomplice is found to be close to the scene of the crime, his fault may be implied, while his contribution has to be spelled out – mental state alone is not sufficient to bring about criminal responsibility. In contrast, in cases of removed assistance or encouragement, knowledge about the crimes and the intent to be involved in their commission become dispositive for attaching responsibility to the accomplice. This consideration is particularly relevant in the context of mass atrocities – the gap between the

⁷⁶ A. Ashworth, 1995, at 409.

⁷⁷ Article 25(3)(c) of the Rome Statute.

⁷⁸ W. Schabas, 2001, at 450.

accomplice and the crime is often very wide, and the only way to compensate for the distance is to focus on individual culpability.

5. The requirement that the aid of the accused is specifically directed towards the crime is arguably part of the fault - rather than conduct – requirement of complicity.⁷⁹ The necessary extent of accessory’s knowledge of the principal offence is a complex consideration that depends largely on the circumstances of the case.⁸⁰ The test in English law would be whether the offence committed was within the contemplated range of offences, and if not, then whether it was of the same *type* as any of those offences contemplated.⁸¹ International criminal law has to devise its own approach to the required level of specificity of the accused’s knowledge. For example, it may be said that the threshold of specificity is met if the accomplice supplies material aid to the rebel groups with the knowledge that the rebels are involved in a large scale mass violence and the furnished aid will almost inevitably be put to criminal use.
6. From the criminological point of view, it seems that the context of political violence has a bearing on the culpability of the accused – offending often stems from obedience rather than defiance. This aspect has to be accounted for when assessing the accomplice’s culpability. Which factors shaped the accomplice’s wrongful decisions? What were the courses of action available to the accused?
7. The collective nature of international criminality is also an important consideration for the purposes of establishing accomplice liability. Factual scenarios of mass atrocities are diverse but are all equally complex. They presuppose co-operation of individuals at different levels of military and political apparatus. It is essential to establish the links between different actors. Culpability in criminal law is individual but should be assessed in relation to the acts of the other perpetrators.
8. The hierarchy of the modes of participation implicit in the reasoning of some ICC, ICTY and ICTR Trial Chambers should be abandoned.

⁷⁹ Cf. *Perišić* Appeal Judgment, § 73.

⁸⁰ K.J.M. Smith, at 161 et sq.

⁸¹ *Ibid*, at 167.

The degree of blameworthiness should not hinge on the legal label attached to the conduct of the accused but should rather be a reflection of the factual circumstances. In the context of political violence, the acts of accomplices are often more reprehensible than those of the primary perpetrators. Accomplices issuing orders from the safety of their desks frequently have more freedom to act in accordance with their conscience than the crime participants pulling the trigger of the gun. Accomplices also frequently enjoy the benefit of time – an opportunity to reflect on the consequences of their conduct – an option that is not available to the principals. This too, must be brought to bear on the assessment of accomplices' individual criminal responsibility.

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Appendix I: Relevant Statutory Provisions

The Nuremberg Charter

Article 6

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **WAR CRIMES:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

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 plan.

The Tokyo Charter

Article 5

Jurisdiction Over Persons and Offences. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *Crimes against Peace:* Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law,

treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) Conventional War Crimes: Namely, violations of the laws or customs of war;

(c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. 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 person in execution of such plan.

Control Council Law No. 10

Article II

1. Each of the following acts is recognized as a crime:

(a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) War Crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(a) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was 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 or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents

or satellites or held high position in the financial, industrial or economic life of any such country.

3. Any persons found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one or more of the following:

- (a) Death.
- (b) Imprisonment for life or a term of years, with or without hard labor.
- (c) Fine, and imprisonment with or without hard labour, in lieu thereof.
- (d) Forfeiture of property.
- (e) Restitution of property wrongfully acquired.
- (f) Deprivation of some or all civil rights.

Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal.

4. (a) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.

(b) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

5. In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.

The ICTY Statute

Article 7: Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts

or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 24 **Penalties**

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 27 **Enforcement of sentences**

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

The ICTR Statute

Article 6: Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be

considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 23: Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 26: Enforcement of Sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

The SCSL Statute

Article 6: Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.
2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.
5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

Article 19: Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.
2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 22: Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.
2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

The ECCC Law

Article 29

Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

The ICC Statute

Article 25: Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 28: Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 78: Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Appendix II: Definitions of the Common Terms

This appendix provides a list of terms associated with complicity and used throughout the thesis. The main focus is on domestic law definitions of the terms.¹

Accessory (an ‘accessory before the fact’ in common law) are all those who are held derivatively liable for another’s committing the offence. This category includes instigators as well as aiders-and-abettors. Unlike civil law, the Anglo-American common law does not recognize the distinction between different types of accessories. Accessories incur secondary liability.

Accomplice per Fletcher’s definition is any partner in crime – a co-perpetrator or an accessory. Ashworth uses the term ‘accomplice’ more narrowly, as a synonym for an accessory, to contrast the accomplice with the principal.

Actus Reus (conduct) is an act or omission contrary to a rule imposing specific behavior.²

Aider and abettor in German law is “any person who intentionally assists another in the intentional commission of an unlawful act” or “a person who assisted in the commission of the offence by supplying counsel, directions, information or the means for the commission” in Russian law.

Conduct Requirements of complicity differ depending on the type of complicity involved but the common feature is that the law of complicity does not require causation. Thus even a small act of assistance may suffice in entailing the liability of an accomplice.

Conspiracy is a distinct offence, consummated upon entering into the agreement to commit the offence. Conspiracy also generates a standard for holding each conspirator complicitous in the crimes of fellow conspirators but, unlike complicity, which is a category of accessorial liability, conspiracy functions as a test of what it means to be a co-perpetrator.

Constituent elements of crimes: it is the general principle of criminal law that a person may not be convicted of a crime unless it is proved beyond reasonable doubt that he has caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs (*actus reus*), and that he had a defined state

¹ Fletcher’s categorization of participants in the crime is widely relied on in providing the definitions.¹ See Fletcher, 1978, at 637 – 649.

² Antonio Cassese, *International Criminal Law*, 2nd edn Oxford University Press, 2008, at 53. Smith and Hogan suggest that *actus reus* includes all the elements in the definition of the crime except the accused’s mental element. Thus, *actus reus* is made up generally of conduct (which includes acts or omissions) and sometimes its consequences, and also the circumstances in which the conduct took place. An example of the ‘circumstances’ would be the absence of the consent of the rape victim. *Actus reus* is sometimes referred to as a ‘conduct element’ of the crime, but as follows from the definition, *actus reus* can be broader than just a conduct. J.C. Smith and Brian Hogan, *Criminal Law*, 10th ed., Butterworths 2002, at 30.

of mind in relation to the causing of the event or the existence of the state of affairs (*mens rea*).

