Iryna Marchuk

The Fundamental Concept of Crime in International Criminal Law

A Comparative Law Analysis

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Chapter 1
Introduction

For the last two decades, a fairly young discipline of international criminal law has been experiencing a dramatic development triggered and sustained by the establishment and work of international criminal courts and tribunals.[1] Although international criminal law remains to some extent a conflicting and fragmented field of law, this fairly new discipline is in a way a product of convergence and cooperation of the world's major legal systems in combating core international crimes such as genocide, war crimes and crimes against humanity. In practical terms, the result of such cooperation is an interfusion of criminal laws originating from various legal systems into the jurisprudence of international criminal courts and tribunals. The existing jurisprudence demonstrates that the incorporation by the ad hoc tribunals and the International Criminal Court[2] of national approaches to international criminal law appears to be more of a technical transposition of concepts rather than the result of a meticulous comparative analysis. Consequently, the jurisprudence is replete with internal inconsistencies and lacunae as to the construal of the fundamental concept of a crime in international criminal law that this book endeavours to address.

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[1] This book mostly deals with the practices and jurisprudence of the the International Criminal Tribunal for the Former Yugoslavia (hereinafter—ICTY), the International Criminal Tribunal for Rwanda (hereinafter—ICTR) and the International Criminal Court (hereinafter—ICC). In some parts, references are made to the jurispudence of the Special Court for Sierra Leone (hereinfater—SCSL).

[2] The Rome Statute of the ICC encompasses a set of Articles (Articles 22–33) that lay down a firm foundation for "general principles" in international criminal law.

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1.1 Relevance and Significance of Comparative Method

The academic literature notes the increasing significance of comparative criminal law in furnishing international law through "general principles of law" identified in domestic criminal law.[3] The benefit of comparative law is enhanced through the implementation of the complementarity principle by States Parties to the Rome Statute which are tasked with a daunting task of harmonising their national laws and bringing them in conformity with internationally recognised standards. As it is rightly penned by *Bassiouni*, "such degree of cross-fertilisation between international and national criminal law contributes to the harmonisation of substantive and procedural laws both at the national and international levels".[4]

This book is concerned with the influence of comparative law on shaping the substantive part of international criminal law. The major finding of this study is that only careful incorporation of general principles originated from *many* world legal systems may compellingly demonstrate that international criminal law is rooted in "generally accepted standards rather than national idiosyncrasies or aberrations".[5] Despite all positive influences of comparative studies on the advancement of international criminal law, the most challenging exercise in the application of the comparative method is "attempting to reconcile, let alone combine, legal concepts pertinent to different legal systems under the umbrella of international criminal law".[6] The use of comparative law is not about "transplantation of one dominant model" into international criminal law, rather it is "hybridisation inspired by pluralism".[7] It is clear that during the drafting process of major international criminal law instruments the statutory language is influenced by the geographical representation of delegates that settle on the most suitable formulation of legal provisions. The judges of international criminal courts have a tendency to reinforce their national perceptions of criminal law, which is clearly visible in a number of the ICTY judgements. However, instead of attempting to bring along legal tradtions from own national jurisdictions into international criminal law, it is advisable to resort to a comprehensive comparative analysis that will underline the existence of commonly shared "universal values" across many legal jurisdictions.[8]

Being a field in its own right, international criminal law is a fascinating amalgam of international law, customary law, and general principles derivative from

[3] For the support of this position, see: Werle (2005), p. 91; Ambos (2006), pp. 660–673, at 661–662.

[4] Bassiouni (2008a), p. 6.

[5] Cryer (2005), p. 173.

[6] Bassiouni (2005a), p. 158.

[7] Delmas-Marty in Cassese (2009a), p. 99.

[8] Fletcher (2007), pp. 4–5.

domestic criminal law.[9] Given its unique nature, it is quintessential to lay down a solid theoretical framework of the fundamental concept of a crime as understood in domestic jurisdictions prior to distilling and channelling the substantive law doctrines (*actus reus*, *mens rea*, modes of liability, defences) through "general principles" to the field of international criminal law. As it is observed by *Delmas-Marty*, the use of comparative law should promote "progressive reconciliation between international and domestic law".[10]

1.2 Shaping International Criminal Law Through General Principles of Law Derivative from National Jurisdictions

General principles of law, which derive from domestic legal jurisdictions, have greatly shaped the substantive part of international criminal law. These principles have played a varying role as a source of law in the jurisprudence of international criminal courts and tribunals, which may be explained by the different legal and political settings in which these judicial bodies were established and have functioned. The statutes of the ad hoc tribunals encompass only a few substantive law provisions and do not provide for a hierarchy of sources of law. This is not particularly surprising given that the statutes were hastily drafted by mostly diplomats, who were not necessarily criminal law experts, in an atmosphere of disbelief that the grand project of international criminal justice would take off the ground. The establishment of international criminal courts was not a routine measure employed by the UN Security Council to restore peace and security in troubled regions of the world, which to some extent expounds the imperfect nature of legal instruments that laid down the jurisdictional basis for the ICTY and ICTR. As a result, the judges of the ad hoc tribunals had to work with the poorly articulated statutes in terms of substantive law. The recourse to customary law and general principles was inevitable, since it was the only way to render legitimacy to the judgments.[11]

While providing for a hierarchy of sources of law, the Rome Statute of the International Criminal Court (hereinafter—ICC) gives utmost importance to the Statute itself, which is a refined codification of substantive and procedural rules of

[9] In the words of *Judge Cassese*, international criminal proceedings "combine and fuse" the adversarial system with a number of significant features of the inquisitorial approach. See also: *Erdemović* Trial Judgement, Dissenting Opinion, Judge Cassese, para. 4.

[10] Delmas-Marty in Cassese (2009a), p. 103.

[11] UN Secretary-General insisted on the preferred application of customary law in the ad hoc tribunals, given the very ad-hocness of the tribunals that put them at a considerable disadvantage in relation to sources of law. For more on the "battle" of sources of law in the ad hoc tribunals, consult: Zahar and Sluiter (2008), pp. 79–105.

international criminal law. Customary law and general principles of law are only consulted if the overarching sources do not address the issue at dispute. It should be noted that many legal provisions of the Rome Statute are indicative of *opinio juris* of States on various matters, although they do not replicate *all* rules of customary law.[12]

The wording of Article 21 of the Rome Statute clearly postulates "general principles derivative from national law" as a source of last resort. The application of "general principles" is conditioned by the consistency of such principles with the Rome Statute, international law, and internationally recognised norms and standards. *Cassese* observed that the hierarchy of sources in the Rome Statute reflects the legal logic that an international tribunal should first look for the existence of a principle belonging to either treaty or custom before turning to general principles of criminal law recognised by the community of nations.[13] The latest Commentary of the Rome Statute treats Article 21 (1) (c) as an "invitation to consult comparative criminal law as a subsidiary source of norms".[14]

The thorny issue on the relevance of national law for the ICC was discussed in greater detail at the negotiations in Rome. The reached compromise was that national law is considered as a source under "general principles of law". It was further clarified that the Court "ought to derive its principles from a general survey of legal systems and national laws".[15] As it is clear from *travaux preparatoires* of the Rome Statute and some critical observations, the mere reliance upon certain domestic national laws and practices does not justify the transposition of said concepts to the field of international criminal law.[16] Only careful employment of comparative method could fully rationalise the application of general principles of law derivative from national law if the existing lacunae are not covered in treaty and/or customary law.

The early jurisprudence of the ICC shows that the judges utilise a comparative method when interpreting the statutory language. The construal of the law of *mens rea* as well as principal liability is clearly inspired by the German legal theory. A broader reach of comparative method covering a wider range of world legal jurisdictions would clearly render more authoritative weight to the jurisprudence.

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[12] Article 21, Rome Statute. For more on whether the Rome Statute's formulations of the applicable law are accurate restatements of customary international law, see: Cryer (2005), pp. 173–176.

[13] Cassese (2008), p. 21. See also: Werle (2005), pp. 47–48.

[14] Schabas (2010), p. 393

[15] Ibid., referring to fn. 3, 4 in the Report of the Working Group on Applicable Law, UN Doc. A/CONF.183/C.1/WGAL/L.2, p.2.

[16] In the context of the ad hoc tribunals, *Judge Cassese* warned against the mechanistic import of legal constructs and terms upheld in national law into international criminal proceedings. See: *Erdemović* Trial Judgement, Dissenting Opinion, Judge Cassese, para. 2.

1.3 Structure

Chapter 2 investigates the fundamental concept of a crime in selected common law jurisdictions such as the UK and USA. The chapter deconstructs the concept of a crime into *actus reus* and *mens rea*. Given the significant influence of the common law theory on the interpretation of the substantive part of international criminal law, such an overview of domestic practices is a solid foundation for a more sound understanding of the concept of a crime and critical assessment of the jurisprudence of international criminal courts.

Chapter 3 examines the concept of a crime in selected continental law jurisdictions, in particular Germany, France, Denmark and the Russian Federation. The chapter scrutinises a number of existing legal instruments and academic writing on the substantive part of criminal law in these jurisdictions, and gives a valuable insight into the construal of the constitutive legal elements of a crime. International criminal courts and tribunals have already substantiated some of their major legal findings with references to national criminal law.[17] However, a broader application of comparative method will furnish and enhance the existing theoretical framework of the substantive part of international criminal law.

Chapter 4 provides brief accompanying historical notes on the legal development of genocide, war crimes and crimes against humanity, and scrupulously analyses contextual elements of international crimes. The chapter touches upon a number of important problematic issues that have been raised in the jurisprudence of the ad hoc tribunals and the ICC on the construal of core international crimes, among others, the much debated contextual element adjacent to the crime of genocide; the meaning of a State or organisational policy within the context of crimes against humanity; the scope of *mens rea* covering contextual elements of international crimes etc.

Chapter 5 explores the complexity of the law on *mens rea* in the jurisprudence of international criminal courts and tribunals. At the backdrop of the inconsistent employment of various *mens rea* in the ad hoc tribunals, the chapter focuses on the latest discussion surrounding the interpretation of Article 30 of the Rome Statute in the jurisprudence of the ICC and offers critical analysis on the evolution of the *mens rea* doctrine through the lens of comparative law.[18]

[17] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 326–341; *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 357; *Stakić* Trial Judgement, paras 438–440.

[18] *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 357. Pre-Trial Chamber attempted to reconcile the continental law and common law theory under the umbrella of international criminal law by conducting a comparative analysis of the gradations of intent in various legal jurisdictions. In regards to *dolus directus* in the second degree, which is a continental law notion, the Chamber found the counterpart of “oblique intention” in English law and cited the following academic works in support: Ormerod and Hooper (2009), p. 19; Kugler (2004), p. 79; Williams (1987), at 422. The notion of *dolus eventualis* was erroneously equated to the concept of subjective or advertent recklessness as known in common

Chapter 6 provides a comprehensive dissection of principal and accessory (derivative) modalities of criminal liability available in international criminal courts and tribunals. The chapter observes the evolution of the controversial concept of Joint Criminal Enterprise (JCE), which was specifically devised to capture "masterminds" (top political and military leadership) who do not necessarily have their hands drenched in blood but direct the commission of international crimes from behind the scenes.[19] On the face of the fading enthusiasm for the applicability of JCE, the chapter investigates the aptness of the newly introduced modes of indirect (co)-perpetration and co-perpetration based on the joint control over the crime in the ICC jurisprudence.[20] The chapter summarises pro- and contra arguments as to the employment of certain principal and accessory modes of criminal responsibility in international criminal law through the comparative analysis of similar notions in selected common law and continental law jurisdictions.

Chapter 7 explores the relevance of grounds excluding criminal responsibility (defences) to core international crimes within the jurisdiction of international criminal courts and tribunals. While the ad hoc tribunals paid little attention to the construal of exculpatory grounds with the exception of the extensive discussion on the duress defence in the *Erdemović* case, the Rome Statute provides a comprehensive overview of defences that could be invoked by the suspect/accused. With the scarce jurisprudence on exculpatory grounds in international law, the chapter examines best domestic practices and compares them to the legal provisions of the Rome Statute.

law. The finding was supported by the ICTY jurisprudence: *Stakić* Trial Judgment, para. 587; *Stakić* Appeal Judgment, para. 101; *Brđanin* Trial Judgment, para. 265 n. 702; *Blagojević* et al., Case No. IT-02-60-T, Judgment on Motions for Acquittal Pursuant to Rule 98ßis, 5 April 2004, para. 50; *Tadić* Appeal Judgment, para. 220.

[19] *Tadić* Appeal Judgement, para. 220.

[20] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 326–341; *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, paras 480–486; *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad *Al Bashir*, 4 March 2009, para. 210; *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, paras 346–348.

Chapter 2
The Concept of Crime in Common Law Jurisdictions

2.1 The Concept of Crime in English Criminal Law

In common law jurisdictions, criminal law is a melting pot of statutory and precedent laws.[21] A particular peculiarity of English criminal law is the origin of many serious criminal offences in precedent law rather than statutory provisions.[22] While it is difficult enough to work with old judicial pronouncements, there is as well a lack of unanimity in the criminal law theory as to the definition and construal of some fundamental concepts. As it was rightly penned by *Fletcher* "the theoretical work on general part [. . .] is plagued by a great confusion of terminology".[23] The accumulated criminal law materials are voluminous and often abstruse, which makes it challenging to coalesce the judicial practice.

In common law, a crime was originally classified into the following three categories: treason, felony or misdemeanour. The original distinction was purely rooted in procedural grounds. As an illustration, a person suspected of felony was liable to arrest without warrant; could rely upon up to twenty peremptory challenges on trial; and was not entitled to be bailed out as a matter of right.[24] Felonies were regarded as grave crimes that entailed more severe punishment, whereas the remaining crimes were labelled misdemeanours. The distinction, which was abolished in the Criminal Law Act 1967, is not replicated in modern criminal law. The major surviving classification of crimes, which is based upon their gravity, includes indictable and summary offences. Most serious offences are tried on

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[21] The history of English criminal law can be traced back far beyond the Conquest. The earliest authority of criminal law was part of the succession laws of kings beginning with King Ethelbert and ending with the compilation of material during the reign of Henry I (*Leges Regis Henrici Primi*). For more on the historical development of English criminal law, see: Stephen (1890), pp. 6–56.

[22] Ormerod (2008), pp. 18–19.

[23] Fletcher (1978, reprint in 2000), p. 395.

[24] Stephen (1890), pp. 58–59.

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indictment, whereas minor offences are tried summarily. The latter category of crimes was embedded in statutory laws in order to overhaul safety standards in the cases of drink-driving, offences of common assault, battery etc.[25]

2.1.1 Actus Reus

The commission of an act prohibited by criminal law or an *actus reus* is not sufficient ground for imposing criminal liability, as it must be accompanied by a necessary mental element or *mens rea*. The very essence of *mens rea* is the attribution of criminal responsibility to persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences.[26] A person is not criminally liable unless the requisite state of mind coincides with the prohibited *actus reus*. The physical act shall be contemporaneous with the guilty state of mind.[27] In some instances, omissions may also attract criminal responsibility. It was penned by *Williams* that a culpable omission means that the accused could have done something if he had been meant to do so and had prepared himself in time, or at least something that another in his place could have done.[28] Normally, a culpable omission requires a duty to act, which may arise out of parental relations, voluntary undertakings, contractual duties etc. However, most crimes are outlined in terms of a positive act rather than omissions. An act shall be *voluntary*, which is fundamental to the imposition of criminal responsibility, because it reflects the underlying respect for the individual's autonomy.[29] It is a general rule that a person cannot bear criminal responsibility for an involuntary act. There are some exceptions thereto applicable to situations when a person acts in a state of self-induced intoxication.[30] Likewise, a person may be exculpated if he acted in a state of automatism which is normally confined to acts done while unconscious and due to spasms, reflex and convulsions.[31]

An *actus reus* may comprise conduct, its attendant circumstances and/or result. As an illustration, the crime of murder embraces the elements of conduct, circumstance (victim is a human being) and result (death of a victim). The crime of rape involves conduct (vaginal or anal penetration) and circumstances (non-consent on

[25] Williams (1983), pp. 18–25; Ormerod (2008), pp. 34–36.

[26] Ashworth (2009), pp. 154–155.

[27] Williams (1961), p. 2.

[28] Ibid., p. 4.

[29] Ormerod (2008), pp. 52–53.

[30] *Hardie* [1984] 3 All ER 848, [1985] 1WLR 64, CA.

[31] *Bratty* [1963] AC 386, [1961] 3 All ER 523 at 532. In the same vein, *Watmore v Jenkins* [1962] 2 All ER 868 at 878.

the part of a victim). The so-called "result" crimes are prevalent in comparison with "conduct" crimes.

2.1.2 Mens Rea

Over the years, the jurisprudence of English courts has been littered with inconsistent and often contradictory interpretations of various *mens rea* standards. In fact, the law on *mens rea* is one of the most challenging and complex areas of criminal law. It is observed by *Williams* that the complexity of the law on *mens rea* is induced by the discordant opinions voiced by judges, which reflect the failure of the legal profession to agree upon the meaning of elementary terms, but not the disagreement among academic commentators.[32] The use of the term *mens rea* in common law was criticised by *Fletcher* who avers that "there is no term fraught with greater ambiguity that that venerable phrase that haunts Anglo-American criminal law: *mens rea*".[33] The confusion over the meaning of the term continues to exist in modern criminal law, which is fuelled by the perpetual theoretical debates on the nature of various *mens rea* standards and the principle of culpability.

Given that the definition of a mental element varies upon each criminal offence, the only means of arriving at a full comprehension of *mens rea* is by detailed examination of the definitions of particular crimes.[34] The law on *mens rea* has been mostly shaped by the discussions on the requisite *mens rea* standards in relation to particular crimes. A number of terms have been employed in English criminal law to convey culpability, among others, purpose, intention, recklessness, wilfulness, knowledge, belief, suspicion, reasonable cause to believe, maliciousness, fraudulence, dishonesty, corruptness, and suspicion.[35] The jurisprudence of international criminal courts is replete with the *mens rea* terms of common law origin, which makes the account of the law on *mens rea* in this chapter particularly beneficial for grasping the complexity of the substantive part of international criminal law.

2.1.2.1 The Concept of Culpability (Blameworthiness)

The term "culpability" derives from the Latin word "*culpa*" and literally means "fault". Despite the perception of the concept of culpability as a philosophical offspring, it is of utmost significance for the criminal law theory. The critique of the concept has largely been due to its proximity to such philosophical categories as will and consciousness. From the legal perspective, culpability is associated with

[32] Williams (1965), p. 9.

[33] Fletcher (1978, reprint in 2000), p. 398.

[34] Stephen (1833), pp. 94–95.

[35] Simester and Sullivan (2007), p. 120.

the level of blameworthiness while committing the crime. The “blame” is a reflection of social condemnation of non-compliance with community demands, although it cannot be understood as the imputation of a purely moral judgement.[36]

Interestingly, some academic writings on *mens rea* lay down propositions that criminal responsibility shall be based on the harm caused rather than the state of a guilty mind. *Baroness Wootton* submits that material consequences of an action, and the reasons for prohibiting it, are the same whether it is the result of sinister malicious plotting, of negligence or of sheer interest. The author brings forward an illustrative example of a man who is equally dead and his relatives equally bereaved whether he was stabbed or run over by a drunken motorist or by an incompetent one. The author concludes that the presence or absence of the guilty mind is not unimportant, but it would be absurd to turn a blind eye to those socially damaging actions, which were due to carelessness, negligence or accident.[37] To the contrary, *Hart* trusts in the people’s ability to determine their own action. He contends that it is important for the law to reflect common judgements of morality, and it is even more important that it should in general reflect in its judgements on human conduct distinctions, which not only underlie morality, but also pervade the whole of our social life.[38] *Hart’s* standpoint on culpability has been widely acknowledged in criminal law with the overwhelming consensus among scholars over the ultimate objective to punish only those individuals who have mental capacity to appreciate unlawfulness of their actions, but nevertheless cross legal boundaries of socially accepted behaviour.

2.1.2.2 Intention

In colloquial terms, it is true that a person can be said to *intend* something if he recognises that there is a chance of achieving it. Hence, if a person does not believe that the consequence is a possible result of his actions, he cannot be regarded as trying to achieve it.[39] The significance of intention in criminal law is clearly demonstrated by the fact that nearly all crimes of serious gravity are defined in terms of “acting with an intent to commit a crime”. However, the law on intention remains the stumbling block in academic and judicial circles alike.

Naturally, when an actor engages himself in any activity, he could entertain different intentions. What does the term “intention” stand for in criminal law? The general approach in criminal law is not to enquire with what intentions a person committed the act, but to ask whether one particular intention was present when the act was committed.[40] The distinction between intention and motive is crucial for the

[36] Silving (1967), p. 19.

[37] Wootton (1981), pp. 43, 46–48.

[38] Hart (1968), p. 183.

[39] Duff (1986) at 779; Duff (1990), p. 58.

[40] Ashworth (2009), p. 171.

theory of criminal law, which is commonly explained by the reference to the following domestic example:

> A man who, at London airport, boards a plane which he knows to be bound for Manchester, clearly intends to travel to Manchester, even though it is the last place he wants to be and his motive for boarding the plane is simply to escape pursuit. The possibility that the plane may have engine trouble and be diverted to Luton does not affect the matter. By boarding the Manchester plane, the man conclusively demonstrates his intention to go there, because it is moral certainty that that is where he will arrive.[41]

Although the proof of motive is often irrelevant, it may be important to infer the existence of intention by way of evidence, notwithstanding that these concepts are distinct.[42] On the interplay between motive and intention, *Gordon* submits that "there will be room for a strong plea in mitigation based on an accused's motive if it is not that of evil doing, malice, defiance, or some similar "criminal" or "depraved" state of mind".[43]

There is no unified legislative definition of intention in English criminal law. It has been coined in relation to particular crimes by the justices who are entrusted with broad discretionary powers. The only statutory law provision on the proof of criminal intent is section 8 of the Criminal Justice Act 1967 which lists a number of procedural rules that a court or jury shall rely upon in determining whether a person committed an offence:

> A court or jury, in determining whether a person has committed an offence,—
>
> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of it being a natural and probable consequence of those actions; but
> (b) shall decide whether he *did intend or foresee* that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

The discussion on the actual meaning of intention has been accompanied by an impressive diversity of opinions, which led to the establishment of the two major concepts. The first one known as "direct intention" means that the prohibited consequence is intended when it is the aim or the objective of the actor. Putting it differently, a result cannot be regarded as intended unless it was the actor's purpose.[44] The concept of "oblique intention" views the prohibited consequence as intended when it is foreseen as a virtual, practical or moral certainty.[45]

The law on *mens rea* is a technical area of law, since it is concerned with legal rather than moral guilt.[46] The *Smith and Hogan Criminal Law* textbook pinpoints that a crime nearly always reflects a state of mind which ordinary people would

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[41] *R. v Moloney* [1985] A.C. 905 at 926.
[42] Stroud (1914), pp. 3–4.
[43] Gordon and Christie (2000), p. 260.
[44] Ormerod (2008), p. 98.
[45] Clarkson et al. (2007), p. 119.
[46] Simester and Sullivan (2007), p. 119.

regard as blameworthy, however, moral blameworthiness is not the legal test.[47] What is meant by "intention" in English criminal law? What is the *mens rea* threshold for intentional crimes? Does a crime qualify as intentional only when a person purposefully brings about the very result of his illegal behaviour? Does the virtual certainty of harmful consequences suffice to prove intentional crimes? These questions have contributed to the terrain for debate in English criminal law. The accumulated precedent law is an excellent working tool to provide answers to the aforesaid questions. The crime of murder reflects the evolution of the concept of intention in English criminal law. The jurisprudence, which is discussed in this sub-chapter, sheds light on this complex and somewhat murky area of law.

The first case, in which the House of Lords discussed the mental element of the crime of murder, is *DPP v Smith*.[48] The accused, who was driving a car loaded with stolen property, refused to stop when asked by a police officer. While the latter clung on to the front of his car, the accused gained speed and drove further until the officer was shaken off and fell in front of oncoming traffic, sustaining fatal injuries.[49] The jury returned a verdict guilty of murder. The Court of Criminal Appeal overturned his conviction on the ground of misdirection and reached a verdict of manslaughter instead. The Crown appealed to the House of Lords that subsequently reversed the decision of the Court of Criminal Appeal and reinstated the conviction for capital murder.[50] The House of Lords employed the objective test of intention to determine the responsibility of the accused:

> [. . .] the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was natural and probable result. The only test available for this is what the ordinary, responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.[51]

By attributing the objective test to the crime of murder (and presumably to all crimes), the House of Lords converted murder to the crime of negligence. The case has gone to the dangerous extreme, given its unconditional reliance on the projected behaviour of a reasonable person. The objective test of intention was hailed with much scepticism among academics and law practitioners who advocated for the subjective test of responsibility. The objective test of intention was eventually overruled by section 8 of the Criminal Justice Act 1967.

Another notable case of *Hyam v DPP* dealt with the accused who set a house ablaze in order to frighten away her rival for the affections of a man. As a result, two children of the targeted woman died while being asleep.[52] The judges came to grips with the question of whether malice aforethought in the crime of murder could be established beyond a reasonable doubt when the accused knew that it was highly

[47] Ormerod (2008), p. 97.

[48] *Director of Public Prosecutions v Smith* [1961] A. C. 290.

[49] Ibid., at 290–291.

[50] Ibid., at 335.

[51] Ibid., at 291.

[52] *Hyam v DPP* [1975] A.C. 55.

probable that the act would result in death or serious bodily harm.[53] The House of Lords upheld the conviction for murder and recognised the state of mind of the accused as amounting to an intention to kill or cause serious bodily harm.[54] *Lord Hailsham* endorsed the definition of intention as outlined in the civil case of *Cunliffe v Goodman*:

> An intention [. . .] connotes a state of affairs which the party 'intending' [. . .] does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition.[55]

The foresight and the degree of likelihood of consequences are essential factors to be placed before a jury in directing them as to whether the consequences were intended. *Lord Hailsham* comports with *Byrne J.* in *Smith* that the inference of intention shall be only drawn when it is inevitable on the facts of the case, yet it shall not be drawn if it is not the correct inference on all facts of the case.[56]

In *R v Moloney,*[57] the concept of intention was reassessed again. When the defendant fired a single cartridge from a twelve-bore shotgun, the full blast of the shot struck his stepfather and killed him instantly. The defendant denied that he entertained the requisite intent to kill. The question, which arose from the factual background of the case, was whether the defendant had the necessary intent when he pulled the trigger.[58] The verdict of murder was set aside and substituted with a verdict of manslaughter on appeal.[59] In the House of Lords, *Lord Bridge* formulated a golden rule in directing the jury on the mental element in a crime of specific intent:

> [. . .] the judge should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent, unless the judge is convinced that, on the facts and having regard to the way the case has been presented to the jury in evidence and argument, some further explanation or elaboration is strictly necessary to avoid misunderstanding.[60]

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[53] Ibid., at 57.

[54] Ibid., at 99.

[55] Ibid., at 74 referring to *Cunliffe v. Goodman* [1950] 2 K.B. 237 at p. 253.

[56] Ibid., at 74. As the Law Commission pointed out in their disquisition on Smith [1961] A.C. 290 [Law Commission Report No. 10], "a man may desire to blow up an aircraft in flight in order to obtain insurance money. But if any passengers are killed, he is guilty of murder, as their death will be a moral certainty if he carries out his intention. There is no difference between blowing up the aircraft and intending the death of some or all of the passengers. On the other hand, the surgeon in a heart transplant operation may intend to save his patient's life, but he may recognise that there is at least a high degree of probability that his action will kill the patient. In that case he intends to save his patient's life, but he foresees as a high degree of probability that he will cause his death, which he neither intends nor desires, since he regards the operation not as a means to killing his patient, but as the best, and possibly the only, means of ensuring his survival".

[57] *R. v Moloney* [1985] A. C. 905.

[58] Ibid., at 905–906.

[59] Ibid., at 929–930.

[60] Ibid., at 926.

Although the direction does not treat the foresight of consequences as the part of substantive law on the crime of murder, it refers it to the law of evidence.[61] Furthermore, *Lord Bridge* formulated two major questions for the consideration of the jury when deciding on the intentionality of conduct: (i) whether death or really serious injury in a murder case was a "natural consequence" of the defendant's voluntary act; and (ii) whether the defendant foresaw that consequence as being a "natural consequence" of his act. In the case of affirmative answers to both questions, the inference is that the defendant intended that consequence.[62] The newly introduced concept of "natural consequences" was described in the following fashion:

> This word conveys the idea that in the ordinary course of events a certain act will lead to a certain consequence unless something unexpected supervenes to prevent it. One might also say that, if a consequence is natural, it is really otiose to speak of it as also probable.[63]

The abovementioned definition of "natural consequences" is riddled with ambiguities. It remains uncertain whether the use of the word "otiose" was meant to draw a demarcating line between "natural" and "probable" consequences.

The interpretation of "natural consequences" was reappraised in *R v Hancock*.[64] The Court unanimously disapproved the guidelines in *R v Moloney* as well as labelled them defective.[65] The direction to "probable consequences" was endorsed as the correct assessment standard: "if the likelihood that death or serious injury will result is high, the probability of that result may be seen as overwhelming evidence of the existence of the intent to kill or injure".[66] It was further explicated that the greater the probability of a consequence implies that it is more likely that the consequence was foreseen, and if that consequence was foreseen, the greater the probability is that the consequence was also intended.[67] Notwithstanding that the main discussion revolved around the probability of consequences with respect to the proof of the very existence of intent in murder cases, particular attention was also paid to the evaluation of evidence while determining whether a person intended to bring about those harmful consequences.[68]

R v Nedrick recapitulated the *mens rea* findings in *R v Moloney* and *R v Hancock*.[69] The defendant who had a grudge against another woman set her house alight. In addition to the house being completely burnt down, one of the woman's children died of asphyxiation and burns. The judges in the given case

[61] Ibid., at 928.

[62] Ibid., at 929.

[63] Ibid.

[64] *R. v Hancock and Shankland* [1986] A. C. 455.

[65] Ibid., at 473.

[66] Ibid.

[67] Ibid.

[68] Ibid., at 474.

[69] *R. v Nedrick* [1986] 1 W.L.R. 1025 (Court of Appeal, Criminal Division).

referred to their Lordships' speeches in *R v Moloney* and *R v Hancock*, and observed that "a man may intend the certain result whilst at the same time not desiring it to come about".[70] The following scenarios were constructed with respect to the foreseeability aspect of intention:

(i) If the defendant did not believe that death or serious harm was *likely* to result from his acts, he *cannot have intended* to bring about said result;
(ii) If the defendant believed that there was a *slight risk* of the death or serious harm, he *cannot have intended* to bring about said result;
(iii) If the defendant believed that death or serious harm would be *virtually certain* to materialize from his voluntary act, then it could be inferred from that fact that he *intended* to kill or cause serious bodily harm, even though he may not have had any desire to achieve that result.[71]

It was lastly accentuated that in rare murder cases, when the simple direction did not suffice, the jury are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as the result of the defendant's actions and that defendant appreciated that such was the case.[72]

The same discussion on the applicability of intention arose in *R. v Woollin*, which involved the defendant who threw his 3-month-old son across a room that led to his death 2 days later.[73] The jury found that the defendant had the necessary intention for the crime of murder. The Court of Appeal examined the appellant's principal ground of appeal that the judge unacceptably enlarged the mental element of murder by directing the jury in terms of substantial risk.[74] The murder conviction was quashed and substituted for manslaughter in the House of Lords with the matter being remitted to the Court of Appeal to pass sentence.[75]

Lord Steyn noted that the model direction for intention was a settled tried-and-tested formula with the reference to *Lord Lane CJ's* judgment in *Nedrick*. However, he found it necessary to substitute the word "infer" with "find", which means that a jury is not entitled to "find" the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty and the defendant appreciated that such was the case.[76] *Woollin* gave rise to the two interpretations of intention which apply in rare cases when a person has a primary objective in acting other than causing the prohibited harm: (i) definitional interpretation—if a consequence is foreseen as virtually certain, the jury may be told that this amounts to intention;

[70] Ibid., at 1027.
[71] Ibid., at 1028.
[72] Ibid.
[73] *R. v Woollin* [1999] 1 A. C. 82.
[74] The Court of Appeal ([1997] 1 Cr.App.R. 97) dismissed the appeal.
[75] *Woollin supra*., at 97.
[76] Ibid.

(ii) evidential interpretation—where a consequence is foreseen as virtually certain, this is evidence entitling a court or jury to find intention.[77]

The definitional interpretation embraces (i) direct intent (a person aims to achieve the prohibited consequences) and (ii) oblique intention (a person aims to achieve other than causing the prohibited harm, but nevertheless foresees such harm as a virtual certainty of his actions). The definitional approach may preclude judges to "find" intention from the foresight of virtual certainty:

> Direct intention and foresight are different states of mind, in the same way that love is different from acquisitiveness. Proving that a person foresees a consequence as probable/highly probable is no more conclusive of an intention to produce that consequence than counting an art dealer's acquisitions can establish his love of art.[78]

The evidential interpretation of intention has two sides to the coin. On the one hand, it renders flexibility to judges to "find" whether intention exists in a particular case. In a situation, when a person does not directly intend consequences which may be foreseen as virtually certain, and those consequences are at serious odds with what the person intended, judges and juries would be entitled to "find" that the moral threshold between what the accused intended and what he foresaw as virtually certain was sufficiently large to avoid attribution of fault.[79] The "beauty" of the evidential interpretation is that it gives a jury more freedom or so-called "moral elbow-room" to dismiss the very existence of intention.[80] However, such significant flexibility may pose danger to the fair administration of justice, as it becomes unpredictable when a jury will or will not "find" intention. The danger is that the jury may simply drown in moral assessments that could potentially lead to the distortion of justice. *Ashworth* advocates for a tighter definition of intention, which omits the permissive formulation and accommodates a greater emphasis on appropriate defences.[81]

The mainstream critique of the concept of intention touches upon the interrelation between substantive law and the law on evidence. The fact that the result was a virtually certain consequence of the person's act is a very good piece of evidence that he knew it was a virtual certain consequence. It may occur that the actor knew that his act will produce virtual certain consequences, but some external circumstances intervened or impeded the virtual certain outcome. The further critique concerns the use of the phrase "may find" in *Woollin*. Does it imply that the jury may find intention only if they wish to do so? Does the foresight of consequences as virtually certain trigger the attribution of intent? Does the foresight of consequences as virtually certain only belong to the law of evidence that could or, alternatively, could not be used by the jury to find the requisite intent? The finding in *Woollin* is far reaching because it allows the jury to "find" intention in

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[77] Clarkson et al. (2007), p. 126.

[78] Wilson (1999) at 451–452.

[79] Norrie (1999) at 538.

[80] Horder (1995) at 687.

[81] Ashworth (2009), pp. 176–177.

particular cases. This contributes to unpredictability of the outcome in criminal cases. The concerted efforts have been undertaken to re-shape the law on *mens rea*, so it would more objectively reflect the needs of criminal justice. The propositions of the Law Commission on re-designing the law on intention have not been implemented, however, there is room for optimism that the law will be unified and settled in the nearest future.

2.1.2.3 Recklessness

Recklessness is an intermediate *mens rea* standard in common criminal law that does not have any counterparts in criminal law of civil law jurisdictions. The cumulative understanding of "acting recklessly" means that a person disregards harmful consequences of his action. The most challenging task is to work out precise boundaries between bordering *mens rea* clusters, in particular intention and recklessness, recklessness and negligence. *Fletcher* submits that the demarcating line between intention and recklessness shall be drawn with the consideration of two distinct factors, which are the relative degree of a risk that the result will occur, and the actor's attitude towards the risk.[82] The distinction between recklessness and negligence may prove to be difficult when the objective test is employed to measure the person's conduct. The digest of the jurisprudence of English courts below illustrates challenges in separating recklessness from other bordering *mens rea* clusters.

R v Cunningham is a pivotal authority on the applicability of the subjective standard of recklessness.[83] In this particular case, the defendant stole a gas meter and its contents from the cellar of a house, and in doing so fractured a gas pipe. As a result of his act, coal gas percolated through the cellar wall to the adjoining house, and entered a bedroom of his neighbour who inhaled a considerable quantity of gas while asleep. The jury was directed by the judge that "maliciously" meant "wickedly"—doing something, which a person has no business to do, and perfectly knows it. The appeal was lodged with respect to the second indictment (endangering life of a person contrary to the 1861 Offences Against the Person Act) on the ground of the misdirection of the jury.[84]

Given that the act of the appellant was clearly unlawful, the question for the jury was whether it was "malicious" within the meaning of section 23 of the Offences Against the Person Act. The counsel for the appellant submitted a number of legal arguments in favour of his client. Firstly, he contended that *mens rea* of some kind was necessary to prove the crime charged in the second indictment. Secondly, he defined the requisite *mens rea* in terms that "the appellant must intend to do the particular kind of harm that was done, or, alternatively, that he must foresee that

[82] Fletcher (1978, reprint in 2000), p. 445.

[83] *R. v Cunningham* [1957] 2 Q.B. 396.

[84] Ibid., at 397.

harm may occur yet nevertheless continue recklessly to do the act". Lastly, he argued that the judge misdirected the jury as to the meaning of the word "maliciously". In light of the defence arguments, the justice *Byrne J* referred to an academic source that construed malice not in the old vague sense of wickedness but as requiring either:

> An actual intention to do the particular kind of harm that in fact was done, or recklessness as to whether such harm should occur or not (the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).[85]

The major finding on appeal was that the word "malicious" in a statutory offence could not be equated to "wicked". In addition, it was observed that it should be left to the jury to decide whether the appellant foresaw that the removal of the gas meter might cause injury to someone, but he nevertheless removed it. The conviction was quashed on the ground of the misdirection of the jury by the trial judge.[86] This authoritative judgement established two limbs of recklessness: (i) foreseeability of the possibility of harmful consequences; and (ii) undertaking of unjustifiable or unreasonable risk.

R v Caldwell is a leading authority on the standard of objective recklessness, which is a departure from the previous findings in *R v Cunningham*.[87] The disgruntled defendant set the residential hotel ablaze, which was his place of employment. The evidence record revealed that the defendant was so drunk at the time that it did not occur to him that there might be people there whose lives were endangered. He pleaded guilty to destroying or damaging property that amounted to the violation of section 1 (1) of the Criminal Damage Act 1971, however, refused to accept the charge under section 1 (2) of intending to endanger life or being reckless as to whether life was endangered. Despite the fact that the defendant was initially found guilty of a more serious charge,[88] the Court of Appeal (Criminal Division) set the respective conviction aside.[89] The question of law certified for the opinion of the House of Lords was whether evidence of self-induced intoxication was equally relevant to intentional and reckless criminal offences within the meaning of section 1 (2) (b) of the Criminal Damage Act 1971.[90] Although the Majority dismissed the relevance of self-induced intoxication for reckless offences, it confirmed its relevance for intentional offences under section 1 (2) of the Criminal Damage Act.

Lord Diplock seized an opportunity to coin the definition of recklessness with respect to the crime charged. His conclusion was that a person is reckless as to whether any such property would be destroyed or damaged if, when he commits the act "he either has not given any thought to the possibility of there being any such

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[85] Ibid., at 399.

[86] Ibid., at 401.

[87] *R. v Caldwell* [1982] A. C. 341 (House of Lords).

[88] Ibid.

[89] In respect to the charge to which the defendant had pleaded guilty the Court imposed the same sentence pronounced by the trial judge.

[90] *Caldwell supra.*, at 344.

risk, or has recognised that there was some risk involved and has nonetheless gone to do it".[91] This finding provoked a terrain for debate in legal circles. The test of objective recklessness was met with the storm of outspoken criticism among academics and practitioners. *Williams* characterised the decision as "profoundly regrettable",[92] whereas *Smith* noted that the decision was "pathetically inadequate".[93] The mainstream criticism was directed against the recognition of such a minor difference in terms of blameworthiness between the defendant who ignored a risk of which he was aware, and the defendant who gave no thought to the potential risk of having exposed others to danger.

R v Lawrence was another notable case before the House of Lords following the judgement in *R v Caldwell*.[94] The defendant killed a pedestrian in the motorcycle accident, and was convicted of causing death by reckless driving contrary to section 1 of the Road Traffic Act 1972.[95] The jury was directed that a driver was guilty of driving recklessly if he deliberately disregarded the obligation to drive with due care and attention, or was indifferent whether or not he did so, and thereby created a risk of an accident which a driver driving with due care and attention would not create (*Murphy* direction). The Court of Appeal (Criminal Division) set aside the verdict on the ground that both directions to the jury left some grey areas of law that rendered the verdict unsafe and unsatisfactory.[96]

The legal points of general importance in the case were as follows: (i) whether *mens rea* is involved in the offence of driving recklessly; (ii) if so, what mental element is required; and (iii) whether the *Murphy* direction[97] was the proper one to follow.[98] With respect to the aforementioned areas of inquiry, *Lord Diplock* acknowledged the presence of *mens rea* in the offence of driving recklessly which involved an obvious and serious risk of causing physical injury to another person, and failure on the part of a driver to give any thought to the possibility of there being any such risk. The mental element also meant to cover situations of some risk, which was undertaken by a person. The *Murphy* direction was dismissed due to its unfavourable effect on the driver.[99] The Caldwell/Lawrence test of recklessness captures a person who failed to give any thought to the possibility of the risk, or who recognised some risk involved. This controversial direction

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[91] Ibid., at 354.

[92] Williams (1981) at 252.

[93] Smith JC (1981) at 394.

[94] *R. v Lawrence* [1982] A. C. 510 (House of Lords).

[95] Amended by Criminal Law Act 1977 (c. 45), s. 50 (1).

[96] *Lawrence supra*.

[97] Reg. v. William Murphy [1980] Q.B. 434. The *Murphy* direction recognises a driver to be guilty of driving recklessly if he deliberately disregards the obligation to drive with due care and attention or is indifferent as to whether or not he does so, and thereby creates a risk of an accident, which a driver driving with due care and attention would not create.

[98] *Lawrence supra*., at 518.

[99] Ibid., 527.

resembles the state of negligence, thus watering down the demarcating line between recklessness and negligence.[100]

Elliot v C examined the *mens rea* standard of recklessness in the crime of arson.[101] The case concerned a 14-year-old girl of low intelligence who entered a wooden shed, in which she picked a bottle of white spirit, poured it on the floor and set it ablaze. The resulting fire immediately flared out of control, and led to the complete destruction of the shed. The defendant was charged contrary to section 1 (1) of the Criminal Damage Act 1971. The judges acquitted the defendant on the ground that the defendant had given no thought to the possibility of the risk that the shed and its contents would be destroyed by her action, and even if she had given thought to the matter, the risk would not have been obvious to her.

The prosecution submitted that the justices misdirected themselves in law while considering whether the risk was obvious to the defendant. The main argument on appeal was that the defendant acted recklessly according of the test laid down in *R v Caldwell* because the risk should have been obvious to a *normal* 14-year old child.[102] The defence counsel challenged the prosecution's argument by contending that the *Caldwell* test spoke of a state of mind of the accused himself at the time of the act, which could not be the mental state of a non-existent hypothetical person. Furthermore, he claimed that it was necessary to decide whether the risk of the shed being destroyed was an obvious risk to the *particular* 14-year old girl in question.[103] The High Court concluded that the justices erred in their interpretation of the meaning of "reckless".[104] The category of "obvious risk" was construed as embedding "the risk which must have been obvious to a reasonably prudent man, not necessarily to the particular defendant if he or she had given thought to it".[105] In other words, neither limited intelligence nor exhaustion served as a defence to non-appreciation of the risk. The adherence to the objective standard of recklessness is truly perplexing, since the test disregards individual characteristics of the defendant and substitutes it with the standard of an ordinary prudent individual.

Shimmen case examined the loophole in the *Caldwell* test of recklessness.[106] The defendant was charged contrary to section 1(1) of the Criminal Damage Act 1971 of "without lawful excuse destroying property, intending to destroy any such property or being reckless as to whether such property would be destroyed". He damaged the property (window) when he attempted to demonstrate his martial arts skills of the control over his bodily movements, and made as if to strike the window with his foot. The justices acquitted the defendant on the ground of his belief in non-existence of the risk due to his martial arts ability.

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[100] Simester and Sullivan (2007), p. 136.

[101] *Elliott v C*. [1983] 1 W.L.R. 939.

[102] Ibid., at 941.

[103] Ibid., at 941–942.

[104] Ibid., at 943–947.

[105] Ibid., at 946.

[106] *Chief Constable of Avon v Shimmen* [1987] 84 Cr.App.R.7 (Quenn's Bench Division).

The contentious issue on appeal was whether the justices were correct in law to decide that the defendant was not reckless as to the damage of the property on account of his belief in martial arts skills, notwithstanding that he had done an act which in fact created an obvious risk to the damage of the property.[107] *Justice Taylor* claimed that the appellant's act fell under the *mens rea* standard as defined by *Lord Diplock*: "[. . .] had recognised that there was some risk involved and has nonetheless gone on to do it".[108] It was concluded that the justices erred in their finding that recklessness did not exist by reason of what the defendant had put forward.[109]

R v G is a milestone case in English jurisprudence, which marked a remarkable departure from the objective test of recklessness.[110] Two defendants of 11 and 12 years old set fire to some newspapers in the back yard of the shop, and then left without taking out the burning papers. As a result, the fire spread to the shop and adjoining building, thus causing the damage worth one million pounds. The defendants were convicted of arson pursuant to section 1(1) of the Criminal Damage Act 1971 for "causing damage to property, being reckless as to whether such property would be destroyed or damaged".[111] They unsuccessfully appealed to the Court of Appeal and thereafter proceeded with the appeal to the House of Lords.[112] The issue of general public importance in the case was whether a defendant could be convicted under section 1 of the Criminal Damage Act 1971 on the basis that he was reckless as to whether property would be destroyed or damaged, when he gave no thought to the risk, but by reason of his age and/or personal characteristics the risk would not have been obvious to him, even if he had thought about it.[113]

The justices felt that it was necessary to depart from the objective test of recklessness in *Caldwell* in light of the following arguments: (i) conviction of serious crime shall depend on the defendant's culpable state of mind; (ii) model direction formulated by *Lord Diplock* in *Lawrence* was capable of leading to obvious unfairness (i.e. non-recognition of the special characteristics of children); and (iii) the mounting criticism of the *Caldwell* test voiced by academics, judges and practitioners.[114]

The discussion on the subjective test of recklessness was strictly confined to the offences penalised under the Criminal Damage Act 1971. Since the Parliament did not mean to incorporate the culpable inadvertence into the definition of recklessness

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[107] Ibid., at 10–11.

[108] Ibid., at 12 referring to Lord Diplock's statement in *R. v Caldwell*.

[109] Ibid., at 12.

[110] *R. v G* [2004] 1 A.C. 1034 (House of Lords).

[111] The trial judge instructed the jury that no allowance could be made for the defendants' youth, their lack of maturity or any inability they might have to assess the situation.

[112] Ibid., at 1034.

[113] Ibid., at 1038.

[114] Ibid., at 1055. The reference was made to a number of academic writings, including that of Smith at 393–396; and Williams (1981) at 252.

in the Act and the law, the justices concluded that the law in *R v Caldwell* took a wrong turn.[115] The new direction recognised that a person acts recklessly with respect to (i) a circumstance when he is aware of a risk that exists or will exist, and (ii) a result when he is aware of a risk that it will occur, and it is with circumstance known to him, unreasonable to take the risk.[116] Although the subjective test was meant to be limited to the criminal damage offences, the *Cunningham* test has been revived in the jurisprudence.

2.1.2.4 Negligence

Negligence is the lowest *mens rea* threshold that denotes a failure to act in accordance with an expected standard of conduct. Neither the foresight of harmful consequences nor the desire of prohibited consequences to occur is required to satisfy the threshold of negligence. Negligent behaviour dangerously exposes another individual to the risk of suffering an injury or loss. A few crimes in English criminal law may be satisfied by the (gross) negligence standard, such as manslaughter and careless driving. *Ashworth* notes a certain degree of reluctance on the part of English lawyers to apply the negligence standard due to its derogation from subjective principles.[117] This does not mean that negligent conduct is not blameworthy, however, the level of blameworthiness is not sufficient to justify the imposition of criminal punishment rather than more natural civil compensation.[118] In fact, the deviation from the expected objective standard of behaviour shall be gross in order to attract criminal responsibility. The negligence standard consists of the following constitutive elements: (i) the harm is great; (ii) the risk is obvious; and (iii) the defendant has the capacity to take the required precautions. The reasonable person standard applies to determine whether a person acted negligently. However, it is not a real person but a legal objective that measures the level of culpability of the real person. This standard may vary upon skills, professional experience and other characterizing criteria. Given that the objective test of responsibility was rejected for reckless offences, it only applies to (gross) negligent crimes.

The leading authority on criminal negligence is *R v Bateman* that coined the *mens rea* test for manslaughter.[119] The case involves a doctor who was called in to attend a woman about to be confined, however, the child was born dead during the difficult delivery. The prosecution alleged that the doctor was criminally negligent in his treatment during the delivery, and in his advise to avoid infirmary. The patient was only ordered by the doctor to be transferred to the infirmary when her condition worsened, but she nonetheless died. The conviction was quashed on the appeal.[120]

[115] Ibid., at 1065.
[116] Ibid., at 1057.
[117] Ashworth (2009), pp. 185–186.
[118] Wilson (2008), p. 136.
[119] *R v Bateman* (1927) 19 Cr. App. R. 8.
[120] Ibid.

The counsel for the appellant argued that his client acted to the best of his ability and referred to the jurisprudence that exculpated a doctor from manslaughter, if he honestly exercised his best skill to cure a patient, but the patient passed away.[121] In explaining to the jury the applicable test to determine whether negligence in the particular case amounted or did not amount to a crime, the judges employed a plethora of epithets, *inter alia,* "culpable", "criminal", "gross", "wicked", "clear", "complete" etc. The jury was entitled to establish criminal liability by negligence only if the appellant showed such disregard for the life and safety of others as to amount to the crime that deserved punishment.[122] The law on manslaughter was summarised in the following fashion:

> If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward.[123]

The law requires a fair and reasonable standard of care and competence but not the highest or the lowest one. When the incompetence is alleged, an unqualified practitioner cannot be measured by any lower standard than applied to a qualified man.[124]

R v Adomako was another case of involuntary manslaughter by a breach of duty.[125] The anaesthetist acted in his professional capacity during an eye operation, which resulted in paralysing the patient, when a tube became disconnected from a ventilator. As a result, the patient suffered a cardiac arrest and died. The defendant was convicted of manslaughter by a breach of duty. Even though the appeal against conviction was dismissed,[126] the Court of Appeal certified the point of law as to whether in cases of manslaughter by criminal negligence involving a breach of duty it was a sufficient direction to the jury to adopt the gross negligence test as set out in *R v Bateman* and *Andrews v. Director of Public Prosecutions* [1937] A.C. 576 without any reference to the test of recklessness in *R v Lawrence*.

[121] Ibid., at 9 citing in support *Van Butchell*, 3 C. & P. 629 (1829).

[122] Ibid., at 11–12.

[123] Ibid., at 12.

[124] Ibid., at 13.

[125] *R. v Adomako* [1995] 1 A.C. 171 (House of Lords).

[126] Ibid., at 172. The Court of Appeal reiterated that in cases of manslaughter by criminal negligence involving a breach of duty the ordinary principles of the law of negligence apply to ascertain whether the defendant had been in breach of a duty of care towards the victim. On the establishment of such a breach of duty, the next question was whether it caused the death of the victim, and if so, whether it ought to be characterised as gross negligence and therefore a crime. It was eminently a jury question to decide whether, having regard to the risk of death involved, the defendant's conduct was so bad in all the circumstances as to amount to a criminal act or omission.

Lord Mackay concluded that that in the case of manslaughter by criminal negligence involving a breach of duty, it was a sufficient direction to the jury to adopt the gross negligence test in *R v Bateman* and *Andrews v. Director of Public Prosecutions*. Hence, it was unnecessary to rely upon the definition of recklessness in *R v Lawrence*, albeit perfectly open to the trial judge to use the word "reckless" in its ordinary meaning as part of his exposition of the law.[127]

2.2 The Concept of Crime in American Criminal Law

American criminal law is a mixed body of statutory and common laws that originated from English criminal law. It is a product of legislative enactment interwoven with the common law, which varies from one state to another.[128] Despite the increasing significance of the consolidation of statutory laws, common law plays an important role in shaping the criminal law theory today.[129]

2.2.1 Actus Reus

Similar to other national jurisdictions, a crime comprises a material element (*actus reus*) and a mental element (*mens rea*). A criminal offence is an act committed or omitted in violation of public law that either forbids or commands it.[130] An *actus reus* of a criminal offences covers both acts and omissions. The discussion as to whether the *actus reus* shall extend to omissions mirrors reflections on the subject in English criminal law, and brings forward an obvious question why the killing-by-omission affronts the public less than the killing-by-commission. The opponents to the criminalisation of omissions refer to the interference with personal autonomy, and a lesser degree of blameworthiness of omissions.[131] Although the basic rule is that an individual is not legally required to assist another person in peril, he may be obliged to do so when such obligations arise out of the law or statute.[132]

The Model Penal Code provides that a "person is not guilty of an offence unless his liability is based on conduct that includes a voluntary act".[133] There is an intimate interrelation between the voluntariness and consciousness of conduct: a

[127] Ibid., at 189.

[128] Hall (2004), pp. 30–47.

[129] Robinson (1997), pp. 67–68. The author acknowledged the utility of common law in the construal of undefined criminal offences proscribed in the criminal codes; and given the ambiguity of statutory law that may require an examination of the drafters' intent etc.

[130] Wharton (1857), p. 111.

[131] For more, consult: Katz (1987), pp. 140–145, also reprinted in Katz et al. (1999), pp. 159–163.

[132] Lippman (2009), pp. 95–103.

[133] Model Penal Code § 2.01.

voluntary conduct must occur as a result of the actor's conscious choice. The Model Penal Code lists specific conditions that determine the involuntariness of conduct, *inter alia,* reflexes and convulsions, bodily movements during unconsciousness or sleep, conduct during hypnosis or resulting from hypnotic suggestion, and other movements that are not a product of the effort or determination of the actor.[134]

Actus reus is not be confused with *mens rea*, as the evil intent is not required to produce an act, and the determination of intent strictly belongs to the law on *mens rea*.[135] *Actus reus* requires only the proof of the voluntariness of conduct, which is in accordance with the criminal law principle that criminal responsibility is only for voluntary acts—not thoughts.[136]

2.2.2 Mens Rea

Mens rea is a state of guilty mind, which is the basic premise of criminal responsibility.[137] Depending upon the intensity of the cognition and will directed at the commission of a criminal offence, *mens rea* reflects either a subjective or an objective test of responsibility. The objective test does not make the fault other than mental: it is still a mind at fault despite the unwillingness to attach the label "wicked mind".[138] It has been argued that the Latin term "*mens rea*" is misleading[139] and too narrow to map the entire area of law. The alternative term "fault" is suggested as a more accurate word to reflect upon the requisite element of a crime.[140] Despite these propositions to get rid of the term *"mens rea"*, this Latin idiom remains a time-honoured label, which signifies guilt in modern criminal law.

As a general rule, most crimes in American criminal law have the accompanying mental element specified in statutory laws. Justice Jackson spoke of "the variety, disparity and confusion of definitions of the requisite but elusive mental element".[141] There is an overwhelming plethora of terms that signify the mental ingredient of a crime, among others, "intentionally", "knowingly", "purposely", "recklessly", "carelessly", "maliciously", "wantonly", "fraudulently", "wilfully", "designedly", "negligently" etc. It does not mean that all statutory laws explicitly define the mental element of a crime. Some statutory laws do not contain any words or phrases that define the requisite *mens rea* standard because the latter is either

[134] Ibid. See: Chap. 7.1.1 (Insanity, Automatism and Burden of Proof).

[135] Hall (2004), p. 66.

[136] Lippman (2009), p. 85.

[137] Davenport (2008), p. 40. The author defines *mens rea* as a person's intent while performing a criminal act that is critical to establishing the nature and degree of a crime.

[138] Perkins and Boyce (1982), p. 828.

[139] Stephen, J., in *Regina v Tolston*, L.R. 23 Q.B.Div. 168, 185 (1889).

[140] LaFave (2003b), p. 239.

[141] *Morissette v. United States*, 342 U.S. 246, 252 (1952).

implied or redundant in strict liability crimes. The other cognisable processes in the mind of a perpetrator are irrelevant to the field of criminal law which is not interested in whether a person acted arrogantly, hopefully, enthusiastically, angrily etc. It is only concerned with "intentionality" which the defendant acted with. In other words, what the defendant intended, knew, or should have known when he acted.[142] However, the role of "motive" cannot be totally neglected, as the evidence of it may affect the severity of a sentence.[143] It is noteworthy that a good motive is not sufficient to relieve someone from criminal responsibility if *actus reus* and *mens rea* are established. Likewise, a bad motive does not prove guilt if either of the requisite elements is missing.[144]

The fine gradations between various *mens rea* clusters are frequently obfuscated when applied to the factual situations. The law on *mens rea* is plagued with many grey areas largely due to the vagueness and inconsistent use of terms.[145] The utmost contribution of the Model Penal Code to the scholarship of criminal law is the introduction of a limited number of culpability terms such as "purposely", "knowingly", "recklessly" and "negligently".