Co-perpetrator (a ‘principal in the second degree’ in common law) is a person who commits the offence jointly with others. The problematic aspect of co-perpetratorship is that sometimes the conduct of one or more co-perpetrators does not satisfy the objective elements of the substantive crime. For example, English law allows holding two or more persons as co-principals (co-perpetrators) if each of them satisfies some part of the conduct element of a substantive crime, and if each of them has the required mental element.³ This is when the joint enterprise concept comes into play.

Counsellor (English law) is someone who persuades to principal to commit a crime by pointing to the advantages of this course of action.

Dolus directus (direct intent) means that the accused desires particular consequence of his act.

Dolus directus in the second degree means awareness that the crime will be the almost inevitable outcome of the acts or omissions of the accused.⁴

Dolus eventualis (indirect intent or inadvertent recklessness) consists of the knowledge of the risk for the effect to occur and the will (at least in the form of the acceptance).

Fault Requirement of complicity has two dimensions: first, the accomplice must intend to do whatever acts of assistance or encouragement are done, and must be aware of his ability to assist or encourage the principal, and secondly, the accomplice must know the circumstances of the offence. The fault requirement serves as a ‘signpost’ limiting accomplice liability, as the conduct requirement allows for a very broad application of the concept.

Joint criminal enterprise (or a ‘common design’) seems to be recognized to some extent by both civil and common law countries. In German law, for example, the joint enterprise could be roughly equated with the notion of ‘co-perpetratorship’ in some instances.

Indirect perpetrator – see perpetrator-by-means.

Instigator in Germany is “any person who intentionally induces another to intentionally commit an unlawful act” and “a person who induced another to commit a crime through persuasion, bribery, threat or any other means” in Russia.

Legal requirements of complicity: it is important to distinguish the constituent elements of the offence and the constituent elements of the mode of responsibility used in conjunction with this offence. In cases when the crime is committed solely by the primary perpetrator (the principal), it is not necessary to discuss separately his mode of liability because his conduct fully satisfies the *actus reus* for the defined crime and he acted with the requisite *mens rea*. However, when talking about various

³ Ashworth, 1995, at 410.

⁴ Schabas, Commentary, at 475.

forms of complicity one needs to differentiate the *actus reus* and *mens rea* of the substantive offence committed by the principal and *the way* in which the accomplice was involved in this act. Consequently, there exists a separate set of requirements for the various forms of complicity designed to help the judge or the juror decide whether the accomplice's involvement in a crime entails criminal responsibility or not.

Mens Rea (state of mind) a psychological element required by the legal order for the conduct to be blameworthy and consequently punishable.⁵

Organizer the Russian law recognizes this additional type of accessory as someone who "planned the commission of the offence or took charge in the commission of the offence."

Perpetrator (a 'principal' in common law) is someone whose liability can be established independently of all other parties. The perpetrator's liability is direct and not derivative of someone else's conduct.

Primary perpetrator (a 'principal in the first degree' in common law) is an actor who "commits the criminal act himself" (as defined by the German Penal Code). In other words, he "directly" or "at first hand" commits the criminal act (as defined in the Russian Penal Code). Smith and Hogan define the principal as someone whose act is the most immediate cause of the *actus reus*.⁶

Perpetrator-by-means (an 'indirect perpetrator' or a 'principal in the first degree' in common law) is a principal who commits the offence through another (as per the German definition), or "the person who committed the offence by using other persons, not subject to criminal responsibility due to their age, insanity or other factors" (as per the Russian definition). The American Model Penal Code offers another definition: perpetrator-by-means "causes an innocent or irresponsible person to engage in the proscribed conduct."

Principal – see perpetrator.

Principal in the first degree – see primary perpetrator; perpetrator-by-means.

Principal in the second degree – see co-perpetrator.

Procurer (English law) is someone who brings about an offence, by deceiving another so that the other commits an offence.

⁵ A. Cassese, 2008, at 53. For the crime to attract criminal liability, *actus reus* must be committed with the requisite state of mind. Smith and Hogan use the term 'mens rea' to mean the state of mind, intention or recklessness required by the particular crime. They suggest that the term 'negligence', while being a manifestation of fault in English law in addition to the intention and recklessness, falls outside the scope of *mens rea*, properly understood, for it is not a state of mind but rather a failure to comply with a standard conduct. The German Criminal Code adopts an even more narrow definition of the requisite state of mind by saying that "[u]nless the law expressly provides for criminal liability based on negligence, only intentional conduct shall attract criminal liability." (Article 15 German Penal Code).

Appendix III: National Legislation on Complicity

Table: National Legislation on Complicity: Comparative Study

*The translation of the terms used in this table may vary due to linguistic peculiarities.

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
Albania	<ol style="list-style-type: none"> 1. Organizers - organize and manage the activity to commit the criminal act. 2. Executors - carry out direct actions to realize the criminal act. 3. Instigators - instigate the other collaborators to commit a criminal act. 4. Helpers - through advice, instructions, concrete means, abolition of obstacles, promise to hide collaborators' tracks or things relevant to the criminal act, help to carry it out. 	No	No	Creation and participation in a criminal organization, terrorist organization, armed gang, or structured criminal group constitute a crime and are punished according to the provisions of the special part of the Penal Code or other special criminal provisions.		Art. 25-28 Albanian Penal Code
Argentina	<ol style="list-style-type: none"> 1. Executors 2. Accomplices without whose help the crime would not have been executed 3. Other accomplices involved in the execution of the crime 	Yes	<p>Yes</p> <p>Mandatory discount for other accomplices (category 3).</p>		Accomplices are punished only for what they intended.	Art. 45-48 Argentinian Penal Code
Austria	Persons involved in the execution of the crime.	No	<p>Yes</p> <p>Discretionary sentencing discount for those participating</p>		Every participant is punished according to the guilt.	Sections 12-13; 34 (1) 6 Austrian Penal Code

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
			in the ancillary manner			
Bangladesh	<ol style="list-style-type: none"> 1. Executors 2. Abettors <ol style="list-style-type: none"> a. Instigators b. Conspirators provided illegal act or omission result from the conspiracy c. Aiders 	No	No		<p>Abettors are punished for the result.</p> <p>Abettors are punished even in cases where the crime is not executed.</p> <p>Abettors are always removed from the scene of the crime. If they are present, they are deemed to have committed the offence.</p>	Chapter 5 Penal Code of Bangladesh
Bolivia	<ol style="list-style-type: none"> 1. Author – any party without whose contribution the crime would not have been executed 2. Instigator 3. Accomplice – contributes intentionally to the crime, which would have would have been executed even without such help 	Yes	<p>Yes</p> <p>Mandatory discount for other accomplices (category 3).</p>			Articles 20-24 and 39 Bolivian Penal Code