All crimes are classified in the three major groups: (i) crimes requiring "subjective fault"—a state of guilty mind on the side of an individual; (ii) crimes that are satisfied by "objective fault"—a standard of a reasonable person; and (iii) crimes that are not accompanied by any fault requirement, i.e. strict liability crimes.[146] The latter category of crimes is often subject to harsh criticism because criminal liability for these crimes is imposed upon an individual without looking into his mind at the time the crime was committed. The catalogue of *mens rea* standards is not uniform in the criminal law theory. The legislatures have frequently left the doctrine of *mens rea* undetermined, whereas the judicial bodies have repeatedly misconstrued the concept in relation to particular crimes. This could be explained by the existence of the complex multi-layered legislation structure that consists of criminal codes of the fifty-two states and the federal criminal code. Given an unfeasible task to examine *mens rea* standards in the criminal law instruments of all individual states, the legal analysis of *mens rea* is conducted with the consideration of the Model Penal Code, the closest non-binding instrument to the "ideal" American penal code, and some notable jurisprudence in that regard. Although some states employ legal terminology that differs from that of the Model Penal Code, the concepts stipulated in the Code replicate general concepts that do not demonstrate the precise boundaries of demarcation.[147]

[142] Kadish and Schulhofer (2001), p. 203.

[143] Davenport (2008), p. 44.

[144] Perkins and Boyce (1982), p. 932.

[145] Bacigal (2002), p. 36.

[146] LaFave (2003b), p. 242.

[147] Bacigal (2002), p. 39.

2.2.2.1 Intent

The jurisprudence re-affirms the position of criminal intent as a *sine qua non* of criminal responsibility.[148] Individuals are only held criminally liable if their conduct clearly shows an intention to commit, aid, advise, or encourage, wilfully and intentionally, a criminal act.[149] The meaning of the term “intent” is far from settled in American criminal law. The obscurity surrounding the definition and construal of “intent” has largely occurred as a result of its use in numerous phrases, *inter alia,* “criminal intent”, “general intent”, “specific intent”, “constructive intent”, “presumed intent” etc.[150] The category of “criminal intent” is narrowly defined as a state of mind operative at the time of an action,[151] which may be either specific or general.[152] Broadly, “criminal intent” involves a variety of culpable states such as purpose, knowledge, recklessness, and negligence.[153] The traditional approach towards “intention” views “knowledge” as its constitutive element, whereas the modern approach treats “knowledge” and “intent” as two separate entities. By differentiating between “purpose” and “knowledge”, the drafters of the Model Penal Code demonstrated the adherence to the modern interpretation of “intention”.

Intention has been conventionally construed in a manner that one intends certain consequences when he desires that his acts cause said consequences, or knows that these consequences are substantially certain to materialise from his acts. The cumulative definition of intent covers prohibited consequences that (i) represent the very purpose for which an act is done (regardless of likelihood of occurrence), or (ii) are known to be substantially certain to result (regardless of desire).[154] The term “intent” in modern criminal law is a loose equivalent to the definition of “purpose” or “aim”. Interestingly, the term is not explicitly used in the Model Penal Code. Section § 2.02 (1) reads that the concepts of purpose, knowledge, recklessness and negligence suffice to delineate the kinds of culpability that may be called for in the definition of specific crimes. *LaFave* claims that the classification in the Model Penal Codes assists to distinguish between one’s objectives and knowledge.[155] The very same section § 2.02(1) does not recognise a person guilty of an offence unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offence.

[148] *U.S.—Rent v. U.S.*, 209 F.2d 893 (5th Cir. 1954); *Alaska—Bell v. State*, 668 P.2d 829 (Alaska Ct. App. 1983).

[149] *Wis.—State v. Jadowski*, 2004 WI 68, 272 Wis. 2d 418, 680 N.W.2d 810 (2004).

[150] LaFave (2003b), p. 244.

[151] *Neb.—State v. Stewart*, 219 Neb. 347, 363 N.W.2d 368 (1985).

[152] *La.—State v. Fuller*, 414 So. 2d 306 (La. 1982); *Mich.—People v. Nowack*, 462 Mich. 392, 614 N.W.2d 78 (2000); *S.D.—State v. Schouten*, 2005 SD 122, 707 N.W.2d 820 (S.D. 2005).

[153] *U.S.—U.S. v. Anton*, 683 F.2d 1011 (7th Cir. 1982) (overruled on other grounds by *U.S. v. Carlos-Colmenares*, 253 F.3d 276 (7th Cir. 2001)).

[154] Perkins and Boyce (1982), p. 835.

[155] LaFave (2003b), p. 246.

Having embraced the "element analysis" approach to the construal of a criminal offence, the Code outlines a crime committed "purposely" in relation to conduct, result, or attendant circumstances. A person acts "purposely" in regards to the prohibited conduct or result when he consciously engages in that conduct or causes such result.[156] Accordingly, the crime of murder requires the proof that the defendant consciously desired that result irrespective of whether or not the death is likely to occur from the defendant's conduct. This *mens rea* standard is reminiscent of *Absicht* or *dolus directus* of the first degree in German criminal law,[157] which is the highest threshold for intentional crimes because an actor must have a particular objective to cause a particular result.[158]

A person acts "purposely" in relation to attendant circumstance if he is aware of the existence of such circumstances or he believes or hopes they exist.[159] The Code's assertion that "purpose" is satisfied either by "belief" or "hope that the circumstance exists" is controversial. It seems that the "hope" provision was employed in order to lower the threshold of culpability in relation to the circumstance element.

The "element analysis" approach equally applies to crimes, which are committed "knowingly". Notwithstanding that "knowledge" is positioned separately from "purpose", the cognitive element of awareness belongs to both *mens rea* standards, although the intensity of cognitive processes directed at the commission of a crime varies. A crime committed "knowingly" is formulated in relation to the prohibited conduct, result or attendant circumstances. A person acts "knowingly" in relation to the prohibited conduct or attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist.[160] A person acts "knowingly" with respect to the prohibited result if he knows that it is practically certain that his conduct will cause such result.[161] Pursuant to Section 2.02(7) of the Model Penal Code, knowledge of a fact extends not only to actors with actual knowledge but also to those who are aware of a high probability that the fact exists:

> *Requirement of Knowledge Satisfied by Knowledge of High Probability*: When knowledge of the existence of a particular *fact* is an element of an offence, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.[162]

[156] Model Penal Code, § 2.02(1)(a).

[157] See: Chap. 3.1.3.1 (Intention (*Vorsatz*) in German Criminal Law).

[158] Robinson (1997), p. 213. The author provides an illustrative example of the offence of indecent exposure that requires proof of the conduct being motivated by a desire to gain sexual gratification or arousal. If the same conduct is performed to annoy or alarm the victim, it does not satisfy the offence's special purpose requirement. See: Model Penal Code, § 213.5.

[159] Model Penal Code, § 2.02(1)(a).

[160] Ibid., § 2.02(1)(b).

[161] Ibid.

[162] Ibid., § 2.02(7) (emphasis added). In *United States v. Leary* 395 U.S. 6 (1969) and *United States v. Turner* 396 U.S. 398 (1970), the Supreme Court approved the use of Section 2.02(7) of the Model Penal Code.

This legal provision corresponds to what is termed as "wilful blindness" in English criminal law, which captures situations in which the defendant is aware of the probable existence of a material fact but does not determine whether it exists or does not exist. In other words, "wilful blindness" indicates a deliberate effort to avoid knowing, by whatever method knowledge might be available.[163] A "wilfully blind" actor is the one who acts with a high level of awareness of a particular fact.

The major difference between crimes committed "purposely" and "knowingly" lies within the actor's attitude towards his final objective. The essence of the narrow distinction is the presence or absence of a *positive desire* to cause the result.[164] In practice, the distinction contributes to yet another classification into specific and general intent crimes.

2.2.2.1.1 Specific Intent

Specific intent, as it has evolved in the jurisprudence and statutory law, is no more than intent to do the prohibited act with *knowledge or desire that it will cause a certain result*.[165] The Supreme Court discussed the concept of specific intent in *United States v Bailey* where it held that "*purpose* corresponds loosely with the common-law concept of specific intent, while *knowledge* corresponds loosely with the concept of general intent".[166] Although this formulation of specific intent was repeatedly cited in the subsequent jurisprudence,[167] it was criticised for equating specific intent to "purpose". As pointed out in the jurisprudence, the major

[163] "Wilful blindness" could be illustrated by the hypothetical situation when a person is driving a car loaded with drugs. If the circumstances known to a person made him realise the possibility of drugs being transported in the vehicle, and that possibility was sufficient to cause him anxiously to avoid finding out the truth for fear of finding drugs in the car, the conduct is definitely culpable. The honest person would not deliberately fail to find out the truth for fear of learning that his act would be unlawful.

[164] Robinson (1997), p. 213.

[165] *Tison v. Arizona*, 481 U.S. 137, 150, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978); see also: *Carter v. United States*, 530 U.S. 255, 268, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (explaining that general intent, as opposed to specific intent, requires "that the defendant possessed knowledge [only] with respect to the *actus reus* of the crime").

[166] *United States v. Bailey*, 444 U.S. 394, 405, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980).

[167] As an example, see: 31 U.S.C. § 3729(b) (knowledge is sufficient for liability under the False Claims Act, and "no proof of specific intent to defraud is required"); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 697 n. 9, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995) (Congress's amendment to a criminal statute outlawing certain activities related to endangered species, in which "willfully" was replaced by "knowingly", was done in order "to make criminal violations of the act a general rather than a specific intent crime") (quoting H.R. Conf. Rep. No. 95-1804, p. 26 (1978), U.S.Code Cong. & Admin.News 1978, pp. 9484, 9493-94); *United States v. Blair*, 54 F.3d 639, 642 (10th Cir.1995) (holding that "a specific intent crime is one in which the defendant acts not only with knowledge of what he is doing, but does so with the objective of completing some unlawful act").

drawback of the *Bailey*'s test is that it would mean that prosecutions for specific intent crimes either proved the defendant's purpose with respect to consequences (and did not rely on knowledge of the certainty of consequences) or resulted otherwise in acquittals.[168] The judges rejected the test and submitted to the jury the following instructions as to the definition "with intent" under the Convention Against Torture (hereinafter—CAT): "Either that (1) it was [the defendant's] conscious *desire* or *purpose* [. . .] to cause a certain result, or that (2) [the defendant] *knew* that (he)(she) [. . .] would be practically certain to cause that result".[169] Purpose coupled with knowledge to cause the prohibited result was welcomed as the proper definition of specific intent.[170] In this particular case, it was held that a petitioner could not obtain relief under the CAT unless he showed that his prospective torturer would have the *goal or purpose of inflicting severe pain or suffering*. Having applied that standard, the judges established that the appellant failed to demonstrate that Haitian officials would have the *purpose of inflicting severe pain or suffering* by placing him in detention upon his removal from the United States, which entailed that he did not qualify for relief under the CAT.[171]

In *Carter v United States*, specific intent for the crime of torture was outlined in similar terms: "for an act to constitute torture, there must be a showing that the actor had the *intent* to commit the act as well as the *intent* to achieve the consequences of the act, namely the infliction of the severe pain and suffering".[172] Where the severe pain and suffering is merely a "foreseeable consequence" of the act, "the specific intent standard would not be satisfied".[173] Hence, an actor who *knowingly* commits an act, although does not intend the illegal outcome of that act, can only be held liable for a general, not specific, intent crime.[174]

The same line of reasoning prevailed in *Pierre* where the Court proclaimed that specific intent requires not simply a general intent to accomplish an act with no particular end in mind, but an additional deliberate and conscious purpose of accomplishing a specific and prohibited result.[175] The digest of the jurisprudence reveals an array and divergence of opinions whether specific intent merely corresponds to "purpose", or whether it also includes the cognitive element of knowledge coupled with the desire to bring about a particular result. The latter is the most favourable interpretation of specific intent.

Purposeful acts, frequently referred to as wanton or wilful acts, are designated *first degree* and attract the highest penalties.[176] Casting a glance at the provisions of the Model Penal Code, specific intent crimes include, among others, inchoate

[168] *Pierre v. Attorney General of U.S.*, 528 F.3d 180, 192 (3rd Cir., Jun 09, 2008) (NO. 06-2496).
[169] Ibid.
[170] Ibid.
[171] Ibid., at 190.
[172] *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) at 145–146.
[173] Ibid., at 146.
[174] Ibid.
[175] *Pierre supra*., at 189.
[176] Davenport (2009), p. 42.

crimes (i.e. solicitation, conspiracy, attempt), first degree murder, voluntary manslaughter, larceny, embezzlement, false pretences, robbery, burglary, forgery etc.[177] The list of specific intent crimes is not exhaustive in the Model Penal Code. The description of crimes may considerably vary in the statutory law and precedent practice of individual states.

2.2.2.1.2 General Intent

General intent is understood as an awareness of acting in a bad state of mind. It suffices for the Prosecution to show that a defendant merely intended to commit the prohibited act, while there is no need to prove the desire to cause a particular consequence.[178] The crimes of rape, battery, and involuntary manslaughter, to name a few, belong to the category of general intent crimes in the Model Penal Code.

The discussion on general intent for the crime of battery arose in the case of *People v Pete Lara* in which the appellant successfully challenged his conviction of battery with serious bodily injury.[179] The defendant was initially convicted of negligent battery as a result of the improper instruction to the jury that criminal negligence was the sufficient *mens rea* standard in support of the crime of battery.[180] The jurisprudence has consistently reinstated the position of the crime of battery as a general intent crime.[181] In other words, criminal liability cannot be attributed when the force or violence is accomplished with a "lesser" state of mind, i.e. "criminal negligence". As with all general intent crimes, the required mental state entails only intent to do the act that causes the harm.[182] The crime of battery requires that the defendant actually intend to commit a "wilful and unlawful use of force or violence upon the person of another".[183]

The judges explicated that general intent may be inferred from the conduct of the defendant if he acts with a "conscious disregard", whereas "criminal negligence" requires jurors to apply an objective standard—to ask whether a reasonable person in the defendant's position would have appreciated the risk his conduct posed to human life.[184] The jury should have been instructed on the general direction of intent for the crime of battery with serious injuries, but was erroneously instructed

[177] As an example, see the description of the crime of burglary in § 221.1 of the Model Penal Code: "a person is not only *knowingly* entering a building, but also desires to accomplish his act *with purpose to commit a crime therein*".

[178] Hall (2004), p. 52.

[179] *People v. Lara*, 44 Cal.App.4th 102, 51 Cal.Rptr.2d 402, 96 Cal. Daily Op. Serv. 2281, 96 Daily Journal D.A.R. 3793 (Cal.App. 2 Dist. Apr 02, 1996) (NO. B091227). During a heated argument, the defendant accidentally struck the face of his girlfriend, breaking the bone in her nose.

[180] Ibid., at 111.

[181] Ibid., at 107 (original footnotes omitted).

[182] Ibid. (original footnotes omitted).

[183] Ibid. (original footnotes omitted).

[184] Ibid. (original footnotes omitted).

that it could convict the appellant if it found that he acted with the "lesser" mental state of "criminal negligence".[185]

2.2.2.2 Recklessness

A number of crimes may be committed by a reckless act or omission, which is a lower *mens rea* threshold than required for the crimes committed "purposely" or "knowingly". The major difference between intentional and reckless crimes is that intentionality requires consciousness of almost-certainty, whereas recklessness is satisfied by something far less than certainty or even probability.[186] Recklessness is rightly distinguished from negligence: the former involves a very significant element of awareness, which is lacking in criminal negligence, and thus makes these two concepts mutually exclusive.[187]

Recklessness or reckless conduct has been variously construed in relation to particular crimes as consciously disregarding a substantial and unjustifiable risk that an act will cause harm to or endanger the safety of another;[188] will result in the death of another person;[189] or is likely to cause death or great bodily harm to another.[190] The disregard of a risk may be demonstrated by a gross deviation from what a reasonable person would do under the circumstances;[191] or a gross deviation from a standard of reasonable care.[192] The recklessness standard for the crime of involuntary manslaughter has an objective component as well as a subjective one: a defendant can be convicted of the crime even if he was so stupid or so heedless that in fact he did not realise the grave danger that an ordinary normal person under the same circumstances would have realised.[193] The jurisprudence is particularly illuminating on the test required for the crime of manslaughter when there is a doubt as to whether the conduct is intentional or reckless.

[185] Ibid., at 108.

[186] LaFave (2003b), p. 269.

[187] Perkins and Boyce (1982), pp. 849–851.

[188] *Alaska—Pears v. State*, 698 P.2d 1198 (Alaska 1985); *Ariz.—State v. Fisher*, 141 Ariz. 227, 686 P.2d 750 (1984); *Ga.—Ward v. State*, 252 Ga. 85, 311 S.E.2d 449 (1984).

[189] *Ky.—Cook v. Com.*, 129 S.W.3d 351 (Ky. 2004); *Mo.—State v. Skinner*, 734 S.W.2d 877 (Mo. Ct. App. E.D. 1987); *N.Y.—People v. Montanez*, 41 N.Y.2d 53, 390 N.Y.S.2d 861, 359 N.E.2d 371 (1976).

[190] *Ill.—People v. Castillo*, 188 Ill. 2d 536, 243 Ill. Dec. 242, 723 N.E.2d 274 (1999).

[191] *Ariz.—State v. Walton*, 133 Ariz. 282, 650 P.2d 1264 (Ct. App. Div. 1 1982); *Ill.—People v. Santiago*, 108 Ill. App. 3d 787, 64 Ill. Dec. 319, 439 N.E.2d 984 (1st Dist. 1982); *Mo.—State v. Thomas*, 161 S.W.3d 377 (Mo. 2005). Gross deviation from law-abiding conduct in *N.H.—State v. Howland*, 119 N.H. 413, 402 A.2d 188 (1979).

[192] *D.C.—Garcia v. U.S.*, 848 A.2d 600 (D.C. 2004); *N.J.—State v. Jamerson*, 153 N.J. 318, 708 A.2d 1183 (1998); *Pa.—Com. v. Youngkin*, 285 Pa. Super. 417, 427 A.2d 1356 (1981).

[193] *Mass.—Com. v. Levesque*, 436 Mass. 443, 766 N.E.2d 50 (2002).

In *State v Smith*, the appellant challenged his conviction of second-degree murder and three counts of assault in the first degree.[194] One of his arguments on appeal was an alleged error of the trial court in failing to submit to the jury an instruction on involuntary manslaughter.[195] The defendant under the influence of alcohol indiscriminately fired at some vehicles on the highway that resulted in the death of one person. He claimed that he did not intend to kill someone and was firing at the oncoming traffic because he "hated the car" and "hated the world".[196] The evidence was conclusive as to the fact that the defendant did not just shoot at the vehicle but shot at the part of the vehicle where the people in it could be hit. Therefore, his conduct was evaluated as contributing to "intent" to perform conduct, which could kill an occupant of the vehicle, and thus went beyond recklessness.[197]

In another case, the defendant appealed the conviction of murder carried out by shooting his wife with a firearm.[198] The defendant submitted that he "blacked out" during the fight with his wife and did not recollect shooting at her.[199] The Court held that the evidence of the struggle with the victim was relevant to the defensive issues of accident and self-defence, but it did not support the finding of recklessness in light of the appellant's self-described mental state. The evidence as to the appellant's inability to remember causing the death of the victim did not ultimately entitle him to the charge of manslaughter, which meant that the trial court's verdict was upheld.[200]

The cumulative definition of recklessness in the Model Penal Code is formulated in the following fashion:

> A person acts recklessly with respect to a material element of an offense when he *consciously disregards a substantial and unjustifiable risk* that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[201]

It is clear from the definition above that recklessness involves at least two foci: (i) conscious knowledge; and (ii) disregard of the risk that is unjustifiable and substantial. To some extent, recklessness resembles "acting knowingly" because it involves a state of awareness, although such awareness is of the risk, which is not substantially certain. As it is clear from a brief overview of the jurisprudence above,

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[194] *State v. Smith*, 747 S.W.2d 678 (Mo.App. S.D. Mar 04, 1988) (NO. 14994).

[195] Ibid., at 680.

[196] Ibid.

[197] Ibid., referring to the statutory law on involuntary manslaughter § 565.024.1(1), RSMo Supp.1984.

[198] *Schroeder v. State*, 123 S.W.3d 398 (Tex.Crim.App., Dec 03, 2003) (NO. 561-03).

[199] Ibid., at 398–400.

[200] Ibid., at 401.

[201] Model Penal Code, § 2.02.

the issue of whether the risk meets the criteria of being "substantial and unjustifiable" is decided on a case-by-case basis upon the consideration and evaluation of the actor's conduct. Pursuant to § 210.1 of the Model Penal Code, reckless cause of a death of another human being satisfies the *mens rea* standard of criminal homicide.[202]

2.2.2.3 Negligence

Negligence is the lowest *mens rea* threshold in criminal law. There have been discussions at great length whether negligence constitutes the *mens rea* standard with the division of scholars and practitioners into those who view negligence as a state of mind, and others who disregard such propositions. The distinct feature of negligence—the very absence of a state of awareness required for the other *mens rea* standards—has sparked a raft of divergent opinions on the nature of negligence in criminal law. The concept of negligence has been clouded by semantic complications due to the use of the same term in the law of torts and criminal law. In order to tackle such a misreading in different fields of law, "culpable negligence" is employed as a term that demonstrates the failure to measure up to the standard of care required for exculpation in criminal cases.[203] The Model Penal Code shapes negligence in the following terms:

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Negligence precludes the very existence of awareness of a substantial and unjustifiable risk. A person inadvertently creates the risk of which he should have been aware. The failure to evaluate the risk stems from a gross deviation from the standard of care that would have been exercised by a reasonable person. This objective reasonable person test determines whether the defendant's conduct elevates to criminal negligence. The concept of negligence is recognised as an appropriate basis for punishing inadvertent homicide criminalised in the Model Penal Code. The developed jurisprudence is particularly illustrative on the interpretation of negligence in homicide cases.

State of Maine v Keith C. Gorman deals with the imposition of criminal liability for criminally negligent manslaughter.[204] Two brothers struck a small fishing boat with their own boat in the middle of the lake. As a result of that collision, a

[202] Pursuant to § 210.2 of the MPC, criminal homicide is murder, manslaughter or negligent homicide.

[203] Perkins and Boyce (1982), pp. 840–849 (original footnote omitted).

[204] *State v. Gorman*, 648 A.2d 967 (Me. Oct 21, 1994) (NO. 7018, WAS-93-832).

fisherman died and another person was severely injured.[205] The main question on appeal was whether the defendant's conduct, viewed objectively, constituted a gross deviation from the standard that a reasonable and prudent person would have observed.[206] The appellant's contention of "driving blind" was recognised meritless. Despite seeing other boats on the lake, the appellant drove across the lake at high speed, thus putting himself in the situation when he was unable to see ahead of his boat. This is strongly indicative of negligence, which was respectively upheld on appeal.[207]

In criminal negligence cases, the emphasis is on the conduct rather than the actor's state of mind.[208] The jurisprudence distinguishes between criminal and ordinary negligence "not by any different mental state on the part of the actor, but by the existence of a high probability of death or great bodily harm as measured by the objective reasonable person test".[209] The statutory law[210] as well as the jurisprudence[211] have endorsed a purely objective test of criminal negligence, which means that the crime is complete without criminal intent.[212] In light of the foregoing, it is clear that neither mistake of law nor mistake of fact apply to negligent crimes.

In *State of New York v Garris*,[213] the Court of Appeals formulated a set of guiding principles for negligent homicide cases which summarise well our discussion on the standard of negligence in criminal law: (i) criminal liability cannot be predicated upon every careless act merely because its carelessness results in another's death; (ii) criminal negligence involves the failure to perceive the risk

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[205] Ibid., at 967. The weight of the testimony, including the appellant's own admission, was that the bow of his boat was up in the air blocking his vision.

[206] Ibid. 17-A M.R.S.A. § 35(4) (1983); *State v. Tempesta,* 617 A.2d at 567.

[207] Ibid., at 968. The appellant's conduct was compared to the hunter's in *State v. Perfetto*, 424 A.2d 1095, 1098 (Me.1981) in which it was established that a hunter who fires a shot without knowing at what he was shooting acts reckless-consciously by disregarding the risk of taking human life.

[208] *Lindvig supra*, at 199.The reference was made to the case *Hart v. State*, 75 Wis.2d 371, 383 n. 4, 249 N.W.2d 810, 815 (1977).

[209] Ibid.

[210] Section 940.08, STATS., 1981–82, provides: "(1) Whoever causes the death of another human being by a high degree of negligence in the operation or handling of a vehicle, firearm, airgun, knife or bow and arrow is guilty of a Class E felony; (2) A high degree of negligence is conduct which demonstrates ordinary negligence to a high degree, consisting of an act which the person should realise creates a situation of unreasonable risk and high probability of death or great bodily harm to another".

[211] *Lindvig supra,* at 199 referring to *State v. Cooper*, 117 Wis.2d 30, 344 N.W.2d 194 (Ct. App.1983).

[212] Ibid. (original footnote omitted)

[213] *People v. Garris*, 159 A.D.2d 744, 551 N.Y.S.2d 971 (N.Y.A.D. 3 Dept., Mar 01, 1990) (NO. 57607). The appellant's only claim was that the evidence was legally insufficient to establish the element of criminal negligence. However, the judges found the appellant's contention unpersuasive and affirmed the prior conviction of a criminally negligent homicide.

in a situation where the offender has a legal duty of awareness; (iii) liability for criminal negligence should not be imposed unless the inadvertent risk created by the conduct would be apparent to anyone who shares the community's general sense of right and wrong; (iv) the finder of fact must evaluate the actor's failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned.[214]

2.3 Interim Conclusions

The criminal law theory of common law jurisdictions deconstructs the crime into *actus reus* and *mens rea*. It is commonly agreed that only voluntary conduct, which could be either an act or an omission, attracts criminal responsibility. Chapter 7 of this book conducts a comparative analysis of defences (exculpatory grounds) in criminal law that are triggered, among others, by the involuntariness of conduct (e.g. insanity, automatism).

The discussion above reveals the complexity of the law on *mens rea* in selected common law jurisdictions. The jurisprudence of English courts has not been congruent as to the interpretation of the concept of *mens rea*. In fact, it has been plagued by disagreement among judges as to the applicability of the correct *mens rea* standards to particular crimes. The most common gradation of *mens* standards in modern English criminal law includes, *inter alia*, intention, recklessness and negligence.

English courts have furnished the jurisprudence with various inconsistent and often contradictory definitions of intention. The proper definition of intention is at the heart of both academic and judicial disputes. The summary of the jurisprudence of English courts demonstrates that intention exists when a person aims to cause the prohibited harm. However, the attribution of intention in practice may prove to be far more challenging. The interpretation difficulties arise when a person did not have a primary aim to cause the prohibited harm but had nevertheless done so. In these "rare" cases, intention ought to be found from the foresight of consequences as a virtual certainty.

Generally, the study of intention in English criminal law rests on the analysis of murder cases. Does it imply that the standard of intention laid down in murder cases is equally applicable to all crimes? It was rendered in *Moloney* and *Hancock* that the test of intention is of general application to all crimes. In *Woollin*, it was emphasised that intention does not necessarily have the same meaning in every context in criminal law. Does it mean that the direction in *Woollin* is applicable to the crime of murder, whereas other crimes are governed by the standard laid down

[214] Ibid., at 745 citing in support, among others, *People v. Ricardo B.*, 73 N.Y.2d 228, 235-236, 538 N.Y.S.2d 796, 535 N.E.2d 1336; *People v. Haney*, 30 N.Y.2d 328, 335, 333 N.Y.S.2d 403, 284 N.E.2d 564.

in *Nedrick*? The existence of varying approaches towards intent in the context of different crimes would amount to even a more perplexing confusion of terms.

The following points summarise the aforementioned discussion on the concept of intention in English criminal law: (i) the foresight of consequence(s) is no more than evidence of the existence of intent, and its weight shall be assessed with the consideration of all evidence in the case; (ii) the probability of the result could be crucial in determining whether it was intended, however, it will only be necessary to direct the jury by reference to the foresight of consequences if the judge is convinced that some further explanation is necessary to avoid misunderstanding; and (iii) it is to the jury's good sense to decide whether the accused acted with the necessary intent. The jury is not entitled to find the necessary intention, unless they feel sure that the prohibited harm was a virtual certainty (barring some unforeseen intervention) as a result of the person's actions, and that the person appreciated that such was the case.

English law on recklessness has oscillated between different tests of responsibility. It leaned towards the subjective test of recklessness in *R. v Cunningham* but shifted to the objective test of recklessness in *R. v Lawrence*. The subsequent case law exposed some "lacunae" of the objective test of recklessness in *Lawrence/Caldwell*, in particular when the special characteristics of a person could not be equated to the actions of an ordinary prudent bystander. Ultimately, the subjective test of recklessness prevailed in the celebrated *R. v G* case. The cognitive element of an awareness of a risk and the volitional element of an unreasonable undertaking of such a risk shape the subjective test of recklessness today. The ultimate support in favour of the subjective test of recklessness resolves the debate as to the differentiation between recklessness and negligence.

Notwithstanding the criminalisation of negligence and its recognition as the fault standard, there are voiced concerns as to the oddness about punishing negligence in criminal law. *Hall* advocates for the limitation of *mens rea* to intentionality and recklessness that support the ethics of personal guilt.[215] Likewise, *Williams* observes that negligence is not necessarily a state of mind and cannot be properly called *mens rea*.[216] The doctrine of *mens rea* in English criminal law is intimately linked to blameworthiness of a person for the proscribed conduct. As it is brilliantly summarised by *Hall, mens rea* is a fusion of the elementary functions of intelligence and volition.[217] Hence, the propositions of treating negligence as the fault standard rather than the *mens rea* cluster are fully consonant with the evolution of the legal concept of *mens rea* in modern criminal law.

American law on *mens rea* bears little resemblance to its counterpart in English criminal law. It is marred by the baggage of abundant and sometimes mismatching terms that reflect upon the nuances of the person's state of mind while committing a crime. The adoption of the Model Penal Code rendered some uniformity in the

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[215] Hall (1960), p. 163.

[216] Williams (1999), pp. 90–91.

[217] Hall (1960), p. 70.

employment of major substantive law terms. The major contribution of the Code is the introduction of a limited catalogue of culpability terms which are defined in relation to each material element of a crime. The MPC drafters endorsed "element analysis" instead of "offence analysis" by outlining *mens rea* standards in relation to conduct, result and circumstance(s) of a criminal offence. This means that a separate body of law on defences is an integral part of the definition of a criminal offence.

The major gradation of crimes in modern American criminal law involves crimes committed "purposely", "knowingly", "recklessly" and "negligently". The departure from the term "intent" or "intentionally" has sparked debate of whether there is a fine line between crimes committed "purposely" and "knowingly". The dividing line between these two *mens rea* standards is difficult to draw, since both of them encompass a cognitive element within their definitions. The distinction primarily lies within the intensity of the positive desire to cause prohibited consequences. The *mens rea* standard of "purposely" in American law loosely corresponds to the notion of direct intent in continental law jurisdictions (*Absicht* in German criminal law, *dol spécial* in French criminal law), whereas the category of "knowingly" is similar to *dolus directus* of the second degree in German criminal law and *le dol général* in French criminal law. Although it is normally required to prove "actual knowledge" on the part of an offender, it may suffice to prove knowledge of a high probability of a certain fact. A similar construction termed as "wilful blindness", which denotes a deliberate avoidance of learning the truth about criminal conduct, is equally used in English criminal law.

The MPC classification of crimes into committed "knowingly" and "purposely" was meant to substitute a more conventional distinction between general and specific intent crimes. The MPC is credited with the elimination of confusing culpability terms which were replaced with four hierarchical culpability levels. However, the application of the law on *mens rea* varies from one state to another, which makes the existence of overlapping *mens rea* standards inevitable in the criminal law theory. As it is clear from above, the most complex issues on the interpretation of *mens rea* in American criminal law lie within the "intent" area.

The concept of recklessness leans towards the subjective standard, as a reckless person *consciously* disregards a substantial and unjustifiable risk that the material elements exist or will result from his conduct. This cognitive element of recklessness distinguishes it from negligence that does not encompass an element of awareness. In addition, recklessness includes an objective standard as to the evaluation of a risk that is commonly referred as a standard of a reasonable observer. Recklessness is an intermediate *mens rea* standard positioned between intention and negligence in common law jurisdictions. Despite an uncanny resemblance to *dolus eventualis* in continental law jurisdictions, recklessness as a distinct *mens rea* category in common law has no counterparts in continental law. The absence of an intermediate category of recklessness is compensated by the criminalisation of conscious negligence in continental law jurisdictions.

The same concern as to whether negligence elevates to the *mens rea*, given the very absence of the cognitive element on the part of an offender, has troubled academic minds in American criminal law. Similar to English criminal law, the discussion is of mainly academic interest, rather than relevant to practice.

Chapter 3
The Concept of Crime in Continental Law Jurisdictions

3.1 The Concept of Crime (*Strafrechtliche Systembildung*) in German Criminal Law

All crimes in German criminal law fall within two major categories, *Verbrechen* (equivalent to the old UK category of felonies) and *Vergehen* (akin to misdemeanours).[218] Article 12 (1) of the German Criminal Code defines *Vebrechen* as "unlawful acts punished by a minimum sentence of one year of imprisonment".[219] *Vergehen* are described as "unlawful acts punishable by a lesser term of imprisonment or a fine.[220] The criminal offence in German criminal law, irrespective of whether it constitutes *Verbrechen* or *Vergehen*, has the three-layered (tripartite) structure:

(i) *Tatbestandsmäßigkeit*—a cumulative term for the objective and subjective elements of a crime;
(ii) *Rechtwidrigkeit*—unlawfulness unless there is a presence of a justificatory defence;
(iii) *Schuld*—culpability unless there is a presence of a valid excuse.[221]

The criminal offence involves prohibited human behaviour that meets the description of the statutory elements of a crime (*tatbestandsmäßig*), is unlawful (*rechtswidrig*) and culpable (*schuldhaft*). The subjective element of a particular crime (*Tatvorsatz*) is distinct from culpability (*Schuld*) pertinent to the tripartite structure of a crime.

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[218] Bohlander (2008), pp. 7–8.

[219] Article 12 (1) of the German Criminal Code reads: "Verbrechen sind rechtswidrige Taten, die im Mindestmaß mit Freiheitsstrafe von einem Jahr oder darüber bedroht sind".

[220] Article 12 (2) of the German Criminal Code sets forth: "Vergehen sind rechtswidrige Taten, die im Mindestmaß mit einer geringeren Freiheitsstrafe oder die mit Geldstrafe bedroht sind".

[221] Baumann et al. (2003), pp. 199–200; Bohlander (2008), pp. 6–7.

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The departure point for the criminality test is the determination whether human behaviour meets the statutory description of a criminal offence (*Tatbestande*). Only when such constitutive elements are established (*Tatbestandsmäßigkeit*), shall one inquire into whether the conduct is unlawful (*rechtswidrig*) and whether any grounds excluding criminal responsibility (justifications) are relevant. The very last element of the inquiry is whether a person is culpable, which implies that his acts or omissions are blameworthy. The determination of the statutory elements of a crime, unlawfulness and culpability form a set of sufficient criteria to qualify a criminal offence. In exceptional cases, the attribution of criminal liability may be dependent upon other requirements (*Strafbarkeitsvoraussetzungen*) in addition to the aforementioned basic elements.[222] Notwithstanding the extensive acknowledgement of the tripartite structure of a crime in academic literature, scholars have developed a number of alternative theories in relation to the structure of a criminal offence, among others, neo-classical or so-called theory of causation, "finalist" theory (*Finaler Straftataufbau*), social action doctrine (*Straftataufbau der Vertreter der "sozialen Handlungslehren"*), and dualistic doctrine (*Dualistischer Straftataufbau*).[223]

3.1.1 Statutory Elements of Criminal Offence (Tatbestandsmäßigkeit)

Human behaviour in the form of an act or omission constitutes a crime only if it satisfies the statutory description of the crime in the Criminal Code. It is reflected in the well-renowned principle of *nullum crimen sine lege*. According to § 1 of the Criminal Code, an act may only be punished if criminal responsibility had been established by law before the act was committed. The principle of non-retroactivity prohibits the application of criminal laws to the conduct, which was not criminalised at the time of its commission. If an act does not satisfy the statutory elements of a crime under the Criminal Code, there is no need to elaborate on the remaining elements of the tripartite structure of the crime, in particular unlawfulness and culpability. The description of the statutory elements of different crimes may be found in the Special Part of the Criminal Code. Other unlawful acts, which are not penalised in the Criminal Code, do not constitute crimes and may attract other forms of civil liability.

[222] Roxin (2006a), pp. 1036–1038.

[223] Baumann et al. (2003), pp. 191–193.

3.1.2 Unlawfulness (*Rechtwidrigkeit*)

An act or omission corresponding to the statutory description of a crime must be unlawful. The fulfilment of the statutory elements of a crime is often an indicator that such an act or omission is unlawful. If a person commits a murder, he acts unlawfully. However, a closer inspection of unlawfulness reveals that there are situations in which even the killing of a person may be justified e.g. the exercise of the right to self-defence. Pursuant to § 32, a person who commits an act in self-defence (*Notwehr*) does not act unlawfully. The Criminal Code lists other grounds excluding criminal liability such as necessity or duress.[224] The doctrine of unlawfulness incorporates the analysis of justificatory defences that either exclude or mitigate criminal responsibility. The interpretation of unlawfulness may also be found in a number of provisions of the Special Part of the Criminal Code (StGB § 240 (2),[225] § 253 (2)[226] etc.).

3.1.3 Culpability (*Schuld*)

The conduct must be blameworthy in order to attract criminal liability. Earlier criminal law was concerned with the objective elements of a crime and did not assess the person's conduct in terms of blameworthiness. In stark contrast, one of the major pillars of contemporary criminal law is culpability (*Schuldstrafrecht*). It means that an offender is criminally liable only if his act or omission is blameworthy (*vorgeworfen werden kann*).[227] The German jurisprudence underlines the importance of the principle of guilt as a constitutional limitation with respect to the imposition of punishment.[228]

Blameworthiness may exist in a weaker form when the wicked (evil) intent is lacking, however, carelessness on the side of an offender is demonstrated instead. The intensity of blameworthiness is reflected in the existence of two major forms of culpability, i.e. intent (*Vorsatz*) and negligence (*Fahrlässigkeit*).

Intent as a form of culpability exists when an offender knows exactly what he does and desires that particular outcome.[229] As an illustration, the offender shoots a victim with the intent to cause his death. This triggers the application of § 212 in the Criminal Code that assigns criminal liability for the crime of murder. Negligence as a form of culpability exists when a person does not know that his act/omission will result in the fulfilment of the statutory elements of a crime, or he knows that the

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[224] StGB § 34 (Rechtfertigender Notstand); StGB § 35 (Entschuldigener Notstand).

[225] StGB § 240 (2) (Nötigung).

[226] StGB § 253 (2) (Erpressung).

[227] Baumann et al. (2003), pp. 194 (original footnote omitted).

[228] Pisani in Schabas and Lattanzi (2004), p 123 (original footnote omitted).

[229] Tröndle and Fischer (2006), p. 195.

fulfilment of the statutory elements of a crime is possible but wrongfully believes that they would not materialise.[230] As a general rule, a person who acts contrary to the law is blameworthy. In exceptional circumstances, blameworthiness may be lacking regardless of the fact that the person appears to have acted culpably. As an illustration, some persons are not capable of appreciating the unlawfulness of their actions and thus their actions cannot be deemed guilty. Pursuant to § 20 of the Criminal Code, mental incapacity may be caused by a pathological mental disorder, a profound consciousness disorder, debility or any other mental abnormality. A mentally challenged person may have killed another human being but would be excused from criminal liability in the absence of the requisite mental capacity to understand and appreciate the unlawfulness of his conduct. The recognition of a person's mental incapability or diminished mental capability triggers the applicability of other relevant legal provisions. For example, the court may impose a psychiatric hospital order (StGB § 63) to evaluate the condition of a person who committed an unlawful act in the state of insanity (StGB §20) or diminished mental capacity (StGB §21). The court may also impose a custodial addiction treatment order on the person who is addicted to alcohol or drugs (StGB § 64).

3.1.3.1 Intent (*Vorsatz*)

The German Criminal Code stipulates the default rule that only *intentional* conduct attracts criminal responsibility unless the law expressly provides for criminal liability based on negligence (StGB § 15). As an illustrative example, the Code explicitly provides for the crime of negligent manslaughter. Pursuant to § 222, whosoever causes the death of a person through negligence shall be held criminally liable. Likewise, § 229 provides for the crime of causing criminal harm by negligence. If the negligence standard is not explicitly enunciated in the Special Part of the Criminal Code, then the default rule of intent applies. The limitation of criminal responsibility to intentional acts is regarded as entirely justified in criminal law that primarily deals with conscious and deliberate violations of the legal order (*Rechtsordnung*). Under some circumstances, the breach of fundamental values upheld in the Criminal Code warrants the criminalisation of negligent offences.

Intent is an integral combination of knowledge (*Wissen*) and desire (*Wollen*). The offence is intentional if an offender knows that acts or omissions will bring about the objective elements of the crime and desires for such an outcome. Negligent offences do not require that the offender is aware that his acts or omissions will bring about the objective elements of the crime (unconscious negligence). Conscious negligence entails that the offender does not desire for the

[230] Lackner and Kühl (2004), p. 104; Tröndle and Fischer (2006), p. 106.

objective elements of a crime to materialise, although he anticipates such an outcome. The intensity of the cognitive element (knowledge/*Wissen*) and volitional element (desire/*Wollen*) may vary which affects the gradation of intent.[231]

An offender must know that his acts or omissions will bring about the objective elements of the crime.[232] If a person believes that he gave sugar to somebody but it turned out to be poison, the person did not act intentionally and may be prosecuted for negligent manslaughter.[233] The knowledge of the offender extends to all attendant circumstances of the crime. If this is not the case, the offence cannot be truly qualified as intentional. Pursuant to § 16 (Mistake of Fact), whosoever at the time of the commission of the offence is unaware of a fact, which is a statutory element of the offence, shall be deemed to lack intention. Furthermore, if the offender mistakenly assumes the existence of facts, which would satisfy the objective elements of the crime under a more lenient criminal provision, he may only be punished for the intentional commission of the crime under that lenient provision (StGB § 16 (2)).

As an illustrative example, the crime of theft (*Diebstahl*) occurs when a person deprives another of property with the intention of its unlawful appropriation for himself or a third person (StGB § 242). If the person is unaware that property belongs to another person, the offence cannot be regarded as intentional, notwithstanding the fact of the appropriation itself. The ignorance of the offender can involve either factual or legal circumstances of each individual case. The legislature included respective provisions on the mistake of fact and mistake of law in the Criminal Code. The mental element of a crime is negated in both cases. The requisite element of knowledge does not need to reflect precisely all cognitive processes in the mind of the offender. The constructive knowledge (*Mitbewußtsein*) may prove to be sufficient, which means that the person is presumed by law to have knowledge about specific facts or circumstances. Such interpretation of knowledge is in conflict with the legal provision on the mistake of law (*Verbotsirrtum*), which is listed as the ground negating the mental element of a crime (StGB § 17). According to that provision, a person does not act intentionally if he lacks awareness that he is acting unlawfully. The provision does not tally with the interpretation of constructive knowledge that presumes knowledge of certain facts or surrounding circumstances by law. The inclusion of the mistake of law in the Criminal Code renders the construal of constructive knowledge meaningless.[234] Furthermore, mere potential knowledge is not sufficient to prove intent. The fact that an offender should have known suffices for the crimes of negligence alone.

An offender shall desire the materialisation of the objective elements of a crime. The offender who knows that he may kill but does not desire it cannot be said to act

[231] For a more detailed description of the intensity of cognitive and volitional elements with respect to each form of intent or negligence, see: Roxin (2006a), pp. 436–438.

[232] For more on *Wissenelement*, see: Schönke and Schröder (2006), p. 266.

[233] Baumann et al. (2003), p. 471.

[234] Ibid., p. 472. For more on the mistake of law and mistake of fact in German criminal law, see: Badar (2005), pp. 235–244.

intentionally.[235] The lack of desire on the part of the perpetrator leads to the absence of intent as such. Nevertheless, anyone who sets a house on fire to claim insurance funds and knows that there is a person(s) inside the house is acting intentionally not only in relation to setting the house on fire but also to the death of the person(s) trapped inside the house. The desire on the part of the perpetrator is assessed on a case-by-case basis. The perpetrator who knows that he will bring about the objective elements of the crime (although he could refrain from doing so) cannot claim that he does not wish for the objective elements of the crime to ensue.

The conditional desire does not suffice to prove the intent requirement. If the ability of an offender to commit a crime is dependent upon certain conditions, it does not demonstrate the volitional element (*Wollen*) of the crime. However, the method of implementation of the crime may be sufficient to prove intent (*Tatvorsatz*). The same is applicable to conditions, which existence or occurrence is assumed by the offenders. If one shoots and consequently kills another person under the condition that the gun is loaded, he desires for such consequences to materialise.[236] There are three different forms of intent (*Vorsatz*) in German criminal law: *dolus directus* in the first degree (*die Absicht*), *dolus directus* in the second degree (*den direkten Vorsatz*) and *dolus eventualis* (*den bedingten Vorsatz*). Apart from intent, the mental element of a crime also encompasses negligence (*Fahrlassigkeit*), which may be either advertent or inadvertent.

Dolus directus in the first degree (*die Absicht*) requires that an offender knows that his acts or omissions will bring about the objective elements of the crime and carries out these acts or omissions with the purposeful will to bring them about. The volitional element prevails over the cognitive one, as the offender purposefully desires to attain the prohibited result (*Tatbestandeserfüllung*).[237] In addition, *dolus directus* in the first degree applies to situations when the offender knows that his acts or omissions will possibly (*möglich*) result in the criminal offence, although he is not absolutely confident. Uncertainty on the part of the offender as to the achievement of the prohibited result does not rule out the attribution of direct intent. It is essential that the prohibited outcome caused by the offender's act or omission reflects his determined will, irrespective of whether he considers the achievement of the prohibited result as certain or possible.[238] Direct intent (*die Absicht*) exists when a particular target is the main purpose (*Hauptbeweggrund*) of the offender's actions. As an illustration, the crime of theft requires the intent of unlawful appropriation on the part of an offender.

Dolus directus in the second degree (*den direkte Vorsatz*) does not require that an offender has the actual will to bring about the material elements of the crime, although he is aware that the constitutive elements (*Tatbestand*) of a crime will be

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[235] For more on *Willenelement*, see: Schönke and Schröder (2006), pp. 276–277.

[236] Baumann et al. (2003), p. 473.

[237] Roxin (2006a), pp. 438–440; Schönke and Schröder (2006), p. 277; Lackner and Kühl (2004), p. 98.

[238] Roxin (2006a), p. 439.

almost the inevitable outcome of his conduct. In this context, the intensity of the volitional element is overridden by the cognitive element, i.e. awareness that the conduct "will" cause the undesired consequence.[239] A good illustration of the attribution of *dolus directus* in the second degree is an example of a person who sets a house ablaze to claim insurance money and knows that it is almost inevitable for the person trapped in the house to die. The offender acts with *dolus directus* in the second degree in regards to the death of the person. When a perpetrator is aware that a bomb will cause death to ordinary bystanders, apart from the person he is intending to kill, the mental element towards the death of those bystanders is intent. Due to the decreasing intensity of the volitional element (*Wollen*), *dolus directus* in the second degree is placed lower on the gradation scale than *dolus directus* in the first degree.

In the cases of *dolus eventualis* (*den bedingte Vorsatz*), an offender neither desires nor anticipates the occurrence of the objective elements of the crime (*Tatbestandsverwirklichung*). However, he foresees a possibility of the occurrence of the material elements of the crime and reconciles himself with such an outcome.[240] The cognitive element (*Wissen*) and volitional element (*Wollen*) are vaguely defined, unlike *dolus directus* in the second degree that requires certainty on the part of a perpetrator as to the fulfilment of the objective elements of a crime (*Tatbestandesefüllung*); and *dolus directus* in the first degree that embraces the purposeful will on the part of the perpetrator to bring about the objective elements of the crime.[241] Although the concept of *dolus eventualis* is covered by § 15 of the Criminal Code,[242] some legal provisions of the Special Part of the Code explicitly call for a higher *mens rea* standard than *dolus eventualis* in relation to specific crimes.

Given an overall weakness of the cognitive and volitional elements pertinent to *dolus eventualis*, academic commentators have struggled to draw a demarcating line between *dolus eventualis* and negligence. The distinction is apparent in the case of inadvertent negligence (*unbewußten Fahrlässigkeit*) when a person neither foresaw nor desired the prohibited outcome. The distinction becomes blurry between *dolus eventualis* and advertent negligence (*bewußten Fahrlässigkeit*) when a person foresaw the possibility of the prohibited outcome but carelessly

[239] Lackner and Kühl (2004), p. 98; Roxin (2006a), pp. 444–445; Tröndle and Fischer (2006), p. 103.

[240] Fletcher (1998), p. 123. The author finds the notion of *dolus eventualis* in German criminal law corresponding to the *mens rea* standard "knowingly" within the legal framework of the US Model Penal Code.

[241] Taylor (2004) at 124–127. The author submits that *dolus eventualis* does not enable a truly subjective-fault-based assessment of the actor's conduct at all—except to the extent that the actor must have foreseen a result as possible, which the author believes is by itself far too low a threshold for the imposition of punishment based on intention. In fact, he treats *dolus eventualis* as a "curious amalgam of over-theorization and under-theorization".

[242] On the historical development of the concept of *dolus eventualis* in German criminal law and its influence upon the legal theory of Scandinavian countries, see: Ross (1974), pp. 54–61.

expected that it would not occur. The demarcating line between those *mens rea* clusters is slim, since the cognitive elements coincide, whereas the distinction upon the volitional element may prove to be challenging in each individual case. The significance of defining proper contours between various *mens rea* clusters cannot be underestimated. Firstly, the qualification of a crime as intentional or negligent affects the severity of penalties. Secondly, the default rule in German criminal law upholds the commission of crimes intentionally, which means the majority of crimes are not penalised if committed negligently.

A number of theories have emerged in criminal law to distinguish between *dolus eventualis* and advertent negligence, among others, consent or approval theory (*die Billigungs- oder Einwilligungtheorie*), indifference theory (*die Gleichgültigkeitstheorie*), possibility theory (*die Vorstellungs- oder Möglichkeitstheorie*), probability theory (*die Wahrscheinlichkeitstheorie*), combination theory (*Kombinationstheorien*) etc. The non-exhaustive list of theories is illustrative of the plethora of approaches in the criminal law theory.[243]

The possibility theory (*die Vorstellungs- oder Möglichkeitstheorie*) favours the cognitive element of knowledge as an utmost distinguishing characteristic of *dolus eventualis*. Accordingly, the mere foreseeability of prohibited consequences without the presence of any volitional element suffices to prove *dolus eventualis*. The theory rejects advertent negligence, while considering negligence to be always inadvertent.[244] The indifference theory (*die Gleichgültigkeitstheorie*) upholds that *dolus eventualis* exists when the offender is indifferent to possible harmful side effects of his conduct. In other words, he does not desire the occurrence of harmful consequences and hopes that they would not materialise. The doctrine has been commended for the construal of "indifference" as a factor that attests to the perpetrator's reconciliation with possible harmful consequences.[245]

3.1.3.2 Negligence (*Fahrlässigkeit*)

Negligent conduct (both acts and omissions) is criminalised only if expressly provided by law. In negligent offences, an offender breaches a duty which is imposed upon him to protect societal values and interests, and thereby causes the prohibited outcome despite the fact that the breach was avoidable given the offender's subjective abilities to reflect upon his conduct.

German criminal law distinguishes between two types of negligent conduct, namely advertent and inadvertent negligence. The cases of inadvertent negligence (*unbewusste Fahrlässigkeit*) are easy to identify in the absence of the cognitive element of knowledge. A person is not aware (*nicht erkennt*) that his conduct may

[243] For a concise description of major theories governing *dolus eventualis*, consult Badar (2005), pp. 228–232.

[244] Roxin (2006a), pp. 455–456.

[245] Ibid., pp. 452–454. See also: Lackner and Kühl (2004), p. 99.

entail the objective elements of a crime (*Tatbestandserwirklichung*).[246] Although advertent negligence (*bewusste Fahrlässigkeit*) encompasses the cognitive element of the foreseeability, an offender believes that prohibited consequences would not materialise.[247] Advertent negligence (*bewusste Fahrlässigkeit*) may be difficult to differentiate from *dolus eventualis* because in both cases a perpetrator foresees the possibility of the occurrence of prohibited consequences. The borderline between those two *mens rea* standards is drawn according to the attitude of an offender. When the offender is consciously negligent, he does not wish to cause the prohibited outcome. Conversely, an offender who acts with *dolus eventualis* is indifferent towards the occurrence of the prohibited outcome.[248]

3.2 The Concept of Crime in French Criminal Law

French criminal law provides for the tripartite classification of criminal offences.[249] The generic term "crime" as understood in most legal jurisdictions bears different connotation for French lawyers because it signifies only the *gravest* category of criminal offences or felonies (*crimes*) adjudicated by *Cour d'Assises*. The remaining categories of criminal offences, namely misdemeanours (*délits*) and contraventions (*contraventions*), are respectively dealt with in the *Tribunal Correctionnel* and *Tribunal de Police*. Misdemeanours (*délits*) denote serious offences (i.e. infliction of bodily harm, theft etc.), albeit less grave than felonies (*crimes*), whereas contraventions are associated with petty offences (i.e. road traffic offences).

The accompanying *mens rea* standard for the aforementioned categories of criminal offences ranges from "intent", which is required for all felonies (*crimes*) and most misdemeanours (*délits*), to negligence standard that may suffice for misdemeanours (*délits*) if explicitly stipulated by law. Pursuant to the French Criminal Code, the default *mens rea* standard is intent for felonies (*crimes*) and misdemeanours (*délits*).[250] However, a lower *mens rea* standard may be applied to misdemeanours (*délits*) if stipulated by the Criminal Code, i.e. the failure to act arising out of an obligation of due care imposed by law on specific categories of persons. Minor offences normally require only the voluntariness of conduct.

The conventional definition of a criminal offence in French criminal law, which is reminiscent of the legal construction employed by the majority of common law jurisdictions, encompasses the material (*l'élément matériel*) and mental (*l'élément moral*) elements. Some legal scholars distinguish an additional third element,

[246] Lackner and Kühl (2004), p. 104; Tröndle and Fischer (2006), p. 107.

[247] Ibid.

[248] Baumann et al. (2003), p. 525.

[249] French Criminal Code, Article 111-1.

[250] Ibid., Article 121-3.

namely *l'élément legal,* which evaluates the conduct from the standpoint of legality and inquires whether any justifications may be applicable.[251]

3.2.1 Intention (Le Dol)

In French criminal law, the mental element ranges from intention (*le dol*) to negligence. The term "*dol*" means the deliberate intention to commit a wrongdoing and comprises of knowledge (*la conscience*) of the certain conduct being prohibited, and deliberate willingness (*la volonté*) to carry out such conduct.[252] There are two major theories on the construal of criminal intention (*l'intention criminelle*) in French criminal law: the classic doctrine (*la doctrine classique*) and the positivist doctrine (*la conception réaliste*). The classic definition of intention was coined by the prominent French lawyer, *Émile Garçon*, who delineated it in terms of the "will to commit an offence expressly prohibited by law" coupled by "the person's awareness that he is engaged in breaching the law" ("*L'intention*, *dans son sens juridique*, *est la volonté de commettre le délit tel qu'il est déterminé par la loi; c'est la conscience*, *chez le coupable*, *d'enfreindre les prohibitions lé gales*").[253] The so-called positivist doctrine (*la conception réaliste*) was introduced by *Enrico Ferri* who does not treat intention as an abstract form but defines it as the determined will coupled by the motive (*une volonté déterminée par un motif ou un mobile*).[254] Despite the divergence of opinions as to the interpretation of intention, French criminal law opts for the classic doctrine of the interpretation of intention.

The conventional classification of intention in the criminal law theory includes *le dol général* (general intent) and *dol spécial* (special intent). Given that the French Criminal Code remains silent on the interpretation of those forms of intention, both terms have been construed at considerable length in academic literature.[255] The major distinction between those forms of intention lies within the interrelation of the intensity of the cognitive (*la conscience*) and volitional (*la volonté*) elements. The cognitive element of *dol général* encompasses the person's knowledge that he violates the law.[256] The classic presumption in French criminal law, which is embedded in the Latin phrase *nemo censetur ignorare legem*, is that a person cannot invoke the ignorance of law as a defence. This does not mean that a person has to be aware of specific criminal provision that he violates, but he shall possess the will to commit an offence prohibited by law.[257]

[251] Elliot (2001), p. 59.

[252] Soyer (2004), p. 98.

[253] Merle and Vitu (1973), p. 566 (original footnote omitted).

[254] Stefani et al. (2003), pp. 230–231.

[255] Ibid., p. 235; Elliot (2001), pp. 66–71.

[256] Renout (2008), p. 140.

[257] Stefani et al. (2003), p. 229.

The volitional element (*la volonté*) of *dol général* refers to the person's willingness to engage in the wrongful conduct but not the desire to achieve the prohibited result.[258] Once the will to engage in the criminal conduct is established, it is irrelevant to deduce motives that were driving the person's conduct. French criminal law reiterates the irrelevance of motive for the qualification of criminal conduct.[259]

A person cannot be said to have entertained general intent if he acted due to the mistake of law that he could not possibly avoid (Article 122–3). Likewise, the mistake of fact may also serve as an exculpatory ground. A classic example is the possession of stolen goods by a person who acted in good faith during their purchase. Furthermore, the cognitive element of knowledge is non-existent when a person suffers from the psychological or neuropsychological disorder that destroys his ability to understand the criminal character of his actions (Article 122–1).

Dol spécial or specific intent encompasses the determined *will* on the part of a perpetrator to achieve the result prohibited by law.[260] As an illustration, a person entertains the will to cause death of another person in the crime of murder (Article 221–1). The crime of theft requires the determined will to appropriate an object that belongs to another person (Art. 311–1). It is not sufficient to prove the person's willingness to commit an unlawful act (*dol général*), rather it is necessary to prove that the person intended to achieve a particular result (*dol spécial*) which is a constitutive element of the offence. The crime of unlawful possession of information concerning national defence (Article 413–11 of the Criminal Code) is a general intent crime, whereas possessing such information with intent of handing it over to a foreign power (Article 413–7 of the Criminal Code) constitutes a specific intent crime. The offence of providing intelligence information to a foreign power as set out in Article 411–10 of the Code is another example of a crime, which requires to be accompanied by *dol spécial*. It expressly provides that the person's conduct must be carried out "in order to incite hostilities or acts of aggression against France".[261] As it is clear from above, all offences that require a certain outcome of criminal conduct need to be accompanied by *dol special*.

In procedural terms, intention is classified into *dol simple* and *dol aggravé,* which affects the qualification of a crime and severity of the imposed punishment.[262] If a person entertains aggravated intent, he deserves a more severe punishment. The major distinguishing feature that singles out a criminal offence with aggravated intent is the existence of premeditation. Premeditation is broadly defined as a desire formed prior to the commission of a criminal offence ("*le dessein*

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[258] Elliot (2001), p. 67.

[259] Stefani et al. (2003), p. 230. However, the Criminal Code lists a number of criminal offences that require "motive" as a constitutive element of an offence (i.e. Article 227-12, Article 314-7, Article 434-25 etc.).

[260] Ibid., p. 235. Elliot (2000) at 38.

[261] French Criminal Code, Article 411-10.

[262] Elliot (2000), pp. 41–42.

formé avant l'action de commettre un crime ou un délit").[263] As an illustration, the crime of assassination is a premeditated murder (Article 221–3). The penalty includes life imprisonment, whereas the crime of murder prescribed in Article 221–1 attracts the maximum sentence of imprisonment up to 30 years. The jurisprudence of the Appeals Court (*la Cour d'Assisez*) pronounced that aggravated intent equally extends to accomplices in the crime of assassination.[264]

Another classification of intention into *dol déterminé* and *dol indéterminé* reflects the level of the intensity of the volitional element. *Dol déterminé* requires the positive will on the side of a perpetrator for prohibited consequences to materialise, although a person does not need to be aware of the identity of a victim. When a person entertains *dol indéterminé*, he does not realise the gravity of his conduct.[265] However, a person is always charged upon the actual result achieved rather than his will.

3.2.2 Dol Éventuel: An Intermediate Mens Rea Standard Between Intention and Negligence

Dol éventuel exists when a person does not desire the materialisation of prohibited consequences but foresees such consequences as possible and treats them with indifference.[266] Similar to German and Danish criminal law, the bone of contention is to draw a clear dividing line between *dolus eventualis* and negligence. The volitional element of the acceptance of the risk as to the occurrence of the prohibited result (*et acceptation au moins eventuelle du resultat*) is a distinguishing feature of *dolus eventualis*.[267] An interesting aspect of *dolus eventualis* in French criminal law is that it is treated as a "buffer" *mens rea* standard between intention and negligence.[268] The approach is very different from a more conventional definition of *dolus* in German and Danish criminal law that construes it as the lowest *mens rea* threshold for intentional crimes. Like the concept of recklessness in common law jurisdictions, the notion of *dolus eventualis* in French criminal law is an intermediate *mens rea* standard that separates intentional offences from negligent ones. This *mens rea* requirement applies to situations of endangering individuals by failing to conform to the required standards of safety. As an illustration, *dolus eventualis* covers "causing death in a deliberate breach of safety regulations" (Article 221–6) or "causing the professional trauma that impedes a person from working in a deliberate breach of safety regulations" (Article 222–19).

[263] Stefani et al. (2003), p. 236.

[264] Ibid. (original footnote omitted).

[265] Ibid.

[266] Soyer (2004), p. 102.

[267] Stefani et al. (2003), p. 238.

[268] Renout (2008), pp. 153–155.

The apparent distinguishing characteristic of *dolus eventualis* from negligent conduct in French criminal law is that a person *deliberately* breaches safety regulations and thereby takes a risk by endangering the life and health of others.

3.2.3 Negligence (La Faute Pénale)

As of 11 July 2000, the French Criminal Code was amended with respect to the negligence standard. Given that the default *mens rea* standard of intention is applicable to the most serious offences (*crimes*) and the majority of misdemeanours (*délits*), negligence is relevant for selected misdemeanours (*délits*) if expressly stipulated by law. Negligent offences differ with respect to whether the harm was caused by the *direct* involvement or *indirect* contribution of a person. Direct harm entails that a person fails to exercise due diligence imposed on him by the statute or regulations when it comes to his role, functions, capacity and/or means available to him.[269] Indirect harm means that a person did not exercise due diligence as required by the statute or regulations in the manifestly deliberate manner, or acted in the manner that exposed another person to the particular serious risk of which he should have been aware.[270]

3.3 The Concept of Crime in Russian Criminal Law

This sub-chapter examines the construction of a crime in Russian criminal law by inquiring into the general concept of a crime and its constitutive elements.[271] A crime embodies the objective and subjective elements pertinent to human behaviour. The unique feature, which distinguishes a crime from other forms of human behaviour, is the breach of fundamental interests and values that the criminal conduct entails. The interpretation of a criminal offence is always dynamic because the evaluation of the importance of fundamental values and interests to the society is rapidly adjusting and evolving. Given the centrepiece role of a crime in the criminal law theory, the concept has been pondered over in academic literature at considerable length. The interpretation of a crime depends upon the interrelation between its antisocial and legal characteristics.[272] The *formal interpretation*

[269] French Criminal Code, Article 121(3).

[270] Ibid.

[271] The construction of legal concepts in modern Russian criminal law was strongly influenced by the theory of Soviet criminal law. The major tasks of the Russian Criminal Code bear no resemblance to the Soviet Criminal Code that was replete with references to socialism, Leninism, communism etc. See: Chikvadze (1959), pp. 5–19.

[272] Kosachenko (2009), pp. 162–163; Raroga (2010), pp. 48–49; Gauhman and Maksimov (2010), pp. 81–82.

underlines the legal nature and defines legal constitutive elements of a crime: a crime is an act or omission criminalised by law. The *material interpretation* focuses on the antisocial nature of a crime: a crime is a socially harmful act or omission that breaches particular social values. The merged *formal-material definition* of a crime comprises both legal and antisocial characteristics of a crime: a crime is a socially harmful act penalised by law.[273] The Criminal Code of the Russian Federation[274] embraces the following formal-material definition of a crime:

> A socially dangerous act, committed with guilt and prohibited by this Code under threat of punishment, shall be deemed to be a crime.[275]

The academic literature has consistently acknowledged the four-layered structure of a criminal offence that consists of the social danger of a crime, culpability, unlawfulness and punishability.[276] The social danger of a crime is a material element that signifies the breach of social relations and values that the crime entails. The recognition of the social danger of certain conduct is closely intertwined with the objective developments of the society. The evaluation of the social danger of the particular act or omission is performed at the legislative and executive levels. The legislative body criminalises certain conduct, whereas the investigative bodies, prosecutors and judges assess the social danger of the conduct penalised by law. The importance of defining the social danger of a crime stems from the following characteristics: (i) it is an objective (material) criterion for the criminalisation of certain conduct; (ii) it enables the construction of the classification of crimes upon their gravity; (iii) it assists in drawing the borderline between a criminal offence and other types of non-criminal offences; and (iv) it is a foundation for the "individualisation" of criminal responsibility and punishment.[277]

Guilt is a fundamental principle of criminal responsibility that reveals the subjective attitude of a person to his socially harmful conduct (acts and omissions) and its consequences penalised by law.[278] A person is considered innocent until proven guilty. Criminal law does not impose criminal responsibility for the conduct penalised by law if the guilt has not been established.[279] Guilt defines the character and gravity of an act or omission, which qualifies as a crime.

[273] Ibid.

[274] The Criminal Code of the Russian Federation (hereinafter—CCRF), adopted by the State Duma on May 24, 1996, adopted by the Federation Council on June 5, 1996, Federal Law No. 64-FZ of June 13, 1996 on the Enforcement of the Criminal Code of the Russian Federation.

[275] CCRF, Article 14 (2). The same formal-material approach to a crime may be found in Article 7 of the old Soviet Criminal Code (1960).

[276] Raroga (2010), pp. 48–54.

[277] For more, consult: Gauhman and Maksimov (2010), pp. 82–83; Raroga (2010), pp. 49–51.

[278] According to Article 5 (1) of the CCRF: "A person shall be subject to criminal responsibility only for those socially harmful acts (omissions) and socially harmful consequences in respect to which his guilt has been established".

[279] Pursuant to Article 5 (2) of the CCRF: "Objective attribution of criminal responsibility for non-culpable conduct shall not be allowed".

Unlawfulness is a formal characteristic of a criminal offence intimately interrelated with the social danger of a crime. It is a legal assessment category of the social danger of the criminal conduct proscribed by law.[280] The concept of unlawfulness is a manifestation of the principle of legality, which implies that a person cannot be found criminally liable unless he committed a socially harmful act or omission criminalised by law.[281] The Criminal Code provides an exhaustive list of criminal offences. Hence, even if an act or omission poses the social danger, albeit not penalised by law, it cannot be regarded as a crime. There is an absolute ban of analogy in criminal law.[282]

Punishability is defined as a threat to impose criminal responsibility for an act or omission penalised by law. It stems from the social danger and unlawfulness of a criminal offence. It is important to bear in mind that an act or omission does not become less than a crime if punishment has not been attributed on certain grounds (e.g. granting of amnesty, applicability of the statute of limitations).[283] It is erroneous to equate punishability with the imposition of punishment, since the former conveys the mere ability to impose criminal liability, once the breach of the criminal sanction has occurred.[284]

The classification of crimes in the Criminal Code is based upon the nature and degree of social danger, and includes crimes of minor gravity,[285] crimes of average gravity,[286] grave crimes,[287] and especially grave crime.[288]

[280] Gauhman and Maksimov (2010), pp. 52–53.

[281] Article 3 (1) of the CCRF provides: "The criminality of conduct, its punishability and other legal consequences shall be determined by the present Code alone".

[282] Article 3 (2) of the CCRF reads: "The application of criminal law by analogy shall not be allowed".

[283] See: Chap. 7.

[284] Kosachenko (2009), pp. 170–171.

[285] Article 15 (2) of the CCRF provides: "Intentional and negligent conduct, which attracts the maximum penalty of no more than two years of deprivation of liberty pursuant this Code, shall be recognised as crimes of minor gravity".

[286] Article 15 (3) of the CCRF reads: "The crimes of average gravity shall be intentional crimes, which attract the maximum punishment of no more than five years of the deprivation of freedom pursuant to this Code, and negligent crimes, which attract the maximum punishment exceeding two years of the deprivation of freedom accordingly".

[287] Article 15 (4) of the CCRF states: "Intentional conduct, which attracts the maximum penalty of no more than ten years of the deprivation of liberty, shall be recognised as grave crimes".

[288] Article 15 (5) of the CCRF reads: "Intentional conduct, which attracts the penalty in the form of the deprivation of liberty for a term exceeding ten years, or a more severe punishment, shall be recognised as especially grave crimes".

3.3.1 Constitutive Elements of Crime (*Corpus Delicti*, *состав преступления*)

Corpus delicti (*состав преступления*) is a combination of particular objective and subjective elements of a crime that qualifies the socially harmful conduct as a criminal offence of a given kind.[289] The criminalisation of certain conduct lies within the discretionary power of the legislative body in the spirit of the renowned principle of *nullum crimen sine lege*. The legislature singles out the most significant and typical elements pertinent to the crimes of the same kind. *Corpus delicti* of each crime is set forth in the Special Part of the Criminal Code. When defining the constitutive elements of a specific crime, the legislature takes into consideration common legal provisions of the General Part of the Criminal Code applicable to all crimes, such as norms governing the age of criminal responsibility, forms of guilt, forms of participation etc.

Corpus delicti is distinct from the crime itself: these terms interrelate as the occurrence (a particular crime) and the legal interpretation of a crime.[290] As an illustration, the crime of theft committed on March 15, 2009 by A in the village X has its unique characteristics as to the place of the commission of a crime, temporal frame and surrounding circumstances. Therefore, it shall be rightly differentiated from a generic *corpus delicti* in the Criminal Code that merely outlines general legal elements of the crime of that kind.

Pursuant to Article 8 of the Criminal Code, the commission of an offence, which encompasses all legal elements of a crime provided for by the Code, shall be the ground for criminal responsibility. In other words, the establishment of *corpus delicti* is the only ground sufficient for the imposition of criminal responsibility. The significance of *corpus delicti* may be summarised in the following fashion: (i) it is a combination of interrelated objective and subjective elements that renders socially harmful conduct criminal; (ii) it is strictly defined by law; and (iii) it determines the character and extent of criminal liability for the crime committed. *Corpus delicti* comprises of the four constitutive elements such as object, objective element, subject and subjective element of a crime.

3.3.1.1 Object of Crime (*объект преступления*)

Object of crime describes social relations that have been affected by a criminal offence.[291] They may broadly include, among others, the protection of human rights and freedoms, property, public order and public security, environment, constitutional system of the Russian Federation, and maintenance of peace and security of

[289] Kosachenko (2009), p. 186; Raroga (2010), p. 71.

[290] Kosachenko (2009), p. 186.

[291] Ibid., p. 189; Gauhman and Maksimov (2010), p. 107; Raroga (2010), p. 73.

mankind.[292] *Object of crime* determines the antisocial nature of a crime and its socially harmful consequences; assists to qualify the prohibited conduct as a crime; and distinguishes a crime from other non-criminal offences. It is important to bear in mind that *object of crime* deals only with the existing objective social relations protected by criminal law and does not relate to a broader spectrum of social relations safeguarded by other social norms (norms of law, customs, moral norms etc.).

3.3.1.2 Objective Element of Crime (*объективная сторона преступления*)

Objective element of crime is an outer manifestation of a crime that comprises of the socially harmful conduct (an act or omission) and consequences; causal link between criminal conduct and socially harmful consequences; place, time, setting, manner and means to commit a crime.[293] It identifies the social danger of a crime through the character of an act or omission, place, time, setting, manner, means employed to commit a crime, and gravity of socially harmful consequences. *Objective element of crime* affects the severity of punishment to be imposed upon an offender. The meticulous analysis of *objective element of crime* assists to identify other constitutive elements of *corpus delicti*, such as object of crime, subjective element of a crime (i.e. form of guilt, motive) etc. This constitutive element is of utmost significance to distinguish between crimes with similar, albeit not analogous, legal elements (i.e. theft, robbery).

3.3.1.3 Subject of Crime (*субъект преступления*)

Subject of crime is a person who committed a crime and is subject to criminal liability. Pursuant to Article 19 of the Criminal Code, only a natural person in sound mind who has attained the statutory age of criminal responsibility shall be subject to criminal responsibility. The minimum age of criminal responsibility is 16 years prior to the commission of a crime.[294] The gravity of certain crimes warrants the imposition of criminal responsibility at the age of 14.[295] Criminal law extends

[292] Article 2(1) of the CCRF reads: "The tasks of the present Code are as follows: the protection of human rights and freedoms, property, public order and public security, environment, constitutional system of the Russian Federation against criminal encroachment, and maintenance of peace and security of mankind; and also the prevention of crimes".

[293] Gauhman and Maksimov (2010), pp. 115–116; Raroga (2010), p. 73.

[294] CCRF, Article 20 (1).

[295] Article 20 (2) of the CCRF prescribes: "Persons who have attained the age of 14 years prior to the commission of a crime shall be subject to criminal liability for homicide (Article 105), intentional infliction of grave bodily injury causing the impairment of health (Article 111), intentional infliction of bodily injury of average gravity (Article 112), kidnapping (Article 126),

solely to natural persons, which is supported by the wording of legal provisions in the General Part of the Criminal Code.[296] The propositions on the inclusion of juridical persons within the reach of criminal law have been dismissed.

Given that the test of criminal liability is subjective, insanity is regarded as a ground excluding criminal responsibility.[297] Only the combination of cognition (ability to understand the actual character of conduct) and will (ability to control the conduct) suffice to trigger the attribution of criminal responsibility. In the case of insanity, both cognitive and volitional elements are non-existent. The determination of sanity is an important prerequisite of guilt. The adherence to the distinguished principle of *nullum crimen sine culpa* is quintessential to the theory of criminal law.

3.3.1.4 Subjective Element of Crime (*субъективная сторона преступления*)

Subjective element of crime is an inner manifestation of a crime, a person's psychological activity that demonstrates his attitude in the form of cognition and will towards his socially harmful conduct. The essence of this constitutive element is guilt.[298] The proof of guilt is of paramount significance in establishing *subjective element of crime*. In some circumstances, motive may also constitute an indispensable legal element of a crime. The correct determination of *subjective element of crime* assists to distinguish between criminal offences with similar *corpora delicti* (e.g. murder[299] and negligent homicide[300]).

The psychological attitude of a person to his socially harmful conduct is reflected in two forms of guilt, in particular intention and negligence. It is of utmost importance to determine which factual circumstances are covered by cognition and will of a perpetrator in order to establish the very existence of intention or negligence. Criminal law is concerned with the psychological attitude that has been the reason (cause) behind the commission of a criminal offence. This attitude

rape (Article 131), forcible sexual actions (Article 132), theft (Article 158), robbery (Article 161), brigandism (Article 162), racketeering (Article 163), unlawful occupancy of a car or any other transport vehicle without theft (Article 166), intentional destruction or damage of property under aggravating circumstances (Article 167(2)), terrorism (Article 205), seizure of a hostage (Article 206), deliberate false reporting about an act of terrorism (Article 207), hooliganism under aggravating circumstances (Article 212(2) and 212(3)), vandalism (Article 214), theft or possession of firearms, ammunition, explosives, and explosive devices (Article 226), theft or possession of drugs or psychotropic substances (Article 229), the destruction of transport vehicles or ways of communication (Article 267)".

[296] Article 11 (1) of the CCRF reads: "Any person who has committed a crime in the territory of the Russian Federation shall be subject to criminal responsibility under the [Criminal] Code".

[297] CCRF, Article 21 (1).

[298] Kosachenko (2009), p. 270; Raroga (2010), p. 122.

[299] CCRF, Article 105.

[300] Ibid. Article 109.

with respect to socially harmful conduct and consequences is termed guilt.[301] Guilt is not an abstract concept detached from particular socially harmful conduct; it is strongly intertwined with the objective element of a crime.

Substance of guilt is a social category that reveals the negative and disdainful attitude of a perpetrator towards interests, social values and benefits protected by criminal law.[302] Therefore, such socially harmful conduct has been rightly criminalised and condemned by law. *Forms of guilt* show the combination of the cognitive and volitional elements of a crime in the mind of a perpetrator. They reproduce the psychological attitude of a perpetrator to socially harmful conduct.[303] Depending upon whether guilt is defined with respect to socially harmful conduct or consequences, all crimes are divided into crimes with *formal corpus delicti* or crimes with *material corpus delicti*. *Degree of guilt* is a quantitative category that measures the gravity of a criminal offence and the perpetrator's danger to the society.[304]

The process of establishing guilt commences at the investigative stage of a crime and continues throughout judicial proceedings. The thorough evaluation of evidence assists to establish guilt or innocence on a case-by-case basis. As an illustration, it has been reiterated in the judicial practice that it is necessary to distinguish between intentional murder and intentional infliction of bodily harm that caused death. In the first instance, a person intended death as an ultimate consequence of his act, whereas in the second instance, a person intended the infliction of bodily harm but was negligent towards the death of a person. Criminal law upholds the subjective test of responsibility, which means that a person cannot be found criminally liable unless guilt has been established.

3.3.1.4.1 Intent (*умысел*)

The law provides for direct (*прямой умысел*) and indirect intent (*непрямой умысел*). A crime is committed with direct intent if a person was aware of the social danger of his conduct (an act or omission), foresaw the possibility or inevitability of the onset of socially harmful consequences and desired for those consequences to occur.[305] The definition comprises of the cognitive and volitional elements. The cognitive aspect of direct intent involves the person's awareness of the social danger of his conduct and foreseeability of the possibility or inevitability of the materialisation of socially harmful consequences. The *awareness of the social danger of conduct* does not only encompass awareness of factual

[301] Garbatobich (2009) (in Russian), p. 7.

[302] Raroga (2010), pp. 124–125.

[303] Ibid., p. 125.

[304] Ibid.

[305] CCRF, Article 25(2).

circumstances that characterise the objective element of a crime but also an understanding of the social harm that such conduct entails.[306] The *foreseeability* aspect conveys the existence of conscious ideas or conceptions as to the possibility or inevitability of the socially harmful outcome. The foreseeability is not of abstract character because a person has a clear idea about the development of the causal link between his conduct and socially harmful consequences.[307] The volitional element of direct intent indicates the will of a person towards prohibited conduct/ consequences.

A crime is committed with indirect intent if a person was aware of the social danger of his conduct (acts or omissions), foresaw the possibility of the onset of socially harmful consequences, did not wish for but consciously allowed those consequences or treated them with indifference.[308] The cognitive element of *awareness of the social danger of the conduct* is analogous to awareness required for direct intent. The foreseeability aspect falls short of the prediction of the inevitability of the occurrence of socially harmful consequences and includes only the possibility that such consequences will ensue. The volitional element facilitates to draw a more definite borderline between two types of intent. Notwithstanding the foreseeability of socially harmful consequences, a person acting with indirect intent remains indifferent if they will ultimately ensue. In some cases, a person unreasonably believes that socially harmful consequences will not occur by relying upon abstract unsubstantiated ideas.[309]

3.3.1.4.2 Negligence (*неосторожность*)

A crime is committed negligently (*преступное легкомыслие*) if a person foresaw the possibility of the onset of socially harmful consequences of his conduct (acts or omissions) but thoughtlessly expected that those consequences would be prevented.[310] The law does not require the person's awareness of the social danger of his conduct. There has been a divergence of opinions as to the psychological attitude of a person to his conduct in negligent offences. Some commentators claim that a person is conscious of the social danger of his conduct, while others believe that a person is not aware of his social danger of his conduct, although there is an obligation and possibility to realise such danger.[311]

The law specifies that a person foresaw the possibility of the onset of socially harmful consequences arising out of his act or omission. However, the foreseeability remains abstract in comparison to crimes that call for indirect intent. A person acting (or failing to act) foresees that his conduct would normally lead to the

[306] Garbatobich (2009), pp. 8–20.

[307] Ibid.

[308] CCRF, Article 25 (3).

[309] Kosachenko (2009), p. 279.

[310] CCRF, Article 26 (2).

[311] Kosachenko (2009), p. 285; Garbatobich (2009), pp. 20–21.

socially harmful outcome and yet is convinced that it would not materialise. In other words, a person does not objectively evaluate the development of the causal link between his behaviour and consequences, although he could have done so if he invested greater intellectual effort.

The volitional element of negligence entails that a person thoughtlessly expected that social harmful consequences would not occur. A person relies upon some actual circumstances that would avert the occurrence of those consequences, i.e. personal skills, acts of other people, physical, chemical or environmental causes etc. Notwithstanding the person's "confidence" as to the non-occurrence of socially harmful consequences, his prediction is erroneous because the reliance on those circumstances could not avert prohibited consequences.[312]

A crime is committed with gross negligence (*преступная небрежность*) if a person did not foresee the possibility of the onset of socially harmful consequences of his conduct (acts or omissions), although he could and should have done so.[313] The legislature provides neither for the awareness nor for the foreseeability of socially harmful consequences. However, it does not mean that the psychological attitude is non-existent. The non-predictability of socially harmful consequences, irrespective of the existing obligation, is a product of psychological processes that take place in the consciousness of a person and suppress the obligation and possibility of the foreseeability. The psychological attitude to criminal conduct in gross negligent offences may take the following forms: (i) a person is aware that he acts in breach of some rules but he does not foresee the possibility of the occurrence of socially harmful consequences;[314] (ii) a person acting consciously is not aware that he acts in breach of the rules;[315] (iii) the person's act is free of volition, but the lack of the control on the part of that person was lost due to his fault.[316]

Gross negligent offences require the existence of an obligation to foresee socially harmful consequences. The obligation on the part of a person to foresee prohibited consequences of his conduct constitutes an objective criterion, whereas the possibility to foresee such consequences contributes to the subjective one.[317] The objective criterion stems from the requirement of personal responsibility to foresee the materialisation of socially harmful consequences while performing duties corresponding to elementary safety requirements. The subjective criterion is closely intertwined with the objective one. The establishment of the factual possibility to foresee consequences prohibited by law is essential. The possibility

[312] Raroga (2010), pp. 139–141.

[313] CCRF, Article 26 (3).

[314] As an illustration, a security guard lets his friend into the building closed to the public but does not realise that he will take an opportunity to commit the crime (i.e. destruction of property). In this particular case, the security guard acts with gross negligence.

[315] A driver does not decrease the speed because he did not see the limitation speed sign.

[316] A worker in the state of alcoholic intoxication leans on the switch that turns electricity on while the maintenance work is carried out.

[317] Raroga (2010), p. 142.

requirement stems either from individual characteristics of a person (e.g. age, education, qualification, professional experience) or the particular setting in which a person acted. The volitional element exists when a person who has the actual possibility to foresee socially harmful consequences does not mobilise his intellectual and psychological abilities to perform volitional acts in order to prevent the occurrence of those consequences.[318]

3.4 The Concept of Crime in Danish Criminal Law

This sub-chapter appraises the doctrine of a crime in Danish criminal law by examining its tripartite concept with a particular focus on theoretical aspects of the concept of guilt. The overwhelming misunderstanding is that Danish criminal law largely reproduces theories and concepts originating from German criminal law. Though Danish criminal law has been affected by the legal theory of its neighbour, it has historically acquired a set of specific legal features, which accommodates Denmark in the Nordic legal family.

The centrepiece of Danish criminal law is a criminal code adopted as early as 1930. Having been amended many times during the last decades, the present Code bears only a minor resemblance to its original version.[319] Criminal liability is attributed if the following conditions are satisfied: (i) an offender completed the objective elements of a crime (*gerningsindhold)* prescribed by law; (ii) the conduct of that offender is unlawful (*retsstridigt*); and (iii) the offender is guilty in the sense that he has the requisite mental capacity (*tilregnelighed*) and fulfils the subjective element of a crime (*tilregnelse*) in the form of intention (*forsæt*) or negligence (*uagtsomhed*).[320] In some instances, Danish criminal law also imposes objective or so-called strict liability.[321]

The Danish Criminal Code sets out that every crime shall meet a formal legal description (*formel typicitet*), which implies that an offender must fulfil all requisite objective elements of a crime (*gerningsindhold)* in order to attract criminal responsibility. The requirement of the statutory elements of a crime encapsulated in the Danish term "*formel typicitet*" resembles to some extent the German legal term "*Tatbestande*".[322] In some circumstances, an offender may have performed an act,

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[318] Kosachenko (2009), p. 286.

[319] The Faroe Islands adopted their own criminal code, which is almost identical in terms of substantive and procedural legal provisions to the Danish one. The Criminal Code of Greenland substantially differs from the Danish and Faroese Criminal Codes. For a historical insight into the development of Danish criminal law, see: Langsted et al. (2004), pp. 23–29.

[320] Waaben (1999), p. 47.

[321] The case on the application of strict liability in Danish criminal law was submitted to the EC Court (326/88 *Hansen & Søn*). The Court held that the regulation at dispute granted member states a considerable discretion as to the introduction of legal provisions concerning criminal liability.

[322] Waaben (1999), pp. 47–48.

which formally corresponds to the description of the objective elements of a crime but is not criminal due to its *atypical* character.[323]

The concept of unlawfulness (*retsstridighed*) is not really a distinct concept in its own right; it is strongly linked to the statutory elements of crimes stipulated by law. It is generally accepted that the objective elements of a crime shall be accompanied by the requisite state of mind in order to constitute a criminal offence. The concept of unlawfulness does not approve of the attribution of criminal responsibility to the lawful conduct, even if the objective elements of a crime were formally satisfied.[324] As an illustration, it is illogical to penalise conduct, which was triggered by an imminent lawful attack in the exercise of the right to self-defence (*nødværge*).[325]

The category of guilt (*skyld*) reflects the mental element of a crime. A person is expected to have the requisite mental capacity (*tilregnelighed*), which signifies the degree of normality in relation to the person's psychological development. The mental element of a crime (*tilregnelse*) in the form of intention or negligence determines the person's attitude towards the objective elements (*objective gerningsindhold*) of a crime.[326] The absence of guilt (*skyld*) may be demonstrated either by the mental incapacity of a person (*utilregnelighed*), or lack of intention or negligence. The law explicitly stipulates that "persons who at the time of the commission of a criminal offence were irresponsible on account of a mental illness or conditions comparable to a mental illness or who are severely mentally challenged are not punishable".[327] When a temporary mental condition was induced by the state of alcohol or drug intoxication, a person is not relieved from criminal responsibility.[328]

The majority of crimes are defined as intentional offences and thus cannot be supported by a lower standard of negligence. In such cases, the lack of intention relieves offenders from criminal responsibility. As it was mentioned above, Danish criminal law imposes objective liability in certain circumstances, which does not require the proof of a state of guilty mind.

[323] Langsted et al. (2004), p. 47. As an illustration, the accused "borrowed" a car of his stepfather in a manner, which would have landed him punishment under section 293 of the Criminal Code (unlawful use of an object belonging to another person), had he been a stranger. The High Court acquitted him on the grounds that the respective provision was not meant to cover situations of that kind (UfR 1970, 680 V).

[324] Waaben (1999), pp. 48–49.

[325] Danish Criminal Code, § 13(1).

[326] Dahl et al. (2002), p. 479; Waaben (1999), pp. 49–50.

[327] Danish Criminal Code, § 16(1).

[328] Ibid.

3.4.1 Mental Element of Crime (*Tilregnelse*)

The general prerequisite of criminal responsibility is the existence of the subjective guilt (*subjektiv skyld*). The proof of guilt requires the mental capacity of an offender (*tilregnelighed*) and subjective element of a crime (*tilregnelse).* The latter exhibits a close interrelation between the objective elements of an offence and the state of mind of a person towards such elements in the form of intention or negligence. The subjective element of a crime encompasses intentional, negligent and accidental behaviour (only when it is penalised as a strict liability crime).[329] Danish criminal law was strongly influenced by the Roman law that operated with notions of *dolus, culpa* and *casus*. The positioning of Danish criminal law in the continental law family explains to a great extent the conceptual approach to guilt and its forms. As it was mentioned in Chap. 2, common criminal law generally considers only intentional conduct as being blameworthy, while finding it contradictory and illogical to treat negligent conduct in that way.[330] In the spirit of the continental law tradition, Danish criminal law treats both intentional and negligent conduct as being equally blameworthy.[331]

3.4.1.1 The Highest Degree of Intent (*Forsæt*)

The popular criminal law work written by the "guru" of Danish criminal law, *Knud Waaben*, explicates the concept of intent and intentional conduct from the standpoint of everyday psychology. The author wittingly selects daily situations that express our will and cognition. The person's consciousness (*bevidsthedsforhold*) is capable of reflecting upon the development of the chain of events which may be certain (*sikkert*), likely (*sandsynligt*) or merely possible (*blot muligt*). Although the comparative exercise is helpful, the ordinary meaning of intention in everyday life is fundamentally different from the legal construal of the term.

The concise description of intent is that one acts with knowledge and will (*med viden og vilje*). In other words, a person aims at the outlawed result.[332] Though the definition is too narrow to map the entire area of "intent", it accurately describes the highest threshold for intentional crimes (direct intent). The conduct criminal offences (*adfærdsdelikter*) require knowledge (*viden*) as to the prohibited conduct itself and attendant circumstances. The existence of such knowledge means that a person knowingly engages himself in the prohibited conduct, e.g. a person has the requisite knowledge that he engages in sexual intercourse with a child under the age of 15 years. Another group of offences branded as result offences

[329] For a concise overview of mental elements in Danish criminal law in English, see: Waaben, Knud, Criminal Law in Vestergaard (1983).

[330] Ashworth (2009), pp. 185–188.

[331] Langsted et al. (2004), p. 55.

[332] Greve et al. (2009), p. 223; Dahl et al. (2002), pp. 479–480; Langsted et al. (2004), p. 56.

(*forårsagelsesdelikter*) require the purpose (*hensigt*)[333] towards the materialisation of prohibited consequences. The nature of the purpose is that a person clearly seeks and desires the occurrence of prohibited consequences. If one can prove the purpose (*hensigt*) of an offender to cause the prohibited result, one does not need to examine whether the outcome was foreseen (*forudset*) as certain (*sikker*) or highly probable (*i høj grad sandsynlig*). If the purpose (*hensigt*) to cause death in the crime of murder cannot be demonstrated, than evidence shall be assessed in terms of whether the death was foreseen as the most probable outcome (*overvejende sandsynlig*) of the person's conduct.

The conduct offences (*adfærdsdelikter*) only require awareness (*viden*) that a person knowingly engages himself in the prohibited conduct. However, the purpose (*hensigt*) may be relevant at the preparatory stages to commit a crime, thus demonstrating the person's will to further his criminal plans.[334]

3.4.1.2 Probability Intent (*Sandsynlighedsforsæt*)

In Danish criminal law, a weaker form of intent is known as probability intent (*sandsynlighedsforsæt*), which captures criminal conduct (*et gerningsmoments tilstedeværelse*) or prohibited consequences perceived as the most probable (*overvejende sandsynlig*). This form of intent applies to situations when it is impossible to demonstrate the person's straightforward knowledge of attendant circumstances or desire for prohibited consequences to materialise.[335] Probability intent falls between the almost-certainty standard and the mere foreseeability of the risk that the prohibited outcome may occur. The "mostly probable" (*overvejende sandsynlig*) standard for legal purposes means that a perpetrator considered it most probable that he engaged in the prohibited conduct (*et gerningsmoment var til stede*) or that prohibited consequences will materialise in the ordinary course of events (*en følge vil indtræde*). Other expressions may be used to describe probability intent, such as "certainly assumed" (*bestemt antaget*), "certainly anticipated" (*bestemt regnet med*) or "had a certain assumption about" (*haft en bestemt (eller sikker) formodning om*).[336]

Probability intent exists when an offender realises the materialisation of prohibited consequences in the ordinary course of events, although he does not desire for such consequences to occur.[337] As an illustration, an offender hits another person with a knife while realising that death can follow as the most probable consequence of his act. For other offences, the offender shall consider it probable that criminal circumstances exist. As an example, a buyer suspects that the

[333] *Hensigt* (purpose) shall not be equated to intention *per se*. For more, see: Ross (1974), pp. 9–54.

[334] Waaben (1999), pp. 144–145.

[335] Greve et al. (2009), p. 224.

[336] Waaben (1999), p. 146.

[337] Langsted et al. (2004), p. 56.

purchased goods were stolen. Calculating it in arithmetic terms, the probability requires more than 50 % of likelihood.[338]

3.4.1.3 *Dolus Eventualis*

Dolus eventualis is the lowest intentional threshold for crimes in Danish criminal law. *Waaben* reckoned that the concept of intent was unreasonably overstretched due to the inclusion of *dolus eventualis* and claimed that probability intent sufficed to denote the lowest threshold for intentional crimes.[339] The concept of *dolus eventualis* was borrowed from German criminal law and subsequently transposed to Danish, Swedish and Norwegian criminal laws. Despite the transposition of the concept in Danish criminal law, it was deemed as being of minor relevance and significance in judicial practice by *Krabbe*, *Hurwitz* and *Waaben*.[340] On the contrary, *Ross* argued that *dolus eventualis* was capable of accommodating the practical needs of criminal law and maintaining the inherited dogma.[341] Despite the division of academic commentators on the relevance of the concept in practice, *dolus eventualis* is rarely employed in judicial practice.[342] The Supreme Court reaffirmed on a number of occasions the application of *dolus eventualis* and its position as an integral part of the mental element of a crime in the jurisprudence.[343]

Dolus eventualis exists when a person considers it possible (*muligt*), albeit not mostly probable (*overvejende sandsynlig*), that criminal conduct would take place or prohibited consequences would materialise. The awareness of the possibility required for *dolus eventualis* is higher than in the case of conscious negligence (*bevidst uagtsomhed*).[344] There are two main approaches towards the concept of *dolus eventualis* in Danish criminal law: a hypothetical intent (*hypotetisk forsæt*) and the acceptance of the risk (*positiv indvilligelse*). The interpretation of *dolus eventualis* as a hypothetical intent (*hypotetisk forsæt*) means that a person foresaw the outcome of his conduct as possible. Additionally, it must be proven that the person would not have acted differently if he had been certain about the prohibited outcome. The essence of this approach is that an offender is judged to have acted intentionally upon the assumption (which does not exist in real life) as how he would have acted subjectively if he had treated the outcome as certain/probable but not possible.[345]

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[338] Greve et al. (2009), p. 224.

[339] Waaben (1999), p. 147.

[340] Krabbe (1947), p. 134; Hurwitz (1952), p. 323.

[341] Ross (1974), p. 73.

[342] Langsted et al. (2004), p. 480; Toftegaard Nielsen (2008), pp. 69–74.

[343] UfR 1979, 576H and UfR 1992, 455 H.

[344] Waaben (1999), p. 147.

[345] Ibid., pp. 147–148; Greve et al. (2009), p. 225.

The approach entitled "acceptance of the risk" (*positiv indvilligelse*) deviates from the hypothetical construction of the perpetrator's state of mind and treats *dolus eventualis* from the perspective of volition. Accordingly, *dolus eventualis* exists when a person accepts (*acceptere*) or approves (*godkende*) the possibility that the prohibited conduct or consequences may materialise. If a person believes or hopes that such outcome is not possible to materialise in reality, then the mental element falls beyond the threshold *dolus eventualis* and constitutes advertent negligence instead (*bevidst uagtsomhed*).[346] Notwithstanding the existence of those different approaches towards *dolus eventualis*, the voiced concern is that the concept *per se* is almost indistinguishable from advertent negligence (*bevidst uagtsomhed*).

3.4.1.4 Negligence (*Uagtsomhed*)

Pursuant to Article 19 of Danish criminal law, negligent conduct shall not be punished unless law expressly provides it.[347] The general starting point is that most crimes are committed intentionally, whereas negligent crimes are penalised only under certain circumstances stipulated by law. The Criminal Code includes a plethora of legal provisions extending to the negligent behaviour, with pure intent crimes such as theft, embezzlement, forgery and rape, being statistically rare.[348]

Negligence in Danish criminal law—reminiscent of the negligence concept in German and Russian criminal law—exists in two forms, advertent negligence (*bevidst uagtsomhed*) and inadvertent negligence (*ubevidst uagtsomhed*). Advertent negligence requires that a person consciously engages in the prohibited conduct and foresees the materialisation of prohibited consequences as possible, provided that such conduct does not elevate to the threshold of *dolus eventualis*. The most common form of negligence is inadvertent negligence (*ubevidst uagtsomhed*), which exists when a person does not give a thought that he engages in the prohibited conduct or that prohibited consequences will materialise.[349] In normative terms, it means that there is a lack of care or attention where it could or should have been exercised. While attributing the negligence standard to the person's conduct, it is necessary to examine whether a person was in a position to exercise more care or attention and whether the conduct itself or consequences were accidental or excusable.

Real life is replete with situations of negligence behaviour. An ordinary person (e.g. playing with fire or weapons), particular groups of people (e.g. employers, car owners etc.), specific categories of professionals (e.g. doctors, nurses, pilots) may be implicated into negligent conduct. The standard the person is judged by is a generally accepted standard applicable to an average person or professional.

[346] Waaben (1999), pp. 148–149; Greve et al. (2009), p. 225; Langsted et al. (2004), p. 57.

[347] Danish Criminal Code, § 19.

[348] Dahl et al. (2002), p. 481.

[349] Waaben (1999), p. 156.

The judges are not bound to examine what the shrewdest or the most experienced professional would have done under the circumstances.[350]

3.5 Interim Conclusions

This chapter has explored the concept of a crime in selected continental law jurisdictions (Germany, France, Denmark and Russian Federation) with the utmost focus on the mental element of a crime. The dependence of continental law jurisdictions on the statutory law as a foremost source of law has shaped the substantive part of criminal law in more theoretical and conceptual terms than in common law jurisdictions. In fact, two legal systems under scrutiny in this book (Germany and Denmark) share the very same tripartite structure of a crime. Apart from unlawfulness and guilt, Russian criminal law recognises the social danger of a crime and punishability as indispensable legal elements of a crime.

Even though the mental elements of a crime in all legal jurisdictions concerned are described in different conceptual terms, one may obviously infer certain commonalities. All jurisdictions subject to the comparative analysis single out the cognitive and volitional elements of a crime. The interplay and intensity of those elements determine the degree of person's culpability. In the cases of the dominant will over the cognitive element of knowledge, German law speaks of *Absicht (dolus directus in the first degree)*, Danish law—of *direkte forsæt*, Russian law of *прямой умысел*, and French criminal law—of *dol spécial*. When the cognitive element prevails over the volitional one, German law attributes *den direkte Vorsatz (dolus directus in the second degree),* Danish law—*sandsynlighedsforsæt,* French law—*le dol général*, Russian law employs the same broad concept of indirect intent. *Dolus eventualis,* which can hardly be equated to any concept in common law jurisdictions, is a notion pertinent solely to the criminal law theory of continental law jurisdictions. Originally developed in Germany, the concept spread its wings and spilled over borders. As mentioned above, the notion of *dolus eventualis* in Danish, Swedish and Norwegian criminal law was technically borrowed from German criminal law. Russian criminal law does not distinguish between indirect intent and *dolus eventualis* but treats them as synonymous terms.

A broad concept of direct intent in Russian criminal law captures situations which are covered by *Absicht* and *den direkte Vorsatz* in German criminal law; *direkte forsæt* and sandsynlighedsforsæt—in Danish criminal law; and *dol spécial* and *dol général*—in French criminal law. The concept of *dolus eventualis* has been subject to harsh criticism in Danish criminal law. According to academic commentators, only *direkte forsæt* and *sandsynlighedsforsæt* reflect the intentionality of a crime, whereas *dolus* is a redundant over-dogmatised concept. *Dolus eventualis* plays a far more significant role in German and Russian jurisdictions that

[350] Ibid., p. 157. See also: Greve et al. (2009), pp. 220–223.

agree on its relevance to demonstrate intentionality, albeit in its weakest form. Interestingly, the notion of *dolus eventualis* in French criminal law is an intermediate *mens rea* standard that separates intentional offences from negligent ones.

The concept of negligence, unlike its counterpart in common law jurisdictions, encompasses both subjective and objective standards. In fact, all selected jurisdictions distinguish between conscious (*bewusste Fahrlässigkeit, bevidst uagtsomhed*, *преступное легкомыслие, la faute d'imprudence)* and unconscious negligence (*unbewusste Fahrlässigkeit, ubevidst uagtsomhed, преступная небрежность, la faute contraventionelle)*. Conscious negligence involves the cognitive element in its weakest form, whereas unconscious negligence relies solely on the volitional element.

The glossary of terms employed in common and continental law jurisdictions is evidently different, which is explicated by the historical development of each legal system. There are certain commonalities towards the concept of a crime and great unanimity that a person shall be *guilty* in order to attract criminal responsibility. The understanding of guilt is complex and expressed in a variety of forms in all legal systems. Attempting to equate notions originated from common law to the ones employed in continental law jurisdictions does not work smoothly. As an illustration, the notion of recklessness is an intermediate concept in common law positioned between intention and negligence. Continental law jurisdictions do not have a transition notion between intention and negligence with an exception of French criminal law. The interpretation of intention in selected continental law jurisdictions is more lenient and includes a unique concept of *dolus eventualis*, which is the lowest denominator of intentionality.

Given that many *mens rea* notions originated from common and continental law have been employed in international criminal law without an introduction of their precise meaning, a thorough comparative analysis on the law on *mens rea* is an excellent starting point to reveal both achievements and failures of international criminal courts and tribunals in the interpretation of the law on *mens* rea.

Chapter 4
The Concept of Crime in International Criminal Law

4.1 Introductory Remarks

Broadly, a crime is a socially harmful act or omission that breaches the values protected by a state. It is an event prohibited by law, one which can be followed by prosecution in criminal proceedings and, thereafter, by punishment on conviction.[351] The state criminalises certain conduct due to burgeoning public pressure to proscribe certain immoral harms. However, criminality shall not be confused with immorality: they are related but not synonymous terms.[352] A lion's share of immoral acts is not criminalised, as well as not all criminal acts are immoral. It is within the discretion of a state to construe which acts require to be criminalised and incorporate such prohibitions into its respective criminal laws.

Legal jurisdictions construe the concept of a crime with the consideration of existing legal environment, history, social developments etc. Notwithstanding a plethora of domestic approaches towards the complex concept of a crime, there is overwhelming unanimity as to the adverse impact of a crime on society and necessity to combat its recurrence. In the era of globalisation, crimes spill over borders, thus making it more challenging to prosecute and adjudicate when several competing jurisdictions are involved. Furthermore, many crimes are carried out with the involvement and condonation of states, which attests to the atrocious brutality that the entire humankind has been confronted with over the past decades. Regrettably, genocide, war crimes and crimes against humanity reflect the gloomy reality of the contemporary world. Notwithstanding all the challenges on the thorny road to international justice, the world community is increasingly consolidating its legal contours under international law, thus reflecting a greater recognition for

[351] Simester and Sullivan (2007), p. 1.

[352] LaFave (2003b), pp. 13–14. See also: Hart (1998), pp. 155–185. Hart examines characteristics that distinguish moral rules and principles not only from legal rules but also from all other forms of social rules or standards of conduct.

I. Marchuk, *The Fundamental Concept of Crime in International Criminal Law*,
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certain global commonly shared values.[353] In this context, an in-depth and thorough study of general principles shared by many legal jurisdictions of the world is of invaluable assistance for shaping the complex concept of a crime in international criminal law.

A crime is an organic combination of both objective (material) and subjective (mental) elements. The mere engagement in prohibited conduct does not suffice alone to attribute criminal responsibility. A guilty state of mind, which accompanies prohibited conduct, is *sine qua non* for imposing criminal responsibility. Only a rough outline of the doctrine of international crimes has hitherto emerged. This calls for a more sound approach as to the systematic recording and classification of the structural elements of all international crimes.[354] The distinguishing feature of international crimes is the context in which these crimes are perpetrated (e.g. an armed conflict, a widespread or systematic attack). The *mens rea* standard of knowledge also extends to the contextual elements, *inter alia,* knowledge of the general context in which acts constituting crimes against humanity occur; knowledge of the widespread or systematic attack directed against the civilian population; awareness of the factual circumstances that established the existence of an armed conflict etc.). In the absence of the requisite contextual elements, the proof of *actus reus* and accompanying *mens rea* of an underlying offence does not suffice to qualify such criminal conduct as amounting to an international crime.

This chapter explores the evolution of the legal concept of a crime in international criminal law. It addresses the historical origins of genocide, war crimes and crimes against humanity, and deconstructs these crimes in terms of the constitutive elements (contextual elements, *actus rea* and *mens rea*) in line with the latest jurisprudence of international criminal courts and tribunals.

4.2 Typology of International Crimes

International criminal justice provides an accountability mechanism for the crimes of the most serious concern to the international community such as genocide, war crimes and crimes against humanity. The legal instruments of international criminal courts and tribunals lay down the subject-matter jurisdiction over core international crimes.[355] Given the dynamic development of international criminal law, the obvious question is whether other categories of crimes live up to the standard of the "most serious concern" threshold, and thus shall be incorporated within the jurisdiction of international criminal courts and tribunals. Apart from the

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[353] Bassiouni in Cassese (2009a), p. 140.

[354] Werle (2005), p. 92.

[355] ICTY Statute, Articles 2–5; ICTR Statute, Articles 2–4; SCSL Statute, Articles 2–4; Rome Statute, Article 5.

contentious crime of aggression, which undisputedly satisfies the required high threshold,[356] attempts to include drug trafficking,[357] terrorism,[358] and prohibition of threat or use of nuclear weapons[359] within the jurisdiction of the ICC failed during the latest ICC Review Conference in Kampala. In rather strong terms, the Rome Statute Commentary submits that only crimes that meet the "most serious concern" threshold, those that are *ejusdem generis* within the four enumerated categories, belong in the Statute.[360]

4.2.1 War Crimes

The term "war crimes" is employed in relation to serious violations of the laws and customs of war. These are serious violations of international humanitarian law that endanger protected persons or objects, or breach important values.[361] Different jurisdictional mechanisms may be triggered in relation to war crimes depending on whether the rules of international humanitarian law or international criminal law are enforced. War crimes, as outlined in the international criminal law instruments, derive from international humanitarian law. Said that, it is important to bear in mind that these bodies of public international law are distinct: international humanitarian

[356] The ICC Review Conference adopted a resolution by which it amended the Rome Statute so as to include the definition of the crime of aggression and the conditions under which the Court could exercise jurisdiction with respect to the crime. The actual exercise of jurisdiction is subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as required for the adoption of an amendment to the Statute. The definition of the crime of aggression was based upon the United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, and was formulated as a crime committed by a political or military leader which, by its character, gravity and scale constituted a manifest violation of the UN Charter. See: ICC Press Release dated 12/06/2010, retrieved on July 10, 2010 from http://www.icc-cpi.int/NR/exeres/CF95BB41-B15A-45DA-B8CF-33E873E73829.htm.

[357] Trinidad and Tobago advocated for the inclusion of international drug trafficking as a crime within the Rome Statute framework by arguing that the scourge of the crime has intensified due to its transboundary character, which makes it of increasingly grave concern to members of the international community. The proposal did not land on the table of negotiations at the ICC Review Conference. See: ICC-ASP/8/20 Volume I Annex II, Report of the Working Group on the Review Conference, paras 52–54; http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/WGRC-ENG.pdf.

[358] The Netherlands unsuccessfully sought to incorporate the crime of terrorism within the jurisdiction of the ICC. ICC-ASP/8/20 Volume I Annex II, Report of the Working Group on the Review Conference, paras 40–51; http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/WGRC-ENG.pdf.

[359] Mexico submitted a proposal to include the prohibition of "threat or use of nuclear weapons" in the Rome Statute. The proposal was not discussed at the ICC Review Conference. ICC-ASP/8/20 Volume I Annex II, Report of the Working Group on the Review Conference, paras 34–39; http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/WGRC-ENG.pdf.

[360] Schabas (2010), p. 108.

[361] Henckaerts J-M, Doswald-Beck L (2005a), pp. 569–570.

law regulates the conduct of warfare between States,[362] whereas international criminal law is concerned with the attribution of individual criminal responsibility to the culprits of war crimes.

4.2.1.1 Historical Origins of War Crimes

Violations of the laws and customs of war take their roots in international humanitarian law that declares certain behaviour in the course of an armed conflict, whether international or non-international, absolutely impermissible, such as killings of civilians, outrages upon personal dignity, inhuman treatment etc.

The inspiration to protect humanity from the scourge of war dates back to ancient times. War—reminiscent of the contagious disease—has accompanied mankind from the beginning of its recorded history. However, it was not until the nineteenth century that the international community undertook considerable efforts to make war more just and humane in relation to the warring parties and civilian population in the aftermath of the battle of *Solferino* fought between the Austrian and French-Sardinian armies in 1859. The book "*A Memory of Solferino*", authored by *Henry Dunant* and published in Geneva in October 1862, provoked impassioned discussion initially in Switzerland and thereafter worldwide on the vital necessity to protect the wounded and sick during the war. The book provided a detailed narrative account of the battle and deplorable conditions suffered by the wounded and dying amidst the cries of agony, pain and neglect, terror and death.[363] The author advocated for the establishment of relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers.[364] The adoption of the *Geneva Convention on 22 August 1864 for the Amelioration of the Wounded in Armies in the Field* was a result of the commendable lobbying work of *Henry Dunant* and his like-minded colleagues who fought to transform the rules of warfare and contributed to laying down the fundamental cornerstone of treaty-based international humanitarian law.[365] This marked the birth of the distinct field of international law in its own right. The original Geneva Convention (1864) does not list violations of the laws and customs of war and only embraces a set of legal provisions as to providing relief to the wounded without any distinction based on nationality; and neutrality (inviolability) of medical personnel and medical units.

The bedrock of modern international humanitarian law is equally shaped by the conventional and customary rules of international law. The punishment for war

[362] UK Ministry of Defence (2004), pp. 3–6; Bouchnet-Saulnier (2007), pp. 18–19.

[363] Dunant (1862). English version by the American Red Cross (1939 & 1959) reprinted by the ICRC in 1994.

[364] Ibid., p. 115.

[365] Bugnion (2009), document retrieved from the ICRC website http://www.icrc.org/web/eng/siteeng0.nsf/html/solferino-Article-bugnion-240409.

crimes is not novel, although the body of precedent law was properly crystallised during the legal proceedings in Nuremberg. The early codifications of the laws of war in 1899 and 1907 in The Hague did not provide for a set of international rules with respect to the violations of the laws and customs of war. It was the very absence of international regulations and inefficiency of national laws in that regard which led to the adoption of the 1949 Geneva Conventions, thus criminalizing certain conduct under the umbrella of war crimes, and bestowing obligations upon the signatories to the Conventions.

The Geneva Conventions form the part of the laws and customs of war, violations of which are commonly referred to as "war crimes".[366] The very first *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* represents the fourth version of the Geneva Convention on the protection of the wounded and sick which followed those adopted in 1864, 1906 and 1929. The second *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* rendered protection to the wounded and sick at sea, thus replacing an out-dated *Hague Convention (X) of 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention*. *Geneva Convention (III) relative to the Treatment of Prisoners of War* broadened a pool of persons entitled to the prisoner of war status, and provided a more elaborate outline of the conditions of captivity for prisoners of war. *Convention (IV) relative to the Protection of Civilian Persons in Time of War* encompasses regulations that govern the status and treatment of protected persons. The Convention does not invalidate the provisions of the Hague Regulations of 1907 on the same subjects but is supplementary to them.[367] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* embraces a number of innovative provisions as to the recognition of armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes as international conflicts;[368] conduct of hostilities and protection of the civilian population against the effects of hostilities; prohibitions of attack on civilian persons and objects[369] etc. Having been adopted in light of the staggering numbers of victims in non-international armed conflicts, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* extends fundamental rules of the law of armed conflicts to internal wars.

[366] Pictet (1958), p. 583.

[367] Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereinafter—Geneva Convention IV), Article 154.

[368] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereinafter—Additional Protocol I), Article 1(4).

[369] Additional Protocol I, Articles 35–60.

The principle of individual criminal responsibility for war crimes is a long-standing rule of customary international law.[370] The aftermath of World War I was accompanied by the initiation of legal proceedings against *Wilhelm II*, the last German Emperor and King of Prussia, who was accused of committing "supreme offences against morality and sanctity of treaties". Interestingly, the charges levied against him were not of a "juridical character but an act of high international politics inspired by universal conscience".[371] However, the trial did not take place given the unwillingness of the Dutch government to satisfy the extradition request, thus sheltering the infamous emperor from criminal responsibility and offering him a safe haven in the country. This rather lukewarm attitude towards the prosecution of those guilty of war crimes was overcome by the desire to punish war criminals after World War II. The war was overly destructive to be associated with a heroic style.[372] The barbarity of atrocities committed by Nazis dramatically challenged the perception of the world community as to the ways of dealing with the most serious crimes. The rationale behind the establishment of an ad hoc court of criminal character, commonly known as the Nuremberg Tribunal, was twofold: to serve justice to the victims, and to teach a historical lesson of "never again" to future generations.

The jurisdictional powers of the Nuremberg Tribunal extended to war crimes, crimes against humanity and crimes against peace.[373] The underlying offences of war crimes encompassed murder; ill-treatment or deportation into slave labour or for any other purpose, of the civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; the killing of hostages; the plunder of public or private property; and the wanton destruction of cities, towns or villages, or devastation not justified by military necessity.[374] The principle of individual criminal responsibility covered both principals and accomplices to a crime, regardless of their ranks and position, who took part in the formulation or

[370] Henckaerts J-M, Doswald-Beck L (2005a), p. 551 citing in support, among others, Lieber Code, Articles 44 and 47; Oxford Manual, Article 84; First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (hereinafter—Geneva Convention I), Article 49; Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (hereinafter—Geneva Convention II), Article 50; Third Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949 (hereinafter—Geneva Convention III), Article 129; Geneva Convention IV, Article 146; Hague Convention for the Protection of Cultural Property, Article 28; Second Protocol to the Hague Convention for the Protection of Cultural Property, Article 15; Additional Protocol I, Article 85.

[371] Treaty of Versailles, Article 227.

[372] Davidson (1973), p. 3.