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
Bosnia and Herzegovina	<ol style="list-style-type: none"> 1. Perpetrator 2. Accomplices (joint perpetrators) 3. Inciter 4. Accessory (helps in the commission of the crime) 	Yes	<p>Yes</p> <p>Discretionary mitigation for accessories (category 4).</p>		The accomplice shall be considered criminally responsible within the limits set by his own intent or negligence, and the inciter and the accessory within the limits of their own intent.	Articles 29-32 Penal Code of Bosnia and Herzegovina
Bulgaria	<p>Accomplices in crime:</p> <ol style="list-style-type: none"> 1. Actual perpetrator 2. Abettor - the one who has deliberately persuaded somebody else to commit the crime 3. Accessory - the one who has deliberately facilitated the commitment of the crime through advice, explanations, promise to provide assistance after the act, removal of obstacles, providing resources or in any other way. 	Yes	<p>Yes</p> <p>Discretionary discount for aiding when the degree of participation is small.</p>		The abettor and the accessory shall be responsible only for what they have deliberately abetted or helped the perpetrator.	Articles 21, 22, 55, 58 Bulgarian Penal Code
Canada	<ol style="list-style-type: none"> 1. Actual perpetrator 2. The one who does or omits to do anything for the purpose of aiding any person to commit the crime 3. Abettor 	No	No			Articles 20-24 Canadian Penal Code

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
	4. Persons carrying out the common purpose 5. Counsellor (procures, solicits and incites)					
China	1. Principal offender is one who organizes and leads a criminal group in conducting criminal activities or plays a principal role in a joint crime 2. Accomplice is one who plays a secondary or supplementary role in a joint crime 3. One who is coerced into committing a crime 4. Instigator	Yes	Yes Mandatory discount for accomplices and those coerced into committing a crime. Discretionary discount for instigators.	A criminal gang is a more or less permanent criminal organization composed of three or more persons for the purpose of jointly committing crimes. The head, who organizes or leads a criminal gang, shall bear criminal responsibility for all the crimes committed by the gang.		Articles 25-28 Criminal Law of the People's Republic of China
Cuba	1. Authors (including those who execute, organize or use an innocent agent to commit crime) 2. Accomplices (including those who encourage others to commit a crime, facilitate its commission through advice or help its commission in other ways).	Yes	Yes Mandatory discount for accomplices.			Articles 18.1 – 19.1 Cuban Penal Code
England	1. Principals 2. Whoever aids, abets, counsels or procures a principal	Not mentioned in the legislation, but in the doctrine.	No	Conspiracy occurs in both English and American law as a distinct offence, consummated upon entering into the agreement to	The general part of criminal law relies heavily on case law.	1861 Aiders and Abettors Act, case law

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
				commit criminal acts. Conspiracy also generates a standard for holding each conspirator complicitous in the crimes of fellow conspirators.		
Estonia	<ol style="list-style-type: none"> 1. Principle offender - unaided principle offender, the one committing crimes through an innocent agent and jointly with other offenders pursuant to an agreement embracing the elements of the offence 2. Accomplice <ol style="list-style-type: none"> a. Abettor - intentionally induces another person to commit an intentional unlawful act. b. Aider - who intentionally provides physical, material or moral assistance to an intentional unlawful act of another person. 	Yes	<p>Yes</p> <p>Discretionary discount for aiders (category 2(b));</p> <p>Mandatory discount for the accomplices that lack the specific personal characteristics, which pursuant to law constitute prerequisites for the liability of the principal offender.</p>			Articles 20-24 Estonian Penal Code
Finland	<ol style="list-style-type: none"> 1. Accomplices - two or more persons have committed an intentional offence together 2. Instigator - intentionally persuades another person to commit an 	Yes	<p>Yes</p> <p>Mandatory discount, if the perpetrator is</p>			Chapter 5 (515/2003) Finnish Penal Code

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
	intentional offence 3. Abettor - before or during the commission of an offence, intentionally furthers the commission by another of an intentional act or of its punishable attempt, through advice, action or otherwise.		convicted as an abettor, or his or her complicity in the offence is otherwise clearly less than that of other accomplices.			
France	1. Perpetrator - commits the criminally prohibited act 2. Accomplice - a. knowingly, by aiding and assisting, facilitates its preparation or commission, or b. by means of a gift, promise, threat, order, or an abuse of authority or powers, incites the commission of an offence or gives instructions to commit it.	Yes	No	Conspiracy is a distinct offence defined as a criminal association established with a view to the preparation of the crime, marked by one or more material actions in furtherance of that crime.	Accomplice is punishable as a perpetrator.	Articles 121-4-121-7 French Penal Code
Georgia	1. Performer (and co-performer) 2. Organizer - a person who organized the commission of a given crime, or who guided its execution, as well as a person who created an organized criminal group 3. Abettor - a person who inclined another person to the commission of a given crime by way of persuasion, subornation, threat, or by any other	Yes	No	The creator and/or organizer of a criminal group is liable in cases specified in the special part of the Penal Code.	Criminal liability of participant in the crime shall be determined by the character and degree of participation of each participant in the commission of a given crime	Articles 27-31 Georgian Penal Code

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
	method 4. Accomplice -a person who co-operated in the commission of a crime by advice, instructions, granting of information, instruments, or means for the commission, or by elimination of the impediments for the commission of a crime, etc.				The commission by a person of a crime which was not covered with the intent of other co-participants shall be recognized as an excess of a co-participant. Other participants in a given crime shall not be subject to criminal liability for an excess.	
Germany	1. Perpetrator commits the crime himself or through another 2. Co- Perpetrator commits a crime jointly with one or more other people 3. Instigator intentionally induces another to commit an unlawful act 4. Accessory intentionally renders aid to another in that person's intentional commission of an unlawful act.	No	Yes Mandatory discount for accessories (category 4)	A person who declares his willingness or who accepts the offer of another or who agrees with another to commit or abet the commission of a felony shall be liable under the same terms.		Sections 25-30, 49 German Penal Code
India	1. Executors 2. Abettors a. Instigators b. Conspirators provided illegal act or omission result from the	No	No	When two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by	Abettors are punished for the result. Abettors are punished	Articles 107-120 Indian Penal Code

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
	<ul style="list-style-type: none"> c. Aiders 			illegal means, such an agreement is designated a criminal conspiracy.	<p>even in cases where the crime is not executed.</p> <p>Abettors are always removed from the scene of the crime. If they are present, they are deemed to have committed the offence.</p>	
Indonesia	<ol style="list-style-type: none"> 1. Principals <ol style="list-style-type: none"> a. Those who perpetrate, cause others to perpetrate, or take a direct part in the execution of the act b. Those who provoke the execution of the act by gifts, promises, abuse of power, etc. 2. Accomplices <ol style="list-style-type: none"> a. Those who deliberately aid in the commission of the crime b. Those who provide opportunity, means and information for the commission of the crime 	Yes	Yes Mandatory discount for accomplices.		Complicity to commit a misdemeanour shall not be punished.	Articles 55-62 Indonesian Penal Code
Iraq	<ol style="list-style-type: none"> 1. Principal <ol style="list-style-type: none"> a. who commits an offence by himself or with others 	No	No	A criminal conspiracy is considered to be an agreement between two or	Any person who participates in the commission of an	§§. 47-59 Iraqi Penal Code

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
	<ul style="list-style-type: none"> b. who participates in the commission of an offence that consists of a number of acts, and who wilfully carries out one of those acts during the commission of that offence c. who incites another in any way to commit an act contributing to an offence if that person is not in any way criminally liable for the offence <p>2. Accessory</p> <ul style="list-style-type: none"> a. who incites another to commit an offence and that offence is committed on the basis of such incitement b. who conspires with others to commit an offence and that offence is committed on the basis of such conspiracy c. who knowingly supplies the principal to an offence with a weapon, instrument or anything else to commit an offence or deliberately assists him in any other way to carry out those acts for which he has received assistance. 			<p>more people to commit a felony or misdemeanour such as theft, fraud or forgery, whether or not it is a specified offence or arises out of acts that are aided and abetted, even though that agreement is in the initial planning stages or has been in existence only for a short time.</p>	<p>offence as principal or accessory is punishable by the penalty prescribed for that offence unless otherwise stipulated by law.</p> <p>An accessory is considered to be a principal to an offence if he is present during the commission of that offence or any act contributing to that offence.</p>	
Israel	<p>1. Perpetrator</p> <ul style="list-style-type: none"> a. Perpetrator 	No	Yes			Articles 29-34

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
	<p>b. Joint perpetrator (performing all acts jointly, or having some acts performed by another person)</p> <p>c. Perpetrator using another person as an instrument</p> <p>2. Instigator - causes another to commit an offence by means of persuasion, encouragement, demand, cajolery</p> <p>3. Accessory - if a person does anything – before an offence is committed or during its commission – to make its commission possible, to support or protect it, or to prevent the perpetrator from being taken or the offence or its loot from being discovered, or if he contributes in any other way to the creation of conditions for the commission of the offence.</p>		Mandatory discount for accessories (category 3).			Israeli Penal Code
Italy	Persons cooperating in crime	No	No Penalty is increased for those who led others to cooperate.	Agreement to commit a crime is not punished if the crime is not carried out. Conspiracies to commit specific offences form an exception to the general rule.	Each of the co-operators is subject to penalties prescribed for the crime itself. Penalty can be increased or decreased (within the sentencing range) using the provision on	Articles 110-118 Italian Penal Code

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
					aggravating and mitigating circumstances.	
Japan	<ol style="list-style-type: none"> 1. Principals 2. Accomplices <ol style="list-style-type: none"> a. Co-principals b. Inducers c. Aiders 	Yes	<p>Yes</p> <p>Mandatory sentencing discount for aiders (category 2(c)).</p>	A person who did not actually take part in committing a crime, but masterminded it and conspired with others is usually punished as a principal because, as held by the Supreme Court, he uses the acts of the others as an instrument to commit a crime (Judgement of the Supreme Court, 28 May 1958, <i>Keishu</i> 12-8-1718).		Articles 60-65 Japanese Penal Code
Kenya	<ol style="list-style-type: none"> 1. Actual perpetrator 2. A person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence 3. A person who aids or abets another person in committing the offence; 4. A person who counsels or procures any other person to commit the offence. 	No	No		Each of the participants in the crime is deemed to have committed the offence and is guilty of that offence.	Articles 20-23 Kenyan Penal Code
Norway	Modes of participation are not listed in	No	No	Conspiracy to commit		

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
	the general part of the code; rather they form a part of the description of specific offences in the special part of the code.		Depending on the particular offence in question, the same penalty is fixed for all of the participants in the crime.	certain crimes is punishable. For example, conspiracy to commit a homicide.		
Philippines	<ol style="list-style-type: none"> 1. Principals <ol style="list-style-type: none"> a. Those who take a direct part in the execution of the act; b. Those who directly force or induce others to commit it; c. Those who cooperate in the commission of the offence by another act without which it would not have been accomplished. 2. Accomplices - persons who, not being principals, cooperate in the execution of the offence by previous or simultaneous acts. 3. Accessories - knowingly take part in the crime subsequent its commission by various forms of assistance. 	Yes	Yes Sentencing discount by one degree for accomplices (category 2) and two degrees for accessories (category 3).	Conspiracy exists when two or more persons come to an agreement concerning the commission of a felony and decide to commit it. Conspiracy is only punishable when the law specifically provides for this.	Accessories are only punished for grave felonies.	Articles 8, 16-20, 52-59 Philippines Penal Code
Poland	<ol style="list-style-type: none"> 1. Perpetrators <ol style="list-style-type: none"> a. Actual perpetrator b. Joint Perpetrator c. The one who ordered the commission of the act 	No	Yes Discretionary mitigation for aiders		Each person co-operating in the perpetration of a prohibited act shall be	Articles 18-24 Polish Penal Code

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
	<p>d. The one who directed the commission of the act</p> <p>2. Instigators</p> <p>3. Aiders and abettors</p> <p>a. The one who with intent that another person should commit a prohibited act, facilitates by his behaviour the commission of the act, particularly by providing the instrument, means of transport, or giving counsel or information</p> <p>b. The one who acting against a particular legal duty of preventing the prohibited act, facilitates its commission by another person through his omission</p>		and abettors (category 3).		liable within the limits of his intent or a lack of it, irrespective of the liability of others co-operating in the perpetration.	
Russia	<p>1. Perpetrator (including joint perpetrator and perpetrator using an innocent agent)</p> <p>2. Organizer who has organized the commission of a crime or has directed its commission, also a person who has created an organized group</p> <p>3. Instigator who has abetted another person in committing a crime by persuasion, bribery, threat, or by any other method</p> <p>4. Aider who has assisted in the commission of a crime by advice, instructions on committing the</p>	Yes (as an umbrella term for all the participants in the crime)	No	The creator and/or organizer of a criminal group is liable in cases specified in the special part of the Penal Code.	<p>The responsibility of accomplices in a crime shall be determined by the character and the degree of the actual participation of each in the commission of the crime.</p> <p>The commission of a crime that is not covered by the intent</p>	Articles 32-36, 67 Russian Penal Code

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
	crime, or the removal of obstacles to it, etc.				of other accomplices shall be deemed to be an excess of the perpetrator. Other accomplices to the crime shall not be subject to criminal responsibility for the excess of the perpetrator.	
Switzerland	<ol style="list-style-type: none"> 1. Perpetrator 2. Those who intentionally participate in crime <ol style="list-style-type: none"> a. Ex. aiders 	No	<p>Yes</p> <p>Mandatory discount for those who intentionally provided assistance to the perpetrator (category 2(a))</p>			Articles 24-27 Swiss Penal Code
United Arab Emirates	<ol style="list-style-type: none"> 1. Principal 2. Accomplice <ol style="list-style-type: none"> a. Direct accomplice <ol style="list-style-type: none"> i. Joint perpetrator ii. Perpetrator of an act that constitutes part of the crime iii. Perpetrator through an innocent agent b. Accomplice to crime by causation 	Yes	No		<p>Accomplices are punished for the result, even if the other crime was intended.</p> <p>Whoever takes part in a crime in his capacity</p>	Articles 44-52 UAE Penal Code