[373] The major distinction between war crimes and crimes against peace is that the former may be equally committed by the members of armed forces and civilians, wheres the latter can only be committed by policy-makers. For a more elaborate discussion on the subject, see: Dinstein and Tabory (1996), pp. 1–19.

[374] Nuremberg Charter, Article 6.

execution of a common plan or conspiracy to commit any of the crimes penalised in the Nuremberg Charter.[375]

Although the success of the Nuremberg Tribunal in the prosecution and adjudication of war crimes can hardly be underestimated, the judicial process revealed the troubling inequality between the victorious and defeated powers. The Allied Powers punished the misconduct of the enemy but left the similar conduct of their own forces unpunished.[376] In November 1947, the General Assembly of the United Nations unanimously adopted the Nuremberg Principles that reaffirmed the catalogue of war crimes as laid down in the Nuremberg Charter (Principle VI). The International Law Commission relied upon this soft law instrument during its work on the successive draft codes on international crimes.

4.2.1.2 War Crimes in International Criminal Courts and Tribunals

The world community witnessed the temporary return to the past as a striking *déjà vu* during the destructive Yugoslav war and hate-fuelled Rwandan conflict. In this context, war crimes trials took place in the ad hoc tribunals—created as a challenging response to the despicable human rights abuses in both countries. The triumphant prosecutions in the ad hoc tribunals reinstated the belief in international justice and served as a catalysing effect for the establishment of the first permanent treaty-based body, the International Criminal Court (ICC). The legal provisions of the Rome Statute lay down a comprehensive catalogue of war crimes committed in the context of an international or non-international armed conflict. The Rome Statute Commentary notes some major omissions in the catalogue, which fails to provide adequate criminalisation of prohibited weapons as a result of a nuclear impasse.[377]

The ICTY and ICTR Statutes grant jurisdiction over the violations of the laws and customs of war.[378] War crimes are divided into sub-categories depending on whether they are committed in the course of an international or non-international armed conflict. Serious violations of international humanitarian law in the context of an international armed conflict are commonly referred to as "grave breaches" of the Geneva Conventions.[379] Common Article 3 to the Geneva Conventions serves as a "minimum yardstick"[380] of rules of international humanitarian law of similar substance, which applies in internal conflicts.

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[375] On October 1, 1946, the trial of major war criminals before the Nuremberg Tribunal was concluded with 11 defendants sentenced to death, 7 sentenced to various terms of imprisonment, and 3 remaining acquitted.

[376] Meltzer (1999), p. 25.

[377] Schabas (2010), p. 195.

[378] ICTY Statute, Articles 2–3; ICTR Statute, Article 4; SCSL Statute, Articles 3–4.

[379] Dörmann (2003), pp. 18–19.

[380] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. U.S.) (Merits), 1986, ICJ Reports 14 (hereinafter—*Nicaragua case*), para. 218.

The Rome Statute boasts a comprehensive catalogue of war crimes committed in the course of an international or non-international armed conflict. The State Parties engaged in the codification of the Rome Statute endorsed "segregated" and also an arguably "less than coherent distinction between various categories of war crimes".[381] The dynamic development of international law seems to be moving towards the abolition of the distinction between crimes committed in the context of an international or non-international armed conflict. Regardless of the nature of the conflict, it is increasingly acknowledged that the same protection shall be afforded to the civilian population who bear the brunt of the war. The Rome Statute adheres to the conventional classification of war crimes, which mirrors the language of the Geneva Conventions, and encompasses the following four categories of crimes:

(i) Grave breaches of the Geneva Conventions of 12 August 1949 in Article 8(2) (a);
(ii) Other serious violations of the laws and customs applicable in international armed conflict in Article 8(2) (b);
(iii) Serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 applicable to non-international armed conflict in Article 8(2) (c);
(iv) Other serious violations of the laws and customs applicable in armed conflicts applicable to non- international armed conflict in Article 8(2) (e).

4.2.1.2.1 Grave Breaches of the Geneva Conventions of 12 August 1949

The list of "grave breaches" was embedded in the Geneva Conventions following the trials of major war criminals in the Nuremberg Tribunal and national prosecutions for war crimes. The idea as to the inclusion of "grave breaches" in the text of the Geneva Convention (I) was brought forward and lobbied by the experts during the gathering of the International Committee of the Red Cross in 1948. This was done in order to "ensure the universality of treatment of war crimes in their repression", and to draw public attention to the crimes committed by persons who were to be searched for in all States.[382] The actual wording "grave breaches" provoked discussions at considerable length. The rationale behind the use of the term was *arguendo* the most unambiguous wording in comparison with other alternative expressions, such as "grave crimes", "war crimes" etc. This category of crimes has been elevated to customary international law due to the virtually uniform practice as well as the universal ratification of the Geneva Conventions.[383]

Modern international courts and tribunals, including the ICTY and the ICC, criminalise "grave breaches" in their statutory laws. The ICTY was a pivotal authority that provided guidance as to the interpretation of the grave breaches regime in the general context and with respect to the underlying offences. The ICTY is rightly credited for "breathing new life" into the regime, which used to be

[381] Stewart (2009) at 859.

[382] Pictet (1952), Article 49 (commentary), p. 370.

[383] For more on the crystallisation of grave breaches in customary international law, see: Henckaerts (2009), pp. 683–701.

confined to a concise list of "largely inoperative prohibitions" of the Geneva Conventions.[384] The underlying offences of grave breaches encompasses any of the following acts against the protected persons or property:

(i) Wilful killing;
(ii) Torture or inhuman treatment, including biological experiments;
(iii) Wilfully causing great suffering, or serious injury to body or health;
(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
(vii) Unlawful deportation or transfer or unlawful confinement;
(viii) Taking of hostages.

The understanding that "grave breaches" constitute war crimes is uncontroversial.[385] The ICC Preparatory Committee—acting in conformity with the jurisprudence of the *Tadić* Appeals Chamber—acknowledged the applicability of the grave breaches regime to international armed conflicts. The Committee paid particular attention to the description of the nexus between the conduct of the perpetrator and international armed conflict, and the mental element attached to the context in which grave breaches occur.[386] From the standpoint of practitioners, the limitation of grave breaches to international armed conflicts, which requires a higher standard of proof in comparison to other categories of war crimes, may have produced unintended consequences of reducing the number of grave breaches charges brought by the prosecution.[387] The decline in the adjudication of grave breaches in international criminal courts has prompted discussion as to whether the regime shall remain "segregated" from other war crimes, ultimately "abandoned", or "assimilated" with other categories of war crimes.[388] Hitherto no clear solution has been produced, however, it seems implausible that such regime will entirely disappear, since the ultimate value of grave breaches—as originally outlined in the Geneva Conventions—lies in its role in "paving the way to universal jurisdiction on war crimes as a permissive rule".[389]

4.2.1.2.2 Other Serious Violations of the Laws and Customs Applicable in International Armed Conflict

This group of serious violations represents the underlying offences that were not enumerated in the statutes of the ad hoc tribunals. Despite the visible absence of this

[384] Roberts (2009) at 744.
[385] Henckaerts J-M, Doswald-Beck L (2005a), p. 574; Schabas (2010), p. 198.
[386] For more, see: Dörmann (2003), pp. 17–22.
[387] Roberts (2009) at 760; Fleck (2009a) at 853.
[388] Stewart (2009) at 855.
[389] Fleck (2009a) at 853.

category of crimes in the statutory language of the tribunals, the judges have not strictly confined themselves to the exisitng catalogue of war crimes and sanctioned a number of war crimes which appeared to have crystallised in international law. The Rome Statute unequivocally distinguishes between "other serious violations" in the context of an international armed conflict as well as an internal one. The identification of violations in the context of an international armed conflict in the Rome Statute, in addition to the grave breaches regime, is reckoned fully justifiable.[390]

Other serious violations of the laws and customs in an international armed conflict, within the established framework of international law, include any of the following acts under the Rome Statute:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
(xi) Killing or wounding treacherously, individuals belonging to the hostile nation or army;
(xii) Declaring that no quarter will be given;
(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

[390] Henckaerts J-M, Doswald-Beck L (2005a), p. 575.

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
(xvi) Pillaging a town or place, even when taken by assault;
(xvii) Employing poison or poisoned weapons;
(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
(xix) Employing bullets, which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

A quick glance at the list of underlying offences committed in the context of an international armed conflict indicates that an overwhelming number of crimes must be committed "intentionally". This means that for the majority of crimes the default *mens rea* state of "knowledge and intention" set forth in Article 30 of the Rome Statute will apply.[391]

4.2.1.2.3 Serious Violations of Article 3 Common to the Four Geneva Conventions of 12 August 1949 Applicable to Non-International Armed Conflict

Violations of Common Article 3 to the Geneva Conventions may be attributed regardless of the nature of a conflict. Common Article 3 is regarded as a

[391] For more, see: Chap. 5.3.2 (Default Requirements of Intent and Knowledge Under Article 30 of the Rome Statute).

"convention in a miniature" *per se*. The wording of the legal provision does not suggest any criminal sanctions if the breach occurs: a Party to the Geneva Conventions "shall be bound to apply [. . .]" but not "shall criminally punish [. . .]". The construction of Common Article 3 was a compromise solution achieved at the Diplomatic Conference of 1949, since it was necessary to "fall back on a less far-reaching conclusion" for the text to be accepted by the states, but at least to ensure the application of the rules recognised as essential by humanity.[392]

The absence of the call for the criminalisation of violations of Common Article 3 has not impeded international criminal courts and tribunals to adjudicate such violations. Putting it in the words of the ICTY judges:

> The fact that the Geneva Conventions themselves do not expressly mention that there shall be criminal liability for violations of common Article 3 clearly does not in itself preclude such liability. While "grave breaches" *must* be prosecuted and punished by all States, "other" breaches of the Geneva Conventions *may* be so. Consequently, an international tribunal must also be permitted to prosecute and punish such violations of the Conventions.[393]

The *Tadić* Appeals Chamber re-affirmed the customary law status of Common Article 3 by referring to the ICJ holding in *Nicaragua* that construed the Article as reflecting "elementary considerations of humanity" applicable under customary international law to *any* conflict.[394] Violations of Common Article 3 are featured in the Rome Statute and were not subject to controversy during the drafting work on the Statute.[395] The constitutive elements of underlying offences within Common Article 3 are similar to those acts which fall within the grave breaches regime.[396] In a non-international armed conflict, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 are the following:[397]

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
(iii) Taking of hostages;
(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.[398]

[392] Pictet (1958), p. 34.

[393] *Čelebići* Trial Chamber, para. 308.

[394] *Tadić* Decision on Jurisdiction, para. 102 referring to the ICJ *Nicaragua Case*, para. 218.

[395] The draft prepared by the ICC Preparatory Committee was not altered in the final version of the Rome Statute. Schabas (2010), p. 199. See also: Dörmann (2003), pp. 383–384.

[396] Henckaerts J-M, Doswald-Beck L (2005a), p. 591.

[397] Any of the following acts shall be committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.

[398] Rome Statute, Article 8(c); ICTR Statute, Article 4; SCSL Statute, Article 3.

4.2.1.2.4 Other Serious Violations of the Laws and Customs Applicable in Armed Conflicts Applicable to Non-International Armed Conflict

Likewise, other serious violations of the laws and customs in an armed conflict of non-international character are included in the text of the Rome Statute. The ICC Preparatory Committee embraced definitions of punishable acts that mirrored other serious violations in the context of an international armed conflict.[399] Not all underlying acts yet reflect the existing customary law, however, they demonstrate the evolving customary nature of such prohibitions and the development of international law at a fast pace. This category of crimes includes the following underlying offences:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
(v) Pillaging a town or place, even when taken by assault;
(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
(ix) Killing or wounding treacherously a combatant adversary;
(x) Declaring that no quarter will be given;
(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

[399] Schabas (2010), p.199; Dörmann (2003), pp. 439–442.

4.2.2 Crimes Against Humanity

4.2.2.1 Historical Origins of Crimes Against Humanity

The historical origins of crimes against humanity trace back to World War I.[400] The mass killings of Armenians—committed with the instigation and support of the Young Turk government—were widely condemned by the Allied powers as "crimes against civilization and humanity" in the *1919 Report of the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War*. However, the endeavours to prosecute violations embraced in lofty words of "laws of humanity" miserably failed in the aftermath of the war. The timidity of the international community to deal with war crimes prosecutions was not only a "strong weakness in the development of a normative legal scheme" but as well as a "major gap in the general deterrence" of the most despicable crimes of concern to the international community.[401] The peace-making accord, known as the *Treaty of Versailles*, recognised the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war, but there was little success in putting these legal provisions into reality.[402]

Just few decades later, in 1945, the world was recovering from the heinous crimes advanced by Nazi Germany. These events led to the prosecution of top Nazi military and political leadership before the Nuremberg Tribunal in the aftermath of World War II. The debate on the subject of crimes against humanity was limited during the drafting of the Nuremberg Charter, since such crimes were treated as an outgrowth of war crimes. The Nuremberg Charter proscribed certain illegal conduct which fell within crimes against humanity (murder, extermination, enslavement, deportation, other inhumane acts committed against civilian population, persecutions on political, racial or religious grounds) but did not offer guidance on the constitutive elements of the given underlying offences.[403] Those underlying offences qualified as crimes against humanity only when committed in execution of or in connection with any crime within the jurisdiction of the Tribunal. This means that the war nexus requirement was an indispensable element of the definition. The inclusion of the nexus requirement was necessary to secure the very adoption of the Nuremberg Charter, as the Allied Powers feared possible repercussions of the provision on their own warmongering leaders, had they extended the jurisdictional reach of crimes against humanity to the times of peace. The crimes of similar

[400] For more, consult: Bassiouni (1999); Robertson (2000).

[401] Bassiouni (2008a), p. 446.

[402] Treaty of Versailles, Article 228. See also: Article 229 provides for the Allies' right to establish national war crimes tribunals to try the alleged German war criminals; Article 230 requires full cooperation and legal assistance of Germany in those proceedings.

[403] London Charter of the International Military Tribunal, London, 8 August 1945 (hereinafter—Nuremberg Charter), Article 6(c).

gravity committed outside the realm of war did not constitute crimes against humanity proper within the meaning of the Nuremberg Charter.

In Nuremberg, the two-dimensional formula of crimes against humanity comprised of the contextual elements as well as the constitutive elements (*actus reus* and *mens rea*) of underlying offences. In the absence of a legal outline of crimes within the jurisdiction of the Tribunal, the judges possessed considerable discretionary powers as to the interpretation of the legal elements of crimes. The jurisprudence of the Nuremberg Tribunal has been instrumental in turning the law on crimes against humanity in a fully-fledged set of legal rules nowadays.[404]

The Charter of the IMT for the Far East (hereinafter—Tokyo Charter) duplicated the definition of crimes against humanity in the Nuremberg Charter.[405] The only discrepancy between definitions is that the crime of persecution on religious grounds was absent in the Tokyo Charter, which could be explained by the insignificant role of religious sentiments in fuelling the conflict in the Far East.

The Control Council Law No 10, which entrusted the Allied Powers to conduct war crimes trials in their respective zones of occupation, defined crimes against humanity as a distinct category of international crimes in the following fashion:

> 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.

A number of underlying offences was significantly expanded in comparison with the catalogue of crimes against humanity in the Nuremberg and Tokyo Charters. The contribution of the Law No10 is that it succeeded in remedying the major deficiency of crimes against humanity by striking out the war nexus from the definition.

While approaching the subject of crimes against humanity, the ILC oscillated between a narrow and broad approach toward the definition of crimes against humanity in a string of draft codes on international crimes. *The Draft Code of Offences against the Peace and Security of Mankind* (1954)[406] posited crimes against humanity as crimes committed by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities. The incorporation of the State policy element is commendable because it reflects the involvement of a State in orchestrating crimes against humanity, which makes it particularly challenging to prosecute such crimes domestically. The Draft Code criminalised the following offences against the peace and security of mankind:

[404] Mettraux (2005), p. 147.

[405] Charter of the International Military Tribunal for the Far East, 19 January 1946 (hereinafter—Tokyo Charter), Article 5.

[406] Report of the International Law Commission to the General Assembly, Draft Code of Offences Against the Peace and Security of Mankind, U.N. GAOR, 9th Sess., Supp. No. 9, U.N. Doc. A/2691 (1954).

(11) Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.

The legal provision was reappraised in the subsequent *Draft Code of Offences against the Peace and Security of Mankind* (1991). While the bulk of underlying offences was retained, crimes against humanity fell under the heading of "systematic or mass violations of human rights":[407]

An individual who commits or orders the commission of any of the following *violations of human rights*: murder; torture; establishing or maintaining over persons a status of slavery, servitude or forced labour; persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; or deportation or forcible transfer of population shall, on conviction thereof, be sentenced [to . . .].

Although every single crime against humanity is a guaranteed human right violation, it does not work *vice versa*. The substitution of crimes against humanity with gross human rights violations would do nothing but impair the prosecution's capacity to prove the commission of crimes beyond a reasonable doubt because human rights violations are generally formulated in much broader terms than international crimes. The feeble justification of the ILC in favour of such an overly inclusive legal construction of crimes against humanity was that *only* systematic or mass violations of human rights were considered to constitute a crime. The "systematic" element was used to designate a constant practice or a methodical plan to carry out human rights violations, whereas the "mass-scale" element was employed to signify a number of people affected by such violations. Either one of those aspects — systematic or mass scale — was deemed sufficient to satisfy the contextual elements of crimes against humanity.

The *Draft Code of Offences against the Peace and Security of Mankind* (1996) overhauled the definition of crimes against humanity yet again.[408] Pursuant to Article 18 of the Code, a crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organisation or group:

(*a*) Murder;
(*b*) Extermination;
(*c*) Torture;
(*d*) Enslavement;
(*e*) Persecution on political, racial, religious or ethnic grounds;
(*f*) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
(*g*) Arbitrary deportation or forcible transfer of population;

[407] Report of the International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, U.N. GAOR, 46th Sess., Supp. No.10, U.N. Doc. A/46/10 (July 19, 1991).

[408] Report of the International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, U.N. GAOR, 48th Sess., U.N. Doc. A/CN.4/L.532 (July 8, 1996).

(*h*) Arbitrary imprisonment;
(*i*) Forced disappearance of persons;
(*j*) Rape, enforced prostitution and other forms of sexual abuse;
(*k*) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

In addition to State authorities, the definition appears to cover non-state actors by providing for the terms of "any organisation" and "any group" as disjunctive. The issue as to whether the acts committed by non-state actors, which are of widespread or systematic nature, form an integral part of the contextual elements of crimes of humanity is further discussed in this chapter.

4.2.2.2 Crimes Against Humanity in International Criminal Courts and Tribunals

Article 5 of the ICTY Statute introduces contextual elements of crimes against humanity: "[. . .] Tribunal shall have the power to prosecute persons responsible for the [. . .] crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population". The original intention of the drafters was to retain the armed conflict nexus, notwithstanding the protracted arguments in the ILC that it was an obsolete criterion that only hindered the prosecution of egregious atrocities in a time of peace. It did not take a long time for the Security Council to rectify the situation by omitting the armed conflict nexus in the definition of crimes against humanity tailored for the ICTR. Article 3 of the Statute reads:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
>
> a) Murder;
> b) Extermination;
> c) Enslavement;
> d) Deportation;
> e) Imprisonment;
> f) Torture;
> g) Rape;
> h) Persecutions on political, racial and religious grounds;
> i) Other inhumane acts.

The ICTY Appeals Chamber in its *Tadić* jurisdictional decision acknowledged the obsolescence of the war nexus requirement.[409] The judges substantiated their legal findings by resorting to international conventions on the prohibition of

[409] *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (hereinafter—*Tadić* Appeal Decision on Jurisdiction), 2 October 1995, para. 140.

genocide and apartheid, both of which proscribed certain crimes against humanity regardless of any connection to an armed conflict.[410] The judges also pinpointed that the obsolescence of the war nexus requirement was settled in customary international law. In the Chamber's belief, the Security Council may have initially defined crimes against humanity more narrowly than necessary under customary international law by requiring that they be committed in either internal or international armed conflict.[411] The definition of crimes against humanity, which was incorporated into the Rome Statute, reflects the existing customary law by re-affirming the irrelevance of whether the crimes are committed in the context of an armed conflict or not:

> For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

This definition is nearly an objective reflection of customary rules governing the law on crimes against humanity.[412] Although the provision does not specify that crimes against humanity may be committed in a time of peace, it is nevertheless implied. The definition explicates customary international law when it specifies that the contextual elements must be accompanied by the requisite *mens rea* standard ("knowledge of the attack") on the part of a perpetrator. The chapeau of the article is silent as to whether "attack directed against a civilian population" must be carried out pursuant to or in furtherance of a State or organisational policy, but the

[410] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, (hereinfater—Genocide Convention), Article 1; International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 U.N.T.S. 243, Articles 1–2.

[411] *Tadić* Appeal Decision on Jurisdiction, para. 141.

[412] For more, see: Cassese et al. (2002), pp. 373–377.

discussion was later featured in the pre-trial jurisprudence of the Court with the division of opinions in that regard.[413] It is important to bear in mind that Article 7 is specific to the jurisdiction of the Court and thus should not be construed as "confining the scope of the customary law meaning of the term of crimes against humanity".[414]

4.2.3 Genocide

4.2.3.1 Historical Origins of the Crime of Genocide

Being as old as humanity, the crime of genocide had not been called by its proper name until 1944, while often been replaced with the term "mass murder". The recognition of genocide as a distinct crime under international law has been "uncomfortable" for States since times immemorial given an added politicised connotation of the term. Frequently, genocide is sparkled by the ideological imperatives, which are endorsed by ruling elites to legitimate their supremacy.[415] The impunity for the Armenian genocide, which is still an issue at dispute, had a profound effect on *Adolf Hitler* who referred to the Ottoman killings of Armenians in order to justify Nazi's policy. His words "who, after all, speaks today of the annihilation of the Armenians?"[416] served as clear guidance to all his followers to act brutally and without mercy. In the midst of the despicable crimes orchestrated and executed by the Nazi leadership, the entire world community felt the brunt of war, which was accompanied by the dominance of army, weaponry and impunity. The then British Prime Minister, *Winston Churchill*, thundered in the BBC broadcast: "We are in the presence of the crime without a name".[417] Eventually, the crime acquired its name—genocide. The term was coined by *Raphael Lemkin*[418] in his world-renowned book *"Axis Rule in Occupied Europe"* (1944).[419] It was the

[413] For more, see: Chap. 4.3.1.2.3 (Organisational Plan or Policy Requirement).

[414] Schabas (2010), p. 144.

[415] Fein in Lattimer (2007), pp. 271–294.

[416] http://www.genocide1915.info/quotes/ retrieved on July 10, 2011.

[417] Prime Minister *Winston Churchill's* broadcast to the world about the meeting with *President Roosevelt* on August 24, 1941. The full text of the broadcast is available at http://www.ibiblio.org/pha/timeline/410824awp.html, retrieved 10 July 2011.

[418] Raphael Lemkin (June 24, 1900 to August 28, 1959) was a lawyer of Polish-Jewish descent. Prior to World War II, Lemkin was taken by the barbarity and vandalism of the Armenian massacre, and campaigned at the League of Nations for the legal prohibition of the crime, what he later termed as genocide.

[419] Lemkin (2005) (originally published in 1944). As early as 1933, Lemkin submitted a proposal, albeit unsuccessfully, to the International Conference for Unification of Criminal Law held in Madrid to declare the destruction of racial, religious or social collectivities a crime under the law of nations (*delictum iuris gentium*).

author's persistent lobbying, backed by the prestige of his book, which contributed to the adoption of the Genocide Convention. The term "genocide"—purposefully invented by the author—succinctly succeeded to connote something evil in its scope. The word derives from Greek *genos* (race or tribe) and Latin *cide* (to kill), and literally means "killing of a race".

Lemkin defines the crime of genocide as "the destruction of a nation or of an ethnic group" that entails the existence of "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves".[420] He recognised that the crime of genocide was not only confined to the deprivation of life but also involved the "prevention of life (abortions, sterilizations) and devices considerably endangering life and health (artificial infections, working to death in special camps, deliberate separation of families for depopulation purposes and son forth)".[421] All underlying acts were "subordinate to the criminal intent to destroy or to cripple permanently a human group".[422] From the cultural perspective, *Lemkin* opined that genocide "conveys the specific losses to civilization in the form of the cultural contributions which can be made only by groups of people united through national, racial or cultural characteristics".[423]

The crime of genocide did not feature in the Nuremberg Charter. The Judgement dismissed genocide charges levied against the accused by the Prosecution that were described as "extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups, in particular Jews, Poles and Gypsies and others".[424] In order to describe the nature of those crimes, other terms and expressions were used, such as mass murder, annihilation of certain groups of individuals or populations, etc. The glaring absence of the crime of genocide in Nuremberg was rooted in the Allies' reluctance to deal with the individualised victim groups, and the acceptance of individuals as victims but not groups or nations *per se*. Another plausible explanation of such an omission may be the fear of revengeful manipulation of trial by certain groups of victims. The judges sought to demonstrate the destruction of millions of human beings but not of the particular ethnic, national or religious groups. The legal justification is the very absence of the crime of genocide in international law at that time. The crime was of unique nature, thus endangering the prosecution's arguments to appear flimsy if the existence of such a crime was to be argued in the court of law.

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[420] Lemkin (2005) (originally published in 1944), p. 79.

[421] Lemkin in Lattimer (2007), p. 147.

[422] Ibid.

[423] Ibid.

[424] IMT, The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part I, 20th November 1945 to 1st December 1945, London, 1946, Indictment, p. 22.

The spectacular development of international human rights law in the aftermath of World War II impelled the international community to impose the prohibition of genocide in ink, which led to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide.[425] The Preamble to the Draft Genocide Convention took notice of the Nuremberg Judgment that "punished under a different legal description certain persons who have committed acts similar to those which the Present Convention aims at punishing".[426] However, the reference was omitted in the original text of the Convention which was most probably done in order to prevent the confusion of genocide with crimes against humanity as laid down in the Nuremberg Charter.[427]

4.2.3.2 Genocide in International Criminal Courts and Tribunals

The prohibition of genocide is firmly entrenched in the conventional and customary rules of international law. The centrepiece of the law of genocide is the Convention on the Prevention and Punishment of the Crime of Genocide, which had been dormant for more than 40 years until the first genocidal cases were adjudicated before the ICTR and its sister-tribunal, the ICTY. The establishment of the ad hoc tribunals and the subsequent development of the jurisprudence have compellingly demonstrated the enforceability of the rules governing the crime of genocide.

The international community has witnessed a number of landmark cases on the crime of genocide in modern international criminal tribunals. The genocidal charges levied against accused have led to successful convictions. These developments attest to the intolerance of impunity for the culprits of genocide. The practices of the ad hoc tribunals have greatly contributed to the formation and expansion of the substantive body of international criminal law. The tribunals performed well with respect to the interpretation of the legal provisions of the Genocide Convention in the absence of clearly defined legal elements of the crime. Whereas the jurisprudence of the ICC on the crime of genocide is in the stage of infancy, it adheres to the trend-setting jurisprudence of its predecessors, in particular with respect to the protected group element, *mens rea*, etc. Said that, the overall picture is not as rosy as it seems, and there has been large-scale condemnation that genocide has not captured enough attention to prevent its recurrence and punish responsible perpetrators.

As early as in 1951, the ICJ in its *Advisory Opinion on Reservations to the Convention on Genocide Case* emphasised that "the origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as a

[425] The Genocide Convention was opened for signature on December 8, 1948 and entered into force on January 12, 1951.

[426] Ad Hoc Committee Draft, Second Draft Genocide Convention prepared by the Ad Hoc Committee of the Economic and Social Council (ECOSOC), meeting between April 5, 1948 and May 10, 1948, UN Doc. E/AC.25/SR.1 to 28.

[427] Official Record of the 3rd Session of the GA, 6th Committee, Summary Records of the Meetings, 21 September to 10 December 1958, UN Doc. A/C.6/SR.109, pp. 489–490.

crime under international law".[428] The principles underlying the Genocide Convention were recognised as binding on states, even without any conventional obligation. The rules governing the crime of genocide were proclaimed an integral part of customary rules of international law, which acquired the level of *jus cogens*.[429] Moreover, the obligations of States to prevent and punish the crime of genocide were considered *erga omnes* in nature.[430] This was reaffirmed in the notable *Barcelona Traction* case.[431]

The parallel development of treaty law and customary law has accentuated similarity and disparity between treaty norms with the focus on individual criminal responsibility and customary law primarily concerned with state responsibility.[432] However, it would be unreasonable to consider these two regimes separately, given that the law on individual criminal responsibility is logically complemented by international state responsibility, which predated the most recent developments in international criminal law. The state responsibility doctrine is somewhat similar to a tort-like concept that, in comparison to that of individual criminal responsibility, is not overburdened by the strict requirements of proof inherent to international criminal law.[433]

Being tasked with the adjudication of disputes between States, the ICJ encountered challenges when interpreting the applicability of *mens rea*—a crucial constitutive element of genocide—to the legal elements of state responsibility. It is crystal clear that a State as an abstract sovereign entity does not possess any mental element. In order to attribute state responsibility for genocide, the ICJ examined the conduct of individual state officials, and whether their conduct may be attributed to a State.[434] The ICJ jurisprudence on state responsibility for genocide remains scarce and involves the recent contentious case of *Bosnia v Serbia* as well as the aforementioned advisory opinion on the reservations to the Genocide Convention.

The legal definition of genocide, as provided in Article 2 (2) of the ICTR Statute, Article 4 (2) of the ICTY Statute, and Article 6 of the Rome Statute, replicates *verbatim* Article 2 of the Genocide Convention:

[428] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, 1951, ICJ Reports 16, para. 23.

[429] Ibid.

[430] Ibid. See also: *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Bosnia-Herzegovina v. Yugoslavia*, 1996, ICJ Reports 595, para. 31.

[431] *Barcelona Traction, Light and Power Company, Ltd., (Belgium v. Spain)*, 1970, ICJ Reports 3, para. 32.

[432] Shany in Gaeta (2009a), p. 25.

[433] Seibert-Fohr in Gaeta (2009a), pp. 369–373. For more on state responsibility for genocide, consult: Ohlin in Gaeta (2009a); Palchetti in Gaeta (2009a); Schabas (2007b).

[434] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007, ICJ Reports 140, paras 179, 415.

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

The ICTR Trial Chamber in its *Musema* Judgment held that it is necessary to prove the following constitutive elements in order to establish the crime of genocide:

> (i) firstly, that one of the acts listed under Article 2(2) of the ICTR Statute be committed;
> (ii) secondly, that such an act be committed against a national, ethnical, racial or religious group, specifically targeted as such;
> (iii) thirdly, that the "act be committed with the intent to destroy, in whole or in part, the targeted group.[435]

Pre-Trial Chamber I of the ICC followed the same interpretation path and deconstructed the crime into the following legal elements:

> (i) the victims must belong to the targeted group;
> (ii) the killings, the serious bodily harm, the serious mental harm, the conditions of life, the measures to prevent births or the forcible transfer of children must take place *'in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'*; and
> (iii) the perpetrator must act with the intent to destroy in whole or in part the targeted group.[436]

The definition of genocide would have satisfied the existing criteria of the crime crystallised in customary international customary law, had it not incorporated the commission of underlying genocidal acts "in the context of a manifest pattern of similar conduct". The debate as to the inclusion of the contextual element as a *sine qua non* requirement for the crime of genocide was predated by the protracted argument on the same subject in the jurisprudence of the ad hoc tribunals.

The indisputable constitutive elements of the crime of genocide involve both the material and mental elements of a crime. First of all, the conviction of genocide requires *actus reus* that consists of one or more acts enumerated in the Genocide Convention. Secondly, the conviction for genocide requires the twofold *mens rea* standard, in particular aggravated intent (*dolus specialis*) "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"[437] as well as general intent in relation to the underlying offences.

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[435] *Musema* Trial Judgment, para. 154.

[436] *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 113.

[437] *Krstić* Trial Judgment, para. 542; *Jelisić* Trial Judgment, para. 62.

4.3 Structure of International Crimes

Each international crime is a two-layered combination of constitutive elements. The very first layer embodies contextual elements, which reveal the context in which the crimes are committed, such as the existence of an international or non-international armed conflict, an attack directed against the civilian population in the time of peace etc. The link between the existence of the requisite contextual elements and underlying offences is reflected in the perpetrator's *mens rea*.

4.3.1 Contextual Elements

The vexed issue as to whether the contextual elements pertain to the material elements of international crimes emerged during the discussion of the ICC Working Group. The recognition of the contextual elements as material elements of international crimes would obviously entail the necessity to attach the requisite *mens rea* standard thereto. The attribution of the separate *mens rea* standard to the contextual elements was deemed to complicate the definitions of crimes within the jurisdiction of the Court, with several delegations advocating to treat the contextual elements as of "purely jurisdictional nature". The overall approach towards the contextual elements in the jurisprudence of international criminal courts and tribunals is that they pertain to the material elements of crimes, but they do not call for the full *mens rea* coverage as required for the underlying offences of international crimes.[438]

4.3.1.1 War Crimes

4.3.1.1.1 Existence of an Armed Conflict

Neither the Geneva Conventions nor Additional Protocols thereto provide for an elaborate definition of an "armed conflict". The concept was expounded in the jurisprudence of the ICTY in the celebrated *Tadić Appeal Decision on Jurisdiction* that defined an armed conflict as "a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".[439]

It is firmly established customary law that international humanitarian law governs the conduct of both international and non-international armed conflicts. The definition of an "armed conflict" varies depending on whether the hostilities are of international or non-international character. Hence, it is essential to distinguish

[438] Kelt and von Hebel in Lee (2001) p. 28.

[439] *Tadić* Appeal Decision on Jurisdiction, para. 70; *Kordić and Čerkez* Appeal Judgement, para. 341.

between an international armed conflict fought between two or more States, and non-international armed conflict fought between a State and another armed force, which does not qualify as a State.

In an international armed conflict, the existence of armed force between States is sufficient by itself to trigger the application of international humanitarian law. The parties to a non-international armed conflict are not sovereign States but the government of a single State in conflict with one or more armed factions within its territory.[440] Not all internal conflicts elevate to the standard accommodated for a non-international armed conflict.[441] Additional Protocol II applies to "all armed conflicts [. . .] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".[442] Article 1(2) of Protocol II rules out "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature". The ICTR Trial Chamber in the *Akayesu* case paid attention to the distinction between genuine armed conflicts and mere acts of banditry or unorganised and short-lived insurrections, and clarified that the term "armed conflict" *per se* suggests the existence of hostilities between armed forces organised to a greater or lesser extent, whereas situations of internal disturbances and tensions do not fall within the framework of "armed conflict" as understood in international humanitarian law.[443] The *Akayesu* Trial Chamber evaluated both the intensity and organisation of the parties to the conflict in order to establish the very existence of the internal armed conflict in the territory of Rwanda.[444] The ICTY Trial Chamber in the *Čelebići* case accentuated on the protracted extent of the armed violence and the extent of organisation of the parties involved that distinguishes internal armed conflicts from cases of civil unrest or terrorist activities.[445] The *Kayishema* Trial Chamber outlined a set of necessary characteristics to be satisfied by the dissident armed forces or other organised armed groups in order to qualify as a party to a non-international armed conflict: (i) be under responsible command; (ii) exercise control over part of the territory of the

[440] *Kayishema* Trial Judgement, para. 247.

[441] *Akayesu* Trial Judgement, paras 619–620; *Kayishema* Trial Judgement, para. 171; *Musema* Trial Judgement, para. 248.

[442] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter—Protocol II), 8 June 1977, Article 1.

[443] *Akayesu* Trial Judgement, paras 619–620.

[444] *Akayesu* Trial Judgement, paras 620–621. The "evaluation" test was initially introduced by the *Akayesu* Trial Chamber, and subsequently followed by the ICTR *Rutaganda* Trial Chamber and *Musema* Trial Chamber.

[445] *Čelebići* Trial Judgement, para. 184.

State; (iii) carry out sustained and concerted military operations; and (iv) be able to implement Protocol II.[446]

International humanitarian law applies from the initiation of an armed conflict and extends beyond the cessation of hostilities until a general conclusion of peace is reached or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place therein.[447] The *Blaškić* Trial Chamber held that it is not necessary to establish the existence of an armed conflict within each municipality concerned; it suffices to establish the existence of the conflict within the whole region, which the municipalities are a part of.[448] In similar words, the *Kordić* Trial Chamber observes that the sufficient requirement to trigger the application of international humanitarian law is to demonstrate that a state of armed conflict existed in the larger territory of which a given location forms part thereof.[449]

4.3.1.1.2 Nexus Between Armed Conflict and Alleged Offence

The act or omission qualifies as a war crime only when it is sufficiently connected to an armed conflict. The existence of the armed conflict nexus distinguishes war crimes from purely domestic crimes, as it strikes out isolated criminal occurrences from the realm of the laws of war.

To demonstrate the nexus between an armed conflict, whether international or non-international, and the alleged offence, it is necessary to determine that the offence was closely related to the armed conflict as a whole.[450] This does not imply that the crimes must all be committed in the precise geographical region where an armed conflict is taking place at a given moment.[451] To show the presence of the link, it suffices that "the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict".[452]

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[446] *Kayishema* Trial Judgement, para. 171.

[447] *Tadić* Appeal Decision on Jurisdiction, para 70. See also: Article 6 (2) of Geneva Convention IV: "[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations". Article 3(b) of Protocol I to the Geneva Conventions contains similar language. In addition to these textual references, the very nature of the Conventions, in particular Conventions III and IV, dictates their application throughout the territories of the parties to the conflict, as any other construction would substantially defeat their purpose.

[448] *Blaškić* Trial Judgement, para. 64.

[449] *Kordić and Čerkez* Trial Judgement, para. 27.

[450] *Blaškić* Trial Judgement, para. 69; *Kordić* and Čerkez Trial Judgement, para. 32; *Tadić* Appeal Decision on Jurisdiction, para. 70.

[451] *Blaškić* Trial Judgement, para. 69.

[452] *Tadić* Appeal Decision on Jurisdiction, para. 70.

There is no requirement that the crimes be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict.[453] An armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it. If it can be established that the perpetrator *acted in furtherance of or under the guise of the armed conflict*, it is sufficient to conclude that his acts were closely related to the armed conflict.[454] The ICTR Appeals Chamber explicated the phrase "under the guise of the armed conflict" in the following fashion:

> "Under the guise of the armed conflict" does not mean simply "at the same time as an armed conflict" and/or "in any circumstances created in part by the armed conflict". For example, if a non-combatant takes advantage of the lessened effectiveness of the police in conditions of disorder created by an armed conflict to murder a neighbour he has hated for years, that would not, without more, constitute a war crime under Article 4 of the [ICTR] Statute. By contrast, the accused in *Kunarac,* were combatants who took advantage of their positions of military authority to rape individuals whose displacement was an express goal of the military campaign in which they took part. Second, the determination of a close relationship between particular offences and an armed conflict will usually require consideration of several factors, not just one.[455]

In determining whether or not the act in question is sufficiently related to the armed conflict, the following factors may be taken into consideration: (i) the fact that the perpetrator is a combatant; (ii) the fact that the victim is a non-combatant; (iii) the fact that the victim is a member of the opposing party; (iv) the fact that the act may be said to serve the ultimate goal of a military campaign; (v) the fact that the crime is committed as part of or in the context of the perpetrator's official duties etc.[456]

4.3.1.1.3 Victims Not Directly Taking Part in the Hostilities

It is important to establish that the victims of war crimes were not directly taking part in the hostilities at the time the alleged violation was committed. Common Article 3 renders protection to "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause". Additional Protocol II speaks of "all persons who do not take a direct part or who have ceased to take part in hostilities". The question as to whether civilians have participated directly in hostilities is decided on the specific facts of each case by taking into

[453] *Tadić* Trial Judgement, para. 573; *Čelebići* Trial Judgement, para. 195.

[454] *Kunarac* Appeal Judgment, para. 58; *Rutaganda* Appeal Judgement, para. 570.

[455] *Rutaganda* Appeal Judgment, para. 570.

[456] *Kunarac* Appeal Judgment, para. 59; *Rutaganda* Appeal Judgement, para. 570.

consideration the sufficient causal relationship between the act of participation and its immediate consequences.[457]

4.3.1.1.4 *Mens Rea* Adjacent to the Contextual Elements of War Crimes

The ad hoc tribunals hinged on the objective criteria to determine the existence of an armed conflict as well as the nexus between the alleged crime and an armed conflict.[458] The jurisprudence remained nearly silent on the relevance of the *mens rea* requirement to the contextual elements. In the *Halilović* case, the Trial Chamber acknowledged that knowledge of the status of the victims was one aspect of the *mens rea* to be proven,[459] however, it did not elaborate on what the remaining *mens rea* aspects were. The *Popović* Trial Chamber held that a perpetrator of the crimes within the premises of Common Article 3 crime must know or should have been aware that the victim was taking no active part in the hostilities when the crime was committed.[460]

The ICC Elements of Crimes do not require awareness by the perpetrator of the facts that established the character of an armed conflict as international or non-international. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict.[461] The ICC PrepCom was engaged into the discussion whether the mental element was meant to accompany the contextual elements of war crimes. In light of the stringent default *mens rea* standard of intent and knowledge in Article 30 of the Statute, it seems that the proof of the perpetrator's awareness of the existence of an armed conflict and its character thereof is required, but in fact the perpetrator should only know about the nexus between his acts and an armed conflict.[462]

4.3.1.2 Crimes Against Humanity

The contextual elements of crimes against humanity are as follows: (i) there must be an attack; (ii) the attack must be widespread or systematic; (iii) the attack must be directed against any civilian population; (iv) the acts of the Accused must be part of the attack; and (iv) the Accused must know that his or her acts constitute part of a widespread or systematic attack directed against any civilian population.[463]

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[457] Sandez et al. (1987) (ICRC Commentary on Additional Protocols), Additional Protocol II, Article 13(3), para. 4787.

[458] *Tadić* Trial Judgement, para. 572; *Tadić* Appeal Decision on Jurisdiction, paras 81, 84.

[459] *Halilović* Trial Judgement, para. 36 and fn 83.

[460] *Boškoski and Tarčulovski* Appeal Judgement, para. 66; *Popović* Trial Judgement, para. 743.

[461] ICC Elements of Crimes, Article 8 (War Crimes), Introduction.

[462] Dörmann (2003), pp. 20–22.

[463] *Kunarac* Appeal Judgement, para. 85; *Popović* Trial Judgement, para. 751.

4.3.1.2.1 The Requirement of an "Attack"

The ICTY jurisprudence has consistently construed "attack" as a course of conduct involving the commission of the acts of violence. The Trial Chamber in the *Tadić* case noted that:

> The very nature of the criminal acts in respect of which competence is conferred upon the International Tribunal by Article 5, that they be "directed against any civilian population", ensures that what is to be alleged will not be one particular act but, instead, a course of conduct.[464]

The ICTY Trial Chamber in *Kunarac* submits that the term "attack" in the context of crimes against humanity bears somewhat different connotation than in the laws of war.[465] In such context, an attack is not limited to the use of armed force but also encompasses any mistreatment of the civilian population.[466]

The ICTR Trial Chamber in *Akayesu* defines "attack" as an unlawful act of the kind enumerated in Article 3 of the ICTR Statute, such as murder, extermination, enslavement etc. The jurisprudence is furnished with examples when "attack" may be non-violent in nature: the imposition of apartheid,[467] or exerting pressure on the population to act in a particular manner under the purview of an attack, provided it is orchestrated on a massive scale or in a systematic manner.[468] The jurisprudence of international criminal courts and tribunals endorses the definition of "attack" which is synonymous to "campaign, operation or course of conduct".[469] An attack can precede, outlast, or continue during an armed conflict and thus it may, but need not be a part of an armed conflict.[470] The distinction between an attack and an armed conflict reflects the position in customary international law that crimes against humanity may be committed in peacetime and independent of an armed conflict.[471] The Rome Statute formulates the definition of "attack" vis-à-vis the element of a State or organisational policy:

> Attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.[472]

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[464] *Prosecutor v Tadić*, Case IT-94-1-A, Decision on the Form of the Indictment, 14 November 1995, para. 11.

[465] Article 49(1) of Additional Protocol I defines "attacks" as "acts of violence against the adversary, whether in offence or in defence".

[466] *Kunarac* Appeal Judgement, para. 86; *Akayesu* Trial Judgement, para. 581.

[467] Apartheid is declared as a crime against humanity in Article 1 of the Apartheid Convention of 1973 and Article 7 of the Rome Statute.

[468] *Akayesu* Trial Judgement, para. 581.

[469] *Naletilić and Martinović* Trial Judgement, para. 233; *Akayesu* Trial Judgement, para. 581.

[470] *Kunarac* Appeal Judgement, para. 86; *Limaj* Trial Judgement, para. 182; *Vasiljević* Trial Judgement, para. 30; *Naletilić and Martinović* Trial Judgement, para. 233.

[471] *Tadić* Appeal Judgement, para. 251; *Tadić* Appeal Decision on Jurisdiction, para. 141; *Kunarac* Appeal Judgement, para. 86.

[472] Rome Statute, Article 7(2)(a).

Similar to the jurisprudential line of reasoning in the ad hoc tribunals, "attack" refers to a campaign or operation carried out against the civilian population, which is supported by the appropriate terminology in Article 7(2)(a) of the Rome Statute, in particular "course of conduct".[473] The commission of any act enumerated in Article 7(1) of the Rome Statute constitutes "attack" with no additional requirement to be proven in that regard.[474] According to Article 7(2)(a) of the Rome Statute, "attack" must be carried out pursuant to or in furtherance of a State or organisational policy. Pre-Trial Chamber I acknowledges that the required policy element may be implemented by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population, and it does not need to be formalised.[475] The *Katanga* Pre-Trial Chamber held that an attack, which is planned, directed or organised in the contrast to spontaneous or isolated acts of violence, will meet the criterion of "a State or organisational policy".[476] The attack requirement serves as a "descriptive device to capture the pattern of criminality", in the context of which the acts of the accused must take place to satisfy the definition of crimes against humanity.[477]

4.3.1.2.2 The Requirement of a "Widespread" or "Systematic" Attack

It is firmly established in customary law that the attack requirement to be either widespread *or* systematic is disjunctive and not cumulative.[478] The term "widespread" refers to the large-scale nature of the attack and the number of victims, whereas the term "systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence.[479] The patterns of crimes—that is the non-accidental repetition of similar criminal conduct on a regular basis—are common expressions of such systematic occurrence.[480] The ICTY Appeals Chamber in the *Kunarac* case introduced the test in order to determine whether "attack" satisfies the "widespread" or "systematic" requirement:

[473] *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 75 citing in support Dixon in Triffterer (2008), p. 175.

[474] Ibid. See also: *Akayesu* Trial Judgment, para. 581.

[475] Ibid. See also: *Tadić* Trial Judgement, para. 653.

[476] Ibid. See also: *Katanga et al.* (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 396.

[477] Mettraux (2005), p. 161.

[478] *Kunarac* Appeal Judgement, para. 97; *Kordić and Čerkez* Appeal Judgement, para. 93; *Limaj* Trial Judgement, para. 183. According to the ICTY *Kunarac* Appeals Chamber, once the Trial Chamber is convinced that either requirement is met, the Chamber is not obliged to consider whether the alternative qualifier is also satisfied (para. 93).

[479] *Kordić and Čerkez* Appeal Judgement, para. 94; *Kunarac* Appeal Judgement, para. 94; *Blaškić* Appeal Judgement, para. 101; *Limaj* Trial Judgement, para. 183.

[480] *Kunarac* Appeal Judgement, para. 94.

> [T]he assessment of what constitutes a 'widespread' or 'systematic' attack is essentially a relative exercise in that it depends upon the civilian population which, allegedly, was being attacked. A Trial Chamber must therefore 'first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic'. The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a 'widespread' or 'systematic' attack vis-à-vis this civilian population.[481]

Likewise, the commission of any act(s) enumerated in Article 7(1) of the Rome Statute constitutes crimes against humanity when committed as part of a widespread or systematic attack directed against the civilian population. Given the absence of the description of "widespread" and "systematic" characteristics of the attack in the text of the Rome Statute, Pre-Trial Chamber I of the ICC endorses the interpretation of both terms akin to that in the jurisprudence of the ad hoc tribunals:

> [T]he expression 'widespread' or 'systematic' in article 7(1) of the [Rome] Statute excludes random or isolated acts of violence. Furthermore, the adjective 'widespread' connotes the large-scale nature of the attack and the number of targeted persons, whereas the adjective 'systematic' refers to the organised nature of the acts of violence and the improbability of their random occurrence.[482]

In the context of a widespread attack, the requirement of an organisational policy within the meaning Article 7(2)(a) of the Rome Statute means that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. Furthermore, it must be also conducted in the furtherance of a *common policy*, which may be formulated either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population.[483]

Pre-Trial Chamber I comports with the ad hoc tribunals as to the interpretation of the term "systematic", which is understood as either an organised plan in furtherance of a common policy that follows a regular pattern and results in the continuous commission of acts,[484] or as "patterns of crimes", i.e. the crimes constitute a "non-

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[481] *Kunarac* Appeal Judgement, para. 95 (original footnotes omitted).

[482] *Katanga et al.* (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 394 citing in support the ICTY jurisprudence: *Kordić and Čerkez* Appeal Judgment, para. 94; *Blagojević* Trial Judgment, paras 545–546.

[483] Ibid., para. 396 citing in support the 1991 Draft Code, commentary on Article 21, para. 5: "Private individuals with *de facto* power or organised in criminal gangs or groups"; *Akayesu* Trial Judgment, para. 580; *Kordić and Čerkez* Trial Judgment, para. 179; *Kordić and Čerkez* Appeal Judgment, para. 94; *Kayishema* Trial Judgment, para. 123; United Nations General Assembly, Report on the International Law Commission to the General Assembly, 51-U.N. GAOR Supp. No. 10 at 94, UN Doc. A/51/10 (1996).

[484] *Akayesu* Trial Judgment, para. 580; *Kayishema* Trial Judgment, para. 123; *Kordić and Čerkez* Trial Judgment, para. 179.

accidental repetition of similar criminal conduct on a regular basis".[485] In the context of a "systematic" attack, the requirement of "multiplicity of victims" pursuant to Article 7(2)(a) of the Statute implies that the attack involves a multiplicity of victims of one of the acts referred to in Article 7(1) of the Rome Statute.

4.3.1.2.3 Organisational Plan or Policy Requirement

The existence of a policy or plan, or that the crimes were supported by the accompanying policy or plan, may be evidentially relevant to establish the "widespread" or "systematic" nature of the attack, but it is not a distinct legal requirement of the contextual elements of crimes against humanity in the view of the ICTY Appeals Chamber.[486] Divergent opinions have been voiced in the jurisprudence and academic writings alike whether the existence of a policy or plan belongs to the constitutive element of crimes against humanity. *Bassiouni* contends that by their very nature crimes against humanity and genocide are the products of state action.[487] *Schabas* concurs with *Bassiouni* in that regard and pinpoints that the ICTY Appeals Chamber failed to show the practice that "overwhelmingly supports the contention that no such [organisational plan or policy] requirement exists under customary international law".[488] In addition, *Schabas* arraigned the Appeals Chamber for failing to mention the text of Article 7(2) of the Rome Statute, and its influence upon the determination of customary international law.[489] Despite the vocal criticism in the academia, the legal finding of the *Kunarac* Appeals Chamber, which favours the absence of a policy or plan requirement, has been approvingly cited in the subsequent jurisprudence of international criminal courts with an exception of the ICC.

Another vexed issue is whether non-state actors are covered under the umbrella of "organisational policy". Although *Bassiouni* acknowledges a rising tendency of the commission of international crimes by non-state actors over the last 50 years, he believes that international criminal law has not developed along those lines.[490] It is true that modern international criminal courts and tribunals were established due to the unwillingness and inability of individual States to prosecute crimes committed as a part of a state policy or a plan. It is with the reference to those developments that *Bassiouni* construes the text of Article 7(2) of the Rome Statute as expressly

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[485] *Kordić and Čerkez* Appeal Judgment, para. 94; *Blaškić* Appeal Judgment, para. 101; *Kunarac* Appeal Judgment, para. 94; *Akayesu* Trial Judgment, para. 580.

[486] *Kunarac* Appeal Judgement, para. 98 which also holds that "neither the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan" [...]. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters". See also: *Blaškić* Appeal Judgement, para. 120.

[487] Bassiouni (2008b), p. 714.

[488] *Kunarac* Appeal Judgement, para. 98.

[489] Schabas (2007b), p. 103.

[490] Bassiouni (2008b), p. 714. For the opposite viewpoint, see: Clapham (2008), pp. 899–926.

referring to a state policy. In his opinion, the reference to "organisational policy" does not mean the policy of an organisation, but the policy of a state.[491]

The early jurisprudence of the ICC has reached a different conclusion that the preponderant opinion of academic experts. Pre-Trial Chamber II examined the contentious element of "a State or organisational policy" as laid down in Article 7 (2)(a) of the Rome Statute and the ICC Elements of Crimes. Having noted the absence of the accompanying definitions in the ICC legal instruments, it referred to the pre-trial jurisprudence on the same subject in the *Katanga* and *Bemba* cases that outlined the required policy requirement as being devised "by groups or persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population".[492] The judges acknowledged the jurisprudential evolution and abandonment of the concept in the ad hoc tribunals, however, approached this requirement from a different angle.[493] From the outset, they differentiated between the disjunctive use of the terms "State" and "organisational" policy. The "State" policy element was broadly defined so to include all kinds of policies of a State irrespective of whether adopted at the highest, regional or even local levels.[494]

The much-debated "organisational" policy element was more challenging to formulate given a great number of divisive opinions in the jurisprudence and academic sources. The Chamber construed the organisational policy element through the "group's capability to perform acts which infringe on basic human values" rather than the "formal nature of a group and the level of its organisation".[495] The judges expounded that the term "organisation" would have been absent in the text of the Statute, had the drafters of the Statute intended to exclude non-state actors from the scope of crimes against humanity.[496] In addition, the decision lists a number of non-exhaustive evidentiary factors in determining whether a group qualifies as an "organisation" within the meaning of the Rome Statute: (i) whether the group is under the responsible command, or has an established hierarchy; (ii) whether the group possesses the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State.[497] The same Pre-Trial Chamber stood by the definition

[491] Bassiouni (2005a), pp. 151–152. See also: Bassiouni (1999), pp. 243–281.

[492] *Situation in Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, paras 84–85 (original footnotes omitted).

[493] Ibid., para. 86.

[494] Ibid., para. 89 (original footnotes omitted).

[495] Ibid., para. 90 (original footnotes omitted).

[496] Ibid., para. 92.

[497] Ibid., para. 93 (original footnotes omitted).

of "organisation" at a later procedural stage when it delivered two decisions on the confirmation of charges.[498]

The broad construal of a State or organisational policy, which accommodates non-state actors on a par with the State entities, entails far-reaching consequences for the development of the law on crimes against humanity. The policy element was initially introduced to distinguish between crimes against humanity as a product of State machinery and other forms of organised crimes, such as the crime of terrorism committed by non-state actors in pursuance of their political or religious ideas. The interpretation of the policy requirement, as outlined in the Majority ruling, eradicates a narrow borderline between crimes against humanity and other types of organised crimes carried out by private entities.[499] The Majority does not seem to have given a proper thought to possible serious repercussions of its legal findings on shaping the law on crimes against humanity.

In his dissenting opinion, Judge Kaul pointed towards lack of clarity with respect to the distinction between crimes against humanity pursuant to Article 7 of the Rome Statute and crimes under national law.[500] He noted the importance of maintaining the demarcation line between these two distinct categories of crimes that "must not be marginalised or downgraded even in an incremental manner".[501] According to him, the expansive interpretation of crimes against humanity is fraught with serious consequences for the ICC, as it is capable of infringing on State sovereignty by interfering with national crimes "which should not be within the ambit of the Statute.[502]

The thrust of Judge Kaul's dissent is his disagreement with the Majority expansive construal of an "organisation", which qualified certain collective entities behind the post-election violence in Kenya within the meaning of "organisations" in Article 7 (2) (a) of the Statute.[503] In his firm opinion, in order to be recognised as an "organisation", it is necessary to prove that a group carries some characteristics of a State.[504] A thorough contextual and teleological analysis of crimes against humanity conducted by Judge Kaul, which was visibly absent in the Majority decision, led him to conclude that it is exactly "a threat emanating from a State policy" that renders crimes against humanity fundamentally different in nature and

[498] *Ruto et al*. (ICC-01/09-01/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, paras 184–185; *Muthaura et al*. (ICC-01/09-02/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, para. 112. The Defence for Mr. Kenyatta unsuccessfully challenged the correctness of the interpretation of "organisational policy" by arguing that the drafters of the Rome Statute "intended to create a clear boundary between crimes against humanity and national crimes, and for this boundary to be dependent not on the abhorrent nature of the crimes but on the entity and policy behind them".

[499] In the same vein, see: Kress (2010) at 873.

[500] Dissenting Opinion of Judge Hans-Peter Kaul, para. 9.

[501] Ibid., para. 9.

[502] Ibid., para. 10.

[503] Ibid., para. 53.