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
	<ul style="list-style-type: none"> i. Abettor ii. Conspirator iii. Aider (by providing weapons, tools and facilitating the commission of the crime by other means) 				as a direct or causative accomplice shall receive the penalty for said crime unless the law provides otherwise.	
United States	<ul style="list-style-type: none"> 1. Direct perpetrator who personally engages in the proscribed conduct; 2. Indirect perpetrator who causes an innocent or irresponsible person to engage in the proscribed conduct; 3. Accomplice who, with the purpose of promoting or facilitating the commission of the offence, <ul style="list-style-type: none"> a. solicits such other person to commit it; b. aids or agrees or attempts to aid such other person in planning or committing it. 	Yes	No Each person's criminal liability should reflect his individual culpability.	Conspiracy exists in both English and American law as a distinct offence, consummated upon entering into the agreement to commit criminal acts. Conspiracy also generates a standard for holding each conspirator complicitous in the crimes of fellow conspirators.	American law is highly fragmented due to the existence of both federal and state legal systems and because not all states have adopted the modern penal code.	Section 2.06 Model Penal Code
Venezuela	<ul style="list-style-type: none"> 1. Perpetrator 2. Immediate co-operator 3. Instigator 4. Accessories (facilitating the commission of the crime, providing means and assistance before or after the act). 	No	Yes Mandatory discount for accessories (category 4) provided their aid was not indispensable for the commission of the			Articles 83-84 Venezuelan Penal Code

Country	Participants in Crime	Term 'Complicity' Mentioned	Sentencing Discount for any mode of participation	Conspiracy	Comments	Reference to Legislation
			crime.			

Appendix IV: Correlation Between the Forms of Liability and Sentencing

Table: Correlation Between the Forms of Liability and Sentencing: ICTY, ICTR, SCSL, ECCC, ICC

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
<i>ICTY</i>					
Aleksovski Zlatko	Appeal	24 March 2000	Outrages upon personal dignity	Aiding and abetting; superior responsibility	7
Babić, Milan	Appeal	18 July 2005	Persecutions on political, racial and religious grounds	Joint criminal enterprise	13
Bala, Haradin	Appeal	27 September 2007	Torture, cruel treatment, murder	Direct perpetration (murder and cruel treatment); aiding and abetting torture	17
Brahimaj, Lahi*	Appeal	21 July 2010	Cruel treatment and torture	Perpetration	6
Banović, Predrag, (guilty plea)	Trial	28 October 2003	Persecutions on political, racial or religious grounds	Joint criminal enterprise	8

*

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
Beara, Ljubiša	Trial	10 June 2010	Genocide, extermination, murder, persecutions	Joint criminal enterprise	Life
Blagojević, Vidoje	Appeal	9 May 2007	Murder, persecutions on political, racial and religious grounds and inhumane acts, forcible transfer)	Aiding and abetting	15
Blaškić, Tihomir	Appeal	29 July 2004	Inhumane treatment	Perpetration, ordering, planning, aiding and abetting	
Borovčanin, Ljubomir, (guilty plea)	Trial	10 June 2010	Extermination, persecutions, forcible transfer and murder	Aiding and abetting	17
Bralo, Miroslav, (guilty plea)	Appeal	2 April 2007	Murder; persecutions on political, racial and religious grounds; rape; torture; inhumane treatment	Perpetration	20
Brđanin, Radoslav	Appeal	3 April 2007	Persecutions; torture; deportation; inhumane acts (forcible transfer), wanton destruction of cities, towns or villages or devastation not justified by military necessity; destruction or wilful damage done to institutions dedicated to religion, wilful killing; torture	Aiding and abetting; instigating	30
Čerkez, Mario	Appeal	17 December	Persecutions on political, racial, or religious grounds; imprisonment; unlawful confinement of civilians	Co-perpetration; superior responsibility	6

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
		2004			
Češić, Ranko, (guilty plea)	Trial	11 March 2004	Murder, humiliating and degrading treatment	Perpetration	18
Čorić, Valentin	Trial	29 May 2013	Persecutions; cruel treatment; unlawful labour; inhumane treatment; wilful killing; unlawful deportation	Joint criminal enterprise	16
Delić, Hazim	Appeal	8 April 2003	Wilful killings, torture, wilfully causing great suffering or serious injury, inhuman treatment	Perpetration	18
Delić, Rasim	Trial	15 September 2008	Cruel treatment	Superior responsibility	3
Deronjić, Miroslav, (guilty plea)	Appeal	25 July 2005	Persecutions on political, racial and religious grounds	Joint criminal enterprise	10
Đorđević, Vlastimir	Appeal	23 February 2011	Deportation, other inhumane acts (forcible transfer), murder, persecutions on political, racial and religious grounds, murder	Joint criminal enterprise; aiding and abetting	27

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
Došen, Damir, (guilty plea)	Trial	13 November 2001	Persecutions on political, racial or religious grounds	Superior responsibility	5
Erdemović, Dražen, (guilty plea)	Trial	5 March 1998	Murder	Perpetration	5
Furundžija, Anto	Appeal	21 July 2000	Torture, outrages upon personal dignity, including rape	Co-perpetration; aiding and abetting	10
Galić, Stanislav	Appeal	30 November 2006	Acts of violence the primary purpose of which is to spread terror among the civilian population, as set forth in Article 51 of Additional Protocol I to the Geneva conventions of 1949; murder and other inhumane acts	Ordering	Life
Gvero, Milan	Trial	10 June 2010	Persecutions and forcible transfer	Joint criminal enterprise	5
Hadžihasanović, Enver	Appeal	22 April 2008	Cruel treatment	Superior responsibility	3,5
Jelisić, Goran	Appeal	5 July 2001	Murder; cruel treatment; plunder; inhumane acts	Perpetration (not specified)	40

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
Jokić, Dragan	Appeal	9 May 2007	Extermination, persecutions on political, racial and religious grounds and murder	Aiding and abetting	9
Josipović, Drago	Appeal	23 October 2001	Persecutions on political, racial or religious grounds; murder; inhumane acts	Perpetration; Co-perpetration	12
Kolundžija, Dragan, (guilty plea)	Trial	13 November 2001	Persecutions on political, racial or religious grounds	Superior responsibility	3
Kordić, Dario	Appeal	17 December 2004	Unlawful attack on civilians; unlawful attack on civilian objects; wanton destruction not justified by military necessity; plunder of public or private property; destruction or wilful damage to institutions dedicated to religion or education	Planning; instigating; ordering	25
Kos, Milojica		2 November 2001	Persecutions on political, racial or religious grounds, murder, inhumane acts; murder; torture	Joint criminal enterprise	6
Kovač, Radomir	Appeal	12 June 2002	Rape, enslavement	Perpetration, aiding and abetting	20