[504] Ibid., para. 51.

scale when compared to national crimes.[505] Judge Kaul rightly warns against an expansive construction of "organisation" adopted by the Majority which would technically cover all kinds of criminal gangs with fluctuating membership that engage in serious and organised crimes.[506]

4.3.1.2.4 Directed Against a Civilian Population

In the context of crimes against humanity, an attack must be directed against any civilian population. This means that the civilian population must "be the primary rather than an incidental target of the attack".[507] The ICTY Appeals Chamber in *Kunarac* case construed the expression "directed against a civilian population" in the following terms:

> [T]he expression "directed against" is an expression which "specifies that in the context of a crime against humanity the civilian population is the primary object of the attack". In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia,* the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.[508]

The drafters of the Rome Statute left the precise meaning of the term "any civilian population" undefined.[509] In the early pre-trial jurisprudence, Pre-Trial Chamber I observed that as opposed to war crimes, the term "civilian population" within the meaning of Article 7 of the Rome Statute affords rights and protection to "any civilian population" regardless of their nationality, ethnicity or other distinguishing feature.[510] This legal finding was supported by the extensive jurisprudence of the ad hoc tribunals on the subject.[511]

The ICTY Appeals Chamber in the *Blaškić* case reaffirmed the absolute prohibition against targeting civilians in customary international law.[512] It is well established that a civilian population includes all persons who are not members

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[505] Ibid., para. 60.

[506] Ibid., para. 52.

[507] *Kunarac* Appeal Judgment, paras 91–92; *Stakić* Trial Judgment, para. 624; *Vasiljević* Trial Judgment, para. 33.

[508] *Kunarac* Appeal Judgement, para. 91.

[509] Lee (2001), p. 78. Most delegations quickly agreed that the subject was too complex and thus left it to the resolution in the jurisprudence.

[510] *Katanga et al.* (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 399; *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 76.

[511] *Tadić* Trial Judgment, para. 635; *Jelisić* Trial Judgment, para. 54; *Kunarac* Trial Judgment, para. 423.

[512] *Blaškić* Appeal Judgement, para. 109.

of the armed forces or otherwise recognised as combatants.[513] A person *hors de combat* does not *prima facie* fall within the definition.[514] The ICTY Appeals Chamber in the *Martić* case clarified that where a person *hors de combat* is the victim of an act, which objectively forms a part of a broader attack directed against a civilian population, this act may amount to a crime against humanity.[515]

In determining whether the presence of soldiers within a civilian population deprives it of its civilian character, additional factual circumstances must be examined, *inter alia,* the number of soldiers as well as their status.[516] The presence of members of resistance armed groups or former combatants within a civilian population, who have laid down their arms, does not affect its civilian nature.[517] The legal norm on crimes against humanity extends to *any* civilian population including, if a State takes part in the attack, that State's own population;[518] there is no requirement that the victims are linked to any particular side.[519] The existence of an attack upon one side's civilian population would not justify or cancel out that side's attack upon the other's civilian population.[520]

The use of the term "population" does not mean that the entire population of the geographical entity whereby the attack occurs must have been subjected to that attack.[521] However, the targeting of a selected group of civilians—for instance, the targeted killing of a number of political opponents—cannot satisfy the requirements of crimes against humanity.[522] It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the requirement that the attack was in fact directed against a civilian population, rather than against a limited and randomly selected number of individuals.[523]

513 *Blaškić* Appeal Judgement, paras 110–113. See also: Article 3 common to the 1949 Geneva Conventions; Articles 43 and 50 of Additional Protocol I.

514 *Martić* Appeal Judgement, para. 302.

515 *Martić* Appeal Judgement, paras 308–309, 313.

516 *Blaškić* Appeal Judgement, para. 115; *Limaj* Trial Judgement, para. 186.

517 *Blaškić* Appeal Judgement, para. 113.

518 *Kunarac* Trial Judgement, para. 423; *Tadić* Trial Judgement, para. 635.

519 *Limaj* Trial Judgement, para. 186; *Kunarac* Trial Judgement, para. 423; *Vasiljević* Trial Judgement, para. 33.

520 *Kunarac* Appeal Judgement, para. 87; *Martić* Appeal Judgement, para. 111.

521 *Kunarac* Appeal Judgement, para. 90; *Blaškić* Appeal Judgement, para. 105; *Bagilishema* Trial Judgment, para. 80; *Semanza* Trial Judgment, para. 330; *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 77.

522 *Limaj* Trial Judgement, para. 187.

523 *Kunarac* Appeal Judgement, para. 90; *Stakić* Trial Judgment, para. 627; *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 77.

4.3.1.2.5 Part of the Attack Against Civilian Population

The requirement that the acts of the Accused must be part of the attack is satisfied by the "commission of an act which, by its nature or consequences, is objectively part of the attack".[524] The alleged crimes shall be related to the attack on a civilian population, but need not have been committed in the midst of that attack.[525] A crime, which is committed prior to or after the main attack or away from it, may still be part of that attack, if sufficiently connected. However, it must not be an isolated act. A crime is regarded as an "isolated act" when it is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.[526] Furthermore, only the attack, not the individual acts, must be widespread or systematic.[527]

To satisfy the requirement "as part of" an attack, the underlying offences enumerated in Article 7(1) of the Rome Statute must be committed in furtherance of the widespread or systematic attack against the civilian population.[528] This requirement is commonly considered as the nexus between the acts of the perpetrator and the attack.[529] In determining whether an act forms part of a widespread attack, Pre-Trial Chamber II in light of the developed jurisprudence of the ad hoc tribunals considered the characteristics, the aims, the nature or consequences of the act.[530]

4.3.1.2.6 *Mens Rea* as to the Contextual Elements of Crimes Against Humanity

Apart from the required criminal intent for the underlying offences of crimes against humanity, the additional mental factor or *mens rea* is adjoined to the contextual elements.[531] In order to establish the existence of crimes against humanity, it is necessary to prove:

(i) Knowledge that there is an attack on the civilian population and knowledge that the accused's acts comprise part of that attack;[532]

[524] *Kunarac* Appeal Judgement, para. 99.

[525] *Kunarac* Appeal Judgement, para. 100; *Limaj* Trial Judgement, para. 189.

[526] *Kunarac* Appeal Judgement, para. 100; *Tadić* Appeal Judgement, para. 271; *Limaj* Trial Judgement, para. 189.

[527] *Kordić and Čerkez* Appeal Judgement, para. 94; *Kunarac* Appeal Judgement, para. 96; *Blaškić* Appeal Judgement, para. 101.

[528] *Katanga et al.* (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 400; *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 84.

[529] *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 84.

[530] Ibid., para. 86 citing in support *Kajelijeli* Trial Judgment, para. 866; *Semanza* Trial Judgment, para. 326.

[531] *Blaškić* Trial Judgement, para. 244.

[532] *Tadić* Appeal Judgement, para. 248; *Kunarac* Appeal Judgement, paras 99, 102; *Blaškić* Appeal Judgement, para. 124.

(ii) General intent required for the underlying offences;[533]
(iii) Aggravated criminal intent (*dolus specialis*), provided it is required by the definition of the underlying offence.

It is clear from the above that the double *mens rea* standard is imposed upon every crime against humanity: knowledge of a broader context in which the crime occurs, and a separate intent requirement for the underlying offence. If a person commits murder as a crime against humanity, he is expected to have knowledge of the context (i.e. widespread or systematic attack against a civilian population), and intent to cause the death of a victim.

Neither the ICTR Statute nor the ICTY Statute elaborate on the nature of the *mens rea* standard adjacent to the contextual elements of crimes against humanity. Article 7 of the Rome Statute stipulates that criminal acts must be perpetrated "in the knowledge" of the widespread or systematic attack. The jurisprudence of the ad hoc tribunals avers that the accused must have *knowledge* of the general context in which his acts occur as well as of the nexus between his action and that context.[534] The requirement was formulated by the *Tadić* Trial Judgement which held that "the perpetrator must know of the broader context in which his act occurs",[535] and "the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population and that the accused must have *known* that his acts fit into such a pattern".[536] Furthermore, the requirement also stems from the legal findings of the ICTR *Kayishema and Ruzindana* Trial Chamber that spoke of the *mens rea* standard for the contextual elements of crimes against humanity in the following fashion:

> [...] to be guilty of crimes against humanity the perpetrator must know that there is an attack on a civilian population and that his act is part of the attack.[537]

The Trial Chamber further continued:

> [p]art of what transforms an individual's act into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, *actual or constructive knowledge of the broader context of the attack*, meaning that the accused must know that his act is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.[538]

In other words, if a disgruntled person kills his neighbour amidst the "widespread" attack directed against the civilian population, which he is aware thereof,

[533] Cassese et al. (2002), p. 364.

[534] *Blaškić* Trial Judgement, para. 247.

[535] *Tadić* Trial Judgement, paras 656–657 citing in support the Decision of the Supreme Court of Canada in the case *Regina v. Finta* [1994] 1, *Recueil de la Cour Suprême*, 701.

[536] *Tadić* Appeal Judgement, para. 248 (emphasis added).

[537] *Kayishema* Trial Judgement, para. 133.

[538] Ibid. para. 134.

he cannot be held liable for crimes against humanity given the remote connection of the culpable act to the attack. The motives for the Accused's participation in the attack are irrelevant for the legal qualification of his conduct.[539] The inclusion of constructive knowledge as the supporting *mens rea* standard is somewhat perplexing, since it is an evidentiary issue that may be inferred from external circumstances.[540] What shall be proved in regards to the contextual elements of crimes against humanity is *actual knowledge* on the part of the perpetrator.

The requirements of "knowledge that there is an attack on the civilian population and that the acts of the Accused are part thereof" were reaffirmed on appeal.[541] Evidence of such knowledge depends on the facts of a particular case, and thus the manner in which this legal element may be proved varies on a case-by-case basis.[542] Although the Accused needs to understand the overall context in which his acts took place,[543] he does not need to know the details of the attack or share the purpose or goal behind the attack.[544] It is also irrelevant whether the Accused intended his acts to be directed against the targeted population or merely against his victim, as it is the attack, and not the acts of the Accused, which must be directed against the targeted population.[545]

As an additional requirement for the *mens rea* standard attached to the contextual elements of crimes against humanity, the ICTY Trial Chamber spoke of "knowing participation in the context". It was reckoned sufficient that the accused, through the functions he willingly accepted, knowingly took the risk of participating in the implementation of the context in which crimes against humanity occurred.[546] The Chamber dismissed the necessity to prove that the "agent had the intent to support the regime or the full and absolute intent to act as its intermediary so long as the proof of the existence of direct or indirect malicious intent or recklessness is provided".[547] On appeal, the articulation of the *mens rea* standard in terms of "willingly taking the risk" was recognised as being ill-defined.[548]

To constitute a crime against humanity, Article 7(1) of the ICC Elements of Crimes requires that the act must have been committed with "knowledge of the

[539] *Kunarac* Appeal Judgement, para. 103. The ICTY Appeals Chamber considered that "[a]t most, evidence that [acts were committed] for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack". See also: *Tadić* Appeal Judgement, paras 248, 252.

[540] Van der Vyver (2004) at 106.

[541] *Kunarac* Appeal Judgement, para. 102.

[542] *Blaškić* Appeal Judgement, para. 126.

[543] *Limaj* Trial Judgement, para. 190; *Kordić and Čerkez* Trial Judgement, para. 185.

[544] *Kunarac* Appeal Judgement, paras 102–103.

[545] Ibid., para. 103.

[546] *Blaškić* Trial Judgement, paras 251–252. The *Blaškić* Trial Chamber drew its conclusion from the statutory law and jurisprudence of the ad hoc tribunals as well as national case law, including the Judgement of the French *Cour de Cassation* Court (*Papon* case, *Cass. Crim.*, 23 January 1997).

[547] Ibid., para. 253.

[548] *Blaškić* Appeal Judgement, paras 126–127.

attack" such that "the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population". The knowledge requirement does not require any proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organisation.[549] The ICC fully comports with the findings of the ad hoc tribunals that the perpetrator must know that there was an attack on a civilian population, and that his or her acts were part of that attack.[550] The knowledge of the attack and the perpetrator's awareness that his conduct was part of such attack may be inferred from the available evidentiary record, among others, the accused's position in the military hierarchy; him assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; the general historical and political environment in which the acts occurred etc.[551]

4.3.1.3 Genocide

4.3.1.3.1 The Contextual Element of the Crime of Genocide: A Separate Requirement or Redundant Element?

Although it is plausible to imagine that the crime of genocide is committed by a lone perpetrator, it is acknowledged in scholarly literature that the crime is normally associated with a State policy.[552] Hence, the particular context in which the crime occurs is regarded as a constitutive element of genocide by those who advocate for the integration of a State plan or policy requirement into the definition of the crime. The opponents of such a proposition treat the contextual elements as an objective point of reference for the determination of a realistic genocidal intent.[553] *Cassese* dismissed both opposing views and labelled them as "not grounded in a proper analysis of the relevant international rules".[554]

The requirement of a plan or context in which the crime of genocide occurs is not mentioned as a distinct legal element of the crime in the Genocide Convention. The statutes of the ad hoc tribunals and the Rome Statute that adopted the *verbatim* wording of the crime from the Genocide Convention remain silent as well. The mantle was picked up by the judges of the ad hoc tribunals and the ICC who have

[549] ICC Elements of Crimes, Article 7 (Crimes against humanity), Introduction, para. 2.

[550] *Katanga et al.* (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 401 citing in support *Kordić and Čerkez* Appeal Judgment, para. 99; *Blaškić* Appeal Judgment, para. 124; *Semanza* Trial Judgment, para. 332.

[551] Ibid., para. 402.

[552] Schabas (2009), p. 244. See also: Lemkin (1944), p. 79; Vest (2007) at 781–797.

[553] Kress (2009) at 297.

[554] Cassese in Gaeta (2009b).

carefully perused the requisite requirements for the crime of genocide. The jurisprudence of the ad hoc tribunals developed along the lines that the existence of a plan or policy was not a legal ingredient of genocide, but that it was an important factor to infer the existence of genocidal intent. In the *Kayishema* case, the Trial Chamber remarked "while it is theoretically possible for genocide to be committed by an individual acting in the absence of some more general plan, in practice it would be impossible to make proof of such a situation".[555] The ICTY jurisprudence confirmed the "requirement of a plan as an evidentiary matter, though it is not explicitly part of the definition within the framework of the Genocide Convention".[556] In *Kayishema*, the ICTR recognised that "although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out genocide without a plan or organisation".[557] Moreover, it underlined that "the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide".[558]

ICC Pre-Trial Chamber I in its *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* revived discussion as to the context in which the crime of genocide occurs. Having noted the developed jurisprudence of the ad hoc tribunals and the provision in the ICC Elements of Crimes that "the conduct must have taken place in the context of a *manifest pattern of similar conduct* directed against the targeted group or must have had such a nature so as to itself effect, the total or partial destruction of the targeted group", the Pre-Trial Chamber held that "the crime of genocide is only completed when it presents a *concrete threat* to the existence of the targeted group, or a part thereof".[559] It remains unclear how the hint of a *concrete threat*, which is deemed necessary to trigger the application of the norm governing the crime of genocide in the Majority's opinion, has clarified the definition of the crime. *Cryer* admits that the Majority's approach added an "odd gloss" to the definition, and that the judges seem to have neglected other ways of satisfying the test necessary to support the genocidal charge.[560] *Kress* submits that the requirement of a *concrete threat* is unfortunately worded because it suggests an unduly stringent threshold.[561]

Given a more elaborate definition of the crime of genocide in the ICC Elements of Crimes, the judges were confronted with the issue of authoritative weight of the Rome Statute and the Elements of Crimes. The judges did not observe any *irreconcilable contradiction* between the definition of the crime in the Rome Statute and

[555] *Kayishema* Trial Judgement, para. 94; *Jelisić* Trial Judgment, para. 101.

[556] *Prosecutor v. Karadžić and Mladić*, Consideration of the Indictment within the Framework of Rule 61of the Rules of Procedure and Evidence, 11 July 1996, para. 94.

[557] *Kayishema* Trial Judgment, para. 94.

[558] Ibid., para. 276.

[559] *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 124.

[560] Cryer (2009) at 291–292.

[561] Kress (2009) at 300.

the formulation of the contextual elements in the Elements of Crimes.[562] In her dissenting opinion, Judge Ušacka disagreed with the Majority's contention that the Elements of Crimes and the Rules must be applied unless an *irreconcilable contradiction* is determined between aforesaid instruments and the Rome Statute.[563] Having noted that the Elements of Crimes "shall assist" the Court in the interpretation of the Rome Statute, she concluded that it is only the Statute that outlines the operative definition of the crime.[564] Judge Ušacka refrained from commenting on whether or not the contextual element is consistent with the statutory definition of genocide.

The jurisprudence of international criminal courts and tribunals is consistently clear that a person cannot be held liable for war crimes and crimes against humanity unless the contextual elements are fulfilled. However, it remains uncertain whether the contextual element is required to prove the crime of genocide. The preponderant opinion is that the existence of a genocidal plan or policy is not an integral legal ingredient of the crime, but it is an evidentiary issue from where the genocidal intent may be inferred. While treating the underlying offences of genocide differently, *Cassese* suggests that "killing members of a group" along with "causing serious bodily or mental harm to members of a group" do not require the existence of a widespread or systematic practice or a plan, whereas the remaining underlying offences call for some sort of collective or even organised action, which is intrinsic to the nature of the conduct.[565] The differential treatment, as suggested by *Cassese*, does not cure the definition of the crime and may provoke even greater ambiguity in the jurisprudence of international criminal courts and tribunals.

The debate over the contextual element of the crime of genocide emerged in the latest ICTY genocide case, as one of the Accused based his submissions on an academic piece written by *Schabas* on the requirement of a state policy for the crime of genocide.[566] The Trial Chamber dismissed as speculation *Schabas'* argument that the issue of a State policy was not addressed by the drafters of the Convention because it was self-evident.[567] It seems that the requirement of the existence of a State plan or policy to carry out genocide has not crystallised in customary international law yet. The wording of the ICC Elements of Crimes and the jurisprudence is indicative of the contextual element requirement for the crime of genocide. If we accept that the proof of a State policy or plan is required, then it is necessary to examine whether perpetrators of the crime were fully aware of the existence of such a plan.

[562] Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 132.

[563] Ibid., Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 17.

[564] Ibid., Separate and Partly Dissenting Opinion of Judge Anita Ušacka, paras 17–18.

[565] Cassese in Gaeta (2009a), pp. 134–136.

[566] *Popović* Trial Judgement, para. 826. The reference was made to Schabas' Article entitled "*State Policy as an Element of the Crime of Genocide*" as of 30 April 2008.

[567] *Popović* Trial Judgement, para. 828.

As early as in 1996, the ILC in its Draft Code of Crimes against the Peace and Security of Mankind stressed upon the magnitude of genocide that often requires some type of involvement on the part of high level government officials or military commanders as well as their subordinates. It further commented on the extent of knowledge of the details of a plan or a policy to carry out the crime of genocide that would vary depending on the position of the perpetrator in the governmental hierarchy or military command structure.[568] It also addressed the issue of criminal responsibility of subordinates in the following fashion:

> [. . .] a subordinate who actually carried the genocidal plan cannot be exempted from the responsibility simply because he did not possess the same degree of knowledge regarding the overall plan as his superiors.[569]

A subordinate cannot shield himself from criminal responsibility if he carries out orders to commit the destructive acts against victims who are selected on the basis of their membership in a particular group by claiming that he was not privy to all aspects of the comprehensive genocidal plan or policy.[570] Under such circumstances, a commander entertains genocidal intent, whereas subordinates are aware of genocidal intent of their commander. It is also possible to imagine a hypothetical situation when a commander acts negligently towards performing his duties, while subordinates embark on the commission of genocidal acts. Whether a commander can be charged with negligent genocide is a "blind" spot in the jurisprudence of international criminal courts and tribunals. *Schabas* observes that it remains somewhat of a paradox "how a specific intent offence can be committed by negligence".[571]

The *mens rea* requirement with respect to the crime of genocide involves two major problems of interpretation. Firstly, if the existence of a genocidal plan or policy is required as a constitutive element, then to what extent the plan shall be covered by knowledge of a perpetrator. Secondly, it is unclear how the crime of genocide may be reconciled with modes of liability, which may be satisfied by a lower *mens rea* threshold than intention. The clash between *dolus specialis* and other lower forms of culpability (*dolus eventualis* in support of JCE III, negligence for command responsibility) is inevitable in such cases.[572]

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[568] Draft Code of Crimes against the Peace and Security of Mankind with commentaries, text adopted by the International Law Commission at its 48th session in 1996 and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report appears in Yearbook of the International Law Commission, 1996, vol. II, Part Two (hereinafter—1996 Draft Code of Crimes), Article 17, para. 5 (commentary on the Article).

[569] Ibid., Article 17, para. 10 (commentary on the Article). It reads: "A subordinate is presumed to *know* the *intentions* of his superiors when he receives orders to commit the prohibited acts against individuals who belong to a particular group".

[570] Ibid.

[571] Schabas (2009), p. 363.

[572] For more, see: Chap. 6.3.1.2.2 (Subjective Elements (*Mens Rea*) of JCE).

4.3.2 *Actus Reus*

Generally, *actus reus* is a behavioural element of a crime which requires an action of some kind. Though *actus reus* normally entails harmful consequences, it is also possible that *actus reus* consists of behaviour only.[573] It is particularly true with regards to inchoate crimes that do not produce any prohibited consequences; it is conduct itself, which is criminal. Logically, the behaviour proscribed in the *actus reus* requires the person's positive act. Nonetheless, an omission or failure to act may also constitute the *actus reus* when a person has a *duty* to act but fails to do so.[574] The duty to act is a legal duty, but not a moral one. To trigger the application of criminal law, the affirmative duty shall be based upon a relationship, statutory provisions, contractual obligations, voluntary assumption of care, creation of the peril etc.[575]

The major international criminal law instruments do not entrench specific legal provisions on the *actus reus* of a crime. Most crimes within the jurisdiction of international criminal courts and tribunals require a positive act on the part of a perpetrator. The failure to act is punishable under the doctrine of superior/command responsibility, which is discussed in Chap. 6 of this book. The Rome Statute does not explicitly outline what is meant by the *actus reus* of a crime. The ICC Preparatory Committee draft preliminary included the provision on the *actus reus,* but it was omitted in the final text of the Statute due to the lack of unanimity as to whether omissions contribute to the *actus reus* of a crime.[576] Casting a glance at Article 30 of the Rome Statute, the *actus reus* of crimes within the jurisdiction of the Court comprises of "conduct", "consequence", and "circumstance".

4.3.3 *Mens Rea*

The cornerstone of criminal law is the principle of culpability that requires a guilty state of mind on the part of an individual. The law on *mens rea* operates with the complex terms of consciousness, volition, awareness, intention etc.

[573] In English criminal law, such crimes are described as "conduct crimes", as the *actus reus* requires only the proof of prohibited conduct and not that of attendant circumstances or consequences. See: Simester and Sullivan (2007), p. 64.

[574] The criminalization of omissions is embedded in the jurisprudence of both civil law and common law jurisdictions. E.g. the Criminal Code of the Russian Federation proscribes "failure to render aid to a sick person" (Article 124) and "abandoning to danger" (Article 125). In English criminal law, the rule of "but for" causation applies, which means that a person's omission causes an outcome whereby, but for that omission, the outcome would not have occurred. See: *Morby* (1882) 8 QBD 571; *Barnett v Chelsea and Kensington Hospital Management Committee* (1969) 1 QB 428.

[575] For more, consult: Simester and Sullivan (2007), pp. 64–74; LaFave (2003b), pp. 310–321.

[576] Schabas (2010), pp. 476–477.

The *mens rea* doctrine in international criminal law has been gradually shaped on a case-by-case basis. It involves a plethora of *mens rea* standards that originate from common law and continental law jurisdictions.[577] The mental element is of utmost importance to prove the commission of a crime in question, since the absence or defect of the *mens rea* precludes the imposition of criminal responsibility. The discussion in Chap. 5 explores the advancement of the law on *mens rea* in international criminal law, and examines challenges as to the amalgamation of the practices of international criminal courts and tribunals with the view of an overwhelming number of technical terms that have been "brought along" from domestic legal jurisdictions, rather than properly incorporated in the theory of international criminal law. There is no customary law providing for the general definition of various *mens rea* standards in international criminal law.[578] The legal provision on *mens rea* in the Rome Statute does not in any case reflect customary law; it is a treaty-law provision that sets out the standard only for the crimes within the jurisdiction of the ICC.

4.4 Interim Conclusions

The evolution of the concept of a crime in international law has gone through different historical phases. The euphoria in Nuremberg over the interpretation of international crimes faded away in the subsequent decades. The attempts of the ILC to codify and elaborate on the concept of an international crime were laudable but generated more confusion than clarity. The despicable events in the former Yugoslavia and Rwanda shook the world community to its core and served as the catalyst for the establishment of the tribunals tasked with the prosecution of those responsible for the most heinous crimes. Having been instituted by the UN Security Council, the ad hoc tribunals were confronted with the apparent lack of practices on the prosecution of international crimes, apart from the legacy of the Nuremberg Tribunal and other post-Nuremberg war trials. Moreover, the tribunals—vested with the power to prosecute the crime of genocide—were trapped in the situation when not a single person had been prosecuted for this crime before.

The concept of a crime has been shaped in the jurisprudence of the ad hoc tribunals; their role in the interpretation of the legal elements of the crimes cannot be underestimated. The judges have consistently underlined the unique nature of crimes within the scope of international criminal justice due to their gravity that goes beyond any of the crimes proscribed by national jurisdictions. The tripartite structure of international crimes includes the contextual elements, *actus reus* and *mens rea*. The contextual elements were added to the two-pronged doctrine of a crime borrowed from the common law theory (*actus reus* and *mens rea*). The

[577] Werle (2005), p. 101.

[578] Cassese (2008), p. 56.

contextual elements assist the judges to distinguish the crime of genocide, war crimes and crimes against humanity from ordinary crimes with the analogous *actus reus,* among others, killing, rape, sexual violence etc. The contextual elements reveal a broad context of macro criminality that transforms ordinary crimes to the crimes of the most serious concern to the mankind. The proof of the contextual elements precedes the examination of the material and mental elements of the underlying offences. One of the stumbling blocks in the jurisprudence is whether the crime of genocide requires to be supported by the contextual elements given the apparent absence of any indicator to such elements in the definition of the crime. The jurisprudence of the ad hoc tribunals—torn in between the two opposite positions—is prone to consider that the element of a State organisational policy or plan is not a *sine qua non* requirement of the definition of genocide, but belongs to the law on evidence and may be a helpful tool to infer the existence of the genocidal intent. The ICC introduced the requirement of a “concrete threat to the existence of the targeted group” which is indicative, albeit in rather unfortunate wording, of the context in which the crime of genocide occurs.

The jurisprudence of the ad hoc tribunals encompasses discordant pieces on the material and mental elements of crimes in the absence of the clear and congruous interpretation of the legal elements of crimes within their jurisdiction. This may be explicated by the fact that the ad hoc tribunals have heavily hinged on customary law in order to render legitimacy to the judgements. In light of the scarce *opinion juris* on the legal elements of international crimes, the judges of the ad hoc tribunals performed at their best. The variety of opinions on the interpretation of the legal elements of crimes is also affected by the geographical representation of the judges who come from different legal jurisdictions, thus adding “a pinch of salt” to the jurisprudence.

The drafters to the Rome Statute pondered over the developments of international criminal law and aimed, to the best of their ability, to produce a more coherent statute covering both substantive and procedural law. The detailed and thoroughly refined statute was considered a “formula of success” to secure as many ratifications as possible. Obviously, the prospective State Parties to the Rome Statute at that time would not have signed the document in the absence of clear guidance of what conduct had constituted crimes within the jurisdiction of the Court. Notwithstanding the elaborate language of the Rome Statute, the concept of a crime still needs to be further clarified in the jurisprudence.

Chapter 5
Evolution of the *Mens Rea* Doctrine in International Criminal Law

5.1 Introductory Remarks

The first pivotal legal instruments of the Nuremberg and Tokyo Tribunals did not elaborate on the *mens rea* attributable to the crimes within their jurisdiction. The victorious Allied powers had appointed justices, who were entrusted with broad judicial discretionary powers, to settle the nature of *mens rea* in relation to the crimes charged. A number of thorny issues on the interpretation of the *mens rea* concept emerged during trial proceedings at Nuremberg, among others, the interpretation of knowledge as to the lawfulness or unlawfulness of conduct, the inference of intent, the interrelation between *mens rea* and defences etc. Defendants in Nuremberg were particularly keen on denying knowledge of the widespread scale of crimes, and invoking defences of superior orders and duress. The judges made it clear that the fact that defendants were assigned to their tasks by Hitler did not absolve them from criminal responsibility. By cooperating with Hitler, with knowledge of his criminal aims, they made themselves parties to the plan that he had initiated.[579]

Since the conduct of trials in the aftermath of World War II, international criminal law has not consolidated a solid law on *mens rea*. A similar approach to the formulation of international crimes in rather general and less specific terms was employed in the ad hoc tribunals that were established half a century later than their predecessors. The very absence of uniformity of the law on *mens rea* has prompted the use of abundant, albeit often inconsistent and mismatching, terms in the jurisprudence of the ad hoc tribunals. The *mens rea* notions originated from various world legal jurisdictions have been blended in the common pot of international criminal law, which led to a certain degree of confusion. It is very unlikely to envisage a domestic criminal lawyer who works with the poorly defined elements of a crime, in particular the requisite *mens rea* standard. Yet, since the Nuremberg Tribunal up until the establishment of the ICC, international criminal lawyers had

[579] Nuremberg Judgement, pp. 448–449.

I. Marchuk, *The Fundamental Concept of Crime in International Criminal Law*,
DOI 10.1007/978-3-642-28246-1_5, © Springer-Verlag Berlin Heidelberg 2014

been charging, prosecuting and convicting individuals based on the poorly articulated law on *mens rea*. In fact, *mens rea*—the most crucial pillar in determining criminal responsibility—is still one of the most intricate areas of international criminal law. The comparative analysis of substantive criminal laws and jurisprudence, which was conducted in Chaps. 2 and 3, assists to expose the roots of confusion in international criminal law with respect to the construal of the concept of *mens rea*. It is important to bear in mind that the substantive part of international criminal law is a *sui generis* amalgam of legal traditions which is "neither the common law nor the civil law as their respective practitioners and devotees understand".[580] This warrants against the mechanistic transposition of domestic criminal law concepts into the theory of international criminal law.

5.2 Law on *Mens Rea* in the Ad Hoc Tribunals

The principle of culpability laid down in Article 7 (1) of the ICTY Statute and Article 6 (1) of the ICTR Statute is outlined in the following terms:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime [. . .], shall be *individually responsible* for the crime (emphasis added).

Neither the ICTY Statute nor the ICTR Statute provides a general definition of the mental element of a crime, which has been left to judicial interpretation. How is intent construed in the jurisprudence of the ad hoc tribunals? A number of important interpretation issues have been raised in the jurisprudence of the tribunals. Do the cognitive element of knowledge and the volitional element of acceptance suffice to prove the requisite mental state for intentional crimes? Does the foreseeability (this belongs to knowledge) of harmful consequences on the part of a perpetrator give rise to criminal responsibility for intentional crimes? Do lower degrees of culpability such as recklessness and negligence satisfy the *mens rea* standard for international crimes? No clear interpretation of the law of *mens rea* has been delivered in the ad hoc tribunals. Instead, much confusion has been generated when a variety of technical terms have been used to denote the same concept or those terms have been construed in a manner that is radically different in various judgments.[581]

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[580] Clark (2008) at 552.

[581] Schabas and Badar provide an overview of *mens rea* standards employed with respect to particular crimes in the ICTY jurisprudence in Schabas (2002) at 1015–1036; Badar (2006) at 313–348.

5.2.1 Intent

No general definition of intent has been coined in the jurisprudence of the ad hoc tribunals. It has been tailored with respect to individual crimes. The copious *mens rea* standards employed in the jurisprudence include, among others, *dolus directus*, *dolus indirectus*, *dolus eventualis,* recklessness, deliberation, wantonness, wilfulness etc. The non-exhaustive list is not a gradation of *mens rea* standards but merely a catalogue of technical terms that have been used in the jurisprudence. Given that the analysis of *mens rea* is tied to particular crimes, the digest of the jurisprudence below illuminates some aspects of the incongruity of the law on *mens rea*.

The legal findings of the ICTY *Blaškić* Trial Chamber on the supporting *mens rea* for grave breaches of the Geneva Conventions are widely quoted in the jurisprudence:

> [. . .] *mens rea* constituting all the violations of Article 2 of the [ICTY] Statute [encompassing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.[582]

The Chamber did not elaborate on the nature of intent and recklessness in more specific terms. The legal finding on the applicable *mens rea* standard in support of grave breaches is imprecise and ill defined at its best. It is unclear what the judges meant by likening guilty intent and recklessness to serious criminal negligence. The discussion on the *mens rea* standard in support of grave breaches ensued in the subsequent jurisprudence. The Prosecution Closing Brief in the *Čelebići* case defined the mental element of inhuman treatment, which belongs to the grave breaches regime, in the following terms:

> The accused or his subordinate(s) intended to unlawfully impair the physical, intellectual or moral integrity of the protected person or otherwise subject him or her to indignities, pain, suffering out of proportion to the treatment expected of one human being to another. Recklessness would constitute a sufficient form of intention.[583]

In response, the *Čelebići* Trial Judgement construed the crime of inhuman treatment as "an *intentional* act or omission, that is an act which judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity".[584] It is apparent that the Prosecution views intention in broad terms, since recklessness is acknowledged as a form of intention. It is not entirely clear from the Trial Judgement whether the judges understand intention in the same fashion. If the judges had viewed intention in broad terms as a state of mind at the time of the commission of an act or omission, they would not have specified the "deliberate and not accidental" nature of the

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[582] *Blaškić* Trial Judgement, para. 152.

[583] *Čelebići* Trial Judgement, para. 513 (original footnote omitted).

[584] *Čelebići* Trial Judgement, para. 543 (emphasis added).

illegal conduct. It appears that they construe intention in much stricter terms than pleaded by the Prosecution in its Closing Brief.

Similar to the debates on the crime of murder in common law jurisdictions[585] there has been a lack of unanimity on the interpretation of intent for the crime of murder as a crime against humanity and wilful killing as a war crime. The general understanding is that intention exists once it is demonstrated that the accused intended to cause death or serious bodily injury that was *likely* to lead to death.[586] The ICTY *Čelebići* Chamber, however, lowered the threshold:

> [. . .] necessary intent, meaning *mens rea*, required to establish the crimes of wilful killing and murder, as recognized in the Geneva Conventions, is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in *reckless* disregard of human life.[587]

Similarly, the *Akayesu* Trial Chamber outlined the mental element in support of the crime of murder in the following fashion:

> [. . .] at the time of the killing the accused or a subordinate had the *intention* to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is *likely* to cause the victim's death, and is *reckless* whether death ensures or not.[588]

The aforementioned pieces of the jurisprudence acknowledge intention and recklessness as the requisite *mens rea* standards for murder and *mutatis mutandis* wilful killing. However, the inclusion of recklessness appears to be unfortunate, as it significantly reduces the *mens rea* threshold for international crimes. Already in its wording the crime of *wilful* killing suggests the deliberateness of criminal conduct. The term was adopted from the criminal law theory of common law jurisdictions. Interestingly, English criminal law is not particularly instructive on whether wilfulness extends only to intent, or intent and recklessness.[589] The same confusion was inadvertently transposed to the field of international criminal law.

The *Brđanin* Trial Chamber noted conflicting discussions surrounding the requisite *mens rea* for murder and *mutatis mutandis* wilful killing in the jurisprudence of the ad hoc tribunals. The Trial Chamber dismissed the necessity to prove premeditation for murder and wilful killing,[590] and endorsed the legal findings of the *Stakić* Trial Chamber on the requisite *mens rea* standard:

> [B]oth a *dolus directus* and a *dolus eventualis* are sufficient to establish the crime of murder [. . .]. The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he 'reconciles himself' or 'makes peace' with the likelihood of death [. . .].[591]

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[585] Chapter 2.1.2.2 (Intention in English Criminal Law).

[586] *Blaškić* Trial Judgement, para. 153.

[587] *Čelebići* Trial Judgement, paras 437, 439; *Kordić and Čerkez* Trial Judgement, para. 229.

[588] *Akayesu* Trial Judgement, para. 589; *Jelisić* Trial Judgement, para. 35.

[589] Ashworth (2009), p. 190.

[590] *Kayishema* Appeal Judgement, para. 151; *Brđanin* Trial Judgement, para. 386.

[591] *Stakić* Trial Judgement, paras 587, 631.

Having outlined *dolus eventualis* in the same manner as understood in most continental law jurisdictions,[592] the Chambers, however, failed to distinguish between *dolus eventualis* and recklessness by treating them as synonymous terms: "the threshold of *dolus eventualis* entails the concept of recklessness, but not that of negligence or gross negligence".[593]

The academic debate is equally divided on the interrelation between *dolus eventualis* and recklessness. *Cassese* opined that both *mens rea* standards "reflect a state a mind where a person foresees that his or her action is likely to produce its prohibited consequences and nevertheless willingly takes the risk of acting so". Furthermore, he asserted that recklessness and *dolus eventualis* were less than intent.[594] The comparative analysis of substantive criminal laws of common law and continental law jurisdictions reveals the opposite. Recklessness is indeed less than intent, whereas *dolus eventualis* is a form of intent, albeit in its weakest form.[595] The misconceived understanding on the interrelation between *dolus eventualis* and recklessness is rooted in the similarity of the cognitive element of foreseeability, which is pertinent to both *mens rea* states. An overview of continental law jurisprudence reveals that *dolus eventualis* is a minimal threshold for intentional crimes and thus cannot entail recklessness, which is an intermediate *mens rea* state between intent and negligence in common law. *Ambos* rightly posits recklessness between *dolus eventualis* and conscious negligence (*bewusste Fahrlässigkeit*), and defines *dolus eventualis* as a "conditional intent by which a wide range of subjective attitudes towards the result are expressed that implies a higher threshold than recklessness".[596]

Indirect intent as construed in the jurisprudence entails a higher *mens rea* threshold than *dolus eventualis*. The *Limaj* Trial Chamber recognised indirect intent as the sufficient requisite *mens rea* state for the crime of murder and *mutatis mutandis* wilful killing, and defined it as "the intent to commit the act or omission in the knowledge that death is a *probable* consequence of the act or omission".[597] The probability aspect clearly posits indirect intent much higher on the gradation scale than *dolus eventualis*, which is satisfied by a lower possibility threshold. The jurisprudence of the ad hoc tribunals on the *mens rea* of the crime of murder and wilful killing is riddled with ambiguities. This has largely occurred due to the

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[592] Chapters 3.1.3.1 (German Criminal Law) and 3.4.1.3 (Danish Criminal Law). See also: Badar and Marchuk (2013), § 3.6.3 (*Dolus Eventualis as the Lowest Threshold for Intentional Crimes*).

[593] *Brđanin* Trial Judgement, para. 386; *Stakić* Trial Judgement, para. 587.

[594] Cassese (2008), p. 58. In the same vein, Hamdorf erroneously admits that the notion of recklessness implies a state of mind that would be treated as *dolus eventualis*, i.e. as intent, under German law. See: Hamdorf (2007), p. 224.

[595] Van Sliedregt (2003a), p. 46. Sliedregt observes that *dolus eventualis* is part of the definition of intention in Dutch and German law, while noting the unique nature of French law that rejects *dolus eventualis* as a degree of intention. See also: Badar and Marchuk (2013), § 3.6.3 (*Dolus Eventualis as the Lowest Threshold for Intentional Crimes*).

[596] Ambos in Cryer and Bekou (2004), p.167.

[597] *Limaj* Trial Chamber, para. 241.

introduction of overlapping *mens rea* states originated from common law and continental legal jurisdictions without the proper explanation of their precise meaning.

The construal of the crime of outrages upon personal dignity, prohibited in Common Article 3 of the Geneva Conventions, Article 75 (2) (b) of Additional Protocol I and Article 4 (2) (e) of Additional Protocol II and penalised in the statutes of the ad hoc tribunals, was also at the heart of the dispute in the jurisprudence. The main dilemma is whether the crime has to be supported by a general or specific intent. The *Aleksovski* Trial Chamber outlined the mental element of a crime in the following terms:

> Recklessness cannot suffice; the *mens rea* standard of the crime of outrages upon personal dignity requires that the perpetrator must have acted deliberately or deliberately omitted to act but deliberation alone is insufficient. While the perpetrator need not have had the specific intent to humiliate or degrade the victim, he must have been able to perceive this to be the foreseeable and reasonable consequence of his actions.[598]

Having dismissed the *mens rea* standard of recklessness, the Trial Chamber acknowledged the general intent requirement as the proper *mens rea* standard. The legal finding is nonetheless confusing, given that apart from the deliberation (a clear indicator of intent) to act, an offender must have been able to perceive the humiliation or degradation of the victim as the foreseeable and reasonable consequence of his actions. The foreseeability of prohibited consequences is indicative of recklessness. Does this mean that intention is required with respect to an act or an omission, whereas recklessness on the part of an offender is needed to be proved with respect to the victim's humiliation? More clarity would be a welcoming addition to the jurisprudence.

The *Aleksovski* Appeals Chamber ruled out the attribution of specific intent and interpreted the wording of the provision as describing the conduct which it seeks to prevent.[599] In addition, the Appeals Chamber examined one of the Appellant's arguments on the relevance of discriminatory intent in support of war crimes under Article 3 of the ICTY Statute, including the crime of outrages upon personal dignity.[600] The Chamber rejected the Appellant's contention on the necessity to prove discriminatory intent.[601] The wording of Common Article 3 is understood to apply "without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria" and not being confined to acts committed with discriminatory motivation.[602]

The *Kunarac* Trial Chamber explored whether knowledge of prohibited consequences on the part of an offender was an integral part of the *mens rea*

[598] *Aleksovski* Trial Judgement, para. 56.

[599] *Aleksovski* Appeal Judgement, para. 27.

[600] Ibid., paras 13–14 (original footnotes omitted).

[601] Ibid., para. 20.

[602] Ibid., para. 22.

requirement for the crime of outrages upon personal dignity apart from intention to engage in the particular act or omission:

> [...] requirement of an intent to commit the specific act or omission which gives rise to criminal liability in this context involves a requirement that the perpetrator be aware of the objective character of the relevant act or omission. It is a necessary aspect of a true intention to undertake a particular action that there is an awareness of the nature of that act. As the relevant act or omission for an outrage upon personal dignity is an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, an accused must know that his act or omission is of that character – i.e. that it could cause serious humiliation, degradation or affront to human dignity. This is not the same as requiring that the accused knew of the *actual* consequences of the act.[603]

As an illustration to the definition provided by the Trial Chamber, it is possible to imagine the situation when a perpetrator forces the civilian female population to parade naked in the streets during the armed conflict. The perpetrator intends to humiliate these women in that way and is aware that forcing them to parade naked would cause great embarrassment and humiliation. The *Kunarac* Trial Chamber summarised the mental element of the crime in the following terms:

(i) the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and
(ii) he knew that the act or omission could have that effect.[604]

The overall reading of the jurisprudence suggests that a perpetrator is expected to satisfy the double intent requirement—that is with respect to his conduct and consequences. The perpetrator must intentionally engage in prohibited conduct with knowledge of the effect of his conduct on the dignity of the victim(s).

International criminal courts and tribunals have faced tremendous challenges in proving the existence of intent in situations where a person was not physically involved in the commission of a crime. The ICTY was first confronted with this issue in the famed *Tadić* case, which examined "whether under international criminal law the Appellant can be held criminally responsible for the killing of the five men, even though there is no evidence that he personally killed any of them".[605] The *Tadić* Appeals Chamber elaborated on the requisite *mens rea* standard assigned to JCE as a principal mode of liability, however, it did not provide for the general definition of *mens rea*.

The two crucial *mens rea* issues stemmed from the factual background of the case, in particular "whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan" and "what degree of *mens rea* is required in such a case".[606] The *Tadić*

[603] *Kunarac* Trial Judgement, para. 512.

[604] Ibid., para. 514.

[605] *Tadić* Appeal Judgement, para. 185.

[606] Ibid.

Appeals Chamber inferred from the evidence record that the Appellant entertained the intention to further the criminal purpose to rid the *Prijedor* region of the non-Serb population by committing inhumane acts against them. In the Chamber's view, it was foreseeable that non-Serbs might have been killed in the effecting of the common aim. The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings but he nevertheless willingly took that risk.[607] The Accused's *mens rea* standard was defined as "a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk (*dolus eventualis*)".[608]

As the *Tadić* Appeal Judgement did not settle the issue on the likelihood of deviatory crimes to allow conviction under the extended category of JCE, the same issue came to light in the subsequent jurisprudence. When analysing the supporting *mens rea* standard of the extended category of JCE, the *Brđanin* Trial Chamber acknowledged the need for a clear distinction between the perception that an event is *possible* and the perception that an event is *likely* (a synonym for *probable*) insofar as the subjective state of mind is concerned. It rightly pinpointed that the probability standard lays a greater burden on the prosecution than the possibility one. In the Chamber's opinion, "most likely" means at least *probable* (if not more), whereas its stated equivalence to the civil law notion of *dolus eventualis* would seem to reduce it once more to possibility.[609]

The same matter was pondered over by the ICTY Appeals Chamber in its Decision in the case of *Karadžić*. It held that the JCE III *mens rea* standard does not require an understanding that a deviatory crime would *probably* be committed; it does, however, require that the *possibility* of the commission of a crime is sufficiently substantial to be foreseeable to an accused.[610]

It is clear from the aforementioned discordant pieces of the jurisprudence that the ad hoc tribunals have endorsed a plethora of *mens rea* standards that stem from various legal jurisdictions. Both intent and recklessness are recognised as the requisite *mens rea* standards in support of war crimes and crimes against humanity. The academic literature notes uncertainty of what is exactly meant by recklessness

[607] Ibid., para. 232.

[608] Ibid., para. 220.

[609] *Prosecutor v. Radoslav Brđanin*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Case No. IT-99-36-PT, 26 June 2001, para. 29. In the accompanying footnote 112, the Chamber defined *dolus eventualis* as "a subtle civil law concept [. . .] which requires an advertence to the possibility that a particular consequence will follow, and acting with either indifference or being reconciled to that possibility (in the sense of being prepared to take that risk)". In the Chamber's opinion, "the extent to which the possibility must be perceived differs according to the particular country in which the civil law is adopted, but the highest would appear to be that there must be a "concrete" basis for supposing that the particular consequence will follow".

[610] *Prosecutor v. Radovan Karadžić*, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, Case No. IT-95-5/18-AR72.4, 25 June 2009, paras 18–19.

in the jurisprudence of the ad hoc tribunals.[611] It is highly unlikely that the tribunals, which are expected to wind up in the nearest future, will attempt to overhaul the law on *mens rea*.

5.2.2 Knowledge

Apart from intent, the notion of knowledge has been lengthily construed in the jurisprudence of international criminal courts and tribunals, particularly knowledge of the context in which genocide, war crimes, and crimes against humanity are committed. There has been reluctance to impose the requirement of knowledge to the context in which the crime of genocide is perpetrated. *Schabas* observes that the case law on genocide has dwelled on the notion of genocidal intent in light of the wording of Article II of the Genocide Convention that does not explicitly provide for the context in which the crime has been committed.[612] The requirement of knowledge pertinent to the contextual elements of genocide, war crimes and crimes against humanity in the jurisprudence of the ad hoc tribunals has already been extensively examined in Chap. 4.[613]

Another category of knowledge—wilful blindness—denotes the mental disposition of a person who turns a blind eye to what he already knows. The concept of wilful blindness—pertinent to the common law theory—oscillates between two *mens rea* alternatives, namely reckless knowledge and actual knowledge.[614] In English criminal law, wilful blindness is a substitute for actual knowledge and implies that a person *intentionally* chooses not to inquire whether something is true.[615] In similar terms, the US Model Penal Code renders awareness of a high probability of the existence of the fact culpable.[616] In *US v Jewell*, it was explicated that "to act "knowingly" does not necessarily mean to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact".[617] Hence, deliberate ignorance and positive knowledge are equally culpable.

Van de Vyver submits that wilful blindness is a strong indicator of at least *dolus eventualis* or recklessness.[618] However, the acceptance of a lesser degree than actual knowledge endangers to water down the distinction between wilful blindness and recklessness.[619] The importance of distinguishing between wilful blindness and

[611] Van Sliedregt (2003a), pp. 49–50.

[612] Schabas (2009), pp. 243–256.

[613] Chapters 4.3.1.1.4 (War Crimes) and 4.3.1.2.6 (Crimes Against Humanity).

[614] Simester and Sullivan (2007), p. 143.

[615] Ashworth (2009), p. 185.

[616] Model Penal Code (MPC), § 2.02(7).

[617] *US v. Jewell*, 532 F.2d 697 (1976) at 700.

[618] Van der Vyver (2004) at 75.

[619] Badar (2008) at 497–498; Badar and Marchuk (2013), § 2.1.3 (*Degrees of Knowledge: Actual Knowledge v. Wilful Blindness in English and Canadian Criminal Law*).

recklessness was reiterated by the Canadian Supreme Court that clearly separated "knowledge of a danger of a risk" inherent to reckless conduct from knowledge of the need for some inquiry that the offender declines because he does not wish to know the truth.[620]

The concept of wilful blindness in international criminal law has often been employed to demonstrate the actual knowledge requirement while attributing the charge of command responsibility to a commander who turns a blind eye to the crimes committed by his subordinates.[621]

5.2.3 Other Mens Rea Standards in the Jurisprudence of the Ad Hoc Tribunals

The discussion on *mens rea* in the ad hoc tribunals has not been limited to the construal of intent and knowledge alone. The *mens rea* standard of recklessness has been prominently featured in the jurisprudence as well. As it was mentioned earlier in this chapter, a misleading perception with respect to the requisite *mens rea* state for the crime of murder in the ICTY jurisprudence is that *dolus eventualis* entails the concept of recklessness.[622] Interestingly, the concept of recklessness is not even applicable to murder in common law jurisdictions because the crime is generally defined as an unlawful deprivation of life committed with malice aforethought. English criminal law speaks of intent to cause death and intent to cause grievous bodily harm as the sufficient mental element for murder.[623]

The crime of extensive destruction of property, which is not justified by military necessity and carried out unlawfully and wantonly, requires a perpetrator to have acted with intent to destroy the protected property or in reckless disregard of the likelihood of its destruction.[624] The finding suggests that the *mens rea* standard of "wantonness" captures both intent and recklessness. The same *mens rea* standard is

[620] *Sansregnet v. The Queen* [1985] 1 S.C.R. 570, 584.

[621] Actual knowledge is awareness that the crime(s) in question were committed or were about to be committed by subordinates. See: *Kordić and Čerkez* Trial Judgement, paras 427–428; *Čelebići* Trial Judgement, paras 383, 386. Chapter 6.5.3.2 (*Mens Rea* Standard for Command Responsibility in the Jurisprudence of the Ad Hoc Tribunals) and Chapter 6.5.3.3 (*Mens Rea* Standard for Command Responsibility in the ICC).

[622] *Stakić* Trial Judgement, para. 587; *Brđanin* Trial Judgement, para. 386.

[623] Simester and Sullivan (2007), p. 343. Murder is distinct from manslaughter that may be committed recklessly. However, as it was noted by Rose LJ, "there is a little scope for a species of manslaughter based exclusively on recklessness" given that "recklessness in the form of advertence to risk or indifference to risk might lead to a finding of gross negligence in criminal law". See: A-G's Reference (No 2 of 1999) [2000] 3 All ER 182.

[624] *Brđanin* Trial Judgement, para. 589; *Kordić and Čerkez* Trial Judgement, para. 341; *Naletilić and Martinović* Trial Judgement, para. 577.

also routinely attributed to the crime of appropriation of property not justified by military necessity and carried out unlawfully and wantonly.[625]

The crime of violence to life and person, which is a broad offence encompassing murder, mutilation, cruel treatment and torture, requires that the accused intended to commit violence to life or person of the victims deliberately or through recklessness.[626] The formulation borders on paradoxical, as one can hardly reconcile specific intent of the underlying act of torture with recklessness. These discordant pieces of jurisprudence reveal the extent of confusion generated in the jurisprudence of the ad hoc tribunals.

The judges of the ad hoc tribunals have deployed a plethora of *mens rea* standards that originate from many world legal jurisdictions, among others, *dolus*, recklessness, wantonness, wilfulness etc. The jurisprudential developments give an impression that the geographical representation of judges has had a significant effect on the interpretation of the law on *mens rea*. The judges with a continental law background have favoured a more conceptual approach to the mental element of a crime in their home jurisdictions, whereas the common law judges have frequently utilised *mens rea* terms available in the common law theory. The developed case law on *mens rea* in the ad hoc tribunals is nothing less than an ill-defined construction of overlapping terms that significantly undermines the principle of culpability in international criminal law.

5.3 The *Mens Rea* Doctrine in the International Criminal Court

Notwithstanding the establishment of the ad hoc tribunals more than two decades ago and extensive interpretation of the concept of *mens rea* with respect to core international crimes in the jurisprudence, the law on *mens rea* remains unsettled. As the first ICL codification with a remarkable general part, the Rome Statute defines the mental element of the crime for the purpose of avoiding a misunderstanding in the application of the law. The legal provision on *mens rea* in the Rome Statute has a limited purport because it is only relevant to crimes within the jurisdiction of the Court and does not reflect or codify customary rules.[627] Other international criminal courts, including the ad hoc and hybrid tribunals, are not bound by the *mens rea* definition set forth in Article 30 of the Rome Statute and the jurisprudence of the Court.

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[625] *Kordić and Čerkez* Trial Judgement, para. 341; *Naletilić and Martinović* Trial Judgement, para. 579.

[626] *Blaškić* Trial Judgement para. 182; *Kordić and Čerkez* Trial Judgement, para. 260; *Vasiljević* Trial Judgement, paras 194, 203.

[627] Cassese (2008), p. 60.

Article 30 ("Mental Element") and Article 32 ("Mistake of Fact or Mistake of law") are welcoming additions to the Rome Statute. It is commendable that the Statute affirms the importance of the long-standing principle of culpability by articulating notions of knowledge and intent, and providing for defences which may be invoked in situations when the offender's *mens rea* is negated.[628]

5.3.1 The Mens Rea Concept in Retrospective: Drafting History

The provision on *mens rea* was a thorny issue during the Rome Conference given the conceptual disparity between notions stemming from various legal systems, *inter alia, dolus eventualis* versus probability, recklessness versus gross negligence etc.[629] The 1996 Preparatory Committee[630] on the Establishment of an International Criminal Court introduced the concept of *mens rea* in terms of "intent and knowledge" which was later integrated into Article 30 of the final text of the Rome Statute. In addition, the draft provision provided for recklessness as the sufficient *mens rea* standard:

> [4. For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if:
> (a) The person is aware of a risk that the circumstance exists or that the consequence will occur;
> (b) The person is aware that the risk is highly unreasonable to take; [and]
> [(c) The person is indifferent to the possibility that the circumstance exists or that the consequence will occur.]]

The fact that the provision on recklessness was taken in squared brackets reveals the hesitance of the drafters to include a lower *mens rea* standard. The accompanying note mentioned that the concepts of recklessness and *dolus eventualis* were to be further considered in the view of the seriousness of the crimes involved. Recklessness was meant to be employed "where the Statute explicitly provides that a specific crime or element may be committed recklessly" with a general rule that "crimes must be committed intentionally and knowingly". The explanatory note resonates with the approach undertaken in the final version of the Rome Statute. Article 30 requires "intent and knowledge" as a general default rule, while other mental states only apply if they are covered by the exception rule of "unless otherwise provided".

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[628] Chapters 7.6 (Mistake of Fact) and 7.7 (Mistake of Law).

[629] Saland (1999), p. 205.

[630] *Report of the Preparatory Committee on the Establishment of an International Criminal Court,* U.N. GAOR, 51st Session, Supp. No. 22, U.N. Doc. A/51/22 (1996) (Vol. I); *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22A, U.N. Doc. A/51/22 (1996) (Vol. II).

The Decisions of the Preparatory Committee at its Session held from 11 to 21 February,[631] the Zutphen Draft[632] and the 1998 Preparatory Committee Draft Statute for the International Criminal Court[633] formulated the notion of intent in relation to conduct and in relation to a consequence. The provision on recklessness survived, but it was meant to be re-examined in light of the definition of crimes. The observation was submitted on the relevance of the concept of negligence with respect to certain proscribed conduct in the Rome Statute. The text of the Drafting Committee transmitted by the Committee of the Whole to the Plenary of the Diplomatic Conference[634] excluded any references to recklessness or any other lower forms of culpability, having endorsed the default rule of "intent and knowledge".[635]

5.3.2 Default Requirements of Intent and Knowledge Under Article 30 of the Rome Statute

Prior to the analysis of the default *mens rea* requirement under the Rome Statute, it is necessary to distinguish between the intensity of various mental elements and the scope of the mental coverage of the requisite material elements of a particular crime.[636] All material elements of a crime stipulated in the Rome Statute and the ICC Elements of Crimes must be covered by the requisite *mens rea* standard.

The default requirement in Article 30 of the Rome Statute encompasses two separate entities, intent and knowledge. However, the early jurisprudence ignores a semantic difference between intent and knowledge by merging those two independent entities into the fully-fledged definition of intent.[637] In the continental law

[631] Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997 (A/AC.249/1997/L.5).