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
Krajišnik, Momčilo	Appeal	17 March 2009	Persecution on political, racial or religious grounds; deportation; inhumane acts (forced transfer)	Joint criminal enterprise	20
Krnojelac, Milorad	Appeal	17 September 2003	Torture, murder, persecutions and cruel treatment	Joint criminal enterprise; superior responsibility	15
Krstić, Radislav	Appeal	19 April 2004	Genocide, murders, extermination and persecutions	Aiding and abetting	35
Kubura, Amir	Appeal	22 April 2008	Plunder of public or private property	Superior responsibility	2
Kunarac, Dragoljub	Appeal	12 June 2002	Torture, rape, enslavement	Perpetration, aiding and abetting	28
Kvočka, Miroslav	Appeal	28 February 2005	Persecutions on political, racial or religious grounds; murder; torture	Joint criminal enterprise	7
Landžo, Esad	Appeal	8 April 2003	Wilful killing, torture, wilfully causing great suffering or serious injury	Perpetration	9

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
Lazarević, Vladimir	Trial	26 February 2009	Deportation, other inhumane acts (forcible transfer)	Aiding and abetting	15
Lukić, Milan	Appeal	4 December 2012	Persecutions on political, racial and religious grounds; murder; inhumane acts; and extermination, murder, and cruel treatment	Perpetration	Life
Lukić, Sredoje	Appeal	4 December 2012	Inhumane acts; aiding and abetting persecutions on political, racial and religious grounds, murder, cruel treatment	Perpetration; aiding and abetting	27
Lukić, Sreten	Trial	26 February 2009	Deportation, other inhumane acts (forcible transfer), murder, persecutions on political, racial or religious grounds, murder	Joint criminal enterprise	22
Martić, Milan	Appeal	8 October 2008	Persecutions on political, racial and religious grounds, murder, imprisonment, torture, inhumane acts, deportation, inhumane acts (forcible transfers), wanton destruction of villages or devastation not justified by military necessity, destruction or wilful damage done to institutions dedicated to education or religion, plunder of public or private property, attacks on civilians	Joint criminal enterprise	35

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
Martinović, Vinko	Appeal	3 May 2006	Inhumane treatment; wilfully causing great suffering or serious injury to body or health; wilful killing; unlawful transfer of a civilian; unlawful labour; plunder of public or private property; persecutions on political, racial and religious grounds, inhumane acts, murder	Perpetration, ordering, aiding and abetting, instigation, superior responsibility	18
Miletić, Radivoje	Trial	10 June 2010	Murder, persecutions, forcible transfer	Joint criminal enterprise	19
Milošević, Dragomir	Appeal	12 November 2009	Terror, murder and inhumane acts	Ordering, superior responsibility	29
Mrđa, Darko, (guilty plea)	Trial	31 March 2004	Murder, inhumane acts	Perpetration	17
Mrkšić, Mile	Appeal	5 May 2009	Murder; torture; cruel treatment	Aiding and abetting	20
Mucić, Zdravko	Appeal	8 April 2003	Wilfully causing great suffering or serious injury, unlawful confinement of civilians, wilful killings, torture, inhuman treatment	Superior responsibility	15
Naletilić, Mladen	Appeal	3 May	Torture; wilfully causing great suffering or serious injury to body or health; unlawful transfer of a civilian; unlawful labour;	Perpetration, ordering, aiding and abetting,	20

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
		2006	wanton destruction not justified by military necessity; plunder of public or private property; persecutions on political, racial and religious grounds	instigation, superior responsibility	
Nikolić, Dragan, (guilty plea)	Appeal	4 February 2005	Persecutions on political, racial and religious grounds, murder, sexual violence, torture	Perpetration	20
Nikolić, Drago	Trial	10 June 2010	Genocide, extermination, murder, persecutions	Aiding and abetting genocide; joint criminal enterprise (persecutions)	35
Nikolić, Momir, (guilty plea)	Appeal	8 March 2006	Persecutions on political, racial and religious grounds	Perpetration	20
Obrenović, Dragan, (guilty plea)	Trial	10 December 2003	Persecutions on political, racial and religious grounds	Superior responsibility	17
Ojdanić, Dragoljub	Trial	26 February 2009	Deportation, other inhumane acts (forcible transfer)	Aiding and abetting	15

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
Pandurević, Vinko	Trial	10 June 2010	Murder, persecutions, forcible transfer	Aiding and abetting; superior responsibility	13
Pavković, Nebojša	Trial	26 February 2009	Deportation, other inhumane acts (forcible transfer), murder, persecutions on political, racial or religious grounds, murder	Joint criminal enterprise	22
Petković, Milivoj	Trial	29 May 2013	Persecutions; cruel treatment; unlawful labour; inhumane treatment; wilful killing; unlawful deportation	Joint criminal enterprise	20
Plavšić, Biljana, (guilty plea)	Trial	27 February 2003	Persecutions on political, racial and religious grounds	Individual criminal responsibility	11
Popović, Vujadin	Trial	10 June 2010	Genocide, extermination, murder, persecutions	Joint criminal enterprise	Life
Praljak, Slobodan	Trial	29 May 2013	Persecutions; cruel treatment; unlawful labour; inhumane treatment; wilful killing; unlawful deportation	Joint criminal enterprise	20
Prcać, Dragoljub	Appeal	28 February 2005	Persecutions on political, racial or religious grounds; murder; torture	Joint criminal enterprise	5
Prlić, Jadranko	Trial	29 May 2013	Persecutions; cruel treatment; unlawful labour; inhumane treatment; wilful killing; unlawful deportation	Joint criminal enterprise	25

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
Pušić, Berislav	Trial	29 May 2013	Persecutions; cruel treatment; unlawful labour; inhumane treatment; wilful killing; unlawful deportation	Joint criminal enterprise	10
Radić, Mlado	Appeal	28 February 2005	Persecutions on political, racial or religious grounds, murder, inhumane acts, torture	Joint criminal enterprise	20
Rajić, Ivica, (guilty plea)	Trial	8 May 2006	Wilful killing, inhumane treatment (including sexual assault), appropriation of property, extensive destruction not justified by military necessity and carried out unlawfully and wantonly	Planning and ordering	12
Šainović, Nikola	Trial	26 February 2009	Deportation, other inhumane acts (forcible transfer), murder, persecutions on political, racial or religious grounds, murder	Joint criminal enterprise	22
Šantić, Vladimir	Appeal	23 October 2001	Persecutions on political, racial or religious grounds; murder; inhumane acts	Perpetration; co-perpetration	18
Sikirica, Duško, (guilty plea)	Trial	13 November 2001	Persecutions on political, racial or religious grounds	Superior responsibility; perpetration	15
Simić, Blagoje	Appeal	28 November	Persecutions; cruel and inhumane treatment including beatings, torture, forced labour, and confinement under inhumane	Aiding and abetting	15