[632] Report of the Inter-Sessional Meeting from 19 to 30 January in Zutphen, The Netherlands, U.N. Doc.A/AC.249/1998/L.13 (1998).

[633] Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1 and Corr. 1 (1998) reprinted in *Official Records from the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, at 13–82), U.N. Doc. A/CONF.183/13 (Vol. III) (1998).

[634] Report of the Drafting Committee, Draft Statute for an International Criminal Court, reprinted in Official Records from the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, at 149–180, U.N. Doc. A/CONF.183/13 (Vol. III) (1998). The text of the draft statute approved by the Committee of the Whole on July 17, 1998 transmitted to the Plenary of the Diplomatic Conference is identical to that of the approved Rome Statute.

[635] For the article-by-article drafting history of Article 30 of the Rome Statute, see: Bassiouni (2005b).

[636] Kelt and von Hebel (2001), p. 28.

[637] Ambos in Cryer and Bekou (2004), p. 22.

spirit, the jurisprudence of the ICC views intent as a fusion of the cognitive and volitional elements.[638]

5.3.2.1 Intent in Relation to Conduct

Pursuant to Article 30 (2) (a) of the Rome Statute, a person has intent when he or she "means to engage in the conduct". This provision demonstrates a close interrelation between intent and conduct, and upholds a straightforward idea that unintentional conduct, such as automatic or reflex behaviour, or accidents, fall outside the realm of criminal law.[639] Pre-Trial Chamber I in the *Lubanga* decision held that conduct encompasses both acts and omissions,[640] which runs against the argument laid down in the Commentary to the Rome Statute that omissions are not covered by the default rule in Article 30 but may fit the framework of criminal responsibility according to the opening words "unless otherwise provided".[641]

5.3.2.2 Intent in Relation to a Consequence

In relation to a consequence of a crime, the person's intent is in place "when he or she means to cause that consequence or is aware that it will occur in the ordinary course of events" pursuant to Article 30 (2) (b) of the Rome Statute. This means that in the perpetrator's perception at the time of the act, prohibited consequences will materialise unless extraordinary circumstances intervene.[642] Therefore, the mere anticipation of a possibility that illegal conduct may cause prohibited consequences does not fall within the *mens rea* threshold set forth in Article 30 (2) (b) of the Rome Statute because the standard of almost-certainty is required. The bone of contention in the early jurisprudence of the Court was whether Article 30 (2) (b) of the Rome Statute covered *dolus eventualis,* recklessness or any other lower forms of culpability.

Pre-Trial Chamber I penned that the cumulative reference to "intent and knowledge" requires the existence of a cognitive and volitional element on the part of the suspect.[643] Initially, *dolus* was classified into three forms depending upon the intensity of the volitional element vis-à-vis the cognitive one: (1) *dolus directus*

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[638] Chapters 3.1.3.1 (Intent (*Vorsatz*)); 3.2.1 (Intention (*Le Dol*)); 3.3.1.4.1 (Intent (*Умысел*)); 3.4.1.1 (The Highest Degree of Intent (*Forsæt*)). Badar and Marchuk (2013), § 3.6 (*Intent*).

[639] Schabas (2010), p. 477. Chapter 7.2 (Insanity, Automatism and Burden of Proof).

[640] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para. 351.

[641] Eser in Cassese et al. (2002), p. 912.

[642] Werle (2005), p. 104.

[643] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para. 351. See also: *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 357.

in the first degree or direct intent; (2) *dolus directus* in the second degree also known as oblique intention; and (3) *dolus eventualis*—commonly referred to as subjective or advertent recklessness.[644]

According to the *Lubanga* Pre-Trial Chamber, *dolus directus* in the first degree (direct intent) requires that a person knows that his/her acts or omissions will bring about the material elements of the crime and carries out these acts or omissions with the purposeful will (intent) or desire to bring them about.[645] The volitional element prevails over the cognitive element, since the person *purposefully* wills/desires to attain the prohibited result. In the context of domestic criminal law, the closest equivalent would be *Absicht (dolus directus in the first degree)* in German law;[646] *direkte forsæt* in Danish law;[647] *прямой умысел* in Russian law;[648] *dol special* in French criminal law etc.[649]

In the Chamber's opinion, situations in which the suspect, without having the concrete intent to bring about the objective elements of the crime, is aware that such elements will be the necessary outcome of his or her actions or omissions are covered by *dolus directus* of the second degree.[650] In this context, the intensity of the volitional element is overridden by the cognitive element of awareness that his or her acts or omissions "will" cause the undesired proscribed consequence(s). This *mens rea* standard is akin to *den direkte Vorsatz (dolus directus in the second degree)* in German law;[651] *sandsynlighedsforsæt* Danish law;[652] and *le dol general* in French law.[653] Russian criminal law employs a broad concept of indirect intent, which as well covers situations of *dolus eventualis*.[654]

The Pre-Trial Chamber assigned the label of *dolus eventualis* to situations in which the suspect is aware of the risk that the objective elements of the crime *may*

[644] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 351–352; *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 357 (original footnotes omitted).

[645] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para. 351 citing in support Eser in Cassese et al. (2002), pp. 899–900. In the same vein, see also: *Katanga et al.* (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 529; *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 358.

[646] Schönke and Schröder (2006), p. 260.

[647] Greve et al. (2009), p. 223.

[648] Russian Criminal Code, Article 25(2). See also: Garbatobich (2009), pp. 8–20.

[649] Stefani et al. (2003), p. 230; Elliot (2000) at 38.

[650] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para. 352 citing in support Eser in Cassese et al. (2002), pp. 898–899. In the same vein, see also: *Katanga et al.* (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 530; *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 359.

[651] Schönke and Schröder (2006), p. 261.

[652] Greve et al. (2009), p. 224.

[653] Elliot (2001), p. 67.

[654] Russian Criminal Code, Article 25(3). See: Chap. 3.5 (Interim Conclusions).

result from his or her acts or omissions and accepts such an outcome by reconciling himself or herself with it or consenting to it.[655] The technical definition of *dolus eventualis* was "borrowed" from the ICTY jurisprudence that coined it with respect to the crime of murder as a crime against humanity and *mutatis mutandis* wilful killing. The ICTY judges still recognised killing as being *intentional* in situations where "the actor engages in life-threatening behaviour" and "reconciles himself or "makes peace" with the likelihood of death".[656]

The *Lubanga* Pre-Trial Chamber singled out two kinds of scenarios when *dolus eventualis* may be attributed. If the risk of bringing about the objective elements of the crime is *substantial* (that is a likelihood that "it will occur in the ordinary course of events"), the fact that the suspect accepts the idea of bringing the objective elements of the crimes may be inferred from:

(i) awareness by the suspect of the substantial likelihood that his or her acts or omissions would result in the realisation of the objective elements of the crime; and
(ii) the decision by the suspect to carry out his or her actions or omissions despite such awareness.[657]

If the risk of bringing the objective elements of the crime is low, the suspect must have clearly and expressly accepted the idea that such objective elements *may* result from his or her actions or omissions.[658]

The Pre-Trial Chamber further clarified that situations in which the state of mind of the suspect falls short of accepting that the objective elements of the crime *may* result from his or her actions or omissions cannot qualify as truly *intentional* realisation of the objective elements of the crime.[659] In support of the finding, the Chamber provided an illustrative example of an individual who is aware of the likelihood that the objective elements of the crime would occur as a result of his actions or omissions, and in spite of that takes the risk in the belief that his or her expertise will suffice in preventing the realisation of the objective elements of the crime.[660] Such conduct would qualify as reckless in the common law theory but consciously negligent in the civil law tradition.[661]

The formulation of *dolus eventualis* by the *Lubanga* Pre-Trial Chamber is misleading. This could be explained by the lack of a thorough comparative analysis of the concept in national legal jurisdictions. The fact that the Chamber reconciled

[655] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para. 352.

[656] *Stakić* Trial Judgement, para. 587.

[657] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para. 353 (original footnote omitted).

[658] Ibid., 354 (original footnote omitted).

[659] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para. 355.

[660] Ibid., para. 355, fn 437.

[661] Badar and Marchuk (2013), § 2.1.2 (*Recklessness in English Criminal Law*); 2.2.2 (*Recklessness in American Criminal Law*); § 3.7 (*Negligence in Continental Law Jurisdictions*).

the volitional element of the acceptance of a risk with the cognitive element of awareness of the substantial likelihood of prohibited consequences renders the interpretation of *dolus eventualis* partially meaningless. In order to establish *dolus eventualis*, it is not required to prove the substantial likelihood of prohibited consequences, rather it is sufficient to prove the *possibility* that the objective elements of the crime *may* materialise and the acceptance of such a risk.[662]

The Majority in the *Katanga* and *Chui* case endorsed the finding in the *Lubanga* decision as to the inclusion of *dolus eventualis* within the ambit of Article 30 of the Statute. Although Judge Ušacka disagreed with the position of the Majority with respect to the application of *dolus eventualis*, she found unnecessary to provide her reasons on whether Article 30 also encompassed *dolus eventualis*, as it was not addressed in the Decision.[663]

Subsequently, the Defence for *Germain Katanga* filed the request for leave to appeal the Decision on the Confirmation of Charges on four grounds, including uncertainty surrounding the *mens rea* standard (ii) whether the majority of the Pre-Trial Chamber—with Judge Ušacka dissenting—applied *dolus eventualis* instead of *dolus directus* in respect of the sexual violence charges under counts 6, 7, 8, and 9.[664] The Chamber concurred with the Prosecution that the Defence did not point out to any single instance in the Decision on the confirmation of charges (DCC) in which the Majority of the Chamber applied the *dolus eventualis* standard under the label of *dolus directus* of the second degree.[665] Furthermore, it identified that the Defence only referred to the disagreement shown by the dissenting opinion of Judge Ušacka in relation to the assessment made by the Majority on the sufficiency of evidence tendered by the Prosecution for the purposes of the confirmation of the charges of sexual violence. In the Chamber's opinion, the mere disagreement with the finding of the Chamber did not *per se* fulfil requirements of Article 8 (2) (l) (d) of the Rome Statute. For all the aforementioned reasons, the request for leave to appeal was rejected.[666]

Pre-Trial Chamber II disagreed with previous findings as to the inclusion of *dolus eventualis* under the default rule set forth in Article 30 of the Rome Statute. In the Chamber's opinion, this is supported by the express language of the phrase "will occur in the ordinary course of events" which does not accommodate a lower

[662] Ibid., § 3.6.3 (*Dolus Eventualis as the Lowest Threshold for Intentional Crimes*).

[663] *Katanga et al.* (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, fn 329.

[664] *Katanga et al.* (ICC-01/04-01/07), Defence Application for Leave to Appeal the Decision on the Confirmation of Charges, 6 October 2008, para. 10.

[665] *Katanga et al.* (ICC-01/04-01/07), Prosecution's Response to Application by the Defence of Katanga for Leave to Appeal the Decision on the Confirmation of Charges, 10 October 2008.

[666] *Katanga et al.* (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Applications for Leave to Appeal the Decision on the Admission of the Evidence of Witnesses 132 and 287 and on the Leave to Appeal the Decision on the Confirmation of Charges, 24 October 2008.

standard than the one required by *dolus directus* in the second degree (oblique intention).[667] To arrive at the conclusion, the Chamber conducted a literal (textual) interpretation of Article 30 of the Statute.[668] It correctly construed the phrase "[a consequence] will occur" as an expression for an event that is "inevitably" expected.[669] The cumulative reading of the parts "will occur" and "in the ordinary course of events" implies an "almost certainty" standard which means that the consequence will follow, barring an unforeseen or unexpected intervention that prevent its occurrence.[670] The same Chamber held that if the inclusion of *dolus eventualis* in the text of Article 30 was intended by the drafters, they could have used the words "may occur" or "might occur in the ordinary course of events" to convey mere eventuality or possibility, rather than near inevitability or virtual certainty.[671]

By striking out *dolus eventualis* from the default rule of "intent and knowledge" under the Rome Statute, Pre-Trial Chamber II ensures that the interpretation of the definition of crimes is in harmony with the rule of strict construction under Article 22 (2) of the Statute. This serves as a guarantee that *de lege lata* are not substituted *de lege ferenda* for the sake of widening the scope of Article 30 and thus bringing to justice a broader range of perpetrators.[672] The approach is fully consonant with the academic writings on the matter.[673] The limitation of the default *mens rea* to *dolus directus in the first degree* and *dolus directus in the second degree* lays a heavier burden of proof on the Prosecution.

The *Lubanga* Trial Chamber acknowledged the flawed interpretation of *dolus eventualis* in the decision on the confirmation of charges and thus accepted the *Bemba* Pre-Trial Chamber II's approach on the issue.[674] However, in the following passage of the Judgement, the judges attempt to define "awareness that a consequence will occur in the ordinary course of events" with the consideration of the concept of "possibility" which is inherent to the notions of "risk" and "danger".

Judge Fulford disapproves the interpretation of the awareness requirement ["consequences will occur in the ordinary course of events"] through a number

[667] *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 360.

[668] Ibid., para. 361, fn 451. The literal (textual) analysis was conducted in conformity with the principles of treaty interpretation laid down in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). UNTS, vol. 1155, p. 331. The same approach was confirmed by the Appeals Chamber in its "Judgment on Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, para. 33.

[669] Ibid., para. 362 (original footnote omitted).

[670] Ibid. (original footnotes omitted).

[671] Ibid., para. 363 (original footnote omitted).

[672] Ibid., para. 369.

[673] Ambos in Cryer and Bekou (2004), p. 22. See also: Weigend (2008) at 484.

[674] *Lubanga* (ICC-01/04-01/06), Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 1011.

of explanatory words such as "possibility", "probability", "risk" or "danger". However, he does not explain how the awareness element shall be understood by merely submitting that "the words are plain and readily understandable".[675] The standard of "awareness that a consequence will occur in the ordinary course of events" does not presuppose any evaluation of "risk" or "possibility" because the perpetrator is certain that the prohibited result will be achieved, barring unforeseen circumstances.

5.3.2.3 Knowledge

Pursuant to Article 30 (3) of the Rome Statute, knowledge means "awareness that a circumstance exists or a consequence will occur in the ordinary course of events". Given that core international crimes are committed in a certain context, be it an armed conflict or a widespread or systematic attack directed against a civilian population, the knowledge requirement accompanies contextual elements of all crimes within the jurisdiction of the Court. As an illustrative example, the *mens rea* element for crimes against humanity is adjoined to the context in which the conduct must take place:

> The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[676]

It is not required to prove that a perpetrator had knowledge of *all* characteristics of the attack or the precise details of the plan or policy of the State or organisation. In the case of an emerging widespread or systematic attack against a civilian population, the requisite mental element is satisfied if the perpetrator intended to further such an attack.[677] Likewise, war crimes[678] and genocide[679] require to be accompanied by knowledge of the context in which the crimes occur.[680]

The knowledge requirement may also be relevant when evaluating a legal circumstance or forming a value judgement. It is within judicial discretion to

[675] Ibid., Separate Opinion of Judge Adrian Fulford, para. 15.

[676] ICC Elements of Crimes, Article 7 (1) (a)-Article 7 (1) (k).

[677] ICC Elements of Crimes, Article 7, Crimes against Humanity (Introduction), para. 2.

[678] ICC Elements of Crimes, Article 8, War Crimes (Introduction) reads: "There is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international; but there is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with".

[679] ICC Elements of Crimes, Article 6 (Introduction) provides: "Notwithstanding the normal requirement for a mental element provided for in Article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis".

[680] Chapters 4.3.1.1 (Contextual Elements of War Crimes) and 4.3.1.3 (Contextual Elements of Genocide).

determine whether the offender's conduct fits the descriptive terms "appropriation", "severe", "inhuman" to name a few, as set out in the Rome Statute.

Although the general part of the Rome Statute sheds light on the interpretation of *mens rea*, the jurisprudence has yet to provide more guidance on the understanding of "knowledge and intent" requirement with respect to specific crimes as well as pleading of defences in situations when the offender's *mens rea* was negated.[681]

5.3.2.4 "Unless Otherwise Provided" Exception Rule

During the drafting process of the Rome Statute there was general reluctance to impose a higher *mens rea* standard under the deviation rule but more flexibility towards the attribution of a lower *mens rea* standard in exceptional circumstances.[682] The deviation rule as it stands in Article 30 does not strike out prosecutions of crimes that call for a lower *mens rea* standard in comparison to the default "intent and knowledge" requirement if a less demanding *mens rea* standard is explicitly articulated in the Statute with respect to a specific crime. However, the deviation rule would rarely apply, since the majority of crimes need to be accompanied by the general default rule of "intent and knowledge".

Article 28 (1) of the Rome Statute assigns criminal responsibility to commanders and other superiors on the basis of a lower form of culpability. The *mens rea* requirement for command responsibility entails that a military commander "either knew or, owing to circumstances at the time, should have known" that a subordinate was committing or about to commit a crime. The *mens rea* standard of "should have known" reduced to negligence is even a lower threshold than that of constructive knowledge laid down in the jurisprudence of the ad hoc tribunals.[683]

Likewise, a number of war crimes penalised in the Rome Statute require the *mens rea* threshold to be less strong than intent. The ICC Elements of Crimes specify that the respect to the subjective elements of the war crime provided for in Article 8 (2) (b) (xxvi) of the Rome Statute (conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities), the perpetrator must satisfy the intent and knowledge requirement as well as a negligence standard stipulated in the phrase "should have known" with regard to the age requirement of a victim. However, the lesser mental element with respect to the age of children was criticised throughout proceedings in the *Lubanga* case.[684] The *Lubanga* Trial Chamber reiterated the

[681] Chapters 7.7 (Mistake of Fact) and 7.8 (Mistake of Law).

[682] Kelt and von Hebel (2001), p. 30.

[683] The *mens rea* standard of constructive knowledge means that a superior had in his possession information, which at least would put him on notice of the risk of crimes committed or about to be committed. See: *Čelebići* Appeal Judgement, para. 222.

[684] *Lubanga* (ICC-01/04-01/06), Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras 1015.

importance of proving the accused's knowledge as to the age of children. On the basis of evidence, it was established that *Mr Lubanga* was indeed aware of the recruitment and use of child soldiers who were clearly below the age of 15.[685]

Some legal provisions of the Rome Statute employ another glossary of *mens rea* terms to convey culpability. Grave breaches of the Geneva Conventions such as *wilful* killing (Article 8 (2) (a) (i)); *wilfully* causing great suffering, or serious injury to body or health (Article 8 (2) (a) (iii)); and *wilfully* depriving a prisoner of war or other protected person of the rights of fair and regular trial (Article 8 (2) (a) (vi)) must be committed *wilfully*. The drafters of the Statute decided to retain specific definitions of war crimes as they were formulated in original treaties because they were afraid that the adjustment of *mens rea* terms for the catalogue of violations in the Geneva Conventions would adversely affect the original definitions.[686] The author of this book believes that the omission of the term "wilful" would do little to alter the character of war crimes, since the term itself is a clear indicator of intent, unless wilfulness will be interpreted as covering both intent and recklessness. A more consistent use of *mens rea* terms would bring more predictability to the jurisprudence and contribute to standardising practices of the Court.

5.3.2.5 Specific Intent (*Dolus Specialis)* in International Criminal Law

Special intent is a well-established criminal law concept which is absolutely required as a constitutive element of certain offences in domestic criminal law and implies that a perpetrator has the clear will to cause the offence. The *Akayesu* Trial Chamber outlined special intent as a "key element of an intentional offence characterised by a psychological relationship between the physical result and the mental state of the perpetrator".[687] The terms "special intent", "specific intent", and "*dolus specialis*" are interchangeable in the jurisprudence of international courts and tribunals. *Schabas* observes that such use of terms is a source of confusion because *dolus specialis* as known in continental law cannot be sweepingly equated to the notions of "specific" and "special" intent in common law.[688]

The academic literature on the nature of specific intent is divided. On the one hand, it is defined as intent that requires a higher degree of intensity that involves an additional mental attitude that goes beyond simply reflecting upon the material elements of the crime.[689] The contrasting position is that specific intent does not

[685] *Lubanga* (ICC-01/04-01/06), Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras 1015, 1278. The *Lubanga* Trial Chamber departed from the finding of the Pre-Trial Chamber that upheld the negligence standard with respect to the age of children. See: *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 357–359.

[686] Eser in Cassese et al. (2002), p. 900.

[687] *Akayesu* Trial Judgment, para. 518 citing Merle and Vitu (1973), p. 723 *et seq*.

[688] Schabas (2001) at 129. The author warns against the importation of enigmatic concept like "*dolus specialis*" or "specific intent" from domestic criminal law.

[689] Werle (2005), pp. 101–102.

require a higher degree of intensity, although it provides an additional requisite as to the scope of the intent but has no particular element connected thereto.[690] The overview of specific intent crimes in international criminal law (as shown below) convincingly demonstrates that a higher degree of intensity accompanies such category of crimes.

The classic specific intent crime in international criminal law is genocide that encompasses the intent to destroy, in whole or in part, a national, ethnical, racial and religious group, as such. Although perpetrators of this abhorrent crime rarely publicly reveal their genocidal intentions, the scale of the crime, its association with a State plan or policy, and the presence of a hostile attitude in public opinion towards a specific group protected by the Genocide Convention, betrays the genocidal intent of perpetrators. Modern international criminal courts and tribunals have been saddled with the daunting task to redress some of the bloodiest genocide atrocities of our times, including the Srebrenica massacre, the Rwandan genocide and the unbearable suffering of the Darfur population in Sudan.

A few crimes against humanity also constitute specific intent crimes, among others, extermination ("intentional infliction of conditions of life (. . .) calculated to bring about the destruction of part of a population),[691] torture ("intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused"),[692] forced pregnancy ("unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population"),[693] persecution ("intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"),[694] apartheid ("inhumane acts committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime"),[695] and enforced disappearance of people ("arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of a State or a political organisation (. . .) with the intention of removing them from the protection of the law for a prolonged period of time").[696] The legal analysis below deconstructs the specific intent requirement in relation to selected crimes within the jurisdiction of international criminal courts and tribunals.

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[690] Kelt and von Hebel (2001), p. 31.

[691] Rome Statute, Article 7 (2) (b).

[692] Ibid., Article 7 (2) (e). It is understood that no specific intent is connected to the crime of torture in the Rome Statute (footnote 14 to Article 7(2)(e), ICC Elements of Crimes). This runs contrary to the practices of the ad hoc tribunals that have consistently construed the crime of torture as the specific intent crime. See below: Chap. 4.3.2.5.2 (*Dolus Specialis* in the Crime of Torture).

[693] Ibid., Article 7 (2) (f).

[694] Ibid., Article 7 (2) (g).

[695] Ibid., Article 7 (2) (h).

[696] Ibid., Article 7 (2) (i).

5.3.2.5.1 *Dolus Specialis* in the Crime of Genocide

The wording of the Genocide Convention clearly posits genocide as a crime of intent. Article 2 of the Convention provides a clear description of intent, that is "to destroy, in whole or in part, a national, ethnical, racial or religious group as such". The *mens rea* standard in support of the crime of genocide is twofold: (i) the general intent requirement with regard to an underlying act(s) of genocide; and (ii) specific intent that such acts were committed with the aim of the destruction of the protected group within the Genocide Convention. The genocidal *mens rea* is scholarly defined as a "mixed individual-collective point of reference" because the mental element of physical destruction refers to a bigger context which involves the collective action.[697]

5.3.2.5.1.1 Purpose-Based v Knowledge-Based Approach Towards Genocidal Intent

The purpose-based approach, which is focused on the genocidal intent as such, stands in contrast to the knowledge-based approach that requires the existence of a plan or policy and knowledge of the context in which the crime of genocide occurs. The drafters of the Genocide Convention were clearly inclined towards the purpose-based approach by delineating genocide as the crime aiming at the destruction of a human group. The jurisprudential line of interpretation is also purpose-oriented. The *Akayesu* Trial Chamber construed *dolus specialis* with respect to genocide by seeking inspiration in French criminal law.[698] *Kress* rightly observes that the Tribunal's finding falls short of a valid "comparative law argument" due its *only* reference to the French legal doctrine and failure to conduct more thorough analysis on the concept of specific intent in other legal jurisdictions.[699]

Cassese expounded the concept of *dolus specialis* as an "aggravated intent that signifies the pursuance of a specific goal going beyond the result of the offender's conduct".[700] In addition to the proof of material consequences of the offender's conduct (e.g. death by killing), it is necessary to prove the existence of "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The reflection of *Cassese's* standpoint on the crime of genocide is also found in the final report of the Commission of Inquiry on Darfur that he chaired. The *mens rea* standard of the crime of genocide was deconstructed into:

(a) criminal intent required for the underlying offence (killing, causing serious bodily or mental harm, etc.);
(b) intent to destroy, in whole or in part the group as such.[701]

[697] Vest (2007) at 785–786.

[698] *Akayesu* Trial Judgement, para. 518 citing in support Merle and Vitu (1973), p. 723. For more, see: Chap. 3.2.1 (Intention (*Le Dol*)).

[699] Kress (2005) at 567.

[700] Cassese (2008), p. 65.

[701] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council resolution 1564 (2004) of 18 September 2004, 25 January 2005 (hereinafter—UN Darfur Report), para. 491.

Dolus specialis presupposes that a perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts will cause such an effect.[702] The ICC Pre-Trial Chamber conforms to the same purpose-based approach and deconstructs the requisite *mens rea* standard of the crime of genocide into:

(i) a general subjective element that must cover any genocidal act provided for in Article 6(a) to 6(e) of the Statute, and which consists of Article 30 intent and knowledge requirement; and
(ii) an additional subjective element, normally referred to as *dolus specialis* or specific intent, according to which any genocidal act must be carried out with the "intent to destroy in whole or in part" the targeted group.[703]

The knowledge-based interpretation of *dolus specialis* suggests that genocide comprises of underlying acts that one knows lead to the destruction of the group,[704] or whose foreseeable or probable consequence is the destruction of the group.[705] The knowledge-based approach seems to be in conflict with the stringent interpretation of *dolus specialis* endorsed in the jurisprudence of the ad hoc tribunals and the ICC pre-trial jurisprudence. The attribution of genocidal intent to a person who merely foresaw the destruction of a group is an unjustifiably low standard than the one agreed upon in the jurisprudence. It is only fair to the accused that the Prosecution bears a heavy burden of proof in genocide cases, given an incredibly significant stigma attached to those convicted of this heinous crime. It is improbable that the purpose-based interpretation of genocidal intent will be brushed aside in the jurisprudence of international criminal courts and tribunals.[706]

The generally accepted purpose-based definition of "intent to destroy, in whole or in a part, a national, ethnical, racial and religious group as such" includes the following three components: (i) degree of the requisite mental state ("to destroy . . ."), (ii) scope of the requisite mental state ("a . . . group, as such"), and (iii) the term "in whole or in part".

5.3.2.5.1.2 Degree of the Requisite Mental State

The ICTY Trial Chamber in the *Krstić* case attempted to clarify what was meant in the Genocide Convention by the *goal of destroying* all or part of the group.[707] It was explicated that the goal does not need to be premeditated over a long period but may

[702] Ibid.

[703] *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 139.

[704] Greenwalt (1999) at 2288.

[705] Kress (2005) at 566.

[706] Van Sliedregt (2007) at 193.

[707] *Krstić* Trial Judgment, para. 571 (emphasis added).

be formulated at a later stage during the implementation of a military operation whose primary objective was totally unrelated to the fate of the protected group.[708]

As to the meaning of "destruction", it has been historically considered that the term only extends to "physical destruction", however, the jurisprudence is not particularly perspicuous on the subject. In his partially dissenting opinion in the *Krstić* Appeal, Judge Shahabuddeen reckoned sufficient to demonstrate that the intent with which that act was perpetrated encompassed the destruction of the group, regardless of whether such intended destruction was to be physical, biological, social or cultural.[709] Despite this rather broad interpretation of "destruction", he clarified that he was not making an argument for the recognition of cultural genocide as a genocidal *actus reus*, but was drawing a distinction as to the intent of the crime only. Judge Shahabuddeen treated the destruction of culture as an evidentiary factor that could confirm the existence of genocidal intent.[710]

5.3.2.5.1.3 Scope of the Requisite Mental State

The concept of a protected group is inseparable from the intrinsic characteristic of the crime of genocide, i.e. *dolus specialis*. The protected group element and *dolus specialis* are strongly intertwined, since the latter can only be established after the identification of the targeted group.[711] The ad hoc tribunals in a number of judgements, in particular *Krstić*,[712] *Akayesu*[713] and *Kayishema*[714] adopted the interpretation of a "group as such" set forth in the 1996 ILC Draft Code of Crimes:

> The group itself is the ultimate target or intended victim of this type of massive criminal conduct. [. . .] the intention must be to destroy the group "as such", meaning as separate and distinct entity.[715]

The Genocide Convention identifies four protected groups, in particular national, ethnical, racial and religious groups. The ICTR jurisprudence describes a national group as "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties".[716] An ethnic group is delineated as "a group whose members share a common language or culture".[717] The conventional definition of racial group is based on the "hereditary

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[708] Ibid., para. 572.

[709] Partial Dissenting Opinion of Judge Shahabuddeen, *Krstić* Appeal Judgment, paras 49–50 (citation omitted).

[710] Ibid., para. 53.

[711] For more on the preparatory work on the Genocide Convention in relation to the protected group element, see: Fanny in Gaeta (2009a).

[712] *Krstić* Trial Judgment, para. 552.

[713] *Akayesu* Trial Judgment, para. 521.

[714] *Kayishema* Trial Judgment, para. 99.

[715] 1996 ILC Draft Code of Crimes, Article 17 (Commentary), paras 6–7.

[716] *Akayesu* Trial Judgment, para. 512.

[717] Ibid., para. 513.

physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors".[718] A religious group includes "members who share the same religion, denomination or mode of worship".[719] It is within judicial discretion to determine which entity constitutes a protected group under the Genocide Convention. The ICTR *Akayesu* Trial Chamber explicated that the crime of genocide was meant to cover only "stable groups, constituted in a permanent fashion and membership of which is determined by birth", while more "mobile groups which one joins through individual voluntary commitment, such as political and economic groups" fell outside the definition of the crime.[720]

The jurisprudence of international courts and tribunals has accumulated an assortment of approaches towards the interpretation of the protected group element. In the notable ICJ Genocide Case, the Respondent (Serbia) challenged the Applicant's (Bosnia) definition of the group element that described it in negative terms as "the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including the Muslim population".[721] The ICJ ruled in favour of the positive identification of the group: "the targeted group must in law be defined positively, and [. . .] not negatively as the "non-Serb" population".[722] To arrive at the conclusion, the ICJ judges scrutinised the *travaux préparatoires* of the Genocide Convention and concluded that the abandonment of propositions to include within the Convention political groups and cultural genocide was a convincing argument in favour of the positive identification of groups with specific distinguishing well-established and immutable characteristics.[723]

Some commentators claim that the failure to protect economic, political and other groups compromises the integrity of the Convention, and unreasonably restricts the scope of the crime of genocide.[724] The exclusion of political groups is regarded as the Convention's "blind spot", which was allegedly driven by the "desire of drafters to insulate political leaders from scrutiny and liability".[725] The expansion of the protected group element to include social groups cannot serve as a "panacea" for all the existing flaws in the jurisprudence. Despite the vocal criticism of the "stable and permanent group" requirement, there is an obvious lack of proper legal analysis of how detrimental the abandonment of such an approach would be in international law.

On many occasions, international criminal courts and tribunals have struggled to fit certain groups within the existing definitions of the protected group element in

[718] Ibid., para. 514.

[719] Ibid., para. 515.

[720] Ibid., para. 511.

[721] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007, ICJ Reports 140, paras 191–192.

[722] Ibid., para. 196. The same approach was re-affirmed in the *Popović* Trial Judgement, para. 809.

[723] Ibid., para. 194.

[724] Lippman in Lattimer (2007), pp. 507–509.

[725] Van Schaack in Lattimer (2007), pp. 2261.

the jurisprudence. The ICTR Trial Chamber in *Akayesu* was confronted with the issue of whether *Tutsi* constituted the protected group within the meaning of the Genocide Convention, since both groups involved in the conflict, *Hutu* and *Tutsi*, shared the same language, culture, religion, and one can even claim the same physical features. The judges adopted a mixed objective-subjective approach when deciding upon whether *Tutsi* constituted an ethnic group within the meaning of the Convention and cited the following major arguments in support of its affirmative conclusion: (i) the Belgian colonizers contributed to the division in the society by issuance of the identity cards that explicitly indicated the belonging to a group; and (ii) self-perception of the population reflected the division into two distinct groups.[726] Although the judges allowed a certain level of flexibility when evaluating the protected group during the Rwandan genocide, they did not deviate from the intention of the drafters of the Genocide Convention to cover only stable and permanent groups.

The same complex issue on the interpretation of the protected group emerged in the *Al Bashir* case before the ICC. The judges grappled with the question of whether the *Fur, Masalit* and *Zaghawas* fall within the protected group requirement. At the outset, the Majority acknowledged that all three groups appear to share Sudanese nationality, similar racial features and Muslim religion.[727] Nevertheless, the Majority considered those groups as separate ethnic entities in light of their own languages, tribal customs and traditional links to the land.[728] The Chamber did not provide any further interpretation of the concept of an ethnic group, although it noted controversies that haunt international law when it comes to the definition of protected groups.[729] Unfortunately, the Majority did not consider it necessary to explore the issue further in its decision.

Judge Ušacka in her dissenting opinion shunned the Majority's analysis of the protected group element that treated the *Fur, Masalit* and *Zaghawas* as separate groups targeted during the GoS counter-insurgency campaign. Instead, she reckoned that the aforementioned groups form a single ethnic group of the "African tribes" in stark contrast to the perpetrators who belong to the "Arab" group.[730] The line of reasoning advanced by Judge Ušacka mirrors the interpretation of the targeted group in the UN Report on Darfur that distinguished between "African" victims who were addressed in the derogatory form as "slaves", "black", "Nuba", or "Zurga", and militias of Arab tribes on horseback or camelback commonly known under the name Janjaweed.[731]

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[726] *Akayesu* Trial Chamber, para. 702.

[727] *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 136 referring to the UN Darfur Report, paras 41, 52–53, 60.

[728] Ibid., para. 137 referring to UN Darfur Report, para. 52.

[729] Ibid., footnote 152.

[730] Ibid., Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 26.

[731] UN Darfur Report, paras 510–511.

The UN Commission of Inquiry on Darfur adopted a more flexible approach towards the definition of a protected group in comparison to the one crystallised in the jurisprudence. International rules on genocide were construed as "intended to protect from obliteration groups targeted not on account of their constituting a territorial unit linked by some community bonds (such as kinship, language and lineage), but only those groups—whatever their magnitude—which show the particular hallmark of sharing a religion, or racial or ethnic features, and are targeted precisely on account of their distinctiveness".[732] The Commission acknowledged that tribes could fall within the protected group "only if they also exhibit the characteristics of one of the four existing categories of groups protected by international law".[733] The Commission's approach renders more flexibility if the answer on the qualification of a protected group is not straightforward.

The jurisprudence oscillates somewhere between the objective interpretation that construes a group from an anthropological perspective, and subjective interpretation that delineates a group on the basis of perception of a perpetrator and self-perception of group members.[734] The gradual shift from the objective approach towards the subjective one enables to take into account "the mutable and contingent nature of social perceptions without reinforcing perilous claims to authenticity in the field of ethnic and racial identities".[735] However, the subjective approach alone is far too dangerous to map the entire protected group area, as it is capable of inadvertently stretching the existing definition of genocide. It is necessary to exercise caution while applying the subjective criterion in order to avoid the dilution of the stable and permanent group concept by the imaginative perception and self-perception that do not meet the existing objective realities. *Kress* submits that the sufficiency of the subjective approach alone to establish the existence of a protected group is capable of converting the crime of genocide into unspecific crime of group destruction based on a discriminatory motive.[736] On the other hand, as it was penned by the UN Commission on Darfur, it would be erroneous to underestimate the process of perception and self-perception of another group that ultimately hardens and crystallises into a real and factual opposition, and thus leads to an objective contrast.[737] The merger of the subjective and objective criteria is a particularly advantageous tool in complex situations where a group does not neatly fit into the existing definition of protected groups under the Genocide Convention.

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[732] UN Darfur Report, para. 497.

[733] Ibid.

[734] *Kayishema* Trial Judgement, para. 98; *Musema* Trial Chamber, paras 161–163; *Rutaganda* Trial Judgement, para. 56; *Jelisić* Trial Chamber, paras 70–71; *Krstić* Trial Chamber, paras 556–557, 559–560.

[735] Verdirame in Lattimer (2007), p. 594.

[736] Kress (2006) at 474.

[737] UN Darfur Report, para. 500.

The *Krstic*[738] and *Jelisic*[739] Trial Judgments underline that the destruction of a group "as such" qualifies genocide as an exceptionally grave crime which is distinct from other serious crimes, such as persecution where the perpetrator selects his victims because of their membership in a specific community but does not necessarily seek to destroy the community as a distinct entity. The same finding was upheld by the *Stakić* Appeals Chamber that acknowledged the significance of the term "as such", as it shows that "the offense requires intent to destroy a collection of people who have a particular group identity".[740] The important legal characteristic of the crime of genocide is that the victim is chosen not on account of his individual identity but on the basis of his membership in a national, ethnical, racial or religious group. The victim of the crime of genocide is not only the individual but the group itself.

5.3.2.5.1.4 The Term "In Whole Or In Part"

A genocidaire does not necessarily need to seek the destruction of the entire group. In order to determine the proportion of a targeted group that satisfies the requirement "in part", it is necessary to examine a set of criteria, in particular the scope or geographical expansion of the group and the perpetrator's subjective perception of the targeted group. The jurisprudence of the ad hoc tribunals affirms that a part of the group may be perceived as a distinct entity regardless of its concentration within a limited geographic area. Both the *Krstić* and *Jelisić* Trial Judgments held that the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area.[741]

The ICTY Trial Chamber in its *Krstić* Judgment examined whether the protected group within the meaning of the definition of genocide was constituted of "Bosnian Muslims of Srebrenica" or "Bosnian Muslims" as a group in general, and found that the protection under the Genocide Convention was afforded to both groups. It was deemed sufficient for the intent to destroy a group living in a particular geographical area to satisfy the definition of genocide because it is not required that the perpetrators of genocide seek to destroy the entire group, rather "they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such".[742]

The *Krstić* Trial Chamber also explored an interesting issue of whether genocidal intent was in place where only men of military age were killed given the

[738] *Krstić* Trial Judgment, para. 553.

[739] *Jelisić* Trial Judgment, para. 79.

[740] *Stakić* Appeal Judgment, para. 20; *Popović* Trial Judgement, para. 821; *Blagojević* Trial Judgement, paras 656, 665.

[741] *Krstić* Trial Judgment, para. 590; *Jelisić* Trial Judgment, para. 83.

[742] *Krstić* Trial Judgment, para. 590.

lasting impact of the selective destruction on the entire population. During the Srebrenica massacre, all men of military age were executed, whereas the rest of the Bosnian Muslim population was subjected to the forcible transfer.[743] It was established that the Bosnian Serbs knew that the combination of the killings with the forcible transfer would result in the physical disappearance of the Bosnian Muslim population of Srebrenica.[744] The developed jurisprudence shows that the sociological context of the targeted group may also be relevant when defining "in part". The *Jelisić* Trial Chamber found that intent could be regarded as genocidal if it seeks to destroy "the most representative members of the targeted community".[745]

The ICJ listed a number of criteria for the determination of "in part" of the group: (i) the existence of intent to destroy at least a *substantial* part of the particular group is demanded by the very nature of the crime;[746] (ii) the existence of intent to destroy the group within a geographically limited area may amount to genocide if this criterion is weighed against the first and essential factor of *substantiality*;[747] (iii) the employment of a qualitative approach rather than a quantitative one, though the former does not suffice to make the correct determination of facts, and the *substantiality* requirement is an essential starting point of the determination of the term "in part".[748] The list of criteria is not exhaustive and the assessment of other relevant factors may be carried out on a case-by-case basis.[749] It is important to bear in mind that the intent of the perpetrator to destroy a particular group in whole or in part differs from the one directed at the destruction of the entire population. Genocide and extermination are two distinct categories of crimes. Whereas genocide denies a particular group the right to existence, the crime of extermination targets the entire population.

5.3.2.5.1.5 Means to Infer the Genocidal Intent

Specific intent is a *sine qua non* of the crime of genocide. Given that it is an onerous task to prove *dolus specialis* in individual cases, specific intent may be inferred from relevant facts and circumstances as a matter of practical necessity.[750] The Trial Chamber in *Kayishema* and *Ruzindana* acknowledged that the perpetrator's actions, including circumstantial evidence, may provide sufficient evidence of

[743] Ibid., para. 595.

[744] Ibid.

[745] *Jelisić* Trial Judgement, para. 82.

[746] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007, ICJ Reports 140, para. 198 (emphasis added). The requirement of substantiality was supported by references to the jurisprudence of the ad hoc tribunals and the 1996 ILC Draft Code.

[747] Ibid., para. 199 citing in support *Stakić* Trial Judgment, para. 523.

[748] Ibid., para. 200 citing in support *Krstić* Appeal Judgement, para. 12.

[749] Ibid., para. 201.

[750] *Akayesu* Trial Judgment, para. 523.

intent.[751] The Appeals Chamber in the same case upheld the Trial Chamber's approach on the inference of the requisite intent from relevant facts and circumstances.[752] The Commission of Experts in the Final Report on the Situation in Rwanda, noting the practical necessity of inferring specific intent, suggested the inference of the requisite specific intent from sufficient facts, such as the number of victims of the protected group.[753] The jurisprudence of the ad hoc tribunals allows the conclusion of guilt to be inferred from circumstantial evidence only if it is the *only* reasonable conclusion available from the evidence. Even though the guilt of the accused may be inferred from particular facts, it must still be established beyond a reasonable doubt.[754]

The jurisprudence of the ad hoc tribunals has amassed an overwhelming number of facts that betray the existence of genocidal intent on the part of a genocidaire: (i) the seriousness of discriminatory acts;[755] (ii) the gravity and methods used for implementing the ethnic cleansing policy;[756] (iii) the general political doctrine giving rise to the acts;[757] (iv) acts which violate or which the perpetrators themselves consider to violate the very foundation of the group;[758] (v) the destruction or attacks on cultural and religious property and symbols of the targeted group;[759] (vi) destruction or attacks on houses belonging to members of the group;[760] (vii) the desired destruction of a more limited number of persons selected for the impact that their disappearance would have on the survival of the group as such which would constitute an intention to destroy the group "selectively";[761] (viii) the perpetration of other acts systematically directed against the same group, whether these acts were committed by the same offender or by others;[762] (ix) the scale of atrocities committed, their general and widespread nature, in a region or a country;[763] (x) systematically targeting victims on account of their membership of a particular

[751] *Kayishema* Trial Judgement, para. 93.

[752] *Kayishema* Appeal Judgement, para.159.

[753] *Final Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994)*, Annex to the Letter from the Secretary-General to the President of the Security Council transmitting the final report of the Commission of Experts, UN Doc.S/1994/1405, 9 December 1994, paras 160–168.

[754] *Karera* Appeals Judgment, para. 34.

[755] *Nikolić* Rule 61 Decision, para. 34.

[756] *Karadžić* and *Mladić* Rule 61 Decision, para. 94.

[757] *Karadžić* and *Mladić* Rule 61 Decision, para. 94; *Sikirica* Trial Judgement, para. 46.

[758] *Karadžić* and *Mladić* Rule 61 Decision, para. 94.

[759] *Krstić* Trial Judgment, paras 580 and 595.

[760] *Krstić* Trial Judgement, para. 595.

[761] *Jelisić* Trial Judgement, para. 82.

[762] *Jelisić* Appeal Judgement, para. 47; *Akayesu* Trial Judgement, paras 519, 523, 726.

[763] *Akayesu* Trial Judgement, para. 523; *Musema* Trial Judgement, para.166; *Rutaganda* Trial Judgement, paras 61 and 398; *Bagilishema* Trial Judgement, para. 62; *Sikirica* Trial Judgement, para. 61.

group while excluding the members of other groups;[764] (xi) the repetition of destructive and discriminatory acts;[765] (xii) the existence of a plan or policy;[766] (xiii) the scale of the actual or attempted destruction;[767] (xiv) the methodical way of planning the killings;[768] (xv) the systematic manner of killing[769] and disposal of bodies;[770] (xvi) the discriminatory nature of the acts;[771] (xvii) the discriminatory intent of the accused;[772] (xviii) all acts or utterances of the accused,[773] in particular the use of derogatory language towards members of the targeted group;[774] (xix) a pattern of purposeful action;[775] (xx) the weapons employed and the extent of bodily injury;[776] (xxi) the proof of the mental state with respect to the commission of the underlying act;[777] and (xxii) forcible transfer.[778] The list of facts is not exhaustive and other facts may be considered as assisting the inference of the requisite intent. The inference of genocidal intent may be drawn from the cumulative combination of facts. As an illustration, the *Popović* Trial Chamber found that the murder operation—from the separation, detention to execution and burial—was a carefully orchestrated strategy aimed at the destruction of the Muslim population of Eastern Bosnia.[779]

Notwithstanding the recognition of the scale and systematic nature of attacks directed against African tribes in Darfur as being indicative of genocidal intent, the UN Commission was not convinced that such intent fuelled the commission of those widespread atrocities.[780] The collected material and testimonies led the Commission to conclude that the "intent of the attackers was not to destroy an ethnic group as such, wholly or in part, but to kill rebels, forcibly displace members

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[764] *Akayesu* Trial Judgement, para. 523; *Musema* Trial Judgement, para.166; *Rutaganda* Trial Judgement, paras 61 and 398; *Bagilishema* Trial Judgement, para. 62.

[765] *Jelisić* Appeal Judgement, para. 47.

[766] Ibid., para. 48.

[767] Ibid., para. 47.

[768] *Sikirica* Trial Judgement, para. 46; *Kayishema* Trial Judgement, para. 93.

[769] *Sikirica* Trial Judgement, para. 46.

[770] Ibid.

[771] Ibid.

[772] *Sikirica* Trial Judgement, para. 46.

[773] *Kayishema* Trial Judgement, paras 93 and 527; *Bagilishema* Trial Judgement, para. 63.

[774] *Kayishema* Trial Judgement, para. 93.

[775] *Bagilishema* Trial Judgement, para. 63.

[776] *Kayishema* Trial Judgement, para. 93.

[777] *Krstić* Appeal Judgement, para. 20; *Popović* Trial Judgement, para. 823.

[778] *Blagojević* Appeal Judgement, para. 123; *Krstić* Appeal Judgement, para. 33; *Popović* Trial Judgement, para. 862. In the *Popović* case, the Trial Chamber considered the frenzied efforts to forcibly remove the remainder of the population in *Potočari*, while the male members of the community were targeted for murder, as providing further evidence on the existence of the genocidal intent.

[779] *Popović* Trial Judgement, para. 861.

[780] UN Darfur Report, para. 513.

of some tribes as a part of counter-insurgency warfare".[781] The same allegations of genocidal intent have emerged in the *Al Bashir* case before the ICC. In the absence of direct evidence in relation to *Al Bashir*'s alleged responsibility for the crime of genocide, the Prosecution based their allegations on certain inferences drawn from the facts of the case.[782] Among the facts that allegedly evinced the requisite genocidal intent of the suspect, the Prosecution listed the existence of the GoS strategy to deny and conceal the crimes committed;[783] the lack of resources allocated by the GoS to ensure adequate conditions of life in IDP camps;[784] the level of the GoS hindrance of medical and humanitarian assistance in IDP camps;[785] and the extent of war crimes and crimes against humanity committed by the GoS forces.[786] In the Pre-Trial Chamber's opinion, the adduced evidence fell short of demonstrating the existence of genocidal intent, which was "only *one* of several reasonable conclusions available on the Prosecution material".[787] The Appeals Chamber reversed the Pre-Trial Chamber's decision not issue a warrant of arrest on genocidal charges in view of an erroneous standard of proof invoked by the Chamber. Since the matter was remanded to the Pre-Trial Chamber for a new decision, it decided *de novo* that there were reasonable grounds to believe that Al Bashir was criminally responsible for the crime of genocide committed by the GoS forces as part of the counter-insurgency campaign.[788]

5.3.2.5.1.6 Can Genocidal Intent Be Attributed to a State?

The Genocide Convention encompasses the following clause on state responsibility for genocide:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

The interrelation between treaty and customary law on the prohibition of genocide, and problematic issues that arise therefrom have already been briefly addressed in this chapter. The nature of individual criminal responsibility is fundamentally different from that of state responsibility for genocide. The imposition of

[781] UN Darfur Report, paras 513–519.

[782] *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 111 (original footnote omitted).

[783] Ibid., paras 165–176.

[784] Ibid., paras 178–180.

[785] Ibid., paras 178, 181–189.

[786] Ibid., paras 190–201.

[787] Ibid., para. 206.

[788] *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Second Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 12 July 2010, p. 8.

individual criminal responsibility is associated with the social stigma borne by the perpetrators who are personally guilty of genocide. Conversely, state responsibility involves the breach of international obligations by a State that entails financial repercussions for that State in the form of reparations. The question whether state responsibility for unlawful acts or omissions is similar to strict liability or whether it calls for the requisite *mens rea* has been a stumbling block in international law. The academic sources and developed case law remain divided on the subject, although *Shaw* notes the majority trend towards the strict liability or so-called objective theory of responsibility.[789] The discussion is particularly relevant to the attribution of state responsibility for genocide, since the definition of the crime itself set forth in Article II of the Genocide Convention includes an indispensable element of *dolus specialis*.

Although Article IX of the Genocide Convention was initially welcomed as a tool with great potential,[790] the application of the law on state responsibility for genocide has proved to be challenging in practice. In its only significant contentious case of *Bosnia v. Serbia* on the prohibition of genocide, the ICJ adhered to the restrictive and conservative construction of the definition of genocide. In order to establish the existence of a genocidal policy allegedly implemented by the Serbian government, the Court turned to the responsibility of individual perpetrators for the crime of genocide and its imputability to the Respondent.[791] The major criticism of the Judgement is that the judges put too much trust in the ICTY jurisprudence on the crime of genocide and did not inquire further into the problematic areas surrounding the definition of the crime, such as the definition of the protected group element, policy plan requirement, *mens rea* etc. The Court operated with a plethora of criminal law terms, *inter alia,* attempt, conspiracy, complicity, which are difficult to reconcile with the concept of state responsibility. The academic literature predicts a rise of a number of challenges in international legal disputes if prospective genocide cases involve States that are allegedly responsible for attempt, conspiracy, or incitement to commit genocide in the absence of liability for genocide proper.[792]

When dealing with the macro dimension of genocide, the UN Commission on Darfur largely focused on the policy of the Government of Sudan and whether such policy contributed to genocide. It conclusively acknowledged that the Government has not pursued a policy of genocide in light of specific evidence, which, in the Commission's view, did not evince the specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds.[793] Although the report's main conclusion largely focused on the lack of genocidal intent

[789] Shaw (2008), p. 783.

[790] Schabas (2007b) at 183.

[791] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007, ICJ Reports 140, para. 379.

[792] Ohlin in Gaeta (2009a), p. 380.

[793] UN Darfur Report, para. 518.

on the government's part, the Commission did not rule out the possibility of genocidal intent being entertained by single individuals but left this area for a competent court to decide.[794] The Commission's primary focus on the intentions of the Sudanese authorities was branded "overly narrow" in comparison with the ICJ's methodological approach which initially assessed whether the perpetrators harboured specific intent and only then determined their relationship vis-à-vis state authorities.[795] Not having been vested with a mandate to assess the responsibility of individual perpetrators, the Commission seems to have exercised caution when dealing with the genocidal allegations against the government.

When the competent court to examine individual criminal responsibility—the ICC—stepped in, it comported with the Commission's findings on the lack of the governmental genocidal intent in the absence of "the existence of reasonable grounds to believe that the GoS acted with *dolus specialis* to destroy in whole or in part the *Fur, Masalit* and *Zaghawa* groups".[796] On the evaluation of evidence submitted by the Prosecution, the Pre-Trial Chamber rejected the issuance of the warrant of arrest for Omar *Al Bashir* on genocidal counts.[797]

Judge Ušacka in her dissenting opinion approached the "evidentiary threshold" requirement by noting the difference in standards of proof at various stages of legal proceedings, in particular "reasonable grounds" at the arrest warrant/summons stage, "substantial grounds" at the confirmation hearing stage, and "beyond a reasonable doubt" at the final stage.[798] She rightly observed that the Prosecution was not required to meet an evidentiary threshold which would also be sufficient to support a conclusion of *beyond a reasonable doubt* at the final stage of trial.[799] Having agreed with Judge Ušacka's argument on the application of an unreasonably high proof threshold, the Prosecution sought leave to appeal the Majority's ruling on the basis that the Pre-Trial Chamber erroneously required the proof of an inference beyond reasonable doubt to establish the required standard of "reasonable grounds to believe" under Article 58 of the Rome Statute.[800]

The Appeals Chamber held that certainty of the commission of a crime(s) is only required at the trial stage of proceedings when the Prosecutor is given a chance to submit more evidence.[801] It further clarified that by "requiring that the existence of

[794] Ibid., paras 513–520.

[795] Loewestein and Kostas (2007) at 856.

[796] *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 205.

[797] Ibid., para. 206.

[798] Ibid., Separate and Partly Dissenting Opinion of Judge Anita Ušacka, paras 7–8.

[799] Ibid., para. 9.

[800] *Al Bashir* (ICC-02/05-01/09), Prosecution Document in Support of Appeal against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 6 July 2009, para. 27.

[801] *Al Bashir* (ICC-02/05-01/09), Appeals Chamber, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 3 February 2010, para. 31.

genocidal intent must be the *only* reasonable conclusion amounts to requiring the Prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubt".[802] In light of those findings, the Appeals Chamber found that the decision of the Pre-Trial Chamber amounted to an error of law, since the standard applied in relation to "proof of inference" was higher than what is stipulated in Article 58 (1) (a) of the Rome Statute.[803] Given that the error materially affected the non-issuance of an arrest warrant on genocidal charges in respect to *Al Bashir*,[804] the matter was remanded to the Pre-Trial Chamber for a new decision based on the correct standard of proof.[805] The second warrant of arrest lists genocidal charges against *Al Bashir*.[806] However, in the absence of formal cooperation between the ICC and the government of Sudan, as well as an influential position of *Al Bashir* as an undisputable leader of his county, it is highly implausible that he will be arrested and surrendered to face trial in the ICC in the nearest future.[807] With the absence of other cases that involve genocidal charges, the ICC has yet to wait until it properly tests the waters of this highly sensitive area of law.

5.3.2.5.1.7 Genocidal Intent v Persecutory Intent

Both persecution and genocide are specific intent crimes that share a common feature of being perpetrated against persons that belong to a particular group and who are targeted because of such belonging. Despite obvious similarities between those crimes, it is necessary to distinguish genocidal intent from discriminatory intent that accompanies the crime of persecution:

> While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution.[808]

Pre-Trial Chamber I in its *Al Bashir* decision also explored the difference between genocidal and persecutory intent. It reiterated the importance of persecutory intent for the practice of ethnic cleansing which has as the main objective to "render an area ethnically homogenous by using force or intimidation to remove

[802] Ibid., para. 33 (original emphasis).

[803] Ibid., para. 39.

[804] Ibid., para. 41.

[805] Ibid., para. 42.

[806] *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Second Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 12 July 2010, p. 8.

[807] Gaeta (2009b) at 332.

[808] *Kupreskić* Trial Judgement, para. 636.

persons of given groups from the area".[809] The distinction is of particular relevance in cases in which allegations of forcible transfer and/or deportation of the members of the targeted group are a key component.[810] Whereas the physical destruction is a key element of the crime of genocide, persecution has as its primary objective dissolution of a group by means of expulsion or forcible transfer.[811] The ICJ re-affirmed the distinction between *mens rea* standards in support of genocide and ethnic cleansing:

> Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.

The obvious distinction between persecution and genocide crystallised in the jurisprudence of international criminal courts and tribunals does not preclude a scenario when the practice of ethnic cleansing gradually transforms into genocide.[812]

5.3.2.5.2 *Dolus Specialis* in the Crime of Torture

The definition of torture as a crime against humanity and war crime rests upon conventional and customary rules of international law. In times of armed conflict, torture is prohibited in international treaty law, in particular the Geneva Conventions of 1949 and the two Additional Protocols of 1977.[813] The ICTY *Furundzija* Trial Chamber affirmed the prohibition of torture in customary law:

> It therefore seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law. In armed conflicts this rule may be applied both as part of international customary law and – if the requisite conditions are met - *qua* treaty law, the content of the prohibition being the same.[814]

[809] *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 143 (original footnote omitted).

[810] Ibid.

[811] *Stakić* Trial Judgment, para. 519.

[812] *Kupreskić* Trial Judgement, para. 636; *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 145. See also: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007, ICJ Reports 140, para. 190.

[813] Common Article 3 to Geneva Conventions; Articles 12 and 50, Geneva Convention I; Articles 12 and 51, Geneva Convention II; Articles 13, 14 and 130, Geneva Convention III; Articles 27, 32 and 147, Geneva Convention IV; Article 75 of Additional Protocol I; Article 4 of Additional Protocol II. For a more comprehensive list of instruments on the prohibition of torture, see: Henckaerts and Doswald-Beck (2005b), paras 980–1009.

[814] *Furundžija* Trial Judgement, para. 139.

While prohibiting the crime of torture, major international humanitarian law instruments do not provide for the definition of the crime. Faced with the absence of the definition, the ICTY *Furundzija* Trial Chamber inferred the constitutive elements of the crime from international human rights instruments, including the Torture Convention, and outlined the crime in terms of "the infliction, by act or omission, of severe pain or suffering, whether physical or mental". In addition, it was deemed necessary that at least one of the persons involved in the process of torture must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.[815] The *Kunarac* Trial Chamber warned against the mechanistic import of concepts pertinent to human rights law into the field of international humanitarian law:[816]

> The definition of the Torture Convention was meant to apply at an inter-state level and was, for that reason, directed at the states' obligations. The definition was also meant to apply only in the context of that Convention, and only to the extent that other international instruments or national laws did not give the individual a broader or better protection.

The *actus reus* of torture, which is the infliction of severe physical or mental pain and suffering, is settled in the jurisprudence.[817] The disputed subject with respect to the *actus reus* during the drafting process of the Rome Statute was whether the official capacity requirement constituted an element of the crime. The ICC PrepCom was opposed to the inclusion of an additional element that could create an unintended impression of the exclusion of non-state actors from the scope of the crime.[818]

The requisite *mens rea* standard for the crime of torture is less clear in the jurisprudence. The *Furundžija* Trial Chamber delineates the twofold *mens rea* of torture in the following fashion:

(ii) [. . .] act or omission must be *intentional*;

(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;[819]

As it is clear from the definition above, the listed purposes form an integral element of the requisite *mens rea* standard and convert torture into a specific intent crime. The ICTY *Furundžija* Trial Chamber noted that the inclusion of the purpose of humiliating the victim was warranted by the general spirit of international humanitarian law to safeguard human dignity.[820] The *Kunarac* Trial Chamber limited a number of criminal purposes that crystallised in customary international

[815] Ibid., para. 162.

[816] *Kunarac* Trial Judgement, para. 471.

[817] *Kunarac* Trial Judgement, para. 497; *Furundžija* Trial Judgement, para. 162; *Čelebići* Trial Judgement, para. 468.

[818] Dörmann (2003), pp. 45–46.

[819] *Furundžija* Trial Judgement, para. 162.

[820] Ibid.

law to (a) obtaining information or a confession; (b) punishing, intimidating or coercing the victim or a third person; and (c) discriminating on any ground against the victim or a third person.[821] In addition, the *Kunarac* Trial Chamber held that "the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose".[822]

The discussion as to whether the purposive element was necessary to differentiate between torture and inhuman treatment arose during the drafting process of the Rome Statute.[823] The ICC Elements of Crimes define the mental element of torture in the following manner:

> 2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.

The reading of the provision clearly posits torture as a specific intent crime.[824] The early jurisprudence of the ICC affirms the specific intent status of the crime of torture.[825] The charge of torture was invoked, albeit unsuccessfully, in the *Bemba* case. Pre-Trial Chamber II declined to confirm the torture charge due to the Prosecution's failure to provide a selection of factual circumstances that evinced specific intent on the part of the MLC (Le Mouvement de libération du Congo) soldiers while engaging in the alleged acts of rape.[826]

The jurisprudence of international criminal courts and tribunals on the crime of torture has been marred by inconsistencies on the interpretation of specific intent. To add to the confusion, the ICC Elements of Crimes determine torture as a general intent crime under the umbrella of crimes against humanity but require the proof of specific intent with regard to torture as a war crime. More clarity is needed on the nature of the prohibited purposes in customary international law, as it still remains unclear whether the purpose to humiliate the victim constitutes a prohibited purpose in international law.

5.3.2.5.3 *Dolus Specialis* in the Crime of Pillage

The prohibition of pillage is embedded in Article 33 (2) of the Fourth Geneva Convention that upholds the protection of human beings and property alike. The rationale behind the inclusion of a separate pillage provision was to spare people from the suffering caused by the destruction of their real and personal property.[827]

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[821] *Kunarac* Trial Judgement, para. 485.

[822] Ibid., para. 486; *Čelebići* Trial Judgement, para. 470.

[823] Dörmann (2003), pp. 44–47.

[824] Burchard (2008) at 180–182.

[825] *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 293.

[826] Ibid., paras 297–300.

[827] Pictet (1958), pp. 300–301 (commentary of Article 53).

Article 4 (f) of the ICTR Statute lists pillage among serious violations of Common Article 3 to the Geneva Conventions and Additional Protocol II. Article 3 (e) of the ICTY Statute accommodates plunder of public or private property among violations of the laws or customs of war.[828]

The crime of pillage has already featured in a number of cases before the ICC, in particular in the Congolese (*Prosecutor v Germain Katanga and Mathieu Ngudjolo*) and Sudanese (*Prosecutor v. Bahr Idriss Abu Garda*) cases. The pillage charge within the meaning of Article 8 (2) (e) (v) of the Rome Statute was attributed to *Abu Garda*. However, the Pre-Trial Chamber declined to confirm charges against him due to the lack of supporting evidence to proceed with the trial.[829] In another case, the Prosecution charged *Germain Katanga* and *Mathieu Ngudjolo Chui* pursuant to Article 8 (2) (b) (xvi) of the Rome Statute with "the pillaging of *Bogoro* village in the *Bahema Sud* collectivité, Irumu territory, Ituri District".[830] In an unexpected twist, the joint case of *Katanga* and *Ngudjolo* was severed into two separate cases at the final stage of judicial deliberation before the issuance of a verdict.[831] With the dismissal of the credibility of key prosecution witness, *Ngudjolo* was acquitted on all charges and walked away as a free man.[832] It remains to be seen whether the charges levied against *Katanga,* including the pillage allegations, will stand in the final judgement which is expected in not too distant future.

The war crime of pillage set forth in Article 8 (2) (b) (xvi) and 8 (2) (e) (v) of the Rome Statute is deconstructed in the following three elements:

(i) The perpetrator appropriated certain property;
(ii) The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use; and
(iii) The appropriation was without the consent of the owner.

The limitation of the appropriation of property to "private or personal use" is unjustifiably narrow in comparison to the jurisprudence of other international courts and tribunals. The AFRC Trial Chamber criticised the requirement of "private and

[828] The official English version of the ICTY and ICTR Statutes uses synonymous terms "plunder" and "pillage". The official French version of both statutes employs the same general term "*le pillage*". See also: *Naletilić and Martinović* Trial Judgement, paras 611–617; *Čelebići* Trial Judgement, paras 584–592; *Blaškić* Trial Judgement, para. 184; *Jelisić* Trial Judgement, paras 46–49; *Kordić* and *Čerkez* Trial Judgement, paras 349–353.

[829] On 8 February 2010, Pre-Trial Chamber I refused to confirm the charges against *Abu Garda*. On 23 April 2010, the same Chamber issued a decision rejecting the Prosecutor's application to appeal the decision declining to confirm the charges.

[830] *Katanga et al*. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 327.

[831] *Katanga et al*. (ICC-01/04-01/07), Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons, 21 November 2012, paras 61–63.

[832] *Ngudjolo* (ICC-01/04-02/12), Judgement pursuant to Article 74 of the Statute, 18 December 2012.

personal use" adopted by the ICC Elements of Crimes as being unduly restrictive.[833]

The *Katanga* Pre-Trial Chamber views the war crime of pillaging under Article 8 (2) (b) (xvi) of the Rome Statute as somewhat similar to the war crime of destruction of property under Article 8 (2) (b) (xiii), as both of them concern property which belongs to an "enemy" or "hostile" party to the conflict.[834] However, this is where the similarities end: the crime of destruction of property may take place before the destroyed property has fallen into the hands of the adversary party, whereas pillaging only occurs when the enemy's property has come under the control of the perpetrator. Only upon gaining the control to such property, is the perpetrator deemed as being in a position to "appropriate".[835] In addition, the motives of perpetrators significantly differ. In the case of pillage, the main objective is to receive financial gains out of the appropriation, while the destruction of property is a means to deprive another person of the use and benefit of the property.

The *Čelebići* Trial Judgement held that the crime of plunder is an intentional offence that must be carried out for private gain or systematic economic exploitation of occupied territory.[836] The *Blaškić* Trial Judgement held that plunder is "wanton appropriation" of enemy property carried out for private interest and within the framework of a systematic economic exploitation of occupied territory.[837] The *Kordić* Trial Judgement requires that property be acquired wilfully.[838] The *Jelisić* Trial Judgement requires appropriation to be "fraudulent" motivated by greed.[839] The *Naletic* and *Martinović* Trial Chamber speaks of the unlawful and wilful appropriation.[840] The RUF Trial Chamber is satisfied with the *mens rea* where it is established that the Accused intended to appropriate the property by depriving the owner of it.[841]

The *Katanga* Pre-Trial Chamber held that the "intent and knowledge" requirement of Article 30 of the Rome Statute applies to the crime of pillaging in the Rome Statute. This offence encompasses, first and foremost, cases of *dolus directus* of the first degree and may also include *dolus directus* of the second degree.[842] In addition, it specifies that the offence requires two additional elements. Firstly, the

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[833] AFRC Trial Judgement, para. 754.

[834] *Katanga et al.* (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 330 (original footnote omitted).

[835] Ibid.

[836] *Čelebići* Trial Judgement, paras 587–592.

[837] *Blaškić* Trial Judgement, para. 184.

[838] *Kordić and Čerkez* Trial Judgement, para. 349.

[839] *Jelisić* Trial Judgement, para. 48.

[840] *Naletilić and Martinović* Trial Judgement, para. 617.

[841] RUF Trial Judgement, para. 211 citing in support *Kordić and Čerkez* Appeal Judgement, para. 84; *Naletilić and Martinović* Trial Judgement, para. 612, fn.1498; *Čelebići* Trial Judgement, para. 590.

[842] *Katanga et al.* (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 331.

act of physical appropriation must be carried out with the *intent to deprive the owner of his property*. Secondly, the act of physical appropriation must also be carried out with the *intent to utilise the appropriated property for private or personal use* (*dolus specialis*).[843] It is clear that the early ICC jurisprudence affirms the specific intent status of the crime of pillaging. However, it is unfortunate that the unlawful appropriation as defined in the Rome Statute is limited to "private or personal use" and does not include appropriation carried out for the purpose of larger economic exploitation.

5.4 Interim Conclusions

The analysis of the law on *mens rea* in international criminal law reveals the complexity of this fragmented area of law. Though the tribunals have significantly contributed to the foundation of the law on *mens rea* by interpreting the requisite *mens rea* with respect to contextual elements and underlying offences of core international crimes, the jurisprudence is still rife with ambiguities and inconsistencies. The judges of international criminal courts, much concerned with the rule of proximity, have greatly focused on the technical comparison of domestic criminal law concepts and inadvertently transposed a certain degree of confusion in international criminal law. The mechanistic transposition of criminal law concepts from national jurisdictions into the context of international criminal law leads to nothing less than the breach of the fundamental principle of culpability. Only careful filtering of the notions from different legal systems through the "general principles of law" is capable of yielding fruitful results. The apparent incongruity of the law on *mens rea* in international criminal law has been the unfortunate result of the lack of a proper comparative analysis conducted in international criminal courts and tribunals. Given the significance of the stigma of criminal conviction for international crimes, it is completely unacceptable to work with loose definitions of the accompanying mental element for the most abhorrent crimes of great concern to the international community.

The ICC as a permanent treaty-based body is expected to live up to the expectations of the State Parties by contributing to the fair administration of international criminal justice. To do so, the strict adherence to the fundamental principles of international criminal law is quintessential. It is the first international court that elaborated on the general mental element of a crime which is applicable to contextual elements and underlying offences of core international crimes. The early jurisprudence reveals that the judges have been clearly inspired by the German law theory as to the interpretation of the mental element of a crime and thus deviated from the practices of the ad hoc tribunals which were primarily influenced by the common law theory. One may certainly deliberate endlessly on

[843] Ibid., para. 332 (original footnote omitted).

the advantages and disadvantages of concepts pertinent to the law on *mens rea* in common law and continental law jurisdictions for the purposes of international criminal law. What is clear from the formulation of Article 30 of the Rome Statute and the line of reasoning in the early jurisprudence is that the judges strongly favour a more conceptual, continental law like approach towards the mental element of a crime by merging the cognitive and volitional elements of a crime into the fully-fledged definition of intent.

It is in the best interest of international criminal law to construct a well-refined conceptual framework of the mental element of a crime which will be of great assistance to the judges while qualifying the prohibited conduct. Given the fondness of the judges of the German law theory evidenced in early jurisprudence of the ICC, there is a misconceived perception that it is German law being applied in The Hague. The judges should definitely look beyond German law and conduct a more thorough comparative analysis on the law on *mens rea*. It is only the emphasis on general principles channelled from many legal jurisdictions and accompanied by the meticulous comparative analysis that will truly attest to the fact that international criminal law is a unique amalgam of world legal practices without undermining its status as a distinct area of international law.[844]

[844] The same argument was advanced by the author of this book in Badar and Marchuk (2013), § Introduction.

Chapter 6
Modalities of Criminal Liability in the Jurisprudence of International Criminal Courts and Tribunals

6.1 Principle of Individual Criminal Responsibility: Introductory Remarks

The discipline of international criminal law deals with the most serious crimes of concern to the international community, for which the responsible individuals shall bear criminal responsibility. Being firmly entrenched in substantive laws of national legal jurisdictions, the principle is not novel in international criminal law and is traceable to the celebrated Nuremberg Judgment. At the outset of the trial in Nuremberg, it was challenging to argue that the precedent of individual criminal responsibility for core international crimes, which called for the universal condemnation, *a priori* existed.[845] In his renowned opening statement, *Robert Jackson* laid down his arguments as to the relevance and necessity of the principle of individual criminal responsibility in international law:

> The principle of individual responsibility for piracy and brigandage, which have long been recognized as crimes punishable under international law, is old and well established. That is what illegal warfare is. This principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace.[846]

Furthermore, he rejected an idea of the commission of crimes by States and corporations as fictional:

[845] *Glaser* submits that the IMT Charter has done nothing more than to consecrate the principle of individual criminal responsibility previously recognised by public international law. He cited in support Article 3 of the Washington Treaty of 1922 and Article 227 of the Treaty of Versailles. For more, consult: Glaser (1948).

[846] IMT, *The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg, Germany (commencing 20th November 1945): Opening Speeches of the Chief Prosecutors for the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics* (London: HMSO, 1946), pp. 149–150.

I. Marchuk, *The Fundamental Concept of Crime in International Criminal Law*,
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> [...] the idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons. While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.[847]

The concept of criminal responsibility of legal persons is a flagrant contradiction to modern international criminal law that renders criminal responsibility dependent upon the culpable state of mind on the part of a perpetrator. It has been questioned on many occasions whether collective responsibility was nevertheless imposed in Article 10 of the Nuremberg Charter:

> In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.

At first glance, the criminalisation of participation in certain organisation(s) seems to clash with the subjective test of responsibility in criminal law, but it is not exactly the case. The approach may be likened to the criminalisation of "criminal conspiracies" in domestic jurisdictions whose members may be held to account for the fact of their membership in the organisation alone.[848] Although the declaration of criminality was upheld with respect to three organisations, including the SS (*Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei*), the Gestapo and the SD (*Geheime Staatspolizei des Reichsfurhers SS*) in the Nuremberg Judgment, criminal responsibility was not assigned on the basis of an objective criterion of membership in the organisation alone but was also grounded in the examination of the state of mind of a person concerned.[849] The post-Nuremberg tribunals refrained from labelling certain organisations "criminal" and abstained from imposing criminal responsibility on the basis of membership in the organisation.

The famed legal pronouncement of the Nuremberg Tribunal on the principle of individual criminal responsibility is mirrored in the jurisprudence of modern international criminal courts and tribunals:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[850]

The provision succinctly conveys the importance of singling out individual perpetrators who contribute to the smooth operation of criminal machinery, rather than blaming collective entities for the most heinous crimes. Despite the fact that

[847] Ibid., p. 150.

[848] Glaser in Mettraux (2008), pp. 66–67.

[849] Nuremberg Judgment, Part: The Accused Organisations, retrieved from http://avalon.law.yale.edu/imt/judorg.asp#general. See also: Donnedieu de Vabres in Mettraux (2008), pp. 251–258.

[850] Nuremberg Judgment, Part: The Law of the Charter, retrieved from http://avalon.law.yale.edu/imt/judlawch.asp.

individuals are held liable for international crimes, it is a matter of fact that they are not capable of embarking upon the commission of these large-scale atrocities unaccompanied; they normally act jointly with others to achieve the prohibited result. Most crimes committed by the Nazis were perpetrated in a concerted effort with other members of the state apparatus, which was reflected in the multiple charges of conspiracy levied against the accused in Nuremberg. The manifestations of collective criminality do not constrain the principle of individual criminal responsibility but reflect the realities of international criminal law.

The principle of individual criminal responsibility envisaged in major modern international legal instruments stems from the Nuremberg Charter and post World War II jurisprudence. The peculiar feature of this principle in international criminal law is that most of the world's infamous war criminals do not necessarily, physically or directly, carry out any of the crimes alleged but commit them through members of state apparatus, army, and rebel groups. Criminal responsibility in international law is assigned to political leaders who plan and conspire the commission of atrocities, as well as high-ranking military commanders who implement the ideas of political leaders in practice. There is a subtle and complex interplay among various modes of liability in international criminal law.[851]

Given remote connections of "masterminds" of large-scale atrocities to the actual scenes of crimes, it is an onerous task to prove before a panel of professional judges sitting in an international criminal court, that these high-ranking officials are culprits of international crimes. It is necessary to bear in mind that international criminal law is not designed to punish *every* physical perpetrator, as it is unfeasible to bring to justice *every* person who was somehow involved in the commission of core international crime(s) before a few existing international courts. Due to the lack of capacity and resources to handle all cases at the international level, and objectives of international criminal justice to go after "big fish", low-level perpetrators shall ideally be dealt with in national jurisdictions.[852] Although the wording of the Rome Statute does not suggest that the prosecutions are expected to be limited to the *most* senior leaders suspected of being *most* responsible for international crimes, it is clear from the careful choice of suspects that they represent the top political and military leadership in the countries concerned. To proceed otherwise would be to stall the progress of legal proceedings and unreasonably increase the cost borne by State Parties in running the already underfunded judicial institution.

Culpability is a crucial pillar of international criminal law that reflects the degree of the person's *blameworthiness* while committing a crime. The mainstream critique of the jurisprudence of international criminal courts is that international criminal law does not accurately distinguish between degrees of criminal responsibility assigned to a minor participant or a chief conspirator. In light of the

[851] Jones and Powles (2003), p. 410.

[852] Low-ranking perpetrators are normally used as "insider" witnesses in international criminal proceedings, providing testimonies that assist to expose "masterminds" of international crimes.

significant stigma attached to a criminal conviction for international crimes, it is of utmost importance to apply correct determinations of culpability at the level of an offence.[853]

6.2 Modes of Criminal Responsibility

Every crime is perceived through a "prism" of individual criminal responsibility, which also holds true for international crimes. The *mens rea* standard fluctuates depending on whether an accused is a principal or an accessory to a crime. The punishment imposed upon an aider/abettor who does not share the principal's intent is rightly expected to be less severe than that which is attributed to a principal.

Forms of liability in international criminal law resonate with the area of substantive criminal law in domestic jurisdictions that describes parties to a crime and imposes criminal liability according to their personal conduct and accompanying *mens rea*.[854] Having been inspired by a plethora of available forms of criminal responsibility in domestic jurisdictions, international criminal courts have developed a sophisticated gradation of modes of criminal responsibility matching the needs and specificity of the complex field of international law. The main concern of international criminal law has been to provide for the efficient legal tools that empower the prosecutions of high-ranking perpetrators who stand remotely from the physical perpetration of crimes. The concepts of JCE, command responsibility, indirect (co)-perpetration along with that of co-perpetration based on the joint control over the crime have been designed and introduced into the jurisprudence in order to tackle criminal responsibility of such "masterminds".

The statutes of the ad hoc tribunals encompass identical, albeit rather sparse, provisions governing the principle of individual criminal responsibility:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime [...] shall be individually responsible for the crime.[855]

The aforementioned modes of criminal responsibility have been construed at considerable length in the jurisprudence of the ad hoc tribunals. Modern hybrid tribunals, including the SCSL and ECCC have predominantly hinged on the jurisprudence of its predecessors, however, produced some original jurisprudence on the interpretation of JCE.[856] The drafters of the Rome Statute tailored the

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[853] Ohlin (2007) at 88.

[854] Boas et al. (2007), p. 2 (original footnote omitted).

[855] Article 6 (1), ICTR Statute; Article 7 (1), ICTY Statute.

[856] The SCSL jurisprudence has largely focused on the construal of the JCE common purpose, more specifically whether a non-criminal goal may be pleaded as an ultimate purpose of JCE. For more: see Chap. 6.3.1.4 (The JCE Doctrine in the SCSL Jurisprudence). The ECCC re-affirmed the existence of the basic and systematic form of JCE but dismissed the customary law status of JCE

provision on individual criminal responsibility to the needs of State Parties and attempted to depart from unfortunate practices of other international criminal courts. Pursuant to Article 25 (3) of the Rome 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.

This legal provision is a multifaceted formulation of principal and accomplice liability that could be described as a "melting pot" of substantive law notions that derive from common law and continental law jurisdictions. Article 25 (3) (a) covers different forms of principal liability, in particular direct perpetration, indirect perpetration and co-perpetration. Subparagraphs (b), (c), and (d) of Article 25 (3) deal with accomplice liability in its various expressions, including a rather peculiar form of common purpose complicity. The extreme gravity of the crime of genocide warrants the criminalisation of "direct and public incitement to commit genocide" in Article 25 (3) (e) of the Statute. It is necessary to bear in mind that "incitement" to commit war crimes and crimes against humanity is only criminal when it leads to the actual commission of crimes in question. The very last subparagraph of Article 25 deals with an inchoate crime of "attempt to commit a crime" within the jurisdiction of the Court. Although Article 25 of the Rome Statute is not the

III. See: Judgment, *Kaing Guek Eav, alias Duch*, Case File No: 001/18-07-2007-ECCC/TC, Trial Chamber, 26 July 2010, paras 504–513; Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, Case File No: 002/19-09-2007-ECCC-OCIJ, Pre-Trial Chamber, 20 May 2010, paras 77–83. For academic discussion on the dismissal of JCE III as part of customary law, see: Gustafson (2010) at 1332.

"state of art" piece in terms of the wording and substance, it is rightly noted that the perfection and linguistic elegance of the provision could hardly be expected given the origins of the norm at the conference in Rome.[857] In addition to modes of liability set forth in Article 25, Article 28 provides for superior/command responsibility that assigns criminal guilt to commanders for the failure to prevent the commission of crimes by their subordinates, or discipline them once the crime has been committed.

6.3 Principal Liability in International Criminal Law

Most domestic jurisdictions distinguish between principal and accessory liability. A principal is a person who physically carries out the offence. Logically, more than one actor may embark upon the commission of a crime and share the requisite *mens rea* requirement. According to English law, there are two possible scenarios in which multiple persons may be held liable as principals: (i) each person may separately satisfy all legal elements of an offence; and (ii) each person may satisfy *some* part of *actus reus* where their combined actions fulfil the complete *actus reus*, provided each meets the requisite *mens rea* requirement.[858] American criminal law defines "principal in the first degree" as a criminal actor who engages in the act or omission that concurs with the mental element and causes the criminal result. When more than one actor participates in the actual commission of a crime, all of them are regarded as principals in the first degree.[859]

The German Criminal Code encompasses legal provisions that divide parties to a crime into principals and accessories.[860] The doctrine of participation in German criminal law has been marked by the protracted argument on drawing legal contours between principals and accessories. The theory of *Tatherschaft* (control over the crime) is a leading approach employed in German criminal law that facilitates the drawing of a dividing line between parties to a crime.[861] It amalgamates legal characteristics of both objective (principals are regarded as those who fully or partially perpetrate a crime) and subjective (principals and accessories are defined on the grounds of their will and motives) doctrines, however, it construes the control over the crime exercised by a party as a decisive factor in attributing criminal liability to a principal. The concept of perpetration (*Täterschaft*)

[857] Werle (2007) at 974.

[858] Ashworth (2009), pp. 195–197.

[859] LaFave (2003b), pp. 664–665.

[860] StGB § 25 (Täterschaft) reads: "(1) Als Täter wird bestraft, wer die Straftat selbst oder durch einen anderen begeht.(2) Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter)". See also: Bohlander (2008).

[861] Roxin (2006b). This is a leading authority on the applicability of the "control over the crime" approach (*Tatherschaft*) to principal liability (*Täterschaft*).

encompasses various forms such as direct perpetration (*Unmittelbare Alleintäterschaft*), co-perpetration (*Mittäterschaft*), and indirect perpetration (*Mittelbare Täterschaft*).[862] The Danish Criminal Code does not clearly distinguish between principal and accomplice liability, which entails confusion as to the employment of different legal terms. Section 23 of the Danish Criminal Code broadly defines parties to a crime in the following fashion:

> The criminal penalty shall be attributed to a person who contributed to the execution of a criminal offence by means of instigating, counselling or assisting thereof.[863]

The Criminal Code of France distinguishes between a principal offender (*l'auteur materiél*) and an accomplice (*les complices*) as parties to a crime. Pursuant to Article 121–4 of the Criminal Code, a principal offender is the person who (i) commits the criminal conduct, and (ii) attempts to commit a felony, or in the cases prescribed by law, a misdemeanour.[864] According to Article 121–7, an accomplice to a felony or misdemeanour is the person who knowingly, by aiding or abetting, facilitated its preparation or commission. The legal provision expounds that any person who, by means of a gift, promise, threat, order or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also regarded as an accomplice.[865]

The comparative analysis of legal provisions originated from common law and continental law jurisdictions clearly shows that both principals and accessories are criminally liable depending upon their level of involvement in the commission of a criminal offence. However, legal opinions and practices diverge as to *who* shall be considered a principal to a crime. The theory of international criminal law has been torn between various approaches towards the doctrine of principal liability. The existing forms of principal liability reflect practices of both common law and continental law jurisdictions, but there is an urgent need to bring more uniformity to this complex area of law and find modes of liability which are well suited for the qualification of criminal conduct of those who commit international crimes.

It is rightly observed that those acting from behind the scenes of international crimes do not fit the category of accomplices, as they are in fact perpetrators.[866] The ad hoc tribunals construe principal liability as embracing "committing" in the

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[862] See: Baumann et al. (2003), pp. 669–670; Lackner and Kühl (2004), pp. 178–179, 182–184; Tröndle and Fischer (2006), pp. 221–224.

[863] Strafeloven, § 23 provides: "Den for en lovovertrædelse givne straffebestemmelse omfatter alle, der ved tilskyndelse, råd eller dåd har medvirket til gerningen". The term "*gerningsmand*" denotes a principal to a crime, whereas a broad term "*medvirke*" applies to all accomplices to a crime. For more, see: Vestergaard (1992), pp. 475–490.

[864] Article 121-4 (Le Code pénal) reads: "Est auteur de l'infraction la personne qui: (1) commet les faits incriminés; (2) tente de commettre un crime ou, dans les cas prévus par la loi, un délit".

[865] Article 121-7 (Le Code pénal) sets forth: "Est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation. Est également complice la personne qui par don, promesse, menace, ordre, abus d'autorité ou de pouvoir aura provoqué à une infraction ou donné des instructions pour la commettre".

[866] Van Sliedregt (2003a), p. 15.

classic sense of the word that means the physical perpetration of a crime. Obviously, such interpretation is not capable of covering all nuances of the involvement of high-ranking perpetrators whose responsibility is notoriously difficult to prove. For that reason, the concept of participation in JCE was introduced to cover a broader range of perpetrators acting in the pursuance of a common criminal plan.

The drafters of the Rome Statute were not convinced of the utility of JCE and sought to provide for alternative modes of principal liability. As a result of gruelling negotiations during the drafting process, the Rome Statute favours forms of principal liability akin to those employed in continental law jurisdictions: (i) direct perpetration, (ii) indirect perpetration, (iii) co-perpetration, and (iv) a merged concept of indirect co-perpetration. The following sub-chapters elaborate in greater detail on the interpretation of principal liability in the jurisprudence of international criminal courts and tribunals.

6.3.1 The Concept of Joint Criminal Enterprise as a Principal Form of Liability: Does It Really Stand for "Just Convict Everyone"?

6.3.1.1 Origins of the JCE Doctrine in International Criminal Law

JCE is one of the most contentious and talked about concepts in international criminal law. Since its outstanding appearance at the legal terrain of the ICTY, it has been credited for being the most appropriate mode of liability to tackle the collective dimension of international crimes. From the outset, the judges of the ad hoc tribunals were confronted with the necessity to evaluate specific contributions of individuals to the commission of international crimes where a multitude of persons were involved. JCE has proved to be an invaluable tool to frame criminal responsibility of multiple actors who are physically absent from the actual commission of crime(s).

Notwithstanding a great triumph of JCE in the ad hoc tribunals, the doctrine has been confronted with fading enthusiasm and questioned whether it is capable of reflecting the "gloomy reality of modern bureaucracies that engage in systematic crime".[867] It remains an open question whether the abandonment of JCE as a distinct mode of principal liability would lead to a stricter compliance with the fundamental principle of legality and culpability in international criminal law.[868]

[867] Van Der Wilt (2007) at 91. The author's mainstream, albeit justified, critique of the JCE doctrine is directed at its inability to establish and account for co-responsibility where the lines of communication between the parties to a crime are diffuse or completely obliterated. See also: Ohlin (2007), a piece in which the author accentuates on the failure of the JCE doctrine to offer a sufficiently nuanced treatment of intentionality, foreseeability and culpability.

[868] Hamdorf (2007) at 208.

The doctrine of acting in pursuance of a common purpose is embedded in many national criminal laws. Obviously, each national jurisdiction construes the doctrine in light of its existing legal environment and traditions. Most legal jurisdictions uphold criminal responsibility for multiple persons acting in pursuance of a common purpose, regardless of their degree or form of participation, if all participants share the intent to perpetrate crimes envisaged in the criminal common purpose. If one of the participants commits a crime falling outside the framework of the common purpose, he is the only one to bear criminal responsibility, provided that other participants did not entertain the intent in relation to that crime.

German jurisprudence upholds the principle whereby if a criminal offence was not envisaged in the common criminal plan, only the actual perpetrator of this offence is to be held to account.[869] The criminal law of the Russian Federation employs the notion of the *"excess of a perpetrator"* which assigns criminal responsibility for additional crimes *only* to a perpetrator(s) who had a culpable state of mind in regards to those crimes.[870] Danish criminal law does not impose criminal responsibility for another participant's spontaneous action that was deliberately in excess to what was expressly agreed upon within the joint criminal enterprise.[871] In French criminal law, the participant in the common criminal plan or enterprise may be regarded either as a joint principal (*co-auteur*) or an accomplice. With respect to responsibility for crimes committed by the multitude of persons, the Court of Cassation addressed the issue of individual responsibility of an accomplice for acts that went beyond the agreed criminal plan. It distinguished between crimes that bear no connection to the crime envisaged (e.g. a person hands over a gun to an accomplice to hold it, which he uses to kill) and crimes with some connection to the crime planned (e.g. theft carried out in the form of robbery). In the former category of cases, French law does not consider the person liable for an incidental crime.

If one participant of the common criminal enterprise commits a crime incidental to the common plan, albeit *foreseeable*, all participants are held criminally liable.[872]

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[869] § 25 (2) of the German Criminal Code (*Strafgezetzbuch*) reads: "Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter)". According to the German Federal Court (in BGH GA 85, 270), "[M]ittäterschaft ist anzunehmen, wenn und soweit das Zusammenwirken der mehreren Beteiligten auf gegenseitigem Einverständnis beruht, während jede rechtsverletzende Handlung eines Mittäters, die über dieses Einverständnis hinausgeht, nur diesem allein zuzurechnen ist". Translation (unofficial): "Co-perpetration (Mittäterschaft) exists when the joint action of several participants is based on the reciprocal agreement (Einverständnis), however, any criminal offence of the participant (Mittäter) that goes beyond such agreement is attributable only to that participant".

[870] The Criminal Code of the Russian Federation, Article 36 (Excess Perpetration) sets forth: "The commission of a crime that is not covered by the intent of other accomplices shall be considered as an excess of the perpetrator. Other accomplices to the crime shall not be subject to criminal responsibility for the excess of the perpetrator".

[871] Vestergaard (1992), para. 23.

[872] Elliott (2001), pp. 90–91 citing in support, among others, the decision of 19 June 1984 in Bulletin des arrêts criminels de la Cour de Cassation 1984, no. 231.

This principle equally applies across common law jurisdictions. The Criminal Code of Canada, Section 21 (2) reads that: "where two or more persons form an intention to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each one of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence". Notwithstanding the reference to the objective foresight in words "ought to have known", the jurisprudence of the Supreme Court of Canada has adopted the subjective test of responsibility.[873] The same test is applicable in Australian criminal law that gradually shifted from the objective test of responsibility towards the actual state of mind of a perpetrator.[874] The widely excepted rule in American criminal law is that accomplice liability extends to acts of the principal in the first degree which were a "natural and probable consequence" of the criminal scheme the accomplice encouraged or aided. As an illustration, if A counsels or aids B in the commission of a burglary or a robbery of C, and B encounters resistance from C and shoots at him in the course of the burglary or robbery, A is an accomplice to attempted murder.[875]

JCE is a *sui generis* concept that amalgamates legal features of the common law concept of accomplice liability and the continental law doctrine of co-perpetration. The greatest achievement of the JCE concept is that it has empowered the prosecutorial divisions of international criminal courts to target "big fish" or high-ranking perpetrators who are often detached from the actual scenes of crimes. Having

[873] In *R. v. Logan* (1990) 2 SCR 731, it was held that "the words "or ought to have known" are inoperative when considering under s. 21(2) whether a person is a party to any offence where it is a constitutional requirement for a conviction that foresight of the consequences be subjective, which is the case for attempted murder. Once these words are deleted, the remaining section requires, in the context of attempted murder, that the party to the common venture knows that it is probable that his accomplice would do something with the intent to kill in carrying out the common purpose".

[874] Under Australian law, the common purpose doctrine applies "where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design" (*McAuliffe v The Queen* (1995) 183 CLR 108, 113). The mental test for determining what comes within the "scope of the common purpose" is the subjective one (*McAuliffe v The Queen* (1995) 183 CLR 108). The evolution of the objective test to the subjective one is clearly expounded in the jurisprudence: "[i]nitially the test of what fell within the scope of the common purpose was determined objectively so that liability was imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose" (McAuliffe v The Queen (1995) 183 CLR 108, 114).

[875] LaFave (2003b), pp. 687–689. See also: *People v Prettyman*, 14 Cal.4th 248, 58 Cal.Rptr.2d 827, 926 P.2d 1013 (1996) ("natural and probable consequences" rule is a well-established rule); *Mitchell v. State*, 114 Nev. 1417, 971 P.2d 813 (1998) ("aiders and abettors are criminally responsible for all harms that are a natural, probable, and foreseeable result of their actions") etc.

proved to be a successful tool in bringing to justice "masterminds" of international crimes, the concept was quickly expanded to individuals who had very remote connections to a crime. The application of JCE was far-reaching to the extent that it was infamously labelled as an abbreviation for "just convict everybody". In light of the discussion above, it is absolutely necessary to turn to the roots of the doctrine in domestic criminal law, and examine whether the doctrine has further prospects in international criminal law, or whether the drafters of the Rome Statute were on the right path by abandoning JCE and opting for alternative forms of principal liability.

6.3.1.1.1 Joint Unlawful Enterprise in English Criminal law

The unique feature of English criminal law, which may be puzzling to a lawyer from the continental law background, is the equal treatment of a person who commits a crime (principal) and person who assists to the commission of a crime (accessory).[876] In other words, a person may be convicted of murder if he merely provided a gun to the actual perpetrator. Generally, secondary participation may take place in the following modes: (a) through assistance or encouragement, *inter alia,* by aiding, abetting, counselling, or procuring the commission of the offence; or (b) through membership in a joint enterprise that led to the offence. The latter mirrors the concept of JCE as understood in the theory of international criminal law. According to English law, when two or more people embark on a joint unlawful enterprise (i.e. burglary), all participants shall be responsible for the agreed consequences of that joint enterprise. The Privy Council (per *Lord Hoffmann*) determined a paradigm case of joint enterprise liability in *Brown and Isaac v The State*:

> The simplest form of joint enterprise, in the context of murder, is when two or more people plan to murder someone and do so. If both participated in carrying out the plan, both are liable. It does not matter who actually inflicted the fatal injury.[877]

The same "plain vanilla version of joint enterprise" was used in the judgment rendered by the Privy Council in *Chan Wing-Siu v The Queen*:

> [. . .] a person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission, by activities variously described as aiding, abetting, counselling, inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all the parties acting in concert.[878]

The touchstone of criminal liability in such cases is the intention of those who participate. The controversy plagues situations when a secondary party goes beyond

[876] Pursuant to Section 8 of the Accessories and Abettors Act 1861 (as amended by s. 65(4) Criminal Law Act 1977), "whosoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender".

[877] *Brown and Isaac v The State* [2003] UKPC 10 at 8.

[878] *Chan Wing-Siu v The Queen* [1985] AC 168 at 175.

the agreed enterprise and commits an additional crime falling outside the scope of the enterprise but nevertheless foreseeable to other participants of the unlawful enterprise. The first scenario of joint unlawful enterprise is as follows:

(i) X and Y embark upon the commission of crime A.
(ii) X foresees that Y might commit crime B in the course of the joint enterprise to commit crime A (with the requisite *mens rea* for that crime).
(iii) Y commits crime B.
(iv) The commission of crime B occurs as an incident to the joint enterprise, however, not in a manner fundamentally different from the possibility foreseen by X.

The second scenario of joint unlawful enterprise is somewhat different:

(i) X and Y embark upon the commission of crime A.
(ii) X does not foresee that Y might commit crime B in the course of the joint enterprise to commit crime A (the requisite *mens rea* for that crime B is therefore lacking).
(iii) Y commits crime B.
(iv) The commission of crime B occurs as an incident to the joint enterprise in a manner fundamentally different from the possibility foreseen by X.[879]

The aforementioned scenarios comprise two separate crimes at the background with multiple perpetrators. To attribute criminal responsibility for an additional crime, it suffices that a principal foresaw the possible commission of that crime by a secondary party within the originally agreed criminal plan to commit another crime. However, a principal cannot be held to account for the crime falling outside the agreed criminal enterprise if the incidental crime is fundamentally different from what he foresaw. Drawing a clear demarcating line between those two different scenarios appears challenging in practice, in particular in murder cases. In fact, it remains one of the thorniest areas of English criminal law. The leading authority in that respect *R v Powell and English* examines accessory criminal responsibility for the crimes going beyond what was originally agreed upon in the criminal enterprise.[880] In the first appeal, that of *Powell and Daniels*, three men (including the two appellants) had gone to the house of a drug dealer to buy drugs, but when he came to the door, one of the three men (it was not clear which) shot him dead. Given uncertainty as to *who* shot the victim, both *Powell* and *Daniels* were convicted of murder on the basis of the following reasoning: if the third man had fired the gun, they knew that he was armed with a gun and realised that he might use it to kill or cause really serious injury to the drug dealer.[881]

The Court elaborated on two separate, albeit complementary legal issues, in particular the mental element for the crime of murder in respect to a principal

[879] For more, see: Simester and Sullivan (2007), pp. 193–246; Ashworth (2009), pp. 420–426.
[880] *R v Powell (Anthony), R v English* [1999] 1 AC 1.
[881] Ibid., at 1–2, 17.

offender and an accessory. The judges considered that the second issue on accessory criminal liability is ripe for the consideration, only if the mental element, which is an intention to kill or to cause serious bodily injury, along with other legal elements for the crime of murder is proved for the primary offender.[882] The judges established that the proof of the foresight that a primary offender might commit a greater offence forms the bedrock of accessory criminal liability.[883] The arguments advanced by the counsel for the appellants on the necessity to satisfy the full *mens rea* for the crime of murder and insufficiency of the proof of foresight, were recognised as being meritless.[884] The House of Lords dismissed the respective appeals of P and D in their entirety.[885]

In the second appeal, *English* and *Weddle* attacked a police officer with wooden posts and caused injury to him. The police officer died from fatal stab wounds inflicted by *Weddle* who used a knife and stabbed the officer to death. The question at stake was whether *English* was liable for the fatal injury inflicted by *Weddle* as a participant of the joint enterprise "to attack and cause the injury to the late police officer".[886] The use of a knife was deemed to be fundamentally different to the use of a wooden post, which raised doubts as to the correctness of the conviction of murder in the first judicial instance.[887] The appeal was allowed in light of defective direction of the trial judge.[888] As it was summarised in the subsequent jurisprudence, the decision of the House of Lords in *R v English* did not create a new rule of accessory liability, but it rightly attributed the weight to (a) the overriding importance of what the particular defendant subjectively foresaw, and (b) the nature of the acts or behaviour said to be a radical departure from what was intended or foreseen.[889]

The rules governing participation in a criminal enterprise are relevant to most criminal offences. However, the applicability of those rules in murder cases is complicated by the definition of *mens rea* for murder in *R v Cunningham,* which delineates the *mens rea* standard either as an intention to kill or an intention to cause really serious injury.[890] In other words, if a primary offender assaults the victim with the intention of causing serious injury, but not death, and death is thereby caused, he is guilty of murder. This leads to infelicitous practice that most criminals convicted of murder did not actually intend to kill but nevertheless recklessly or negligently did so by causing serious injuries to the victim.

[882] Ibid., at 12.
[883] Ibid., at 12–13.
[884] Ibid., at 13.
[885] Ibid., at 31.
[886] Ibid., at 2.
[887] Ibid., at 28.
[888] Ibid., at 31.
[889] Ibid., at 30–31. See: *R v Rahman and Others* [2008] UKHL 45 at 16.
[890] *R v Cunningham* [1982] AC 566.

6.3.1.1.2 Co-Perpetration in German Criminal Law

The German Criminal Code does not entrench any provisions on JCE as a distinct mode of criminal responsibility. The Code divides parties to a crime into principals and accessories. The doctrine of German criminal law has been marred by debates on delineating proper legal contours between parties to a crime. The German Criminal Code clearly singles out three categories of principals such as direct perpetrator (*unmittelbarer Täter*), indirect perpetrator (*mittelbarer Täter*) and co-perpetrator (*Mittäter*).[891] Among accessories to a crime, the Code identifies a solicitor (*Anstifler*)[892] and an aider (*Gehilfe*).[893] It has already been noted that the doctrine of *Tatherschaft* (control over the crime), which is a fusion of legal features pertinent to the objective and subjective approaches to criminal liability, facilitates the drawing of a borderline between principals and accessories to a crime. This merger is reckoned as a "suitable compromise" that accurately reflects gradations of personal culpability of various parties to a crime.[894]

Co-perpetration (*Mittäterschaft*), which is the closest equivalent to JCE, requires the existence of a commonly agreed criminal plan. This mode of principal liability is characterised by the equal division of tasks among all parties to a crime that complement the work of each other. All participants bear the same degree of criminal responsibility for the conduct, which is a result of the joint concerted effort. The most significant aspect of co-perpetration is that each participant must be acting (or failing to act) *intentionally* with respect to a contemplated crime and a common plan.[895]

6.3.1.2 The Concept of JCE in the ICTY Jurisprudence

The much-debated concept of JCE has been extensively discussed in the jurisprudence of international criminal courts and tribunals. The concept was originally

[891] Pursuant to § 25 of of the German Criminal Code (StGB), "[A]ls Täter wird bestraft, wer die Straftat selbst oder durch einen anderen begeht; (2) Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter)".

[892] § 26 of the German Criminal Code (StGB) reads: "[A]ls Anstifter wird gleich einem Täter bestraft, wer vorsätzlich einen anderen zu dessen vorsätzlich begangener rechtswidriger Tat bestimmt hat".

[893] § 27 (1) of the German Criminal Code (StGB) sets forth: "[A]ls Gehilfe wird bestraft, wer vorsätzlich einem anderen zu dessen vorsätzlich begangener rechtswidriger Tat Hilfe geleistet hat".

[894] See also: Dubber (2007) at 983–984 where the author conducts comparative analysis of the complicity doctrine in American and German criminal law and clearly favours the MPC approach for purposes of international criminal law.

[895] For more, consult: Baumann et al. (2003), pp. 688–699. For more on co-perpetration and its constitutive legal elements in German criminal law, see: Lackner and Kühl (2004), pp. 182–186. The elements of co-perpetration as construed in the ICC are further analysed in Chap. 6.3.2.2.2 (Objective Commision (*Actus Reus*) for Joint Commision of a Crime).

coined by the *Tadić* Appeals Chamber that recognised it as "the firm reflection of existing customary international law upheld, albeit implicitly, in the ICTY Statute".[896] Interestingly, this legal finding was supported by the reference to Article 25 (3) (d) of the Rome Statute[897] that criminalises "common purpose complicity". This particular provision on accomplice liability was wrongly misread as an indicator of JCE.[898]

The *Tadić* Appeals Chamber was confronted with the legal qualification of conduct of those who stand remotely from the commission of a crime, in particular "whether under international criminal law a person can be held criminally responsible for the killing [...], notwithstanding the very absence of evidence that he personally killed any of them". The Chamber examined (i) whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan; and (ii) what degree of *mens rea* is required in such a case.[899] Having construed legal provisions of the Statute in light of its object and purpose,[900] the ICTY judges concluded that criminal responsibility was not only limited to those who actually carried out *actus reus* of the enumerated crimes but also extended to other offenders who contributed to the commission of the crime.[901]

The Appeals Chamber underlined that "all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice".[902] The Statute was construed as "not confining itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution".[903] The broad interpretation of individual criminal responsibility accommodated "modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons".[904] The Appeals Chamber held that "whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable".[905] The judges noted the collective dimension of international crimes that required an innovative interpretation of forms of liability available under Article 7 (1) of the Statute:

[896] *Tadić* Appeal Judgement, para. 220.
[897] Ibid., para. 222.
[898] See: Chap. 6.4.3.5 (Complicity in Group Crime Under Article 25 (3) (d) of the Rome Statute).
[899] *Tadić* Appeal Judgement, para. 185.
[900] ICTY Statute, Article 1.
[901] *Tadić* Appeal Judgement, para. 189.
[902] Ibid., para. 190.
[903] Ibid.
[904] Ibid.
[905] Ibid.

> Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.[906]

It was reckoned fundamentally wrong to hold criminally liable as a perpetrator only the person who materially performs the criminal act, thus disregarding the role of co-perpetrators who in some way made it possible for the physical perpetrator to carry out that crime. The judges pointed out that the qualification of co-perpetrators as aiders and abettors would understate the degree of their criminal responsibility.[907] In light of all the arguments and concerns as outlined above, the concept of JCE was introduced in order to reflect upon the collective dimension of international criminality and accommodate the needs of the Tribunal entrusted with the adjudication of core international crimes. The judges deconstructed JCE into three major forms depending upon the accompanying *mens rea* of each participant:

1) *basic form* (first category JCE) – cases of co-perpetration where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime with intent).

2) *systematic form* (second category JCE) – so-called "concentration camp" cases where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment.

3) *extended form of common purpose* (third category JCE) – third category of cases must satisfy the following *mens rea* requirements:

   (i) the intention to take part in JCE and to further – individually and jointly – the criminal purposes of that enterprise; and
   (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose.[908]

6.3.1.2.1 Objective Elements (*Actus Reus*) of JCE

The *actus reus* includes the following constitutive elements, which are common to all categories of JCE:

(i) A *plurality of persons* who do not need not be organised in a military, political or administrative structure.
(ii) The existence of a *common plan, design or purpose*, which amounts to or involves the commission of a crime provided for in the statutes of the ad hoc tribunals. The plan, design or purpose should not have been previously arranged or formulated; it may

[906] Ibid.
[907] Ibid., para. 192.
[908] Ibid., para. 220.

materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect JCE.

(iii) *Participation of the accused* in the common design which either involves the commission of a specific crime (for example, murder, extermination, torture, rape, etc.), or takes form in assistance, contribution, or the execution of the common plan or purpose.[909]

6.3.1.2.2 Subjective Elements (*Mens Rea*) of JCE

The *mens rea* standard fluctuates according to the category of JCE under consideration. The first category requires the intent to perpetrate a particular crime on the part of all co-perpetrators. The second category requires the element of personal knowledge of the system of ill-treatment, which may be proved by express testimony or inferred from the accused's position of authority as well as the intent to further this common concerted system of ill-treatment. The third category requires the intention to participate in and further the criminal activity or the criminal purpose of a group. In addition, criminal responsibility for an offence other than the one agreed upon in the common plan is equally attributed to all participants of JCE if (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.[910] As an illustration, the participants of JCE intended, for instance, to ill-treat prisoners of war, but one of the members of the group killed them. In order for criminal responsibility for the deaths to be imputed to the others, everyone in the group must have been able to predict the result. The *mens rea* standard of negligence does not suffice in that regard. A state of mind is required in which a person, although he or she did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. The state of mind is commonly known as *dolus eventualis*, which is the lowest *mens rea* threshold for intentional crimes in the criminal law theory of continental law jurisdictions.[911]

Actus reus and *mens rea* in support of each form of JCE were laid down in the *Tadić* Appeal Judgement as illustrated in the table below:

Form of JCE	*Actus reus*	*Mens rea*
Basic form	(i) A plurality of persons. (ii) The existence of a common plan, design or purpose, which amounts to or involves the commission of a crime provided for in the ICTY Statute.	All participants in the common design share the same intent to commit a crime.
Systematic form		Knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment.

(continued)

[909] *Tadić* Appeal Judgement, para. 227.

[910] Ibid., para. 228.

[911] For more, see: Badar and Marchuk (2013), § 3.6.3 (*Dolus Eventualis as the Lowest Threshold for Intentional Crimes*).

Form of JCE	*Actus reus*	*Mens rea*
Extended form	(iii) Participation of the accused in the common design.	(i) intention to take part in JCE and to further—individually and jointly—the criminal purposes of that enterprise; and (ii) foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Intention in the form of *dolus eventualis* when a person: (i) did not intend to bring about a certain result, but (ii) was aware that the actions of the group were most likely to lead to that result (cognitive element); (iii) nevertheless willingly took that risk (volitional element).

The attribution of JCE in genocide cases is particularly problematic given a very high *mens rea* threshold attached to the crime (*dolus specialis*). Not much controversy accompanies the first two categories of JCE because all participants must share *dolus specialis*. The difficulties arise with respect to the attribution of the extended form of JCE, since *dolus specialis* of the crime of genocide clashes with a more lenient *mens rea* standard of *dolus eventualis*.[912] The discussion on the possibility to reconcile the requisite *mens rea* threshold for JCE III and *dolus specialis* has received adequate attention in scholarly writings. *Sliedregt* submits that the convictions for genocide under JCE III are "justifiable". She construes JCE as a form of criminal participation governed by the principles of derivative liability which on a par with "aiding and abetting" calls for a lower *mens rea* threshold, and thus does not require to be covered by the full *mens rea* requirement. In other words, the mere knowledge of the principal's genocidal intent is sufficient.[913] *Schabas* opines that the entire discussion on the applicability of JCE III to genocide cases is mainly of theoretical nature with the failure to demonstrate "any genuine utility of JCE in genocide prosecutions".[914] Given that JCE is recognised as a principal form of liability in the jurisprudence of the ad hoc tribunals, it is the full intent requirement, which is required to prove in genocide cases. The *mens rea* standard in

[912] *Stakić* Trial Judgement, para. 530; *Prosecutor v Brđanin* (IT-99-36-T), Decision on Motion for Acquittal Pursuant to Rule 98bis, 28 November 2003, para. 57.

[913] Van Sliedregt (2007) at 203.

[914] Schabas (2009), p. 355.

support of the extended form of JCE cannot be reconciled with the crime of genocide because an offender is expected to entertain *dolus specialis* in relation to the destruction of a protected group, whereas the mere foreseeability of genocide does not justify the conviction on that charge.

6.3.1.2.3 Drawing Boundaries Between JCE and "Aiding and Abetting"

The concept of JCE has been sometimes confused with an accomplice liability of "aiding and abetting", as both modes of participation require the contribution to a crime. The distinction between a participant in JCE and an aider/abettor to a crime is of utmost importance, as it affects the legal qualification of conduct and severity of the imposed punishment at the sentencing stage. It is simply unwarranted to equate the culpable state of mind of an aider/abettor with the one of a perpetrator. The jurisprudence of international criminal courts and tribunals is unanimous that "aiding and abetting" deserves a lesser degree of criminal responsibility than the participation in JCE.[915] The differentiating features between those two forms of participation were initially discussed in the *Tadić* Appeal Judgement (an illustration table below):[916]

Acting in pursuance of a common purpose or design to commit a crime (JCE)	Aiding and abetting
All individuals involved in the commission of a crime are considered to be participants of the crime.	A person is always an accessory to a crime perpetrated by the principal.
The proof of the existence of a common plan, design or purpose, which amounts to or involves the commission of a crime, is required.	No proof of the existence of a common concerted plan is required. The principal may not even know about the accomplice's contribution to a crime.
It is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.	A person carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime; this support has a substantial effect upon the perpetration of the crime.
Intent is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design coupled by the foresight that the crimes outside the criminal common purpose were likely to be committed).	Knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.

[915] *Vasiljević* Appeal Judgement, para. 102; *Krnojelac* Appeal Judgement, para. 75 ("[T]he acts of a participant in a joint criminal enterprise are more serious than those of an aider and abettor since a participant in a joint criminal enterprise shares the intent of the principal offender whereas an aider and abettor need only be aware of that intent").

[916] *Tadić* Appeal Judgement, para. 229.

The same approach towards the distinction between the participation in JCE and aiding/abetting has been endorsed in the subsequent jurisprudence. The *Vasiljević* Appeals Chamber concurred with the reasoning of the *Tadić* Appeals Chamber:

(i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a *substantial* effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in JCE to perform acts that in some way are directed to the furtherance of the common design.

(ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assists the commission of the specific crime of the principal. By contrast, in the case of participation in JCE, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.[917]

The *Kvočka* Appeals Chamber noted the absence of a specific legal requirement that the accused should make a *substantial* contribution to JCE. However, it mentioned that some specific cases may require, as an exception to the general rule, the proof of the *substantial* contribution in order to determine whether the accused participated in JCE. The significance of the accused's contribution is measured by his shared intent to pursue the common purpose.[918] The same Appeals Chamber explored whether an aider and abettor is held responsible for assisting an individual crime committed by a single perpetrator, or for assisting in all crimes committed by the plurality of persons involved in JCE:

> The requisite mental element applies equally to aiding and abetting a crime committed by an individual or a plurality of persons. Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes. Where, however, the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.[919]

The correct qualification of *mens rea* is crucial in determining the appropriate mode of liability. While dwelling on the subjective test of responsibility, the jurisprudence of the ad hoc and hybrid tribunals is less clear as to which level of contribution differentiates JCE from aiding and abetting.

A number of cases subject to legal analysis in this chapter expose the most challenging issues on the applicability of JCE faced by the ad hoc tribunals. Particular attention is given to the ICTY jurisprudence in light of the origins of JCE. The ICTR has not employed the concept of JCE as often, although it produced some noteworthy jurisprudence on the subject. In construing the concept of JCE, the SCSL mostly followed the developed case law of its predecessors, however, the

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[917] *Vasiljević* Appeal Judgement, para. 102.

[918] *Kvočka* Appeal Judgement, para. 97 (emphasis added).

[919] Ibid., para. 90.

judges touched upon a number of problematic areas, including the meaning of the JCE "common purpose".

6.3.1.2.4 Pleading of the Basic Form of JCE in the Sexual-Related Crimes *(Prosecutor v Anto Furundžija)*

The initial indictment against *Anto Furundžija* charged him with one count of grave breaches of the Geneva Conventions and two counts of violations of the laws or customs of war.[920] The amended indictment charged the Accused with torture and outrages upon personal dignity (including rape) as violations of the laws or customs of war under Article 3 of the ICTY Statute.[921]

The allegations against the Accused covered the incident in which he subjected a married civilian woman of Bosnian Muslim origin to the interrogation who was stripped naked in front of soldiers with one of them threatening her with genital mutilation.[922] The soldier forced the woman to perform oral and vaginal sex acts with him in the presence of the Accused who did nothing to stop or curtail the beatings or sexual violence.[923]

The *Furundžija* Trial Chamber recognised two types of liability for criminal participation to have crystallised in international law, in particular the participation in JCE and "aiding and abetting".[924] It was established that the Accused participated in the torture process with the requisite *mens rea* and thus qualified as a co-perpetrator.[925] On appeal, the Accused contested legal findings of the Trial Chamber by claiming that it was required to prove that there was a "direct connection" between his questioning and the infliction on the victim of severe pain or suffering, whether physical or mental, in order to sustain his conviction as a co-perpetrator of torture.[926] In addition, the Accused pinpointed the absence of any allegation or proof that he participated in any crime.[927]

The *Furundžija* Appeals Chamber dismissed the Appellant's arguments and established that the factual circumstances of the given case proved beyond a reasonable doubt that the Appellant and Accused B knew what they were doing to the victim and for what purpose they were treating her in that manner. The "common purpose" of JCE was inferred from the following factual circumstances:

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[920] *Prosecutor v Anto Furundžija*, Case No: IT-95-17/1, Indictment, 2 November 1995, paras 13–14.