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
		2006	conditions; and deportation and forcible transfer		
Simić, Milan, (guilty plea)	Trial	17 October 2002	Torture	Perpetration	5
Šljivančanin, Veselin	Appeal	8 December 2010	Torture	Aiding and abetting	10
Stakić, Milomir	Appeal	22 March 2006	Extermination, murder and persecutions	Joint criminal enterprise	40
Stanišić, Mićo	Trial	27 March 2013	Persecutions on political, racial or religious grounds, murder and torture	Joint criminal enterprise	22
Stojić, Bruno	Trial	29 May 2013	Persecutions; cruel treatment; unlawful labour; inhumane treatment; wilful killing; unlawful deportation	Joint criminal enterprise	20
Strugar, Pavle	Appeal	17 July 2008	Attacks on civilians; destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; devastation not justified by military necessity; unlawful attacks	Superior responsibility	7,5

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
			on civilian objects.		
Tadić, Duško	Appeal	26 January 2000	Wilful killing, torture or inhuman treatment and murder	Joint criminal enterprise	20
Tadić, Miroslav, (guilty plea)	Trial	17 October 2003	Persecutions based upon deportation and forcible transfer	Aiding and abetting	8
Tarčulovski, Johan	Appeal	19 May 2010	Murder, wanton destruction, cruel treatment	Ordering, planning and instigating	12
Todorović, Stevan, (guilty plea)	Trial	31 July 2001	Persecutions on political, racial and religious grounds	Ordering, perpetration, superior responsibility	10
Tolimir, Zdravko	Trial	12 December 2012	Genocide, conspiracy to commit genocide, extermination, murder, persecutions and forcible transfer	Joint criminal enterprise	Life
Vasiljević, Mitar	Appeal	25 Februar	Persecutions on political, racial or religious grounds and murder	Aiding and abetting	15

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
		y 2004			
Vuković, Zoran	Appeal	12 June 2002	Torture and rape	Perpetration	12
Zarić, Simo	Trial	17 October 2003	Persecutions based upon cruel and inhumane treatment including beatings, torture, and confinement under inhumane conditions	Aiding and abetting	6
Zelenović, Dragan, (guilty plea)	Appeal	31 October 2007	Torture and rape	Co-perpetration	15
Žigić, Zoran	Appeal	28 February 2005	Persecutions on political, racial or religious grounds, torture, cruel treatment	Joint criminal enterprise	25
Župljanin, Stojan	Trial	27 March 2013	Persecutions on political, racial or religious grounds, extermination, murder and torture	Joint criminal enterprise	22
ICTR					
AKAYESU, Jean Paul	Appeal	1 June 2001	Genocide, incitement to commit genocide, rape, murder, cruel treatment	Perpetration, instigation, ordering and aiding and abetting	Life

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
BAGARAGAZA Michel (guilty plea)	Trial	17 November 2009	Complicity in genocide	Individual criminal responsibility (substantial assistance)	8
BAGOSORA, Théoneste	Appeal	14 December 2011	Genocide, murder, extermination, rape, persecutions, serious violations of Article 3.	Ordering, superior responsibility	35
BARAYAGWIZA, Jean Bosco	Appeal	28 November 2007	Genocide, extermination, persecution	Instigation, ordering	32
BIKINDI, Simon	Appeal	18 March 2010	Direct and public incitement to commit genocide	Perpetration	15
BISENGIMANA, Paul (guilty plea)	Trial	13 April 2006	Extermination	Aiding and abetting	15
BIZIMUNGU, Augustin	Trial	17 May 2011	Genocide, murder, extermination, rape	Superior responsibility	30

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
'GAA'(guilty plea)	Trial	4 December 2007	Giving false testimony	Perpetration	9 months
GACUMBITSI, Sylvestre	Appeal	7 July 2006	Genocide, extermination, murder, and rape	Committing, ordering, instigating, aiding and abetting	Life
GATETE Jean Baptiste	Appeal	9 October 2012	Genocide, extermination, conspiracy to commit genocide	Joint criminal enterprise	40
HATEGEKIMAN A, Idelphonse	Appeal	8 March 2012	Genocide, rape, murder	Joint criminal enterprise	Life
IMANISHIMWE, Samuel	Appeal	7 July 2006	Torture, murder, cruel treatment, imprisonment	Ordering, aiding and abetting	12
KAJELIJELI, Juvénal	Appeal	23 May 2005	Genocide, direct and public incitement to commit genocide, extermination	Ordering, instigating, and aiding and abetting	45
KALIMANZIRA Callixte	Appeal	20 October 2010	Genocide	Aiding and abetting	25

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
KAMBANDA, Jean (guilty plea)	Trial	19 October 2000	Genocide	Instigation, aiding and abetting	Life
KAMUHANDA, Jean de Dieu	Appeal	19 September 2005	Genocide, extermination	Ordering	Life
KANYARUKIGA Gaspard	Appeal	8 May 2012	Genocide, extermination	Planning	30
KANYABASHI, Joseph	Trial	24 June 2011	Genocide, direct and public incitement to commit genocide, extermination, persecution, violence to life, health and physical or mental well-being of persons)	Superior responsibility	35
KAREMERA, Edouard	Trial	2 February 2012	Direct and public incitement to commit genocide, genocide, rape, extermination, and killing and causing violence to health and well-being	Committing, ordering, instigating, aiding and abetting	Life
KARERA François	Appeal	2 February 2009	Genocide, extermination, murder	Instigating, committing, ordering, aiding and abetting	Life
KAYISHEMA, Clément	Appeal	1 June 2001	Genocide	Committing, instigating, ordering, aiding and	Life

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
				abetting	
MUHIMANA, Mikaeli	Appeal	21 May 2007	Genocide, rape, murder	Instigating, committing, abetting	Life
MUNYAKAZI, Yussuf	Appeal	28 September 2011	Genocide, extermination	Commission	25
MUSEMA, Alfred	Appeal	16 November 2001	Genocide, extermination	Ordering, committing	Life
MUVUNYI, Tharcisse	Appeal	1 April 2011	Direct and public incitement to commit genocide	Committing	15
NAHIMANA, Ferdinand	Appeal	28 November 2007	Direct and public incitement to commit genocide, persecution	Superior responsibility	30
NCHAMIHIGO, Simeon	Appeal	18 March 2010	Genocide, murder, inhumane acts	Ordering, instigating	40

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
NDAHIMANA Gregoire	Trial	30 December 2011	Genocide, extermination	Aiding and abetting, superior responsibility	15
NDAYAMBAJE, Elie	Trial	24 June 2011	Genocide, direct and public incitement to commit genocide, extermination, persecution, violence to life, health and physical or mental well-being of persons)	Instigating, aiding and abetting	Life
NDINDABAHIZI, Emmanuel	Appeal	16 January 2007	Genocide, extermination	Committing, instigating, aiding and abetting	Life
NDINDILYIMANA, Augustine	Trial	17 May 2011	Genocide, murder, extermination	Superior responsibility	11
NGEZE, Hassan	Appeal	28 November 2007	Genocide, incitement to commit genocide, extermination	Aiding and abetting	35
NGIRUMPATSE, Mathieu	Trial	2 February 2012	Direct and public incitement to commit genocide, genocide, rape, extermination, and killing and causing violence to health and well-being	Committing, instigating, aiding and abetting	Life
NIYITEGEKA,	Appeal	9 July	Genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, murder, extermination, other	Ordering	Life

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
Eliezer		2004	inhumane acts		
NIZEYIMANA, Idelphonse	Trial	19 June 2012	Genocide, extermination and murder	Joint criminal enterprise, ordering	Life
NSABIMANA, Sylvain	Trial	24 June 2011	Genocide, extermination, persecution, violence to life, health and physical or mental well-being of persons)	Aiding and abetting	25
NSENGIYUMVA, Anatole	Appeal	14 December 2011	Genocide, murder, extermination, persecutions, serious violations of Article 3.	Ordering, aiding and abetting	15
NSHOGOZA Léonidas	Appeal	15 May 2010	Contempt of the court	Committing	10 months
NTABAKUZE, Aloys	Appeal	14 December 2011	Genocide, murder, extermination, persecutions, serious violations of Article 3.	Superior responsibility	Life
NTAHOBALI, Arsène Shalom	Trial	24 June 2011	Genocide, rape, extermination, persecution, violence to life, health and physical or mental well-being of persons), outrages upon personal dignity	Committing, ordering, and aiding and abetting, superior responsibility	Life
NTAKIRUTIMA	Appeal	13 December	Genocide, extermination	Aiding and abetting	10

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
NA, Elizaphan		ber 2004			
NTAKIRUTIMA NA, Gérard	Appeal	13 December 2004	Genocide, murder, extermination	Committing, aiding and abetting	25
NTAWUKULILY AYO Dominique	Appeal	14 December 2013	Genocide	Aiding and abetting	20
NTEZIRYAYO, Alphonse	Trial	24 June 2011	Direct and public incitement to commit genocide	Not specified	30
NYIRAMASUHU KO, Pauline	Trial	24 June 2011	Genocide, conspiracy to commit genocide, rape, extermination, persecution, violence to life, health and physical or mental well-being of persons), outrages upon personal dignity	Ordering, superior responsibility	Life
NZABIRINDA, Joseph (guilty plea)	Trial	23 February 2007	Murder	Not specified	7
NZUWONEMEY E, François-	Trial	17 May 2011	Murder	Committing, ordering, aiding and abetting	20

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
Xavier					
NZABONIMANA, Callixte	Trial	31 May 2012	Genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, extermination	Committing, instigating	Life
RENZAHO Tharcisse	Appeal	1 April 2011	Genocide, murder	Ordering, aiding abetting, superior responsibility	Life
RUGAMBARAR A, Juvénal (guilty plea)	Trial	16 November 2007	Extermination	Superior responsibility	11
RUGGIU, Georges (guilty plea)	Trial	1 June 2000	Direct and public incitement to commit genocide, persecution	Committing	12
RUKUNDO, Emmanuel	Appeal	20 October 2010	Genocide, murder, extermination	Aiding and abetting	23
RUTAGANDA, George	Trial	6 December 1999	Genocide, extermination, murder	Committing, aiding and abetting	Life

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
RUTAGANIRA Vincent (guilty plea)	Trial	14 May 2005	Extermination	Aiding and abetting (by omission)	6
RUZINDANA, Obed	Appeal	1 June 2001		Committing, instigating, ordering, aiding and abetting	25
SAGAHUTU, Innocent	Trial	17 May 2011	Murder	Committing, ordering, aiding and abetting	20
SEMANZA, Laurent	Appeal	10 May 2005	Genocide, complicity in genocide, extermination, rape, torture	Committing, aiding and abetting, ordering	35
SEROMBA, Athanase	Appeal	12 March 2008	Genocide, extermination	Committing, aiding and abetting	Life
SERUGENDO Joseph (guilty plea)	Trial	12 June 2006	Genocide and persecution	Committing	6
SERUSHAGO, Omar (guilty plea)	Trial	5 February 1999	Genocide, murder, extermination, torture	Not specified	15

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
SETAKO, Ephrem	Appeal	28 September 2011	Genocide, extermination, murder	Committing, ordering	25
SIMBA, Aloys	Appeal	27 September 2007	Genocide, extermination	Joint criminal enterprise	25
<i>SCSL</i>					
Brima, Alex Tamba	Appeal	22 February 2008	Extermination, murders, act of terrorism, outrages upon personal dignity, sexual slavery and rape	Committing, ordering, planning, superior responsibility	50
Gbao, Augustine	Appeal	26 October 2009	Extermination, murder, rape, sexual slavery, other inhumane acts; violence to life, health and physical or mental well-being of persons; intentionally directing attacks against peacekeepers	Joint criminal enterprise	20
Fofana, Moinina	Appeal	28 May 2008	Murder, violence to life, health and physical or mental well-being of persons, other inhumane acts, pillage	Aiding and abetting, superior responsibility	15
Kallon, Morris	Appeal	26 October 2009	Extermination, murder, rape, sexual slavery, other inhumane acts; violence to life, health and physical or mental well-being of persons; intentionally directing attacks against peacekeepers;	Joint criminal enterprise	40

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
			conscripting or enlisting children under the age of 15 years into armed forces or groups		
Kamara, Brima Bazy	Appeal	22 February 2008	Extermination, murders, act of terrorism, outrages upon personal dignity, sexual slavery and rape	Ordering, planning, aiding and abetting	45
Kanu, Santigie Borbor	Appeal	22 February 2008	Extermination, murders, act of terrorism, outrages upon personal dignity, sexual slavery and rape	Planning, superior responsibility	50
Kondewa, Allieu	Appeal	28 May 2008	Murder, violence to life, health and physical or mental well-being of persons, other inhumane acts, pillage, cruel treatment	Aiding and abetting, superior responsibility	20
Sesay, Issa Hassan	Appeal	26 October 2009	Extermination, murder, rape, sexual slavery, other inhumane acts; violence to life, health and physical or mental well-being of persons; intentionally directing attacks against peacekeepers; conscripting or enlisting children under the age of 15 years into armed forces or groups	Joint criminal enterprise	42
Taylor, Charles	Appeal	26 September 2013	Murder, rape, enslavement, terrorism, outrages upon personal dignity, violence to life, health and physical or mental well-being of persons, in particular cruel treatment, pillage	Planning, aiding and abetting	50
ICC					

Name of the Accused	Level	Date	Crimes	Mode of Participation	Sentence length/number of years
Lubanga Dyilo, Thomas	Trial	14 March 2012	Enlistment, conscription and use of children below the age of 15 to participate actively in hostilities	Direct co-perpetration	14
German Katanga	Trial	7 March 2014	Murder, attacking a civilian population, destruction of property and pillaging.	Contribution to the crime committed by a group (Article 25(3)(d)(ii))	TBD
<i>ECCC</i>					
KAING Guek Eav alias 'DUCH'	Appeal	3 February 2012	Persecution, extermination (encompassing murder), enslavement, imprisonment, torture, and other inhumane acts.	Joint criminal enterprise, planning, instigating, ordering, aiding and abetting	Life