[921] *Prosecutor v Anto Furundžija*, Case No: IT-95-17/1-PT, Amended Indictment, 2 June 1998, paras 16, 25–26.

[922] Ibid., para. 25.

[923] Ibid., para. 26.

[924] *Furundžija* Trial Judgement, para. 216.

[925] Ibid.

[926] *Furundžija* Appeal Judgement, para. 115 (original footnote omitted).

[927] Ibid.

(1) the interrogation of Witness A by the Appellant in both the Large Room while she was in a state of nudity, and the Pantry where she was sexually assaulted in the Appellant's presence; and

(2) the acts of sexual assault committed by Accused B on Witness A in both rooms, as charged in the Amended Indictment. Where the act of one accused contributes to the purpose of the other, and both acted simultaneously, in the same place and within full view of each other, over a prolonged period of time, the argument that there was no common purpose is plainly unsustainable.[928]

The Trial and Appeals Chambers clearly endorsed the subjective test of responsibility that sustained the conviction of the Accused/Appellant as a co-perpetrator in JCE. The evidence demonstrated the requisite *mens rea* on the part of the Accused, that is the specific intent required for the crime of torture. By condoning the crimes against the victim committed by another soldier, the Accused furthered the criminal purpose of JCE.

6.3.1.2.5 Discussion of the Systematic Form of JCE in the *Prosecutor v Miroslav Kvočka*

Miroslav Kvočka was a police officer in *Prijedor* municipality and the first commander of the *Omarska* camp at the outset of the conflict. As a commander, he was in a position of authority superior to everyone in the camp.[929] In the period between May and August 1992, Bosnian Serb authorities in the *Prijedor* municipality unlawfully segregated, detained and confined more than 6,000 Bosnian Muslims, Bosnian Croats and other non-Serbs from the *Prijedor* area in the *Omarska, Keraterm*, and *Trnopolje* camps. In the *Omarska* camp, the prisoners included military-aged males and political, economic, social and intellectual elite of the Bosnian Muslim and Bosnian Croat population.[930] Severe beatings, torture, killings, sexual assault, and other forms of physical and psychological abuse were commonplace in the camp.[931]

The Trial Chamber assigned the JCE mode of liability to *Kvočka* in the absence of the sufficient evidence to conclude that he physically perpetrated crimes against detainees in the camp. The Chamber established that he was aware of the crimes of extreme physical and mental violence inflicted upon the non-Serbs imprisoned in *Omarska* camp.[932] *Kvočka's* contribution to the functioning of *Omarska* camp was deemed significant in light of his key role in the administration and functioning of the camp, and knowledge that the detainees, subjected to the abusive treatment and conditions, were of non-Serb origin and their religion, political views, and ethnicity

[928] Ibid., para. 120.

[929] *Prosecutor v Miroslav Kvočka*, Amended Indictment, Case No. IT-98-30/1-PT, 26 October 2000, para. 19.

[930] Ibid., para. 6.

[931] Ibid., para. 9.

[932] *Kvočka* Trial Judgement, para. 397 (original footnote omitted).

were the reasons behind their detention and abuse.[933] His participation in *Omarska* camp was not only knowing, but it was willing,[934] as it enabled the camp to continue its abusive policies and practices,[935] and sent a message of approval to other participants in the camp's operation.[936] The judges discussed in depth the accompanying *mens rea* standard of JCE:

> *Kvočka's* knowledge of the criminal nature of the camp system in which he worked, including its discriminatory practices, combined with his willingness to continue in a position of authority and influence, demonstrates that he was substantially involved in the common criminal enterprise. *Kvočka* was more than merely a passive or reluctant participant in the criminal enterprise. He actively contributed to the everyday functioning and maintenance of the camp and he remained culpably indifferent to the crimes committed therein. His participation enabled the camp to continue unabated its insidious policies and practices.[937]

The Trial Chamber established beyond a reasonable doubt that *Kvočka* was aware of the context of persecution and ethnic violence prevalent in the camp and knew that his work in the camp facilitated the commission of crimes. The Accused was found guilty of the crimes committed in the *Omarska* camp on the basis of his participation in JCE.[938]

6.3.1.2.5.1 JCE Liability of Dragoljub Prcać

At the outbreak of the conflict, *Prcać* was mobilised to work in *Omarska* camp.[939] The Prosecution and Defence were in discord over the position held by the Accused in the camp. The Prosecution alleged that he was a deputy commander of the camp and thus, by virtue of his position of superior authority, was responsible for the acts of his subordinates. The Defence contended that *Prcać* was neither in a position of authority nor had any subordinates.[940]

Having thoroughly reviewed the evidence, the Trial Chamber dismissed the Prosecution's allegation as to the position of *Prcać* in the camp. It did, however, find that *Prcać* was an administrative aide to the commander of the *Omarska* camp.[941] The issue at stake was whether *Prcać's* participation in the functioning of the camp was accompanied by knowledge of its criminal nature, and whether

[933] Ibid., para. 406.

[934] Ibid., para. 403 which reads: "[E]ven if a knowing participant in a criminal enterprise was unwilling to resign because it would prejudice his career, or he feared he would be sent to the front lines, imprisoned, or punished, the Trial Chamber emphasised that this did not serve as an excuse or a defence to criminal liability for participating in war crimes or crimes against humanity".

[935] Ibid., para. 404.

[936] Ibid., para. 405.

[937] Ibid., para. 407.

[938] Ibid., para. 408.

[939] *Kvočka* Trial Judgement, paras 426–427.

[940] Ibid., para. 431 (original footnote omitted).

[941] Ibid., para. 439.

crimes committed in furtherance of the enterprise were to be attributed to him during his work in the camp.

The Trial Chamber failed to establish beyond a reasonable doubt that *Prcać* was directly involved in the commission of crimes against detainees,[942] although it held that he was aware of the crimes of extreme physical and mental violence inflicted upon the non-Serbs. Notwithstanding his knowledge of the abusive detention conditions, the Accused continued to work in the camp.[943] *Prcać's* knowing participation in the camp was deemed significant, since his conduct substantially contributed to assisting and facilitating JCE to persecute the non-Serb population detained in the *Omarska* camp.[944] As a result, he was held liable for participating in the crime of persecution, which contributed to JCE, because he was aware of the context of persecution and ethnic conflict prevalent in the camp, and knew that his work in the camp facilitated the crimes committed therein.[945]

6.3.1.2.5.2 JCE Liability of Milojica Kos

Kos performed his duties as a guard shift leader in *Omarska* camp where he held a position of authority over guards on his shift.[946] The evidence demonstrated that, by virtue of authority, he routinely gave instructions to guards and orders to female detainees in the camp.[947]

The Trial Chamber held that *Kos* was aware of the crimes of extreme physical and mental violence routinely inflicted upon the non-Serbs detainees in *Omarska*, and the context of discrimination in which the crimes were committed therein. Despite such knowledge, the Accused continued to work in the camp and performed the tasks required without complaint or hesitation.[948] It was established beyond a reasonable doubt that the Accused was directly and personally involved in the crimes perpetrated in the camp such as beatings, extortion and stealing money from detainees as a part of the persecutory campaign.[949] The Accused entertained the intent to further JCE, which was inferred from his continued presence as a guard shift leader in the camp and personal implication in the crimes of violence, harassment and intimidation against detainees.[950] His contribution to the maintenance and functioning of the *Omarska* camp as a guard shift leader was deemed substantial, knowing and intentional.[951]

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[942] Ibid., para. 456.
[943] Ibid., para. 457.
[944] Ibid., para. 463.
[945] Ibid., para. 464.
[946] Ibid., paras 475–476.
[947] Ibid., para. 485.
[948] Ibid., para. 489.
[949] Ibid., para. 496.
[950] Ibid., para. 499.
[951] Ibid., para. 500.

6.3.1.2.5.3 JCE Liability of Mlado Radić

Radić was a guard shift leader in the *Omarska* camp[952] in a position of authority over the guards[953] who engaged in the abusive mistreatment of the camp detainees, including murder and torture. The Accused did not exercise his authority to prevent the guards from committing such crimes. His non-intervention condoned, encouraged, and contributed to the commission and continuance of crimes.[954] The Accused knew of the commission of crimes of extreme physical and mental violence on the discriminatory grounds. Moreover, he was directly implicated in the sexual harassment, humiliation and violation of women in the *Omarska* camp.[955]

The Trial Chamber found that *Radić's* contribution to the maintenance and functioning of the camp was knowing and substantial, since he willingly and intentionally furthered the JCE objective to persecute and otherwise abuse the non-Serbs detainees in the camp.[956]

6.3.1.2.5.4 JCE Liability of Zoran Žigić

Žigić regularly entered the *Omarska* camp for the specific purpose of abusing detainees. He physically and directly perpetrated the crimes of serious physical and mental violence against the non-Serb detainees on discriminatory grounds. The Trial Chamber established that *Žigic's* participation in the camp was significant. Notwithstanding the awareness of the persecutory nature of the crimes, the Accused aggressively and eagerly participated in the persecution of non-Serbs by acting as a co-perpetrator of JCE in the *Omarska* camp.[957] Apart from the crimes committed in *Omarska* camp, *Žigić* committed, instigated, and aided/abetted the crimes of persecution, torture, murder and other cruel treatment in the *Keraterm*[958] and *Trnopolje*[959] camps. However, it was his substantial contribution to the crimes in the *Omarska* camp that furthered the JCE objective and qualified him as a co-perpetrator of the enterprise.[960]

6.3.1.2.5.5 Common Legal Issues on the Pleading of JCE Before the Appeals Chamber

Radić, Žigić, Kvočka, and *Prcać* challenged on appeal the proper pleading of JCE as outlined in the indictment. Whereas the Appeals Chamber dismissed their ground of

[952] Ibid., para. 517.
[953] Ibid., para. 518.
[954] Ibid., para. 538.
[955] Ibid., para. 546.
[956] Ibid., para. 566.
[957] Ibid., para. 610.
[958] Ibid., para. 672.
[959] Ibid., para. 681.
[960] Ibid., para. 682.

appeal, it shed light on a number of important issues surrounding the interpretation of the systematic form of JCE.[961] At the outset, the Appeals Chamber concurred with the legal finding of the Trial Chamber that the crimes in the *Omarska* camp were best fitted within the legal framework of JCE II:

> Although the first two categories enunciated by *Tadić* are quite similar, and all three are applicable to this case to some degree, the second category, which embraces the post war 'concentration camp' cases, best resonates with the facts of this case [...].[962]

The judges held that a participant may be held to account for crimes falling outside the common purpose of JCE II only if it is proved that the Accused had sufficient knowledge of additional crimes being a natural and foreseeable consequence(s) of his conduct.[963]

The Appeals Chamber explored whether a participant in JCE must physically commit part of the *actus reus* of a crime, and concluded that it was not necessary to physically participate in any element of any crime as long as the requirements of JCE responsibility were satisfied.[964] In light of the Appellants' contention of their insignificant contribution to JCE with the reference to their low positions of employment in the camp,[965] the Appeals Chamber construed *de facto* or *de jure* position of employment as only *one* of the contextual factors in determining whether an individual participated in the common purpose. The position of authority was recognised relevant for establishing the Accused's awareness of the system, his participation in enforcing or perpetuating the common criminal purpose of the system and evaluating his level of participation for sentencing purposes.[966] With respect to the Appellants' argument they were "merely doing their job" and thus lacked the requisite intent to further JCE,[967] the Appeals Chamber re-affirmed a long-standing distinction between intent and motive in the following fashion:

> The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the

[961] *Kvočka* Appeal Judgement, para. 54.

[962] Ibid., para. 84 referring to *Kvočka* Trial Judgment, para. 268.

[963] Ibid., para. 86.

[964] Ibid., para. 99 (original footnote omitted).

[965] Ibid., para. 100 referring to the Appellants' arguments in *Kvočka* Appeal Brief, paras 163–164 ("*Kvočka* did not have any important position in the camp. He had no authority and influence over guards"); *Prcać* Appeal Brief, paras 348, 352; *Radić* Appeal Brief, paras 57, 61–62 ("[T]he Trial Chamber erroneously objectifies existence of joint criminal enterprise and it mistakenly takes (sic) that if Omarska is a joint criminal enterprise it automatically means that the shift leader of the guard must be the co-perpetrator in the joint criminal enterprise, without finding it necessary to establish individual circumstance of possible involvement of the accused"); *Radić* Reply Brief, para. 36 ("[T]he authority is the key factor with which to determine the contribution to the joint criminal enterprise").

[966] Ibid., para. 101. See also: *Krnojelac* Appeal Judgement, para. 96.

[967] Ibid., para. 105 (original footnote omitted).

specific intent to commit genocide. In the *Tadić* Appeal Judgement the Appeals Chamber stressed the irrelevance and "inscrutability of motives in criminal law".[968]

As it is clear from above, the shared criminal intent does not need to be accompanied by the co-perpetrator's personal satisfaction or enthusiasm, or his personal initiative in contributing to JCE.[969] Another issue in the Appellants' submissions was whether it was necessary to prove an agreement between the Accused and the other participants in JCE II.[970] Despite the lack of clarity in the jurisprudence, the Chamber held that JCE II does not require any proof of an agreement, as it goes beyond the criterion enunciated by the *Tadić* Appeals Chamber.[971]

The case summarises the jurisprudence on the attribution of JCE II in the context of the concentration camp cases. The Appeals Chamber clarified a number of important legal issues, among others, the assignment of criminal responsibility for crimes falling outside the common purpose of JCE II, the required level of contribution as well as the requisite *mens rea* standard. This case is a perfect illustration of the imperfectness of the JCE doctrine, as it assigns the same level of blameworthiness regardless of whether the accused is a commander or a camp guard.

6.3.1.2.6 Abortive Attempts to Introduce Alternative Modes of Principal Liability in the *Prosecutor v Milomir Stakić*

Acting in his official position as the President of the *Prijedor* Crisis Staff and the Head of the *Prijedor* Municipal Council for National Defence, *Milomir Stakić* instigated military attacks on areas inhabited primarily by Bosnian Muslims and Bosnian Croats in *Prijedor* municipality in May 1992.[972] Following an attempt by a small resistance group to regain *Prijedor* town, the Bosnian Serb authorities accelerated their campaign to permanently remove the majority of the non-Serb population from the town. Thousands of non-Serbs, including men, women and children, were rounded up from their homes and transported to detention facilities in the *Omarska*, *Keraterm* and *Trnopolje* camps where many prisoners were killed, tortured, and subjected to inhumane treatment.[973] The Accused played a crucial role in implementing the brutal campaign of persecution against the non-Serb

[968] Ibid., para. 106. In the same vein, see: *Jelesić* Appeal Judgement, para. 49; *Tadić* Appeal Judgement, para. 269; *Krnojelac* Appeal Judgement, para. 102.

[969] Ibid. See also: *Krnojelac* Appeal Judgement, para. 100.

[970] Ibid., para 115 (original footnotes omitted).

[971] *Kvočka* Appeal Judgement para. 118. See also: *Krnojelac* Appeal Judgement, para. 97.

[972] *Prosecutor v Milomir Stakić*, Case No. IT-97-24-PT, Fourth Amended Indictment, 10 April 2002, para. 16.

[973] Ibid., paras 18–19.

population.[974] The amended indictment outlined the JCE "common purpose" in the following terms:

> The purpose of JCE was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state, including a campaign of persecutions through the commission of the crimes [. . .].[975]

Notwithstanding the pleading of JCE by the Prosecution in the indictment[976] and throughout the trial, the Trial Chamber rejected the attribution of JCE as a principal mode of liability to qualify the Accused's conduct. The JCE concept was construed as only *one* of several possible interpretations of the term "commission" within the meaning of Article 7 (1) of the ICTY Statute.[977] The Trial Chamber opted for a more direct reference to "commission" in its traditional sense.[978] In lieu of the well-established concept of JCE in the jurisprudence of the ad hoc tribunals, an alternative mode of liability termed "co-perpetration" was assigned to the Accused. The judges took inspiration from the criminal theory of continental law jurisdictions that delineates principal liability in terms of participating, physically or otherwise directly or indirectly, in the material elements of the crime, whether individually or jointly with others. Being cognisant of peculiarities of international crimes, which are often directed by "masterminds" removed from the actual scenes of crimes, the judges clarified that the Accused himself need not participate in all aspects of the alleged criminal conduct.[979] The Trial Chamber further explicated the concept of co-perpetration by referring to the "control over the crime" theory:

> For co-perpetration it suffices that there was an explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct. For this kind of co-perpetration it is typical, but not mandatory, that one perpetrator possesses skills or authority, which the other perpetrator does not. These can be described as shared acts which when brought together achieve the shared goal based on the same degree of control over the execution of the common acts.[980]

The concept of co-perpetration based on the control over the crime (*Mittäterschaft*), which is shared among all participants to a crime, was originally coined in the academic works of the distinguished German lawyer, *Claus Roxin*.[981] He construed the mode of liability through the mutual dependence of co-perpetrators to achieve the prohibited result, which essentially puts all of them

[974] Ibid., para. 23.

[975] Ibid., para. 26.

[976] Ibid., para. 26. See also: paras 25, 27–29. The Trial Chamber noted that "[t]he Prosecution pleaded all three categories of joint criminal enterprise in relation to all the Counts charged in the Indictment" (*Stakić* Trial Judgement, para. 427).

[977] *Stakić* Trial Judgement, para. 438.

[978] Ibid.

[979] Ibid., para. 439.

[980] Ibid., para. 440.

[981] For more, see: Roxin (2006b), pp. 277–282.

in the same position.[982] Co-perpetrators accomplish their plan only if they act in a concerted effort. Failing to do so, even on the part of a single participant, frustrates the implementation of the common criminal plan.[983] This "key position" of each co-perpetrator defines the concept of co-perpetration (*Mittäterschaft*) in German criminal law.[984]

Although the *Stakić* Trial Chamber noted that co-perpetration and JCE overlap in some parts, it reckoned that co-perpetration was closer to what most legal systems understand under the term "committing".[985] It further clarified that the introduction of alternative modes of commission was not meant to give a misleading impression that a new crime (i.e. membership in a criminal organisation), albeit not penalised in the ICTY Statute, had been introduced through the backdoor.[986]

The requisite *mens rea* standard in support of co-perpetration was defined as requiring that the Accused must have acted with the awareness of the substantial likelihood that punishable conduct would occur as a consequence of coordinated co-operation based on the same degree of control over the execution of common acts. In addition, the Accused must have been aware of his essential role for the achievement of the common goal.[987]

The Trial Chamber married the facts of the case with the *actus reus* of co-perpetration, which is illustrated in the table below:

Objective elements	Facts supporting the objective elements
A plurality of persons (Co-perpetrators)	Associates of the accused[988]
The existence of a common goal	The objective of consolidating Serbian control in *Prijedor* Municipality which had a majority Muslim population[989]
The existence of an agreement or silent consent	The final agreement to take over power in *Prijedor* municipality which was reached at the meeting convened by *Stakić* at

(continued)

[982] Ibid., p. 278 ("Der Beteiligte kann allein nichts ausrichten [. . .] nur wenn der Komplice mitmacht, funktioniert der Plan"). The author brings forward an example of bank robbery where none of the parties are able to achieve the result unless each person performs his assigned role. The intimidation of bank employees with a gun by one of the participants does not actually result in bank robbery, since the contribution of another party is required to accomplish the crime.

[983] Ibid. ("Sie konnen nur, indem sie gemeinsam handeln, ihren Plan verwirklichen, aber jeder einzelne kann, indem er seinen Tatbeitrag zuruckzieht, den Gesamtplan zunichtemachen. Insofern hat er die Tat in der Hand").

[984] Ibid. ("Diese Art der" Schlusselstellung "jedes Beteiligten umschreibt genau die Struktur der Mittäterschaft").

[985] *Stakić* Trial Judgement, para. 441 (original footnote omitted).

[986] Ibid.

[987] Ibid., para. 442.

[988] Ibid., para. 469.

[989] Ibid., paras 470–471.

Objective elements	Facts supporting the objective elements
	Prijedor JNA barracks and during the gathering in *Cirkin Polje* on 29 April, 1992[990]
Coordinated cooperation	The takeover was carried out by means of closely coordinated cooperation among the Serb civilian authorities, the military, the TO and the police on 30 April 1992[991]
Joint control over criminal conduct	If political authorities led by *Stakić* had not participated, the common plan would have been frustrated[992]
Accused's authority	*Stakić* was a leading political figure in *Prijedor* in 1992. Following the takeover, *Stakić* became the President of the Municipal Assembly and President of the *Prijedor* Municipal People's (National) Defence Council. He also served as the President of the *Prijedor* Municipal Crisis Staff[993]

The required *mens rea* requirement was inferred from the following factual circumstances:

Subjective elements	Facts supporting the subjective elements
Mutual awareness of substantial likelihood that crimes would occur	*Stakić* and his co-perpetrators acted in the awareness that crimes would occur as a direct consequence of their pursuit of the common goal to remove Muslims from *Prijedor* by whatever means required[994]
Accused's awareness of the importance of his own role	*Stakić* knew that his role and authority as the leading politician in *Prijedor* was essential for the accomplishment of the common goal. He was aware that he could frustrate the objective of achieving the Serbian municipality by using his powers to hold to account those responsible for crimes, by protecting or assisting non-Serbs or by stepping down from his superior positions[995]

Neither the Prosecution nor the Defence appealed the alternative interpretation of "commission" endorsed by the Trial Chamber. However, the Appeals Chamber ruled against the introduction of other modes of liability into the jurisprudence amidst the fear that such developments would generate uncertainty and confusion in the determination and application of the law by all the parties to legal proceedings. The Appeals Chamber held that the Trial Chamber erred in conducting the analysis of criminal responsibility of the Appellant within the framework of co-perpetration, as the concept lacked support in customary international law.[996] On the contrary,

[990] Ibid., paras 472–477.

[991] Ibid., paras 478–489.

[992] Ibid., paras 490–491.

[993] Ibid., paras 492–494.

[994] Ibid., para. 496.

[995] Ibid., paras 497–498.

[996] *Stakić* Appeal Judgement, para. 62.

the JCE concept was deemed to be firmly established in customary international law and thus more suitable to qualify the Accused's conduct.[997] On appeal, *Stakić* was found a participant of JCE I in light of his substantial contribution to the implementation of the common purpose, which involved the discriminatory campaign to ethnically cleanse the municipality of *Prijedor* by means of deporting and persecuting Bosnian Muslims and Bosnian Croats in order to establish Serbian control.[998] In addition, he was held liable under JCE III for the crimes of murder and extermination.[999] Furthermore, the Appeals Chamber dismissed the Appellant's argument on the impermissible enlargement of the *mens rea* standard for crimes against humanity and war crimes by means of lowering the *mens rea* standard to *dolus eventualis* for JCE III.[1000]

It is clear from above that the judicial creativity to launch alternative modes of "commission" was not favourably accepted in the ICTY. Yet, it did not take a very long time until an alternative interpretation of principal liability had a striking appearance in the pivotal *Lubanga* case and the subsequent jurisprudence of the ICC.[1001]

6.3.1.2.7 Preliminary Discussions on the Requisite *Mens Rea* Standard of JCE III in the *Prosecutor v Karadžić*

Radovan Karadžić—a former sought-after notorious fugitive—was a founding member of the Serbian Democratic Party of Bosnia and Herzegovina (*Srpska Demokratska Stranka*) established in Bosnia and Herzegovina in July 1990.[1002] *Karadžić* also served as the President of the *Republika Srpska* and Supreme Commander of the Armed Forces from 1992 until 1996.[1003] In light of *Karadžić*'s undisputed influential civilian and military authority, the Prosecution qualified his responsibility for the crimes committed during the indictment period within the legal framework of JCE:

[997] *Stakić* Appeal Judgement, para. 62 citing in support *Kvočka* Appeal Judgement, para. 79; *Vasiljević* Appeal Judgement, para. 95; *Krstić* Appeal Judgement, paras 79–134; *Ojdanić* Decision on Jurisdiction, paras 20, 43; *Furundžija* Appeal Judgement, para. 119; *Krnojelac* Appeal Judgement paras 29–32; *Čelebići* Appeal Judgement, para. 366; *Tadić* Appeal Judgement, para. 220; *Prosecutor v. Radoslav Brđanin,* Case No: IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 24; *Babić* Judgement on Sentencing Appeal, paras 27, 38, 40.

[998] Ibid., paras 73–85.

[999] Ibid., para. 98.

[1000] Ibid., paras 99–103 (original footnote omitted).

[1001] Chapter 6.3.2 (Modes of Principal Liability in the International Criminal Court).

[1002] *Prosecutor v. Radovan Karadžić*, Third Amended Indictment, Case No. IT-95-5/18-PT, 27 February 2009, para. 2.

[1003] Ibid., para. 3.

> By using the word "committed" in this indictment, the Prosecutor does not mean that the Accused physically committed any of the crimes charged personally. "Committed", in the context of the accused's liability under Article 7(1), refers to his participation in JCE.[1004]

It was alleged that *Karadžić* committed crimes in a concerted effort with others through his participation in several related JCE.[1005] In particular, the Accused and *Ratko Mladić* were allegedly key members of an overarching JCE, which involved the ultimate objective of the permanent removal of Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory of Bosnia and Herzegovina through the crimes charged in the indictment.[1006] The indictment outlines the objectives of three additional JCE, in which the Accused allegedly participated: (i) to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling;[1007] (ii) to eliminate the Bosnian Muslims in Srebrenica;[1008] and (iii) to take United Nations personnel as hostages.[1009] The pursuit of each of those objectives is related to the objective of the overarching JCE to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina.[1010]

In the course of the trial, the Chamber issued "Decision on Six Preliminary Motions Challenging Jurisdiction",[1011] in which it jointly considered all *Karadžić's* motions under Rule 72 of the ICTY Rules of Procedure and Evidence. Whereas the judges held that none of the motions raised a proper jurisdictional challenge,[1012] they examined a number of issues related to the alleged defects in the form of the indictment.[1013] Particular attention was given to the interpretation of the accompanying *mens rea* standard in support of JCE III. The Trial Chamber held that the most appropriate formulation for the mental element of JCE III was "reasonably foreseeable consequences",[1014] "foresight by the accused that the deviatory crimes would probably be committed"[1015] as opposed to the indictment's reference to "possible consequence".[1016] As a result, the judges allowed the Prosecution "to propose an amendment to correct the defect in the form of the indictment".[1017]

[1004] Ibid., para. 5.
[1005] Ibid., para. 6.
[1006] Ibid., paras 9–14.
[1007] Ibid., paras 15–19.
[1008] Ibid., paras 20–24.
[1009] Ibid., paras 25–29.
[1010] Ibid., para. 8.
[1011] *Prosecutor v Radovan Karadžić,* Decision on Six Preliminary Motions Challenging Jurisdiction, Case No. IT-95-5/18-PT, 28 April 2009 ("*Karadžić* Jurisdiction Decision").
[1012] Ibid., para. 33.
[1013] Ibid., paras 33, 45.
[1014] Ibid., para. 56.
[1015] Ibid., para. 55.
[1016] Indictment para. 10; *Karadžić* Jurisdiction Decision, paras 50, 56.
[1017] *Karadžić* Jurisdiction Decision, para. 57.

The Prosecution claimed that the Trial Chamber erred in law while determining that the standard for the *mens rea* component of JCE III was that of "probability" rather than a broader "possible consequence" standard as suggested in the indictment.[1018] In support of its argument, the Prosecution cited the case law of the Appeals Chamber that almost universally adopted a much lower "possible consequence" standard in *Martić, Brđanin, Stakić, Blaškic, Vasiljević, Krnojelac, Kvočka* and *Deronjic* Appeal Judgements, as well as an interlocutory decision by the Appeals Chamber in *Gotovina*.[1019] The Prosecution requested to reverse the decision of the Trial Chamber[1020] and sought the confirmation from the Appeals Chamber that the indictment correctly pleaded the JCE III standard.[1021]

Karadžić maintained the position that the jurisprudence on the JCE III *mens rea* was not "clear and consistent". He contended that the probability standard was employed in 25 % of the cases that had addressed the issue. He suggested that the alleged inconsistencies in the jurisprudence should be resolved in favour of the accused in accordance with the principle of *in dubio pro reo*.[1022] Whereas the Chamber pinpointed that the *Tadić* Appeal Judgement had not settled the issue of the likelihood of deviatory crimes in order to allow conviction under JCE III, the subsequent Appeals Chamber jurisprudence convincingly did so. A number of Appeal Judgements overwhelmingly endorsed formulations suggestive of the possibility standard rather than the probability one. In particular, the *Vasiljević, Brđanin, Stakić, Blaškic, Martić* and *Krnojelac* Appeal Judgements all employed the *Tadić* Appeal Judgement formulation "foreseeable that such a crime might be perpetrated" in defining the JCE III *mens rea* requirement.[1023]

Following the review of the jurisprudence on the subject of the *mens rea* standard for deviatory crimes, the Appeals Chamber was convinced that JCE III *mens rea* did not require the *probability* standard and thus was satisfied by the *possibility* that a crime could be committed, which was deemed sufficiently substantial to prove that it was foreseeable to an Accused. The Appeals Chamber held that the Trial Chamber erred in determining that the Indictment's formulation of JCE III *mens rea* was flawed.[1024]

Later, the Accused requested a fresh determination by the Trial Chamber on the question of the applicability of JCE III as a mode of liability to specific intent

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[1018] *Prosecutor v. Radovan Karadžić,* Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability ("Jurisdiction Appeal Decision), Case No. IT-95-5/18-AR72.4, 25 June 2009, para. 7.

[1019] Ibid. (original footnote omitted).

[1020] Ibid., para. 9.

[1021] Ibid., para. 18.

[1022] Ibid., para. 30.

[1023] *Vasiljević* Appeal Judgement, para. 101; *Brđanin* Appeal Judgement, paras 365, 411; *Stakić* Appeal Judgement, para. 65; *Blaškić* Appeal Judgement, para. 33; *Martić* Appeal Judgement, para. 168; *Krnojelac* Appeal Judgement, para. 32; *Kvočka* Appeal Judgement, para. 83.

[1024] *Karadžić* Jurisdiction Appeal Decision, paras 18–19.

crimes such as genocide and persecutions.[1025] He sought to strike out the JCE III allegations with respect to genocide and persecution due to the inherent inconsistencies of the required JCE III standard of *dolus eventualis* with specific intent crimes.[1026] The Accused's decision to bring forth the issue again, regardless of the fact that his initial challenges on the same subject were dismissed 2 years ago, was prompted by the latest developments in the jurisprudence of the ECCC and the STL which ruled against the convictions on the basis of JCE III for specific intent crimes.[1027] The Prosecutor supported the relevance of JCE III for specific intent crimes and referred to the favourable finding of the ICTY Appeals Chamber in that regard.[1028] The Chamber dismissed the Accused's motion on technical grounds, having considered it premature to address the challenge, which should be examined once the Trial Chamber is asked to rule on the Accused's responsibility for the crimes charged.[1029]

6.3.1.3 The JCE Doctrine in the ICTR Jurisprudence

The ICTR jurisprudence has been more scarce on the attribution of JCE as a principal mode of criminal liability, notwithstanding the extensive recognition of the concept in the jurisprudence of its sister tribunal, the ICTY.

The Defence initiated an interesting discussion on the relevance of JCE as a form of liability for internal conflicts, contending that the extended form of JCE was part of customary international law solely for international armed conflicts. The Defence referred to the legal pronouncements of the Appeals Chamber in *Tadić* that most countries do not provide for the notion of common purpose in their national laws. It also argued that under Rwandan law, an individual may not be held responsible for acts of another person without having agreed to these acts or aided and abetted to them.[1030] Furthermore, the Defence claimed that the application of JCE III, as pleaded by the Prosecution in the indictment, violated the principle of *nullum crimen sine lege*.[1031] The Defence Counsel for *Rwamakuba* submitted that JCE was inapplicable, since it was neither implicitly mentioned in the Genocide Convention nor constituted a part of customary international law.[1032]

[1025] *Prosecutor v. Radovan Karadžić*, Decision on Accused's Motion to Strike JCE III Allegations as to Specific Intent Crimes, Case No IT-95-5/18-T, 8 April 2011, para. 2.

[1026] Ibid.

[1027] Ibid., para. 3 (original footnote omitted).

[1028] Ibid., para. 4 (original footnote omitted).

[1029] Ibid., para. 5 (original footnote omitted).

[1030] *The Prosecutor v Mathieu Ngirumpatse, Joseph Nzirorera, André Rwamakuba,* Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise ("Karemera JCE Decision"), Case No. ICTR-98-44-T, 11 May 2004.

[1031] Ibid., paras 1–6, 13–17.

[1032] Ibid., paras 21–25.

The Prosecution responded that the participation in JCE was implicitly included in the ICTR Statute as a form of liability, whereas its elements were firmly entrenched in customary international law. It also noted that the Appeals Chamber in *Tadić, Ojdanic* and *Brđanin* did not limit the applicability of JCE liability to international armed conflicts, and thus the employment of JCE to internal armed conflicts did not infringe the principle of legality. The Prosecution contended that JCE as a form of liability was applicable to all crimes within the jurisdiction of the Tribunal, including the crime of genocide.[1033]

The Chamber comported with the Prosecution arguments that the well-established concept of JCE was equally applicable to all crimes within the jurisdiction of the Tribunal, regardless of whether they were committed in the course of international or internal armed conflicts.[1034] In the Chamber's opinion, it was uncontested customary international law that individual criminal responsibility for serious violations of international humanitarian law equally applied to internal armed conflicts.[1035] The nature of the conflict was reckoned to be irrelevant to the responsibility of a perpetrator.[1036] As to the attribution of JCE to the crime of genocide, the judges concurred with the Prosecution by re-affirming that Article 6 (1) of the ICTR Statute is of general application to all crimes within the jurisdiction of the Tribunal.[1037]

The *Seromba* Appeals Chamber re-examined the meaning of "commission" within the meaning of the ICTR Statute. The Accused was initially convicted of aiding and abetting the crimes of genocide and extermination. The facts of the case involved the killing of Tutsi refugees in the church where they took shelter. The Trial Chamber failed to establish beyond a reasonable doubt that Father *Seromba* planned or committed the massacres of Tutsi refugees. The judges did not find any evidence that evinced the existence of genocidal intent.[1038] On appeal, the Prosecution submitted that confining the mode of liability "committing" to direct participation in the commission of a crime was erroneous, as it neglected the fact that the Accused could have acted through others.[1039] In support of its argument, the Prosecution referred to the findings of the *Gacumbitsi* Appeal Judgement which clarified that the commission of the crime of genocide could not be restricted to the physical killing of individuals, but it also included other acts, *inter alia*, being present, supervising and directing a massacre, and separating Tutsis so they could be killed.[1040]

[1033] Ibid., paras 26–30.

[1034] Ibid., para. 33.

[1035] Ibid., para. 35.

[1036] Ibid., para. 36.

[1037] Ibid., paras 46–48.

[1038] *Seromba* Trial Judgement, para. 312.

[1039] *Seromba* Appeal Judgement, para. 156 (original footnote omitted).

[1040] *Gacumbitsi* Appeal Judgement, paras 59–61.

The *Seromba* Appeals Chamber found that the Trial Chamber erred in holding that "committing" requires direct and physical perpetration of a crime by an offender. The judges were satisfied that the evidence sustained the conclusion that the Accused acted in the capacity of a principal perpetrator of the crime of genocide. The fact that *Seromba* approved and embraced as his own the decision to destroy the church in order to kill the Tutsi refugees was construed as contributing to nothing less than "committing". It was deemed irrelevant that the Accused did not personally drive the bulldozer to destroy the church, since he exercised full influence over the bulldozer driver who accepted the Accused as the only authority, and whose directions he diligently followed.[1041] In his dissenting opinion, Judge Liu disagreed with the finding of the Majority as to the existence of an error of law on the part of the Trial Chamber for not convicting *Seromba* of the commission of genocide and extermination.[1042] He submitted that the Appeals Chamber's pronouncement in *Gacumbitsi* dealt only with the crime of genocide, whereas the Majority in *Seromba* erroneously construed it as a general principle and thus extended it to the crime of extermination.[1043] Judge Liu observed that *Seromba's* acts were not comparable to those of *Gacumbitsi*, since the latter supervised and directed the massacre as well as separated Tutsi refugees for the killing, whereas the former was not directly involved in the commission of crimes in the parish.[1044] He remarked that the Majority confused "committing" *simpliciter* with other forms of committing which were not recognised in the practice of the Tribunal.[1045] Although Judge Liu acknowledged the existence of alternative modes of principal liability in other legal jurisdictions of the world, e.g. co-perpetration and indirect perpetration, he found them to be in conflict with the jurisprudence of the ad hoc tribunals.[1046]

Another important aspect of Judge Liu's dissent concerns the specific intent of the crime of genocide. He emphasised that "mere knowledge that the destruction of the church would necessarily cause the death of approximately 1,500 Tutsi refugees" did not exactly correlate with "an intention to destroy a group in whole or in part". He also pointed to the absence of genocidal intent when the Accused turned away Tutsi refugees from the presbytery.[1047] In Judge Liu's respectful opinion, the broadening of the concept of "committing" opened the door for convictions in the absence of direct perpetration, while the failure on the part of the Prosecution to plead the essential elements of JCE contributed to the violation of the Accused's right to legal certainty.[1048] In light of the foregoing, he comported

[1041] *Seromba* Appeal Judgement, para. 171.

[1042] Dissenting Opinion of Judge Liu, para. 1.

[1043] Ibid., para. 2.

[1044] Ibid., para. 5.

[1045] Ibid., para. 6.

[1046] Ibid., paras 8–9 referring to *Stakić* Appeal Judgement, para. 62.

[1047] Ibid., para. 16.

[1048] Ibid., para. 18.

with the finding of the Trial Chamber on the qualification of the Accused's conduct under "aiding and abetting" but advocated for the increase of the sentence.[1049]

The debate in the *Seromba* case demonstrates the rigidity of the ad hoc tribunals when dealing with criminal conduct that does not fit well within the existing forms of liability. The qualification of the Accused's conduct as an aider and abettor to the crime of genocide and extermination does not seem to be the most appropriate form of criminal liability to cover the acts that led, albeit indirectly, to the death of 1,500 Tutsi refugees. The unwillingness of the judges to expound in greater detail on the nature of "committing" creates a wrongful impression of stretching the boundaries of principal liability.[1050] As it is clear from the existing jurisprudence, the current interpretation of "committing" in the ad hoc tribunals, which comprises of physical perpetration and JCE, does not provide for the sufficient legal tools to capture "masterminds" of core international crimes. Turning a "blind eye" to other available modes of liability does not do any good to the work of the ad hoc tribunals because it stagnates the jurisprudential development.

6.3.1.4 The JCE Doctrine in the SCSL Jurisprudence

The SCSL has diligently abided by the jurisprudence of the ad hoc tribunals on the applicability of the JCE doctrine. The discussion on the proper pleading of JCE and the nature of criminal purpose initially arose in the AFRC case and then continued in the subsequent case law.[1051] The AFRC Indictment pleaded that the members of the rebel group and the RUF shared a common plan, purpose or design which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas.[1052] The crimes enumerated in the Indictment, such as unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian

[1049] Ibid., paras 17–18.

[1050] For more, see: Giustiniani (2008) at 783–799. The author heavily criticises the approach undertaken by the *Seromba* Appeals Chamber as having "a perverse effect on the application of a hierarchy among various forms of liability with commission being the gravest one". In the opinion of this book's author, the central role of the commission liability does not in any case diminish the importance of secondary liability, which organically complements available legal tools of attribution in international criminal law.

[1051] *Prosecutor v. Taylor*, Public Consequential Submission in Support of Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, Case No. SCSL-03-01-T-446, 31 March 2008; *Prosecutor v. Taylor*, Prosecution Response to the Defence Consequential Submission Regarding the Pleading of the JCE", Case No. SCSL-03-01-T-463, 10 April 2008; *Prosecutor v. Taylor*, Decision on Public Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, Case No. SCSL-03-01-T-752, 27 February 2009.

[1052] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu,* Indictment, Case No. SCSL-2004-16-PT, 18 February 2005 ("AFRC Indictment"), para. 33.

structures, were alleged as either actions within JCE or a reasonably foreseeable consequence of JCE.[1053]

The AFRC Trial Chamber determined that JCE was not properly pleaded in the indictment, since the common purpose of JCE—"to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone"—was not an inherently criminal conduct.[1054] The Prosecution contested the legal pronouncement of the Trial Chamber arguing that the purpose of JCE was inherently criminal.[1055] It claimed that "even where the ultimate aim or objective of a common enterprise is not in itself inherently criminal, it is nonetheless JCE if the participants have a common purpose of committing particular types of crimes in order to achieve that objective".[1056] The Prosecution submitted that the Trial Chamber erred in treating the ultimate objective of JCE as the alleged common criminal purpose itself.[1057] More specifically, the Prosecution argued that the Indictment *as a whole* alleged a common plan to carry out a campaign of terrorising and collectively punishing the civilian population of Sierra Leone through the commission of crimes within the jurisdiction of the Court in order to achieve the ultimate objective of gaining and exercising political power and control over the territory of Sierra Leone.[1058] In response to the Prosecution arguments, the Defence claimed that the indictment failed to indicate the criminal means involved in conducting JCE.[1059] Furthermore, it brought to the attention of the judges that "gaining and exercising control over the population of Sierra Leone" did not constitute a crime under international law, which the indictment should have alleged as a common purpose of JCE.[1060]

The question for the determination of the AFRC Appeals Chamber was the nature of the common plan, design or purpose of JCE. The judges adhered to the jurisprudence of the ad hoc tribunals by submitting that the criminal purpose of JCE could derive not only from its ultimate objective, but also from the means contemplated to achieve that objective.[1061] The AFRC Appeals Chamber held that the actions contemplated as a means to achieve a non-criminal objective of gaining and exercising political power and control over the territory of Sierra Leone were crimes within the jurisdiction of the Court, and thus contributed to the

[1053] Ibid., para. 34.

[1054] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Trial Judgment ("AFRC Trial Judgment"), Case No. SCSL-2004-16-T, 20 June 2007, paras 66–70.

[1055] Prosecution Appeal Brief, paras 393–394.

[1056] Ibid., para. 386.

[1057] Ibid., para. 388.

[1058] Ibid., paras 389, 391.

[1059] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu,* Appeal Judgement ("AFRC Appeal Judgement"), Case No. SCSL-2004-16-A, 22 February 2008, para. 71 citing in support Brima Response Brief, para. 68; Kamara Response Brief, para. 115.

[1060] Ibid., citing in support Kanu Response Brief, para. 4.24.

[1061] Ibid., para. 76.

common purpose of JCE.[1062] In contrast to a rather broad interpretation of common purpose in the SCSL jurisprudence, *Schabas* favours a narrow and strict interpretation. In his words, although attempts to take control of a country, and of its mineral wealth, are almost certainly contrary to national law, it is not a crime within the jurisdiction of the SCSL.[1063]

The same discussion emerged in the case against *Charles Taylor*, a former authoritarian President of Liberia, who was recently convicted of aiding and abetting war crimes and crimes against humanity in Sierra Leone.[1064] From the very outset of the trial, the meaning of "common purpose" as stipulated in the Indictment was at the heart of the dispute. In his opening statement, the Prosecutor alleged that the common purpose of the Accused was "to take over political and physical control of Sierra in order to exploit its abundant natural resources".[1065] The Defence consistently maintained its position that "taking a political power over a country" was not a crime under international law.[1066] Given uncertainty as to the proper contours of "common purpose", the Prosecution reframed the ultimate objective of "common purpose" to include the crime within its primary objective. The amended indictment pleaded that the common purpose of JCE was "to carry out a criminal campaign of terror [. . .] in order to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone".[1067] The Defence contested the revised description of the "common plan, design or purpose", and described it as "ill-defined at best" and "not legally sufficient".[1068] Following unprecedented 13 months of deliberations in the Trial Chamber, the judges dismissed all Defence arguments and confirmed the proper pleading of JCE by the Prosecution.

The Appeals Chamber concurred with the Trial Chamber that "common purpose" comprises both the objective of JCE and the means contemplated to achieve that objective.[1069] The decision did not come as a major surprise in light of similar findings already rehearsed by the judges in previous cases.[1070] Interestingly, the Defence questioned the fairness of prejudicial delay of 13 months that the Trial

[1062] Ibid., para. 84.

[1063] Schabas (2007a), p. 217.

[1064] *Taylor* Trial Judgment, paras 6894–6900.

[1065] Prosecution Opening Statement, Trial Transcript, p. 282.

[1066] *Prosecutor v. Taylor*, Defence Final Trial Brief, Case No. SCSL-03-01-T-1248, 23 May 2011, para. 737.

[1067] *Prosecutor v. Charles Taylor,* Second Amended Indictment, Case No 03-01-T, 29 May 2007, para. 33. See also: *Prosecutor v. Taylor*, Decision on Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment ("JCE Appeal Decision"), Case No. SCSL-03-01-T, 1 May 2009.

[1068] *Prosecutor v. Taylor*, Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, Case No. SCSL-03-01-T, 14 December 2007, paras 25–26.

[1069] JCE Appeal Decision, paras 15, 25 (original footnote omitted).

[1070] AFRC Appeal Judgement, para. 80.

Chamber took to elaborate on the Defence challenge of the proper pleading of JCE in its Final Brief.[1071] According to the Defence, such an unreasonable delay seriously damaged the construction of their case, including the conduct of pre-trial investigations, cross-examination of witnesses during the trial and other related preparatory work.[1072] Based on the aforementioned arguments advanced by the Defence, they requested the Trial Chamber to decline JCE as a mode of liability against the Accused.[1073] Ultimately, the Trial Chamber did not qualify the Accused's conduct within the JCE framework given the very absence of the sufficient evidence to sustain the charge.[1074]

6.3.2 Modes of Principal Liability in the International Criminal Court

Pursuant to Article 25 (3) (a) of the Rome 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". The provision is an accurate reflection of principal modes of liability: (i) direct perpetration (commission of a crime by an individual); (ii) co-perpetration (commission of a crime jointly with others); and (iii) indirect perpetration (commission of a crime through another person).

The *Lubanga* decision on the confirmation of charges (hereinafter—DCC) was a pivotal authority that shed light on the interpretation of principal liability. Pre-Trial Chamber I held that co-perpetration encapsulated in the words "[committing] jointly with another" was meant to be attributed together with the concept of "control over the crime", an offspring of the German legal theory.[1075] Pre-Trial Chamber II in its *Jean-Pierre Bemba Gombo* decision confirmed that there was no reason to deviate from the line of reasoning advanced by Pre-Trial Chamber I, as it was consistent with the letter and spirit of Article 25 (3) of the Rome Statute.[1076] Although principal liability has been constructed through the concept of "control over the crime" in the early jurisprudence of the Court,[1077] the utility of the concept

[1071] Defence Final Brief, paras 52–58.

[1072] Ibid., para. 55.

[1073] Ibid., para. 59.

[1074] *Taylor* Trial Judgment, para. 6900.

[1075] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 326–341.

[1076] *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 348.

[1077] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 326–341; *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision

has already been questioned in two separate opinions appended to the final judgements in *Lubanga* and *Ngudjolo*.[1078]

6.3.2.1 Control Over the Crime Approach

The *Lubanga* DCC identified three main approaches in order to distinguish between principals and accessories to a crime: the *objective* approach, the *subjective* approach and the *control over the crime* approach.[1079] Having pondered over advantages and disadvantages of those approaches, the judges opted for the "control over the crime" doctrine as the most appropriate tool to qualify conduct of those responsible for core international crimes.

The objective approach was rejected by the Pre-Trial Chamber given its narrow interpretation of "principals" as only "those individuals who physically carry out one or more elements of a crime". The limited interpretation of "principals" was deemed to contradict Article 25 (3) (a) of the Rome Statute that dismisses the objective approach by providing for "commission through another person".[1080] The subjective approach covers "individuals who know the intent of a group of persons to commit a crime, and who aim to further the criminal activity by intentionally contributing to its commission". In contrast to the objective approach, the focus is shifted from the level of the contribution to the state of mind in which contribution to the crime was made. Pre-Trial Chamber I noted the limited reach of the subjective approach because it captures only "principals who contribute to the commission of the crime with shared intent regardless of their level of contribution".[1081]

The subjective approach has been routinely employed in the jurisprudence of the ad hoc and hybrid tribunals. The introduction of JCE as a principal form of liability in the ICTY *Tadić* case enabled the Prosecution to target high-ranking perpetrators who, in spite of being detached from the actual scenes of crimes, tend to be more culpable than physical perpetrators. This purely subjective approach, which governs the JCE doctrine, was abandoned by the drafters of the Rome Statute.

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on the Confirmation of Charges, 30 September 2008, paras 480–486; *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad *Al Bashir*, 4 March 2009, para. 210; *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, paras 346–348.

[1078] *Lubanga* (ICC-01/04-01/06), Trial Chamber I, Judgment pursuant to Article 74 of the Statute, Separate Opinion of Judge Adrian Fulford, 14 March 2012; *Ngudjolo* (ICC-01/04-02/12), Judgement pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012.

[1079] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para. 327.

[1080] Ibid., paras 328, 333.

[1081] Ibid., para. 329. Pre-Trial Chamber I notes that the concept of JCE or common purpose doctrine encompasses the subjective criterion in order to distinguish between principals and accessories to a crime.

While examining co-perpetration as a form of principal liability, the Pre-Trial Chamber dismissed purely objective and subjective approaches to criminal responsibility, and endorsed the control over the crime theory.[1082] Originally, the "control over the crime", a "darling" of the German legal theory, was prominently featured in the academic work of *Roxin*[1083] who recognised the mutual dependence of co-perpetrators to achieve the prohibited result.[1084] He meant that co-perpetrators are capable of accomplishing a common criminal plan only if they act in a concerted effort, and each individually can frustrate the implementation of the plan if he withdraws the contribution.[1085] The theory is credited for capturing principals "not limited to those who physically carry out the objective elements of the offence" but also including "those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed".[1086] International criminal law pundits note greater conformity of the theory with the fundamental principle of culpability in stark comparison to the ill-equipped concept of JCE that treats all participants equally guilty regardless of their role and function in the enterprise.[1087] The "control over the crime" doctrine, however, has not escaped a fair share of criticism. While favourably accepting its introduction into the jurisprudence, some commentators question the appropriateness of the concept in the context of informal structures of power.[1088] *Ohlin* submits that the utility of the control theory as a distinguishing method between principals and accomplices is over-exaggerated. In fact, he suggests an alternative theory of joint intentions, which, according to him, is better equipped in drawing the distinction between parties to a crime. This means that participants who jointly *intend* to commit the crime with other(s) would qualify as co-perpetrators, whereas those who merely assist the group with the *knowledge* that their assistance will facilitate the commission of the crime would qualify as accomplices.[1089]

[1082] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 326–341. See also: *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 348.

[1083] Roxin (2006b), pp. 277–282 (Chapter II. *Die Mittaterschaft als funktionelle Tatherrschaft/Co-Perpetration as the Functional Control over the Crime*).

[1084] Ibid., p. 278 ("Der Beteiligte kann allein nichts ausrichten [...] nur wenn der Komplice mitmacht, funktioniert der Plan"). The author provides an example of bank robbery where none of the parties are able to achieve the result unless each person performs his assigned role. The intimidation of bank employees with a gun by one of the participants does not actually result in the crime, as the contribution of another party is required to accomplish the crime.

[1085] Ibid., p. 278 ("Sie konnen nur, indem sie gemeinsam handeln, ihren Plan verwirklichen, aber jeder einzelne kann, indem er seinen Tatbeitrag zuruckzieht, den Gesamtplan zunichtemachen. Insofern hat er die Tat in der Hand").

[1086] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para. 330.

[1087] Ambos (2007) at 173, 183.

[1088] Manacorda and Meloni (2011) at 171.

[1089] Ohlin (2011) at 745.

The Majority in the *Lubanga* Judgement did not depart from the Pre-Trial Chamber's findings with respect to the attribution of the "control over the crime" theory. In his separate opinion, Judge Fulford voiced his concern about the transposition of domestic law doctrines into the jurisprudence of the ICC. He rejected the "control over the crime" approach as a distinguishing theory between principal and accessory liability because of the perceived danger "to apply a national statutory interpretation" [read German] in the "significantly different" overall context of legal proceedings in the ICC.[1090]

According to Judge Fulford, the plain reading of Article 25 (3) (a) establishes criminal liability of co-perpetrators "who contribute to the commission of a crime notwithstanding their absence from the actual scenes of a crime" which renders the interpretation of co-perpetration through the "control over a crime" unwarranted.[1091] Whereas Judge Fulford is right that the control theory is not the *only* available tool to qualify criminal conduct of those who are not physically present during the commission of a crime, he disregards an important feature of the theory which determines criminal responsibility according to the *degree* of contribution, thus more objectively reflecting the blameworthiness of parties to a crime.

The dissent of Judge Fulford goes beyond the mere disagreement over the control theory. He argues against the necessity of drawing a hierarchy of modes of liability in Article 25 (3) of the Statute and pinpoints the insignificance of sentencing considerations depending upon the attributed mode of liability in the ICC in contrast to the German legal practice.[1092] Judge Fulford's opinion was mostly perceived as "hostility" of a common-law bred jurist towards acknowledging the usefulness of legal theories that stem from continental law jurisdictions. However, the jurisprudence got an unexpected twist when the Belgian Judge Van den Wyngaert appended her concurring opinion to the *Ngudjolo* Judgement, in which she similarly distanced herself from the control theory and refused to accept the premise on which the theory is based, i.e. the alleged hierarchy of modes of liability in Article 25 (3) (a)-(d).[1093]

6.3.2.2 The Merged Concept of Indirect Co-Perpetration as a Mode of Principal Liability in Article 25 (3) (a) of the Rome Statute

An interesting discussion on the merger of two distinct principal modes of liability, indirect perpetration and co-perpetration, featured in the *Katanga* case. The Defence for *Katanga* claimed that Article 25 (3) (a) of the Rome Statute provides

[1090] *Lubanga* (ICC-01/04-01/06), Trial Chamber I, Judgment pursuant to Article 74 of the Statute, Separate Opinion of Judge Adrian Fulford, 14 March 2012, paras 6, 10.

[1091] Ibid., para. 12.

[1092] Ibid., para. 11.

[1093] *Ngudjolo* (ICC-01/04-02/12), Judgement pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, para. 6.

only for co-perpetration and indirect perpetration without any mention of the combined notion of indirect co-perpetration if read literally, "[. . .] jointly with another *or* through another person" but not "jointly with another *and* through another person".[1094] However, the judges found it unreasonable to limit joint commission of a crime to situations in which perpetrators execute a portion of the crime by exercising direct control over it. Hence, the combined notion of indirect co-perpetration was accepted as a proper mode of liability to assess the blameworthiness of "senior leaders" 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.[1095]

In the Kenyan case, the Defence for *Mr. Ruto* challenged the merged doctrine of indirect co-perpetration as being contrary to Article 25 (3) (a) of the Statute and customary international law.[1096] The Pre-Trial Chamber disapproved of the Defence's contention and pointed towards the hierarchy of sources in Article 21 that clearly posits the Rome Statute as a primary source of law.[1097] The judges did not find any reason to deviate from the approach advanced by the *Katanga* Pre-Trial Chamber that proposed a dynamic interpretation of Article 25 (3) (a) by merging two different principal modes of participation.[1098] The role of *Mr. Ruto* as an indirect co-perpetrator was established to the requisite threshold in light of his participation in the criminal plan of evicting the PNU (Party of National Unity) opponents by means of committing crimes against humanity.[1099] The same conclusion was reached at the confirmation hearing with respect to *Mr. Muthaura* and *Mr. Kenyatta*, two political figures on the other side of the conflict during the turbulent period of post-election violence in Kenya, who were preliminary confirmed as indirect co-perpetrators of the alleged crimes.[1100] On 11 March 2013, the Prosecutor of the ICC publicly announced that she decided to withdraw charges levied against *Mr. Muthaura* due to the unavailability of key witnesses who either died or were too afraid to testify; the failure of Kenyan authorities to provide important evidence and grant access to victims; and the questionable credibility of the key prosecution witness.[1101] The timing of the withdrawal of charges is very peculiar, as it came about just after the co-accused in the same case, *Mr. Kenyatta,* secured

[1094] *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 490 (original footnote omitted).

[1095] Ibid., para. 492.

[1096] *Ruto* et al. (ICC-01/09-01/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, paras 286, 288.

[1097] Ibid., para. 289.

[1098] Ibid.

[1099] Ibid., paras 299, 302.

[1100] *Muthaura* et al. (ICC-01/09-02/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, para. 298.

[1101] Statement by ICC Prosecutor on the notice to withdraw charges against Mr Muthaura, retrieved on 11 March 2013. http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx.

the majority of votes in the presidential race. Although the Prosecutor made it clear that her decision only concerned *Mr. Muthaura,* it remains uncertain how trial proceedings will move with respect to the accused who currently holds the presidential post in the country.

The combined mode of liability has proved to be particularly useful in assigning criminal responsibility to senior political leaders, such as *Al Bashir* (incumbent President of Sudan), late *Gaddafi* (leader of Libyan Arab Jamahiriya, *de facto* President of Libya) and *Gbagbo* (former President of Ivory Coast). When examining the mode of criminal responsibility to be attributed to *Al Bashir*, the judges delved into the "locus of control" theory. The Majority found reasonable grounds to believe that *Al Bashir* and the other high-ranking Sudanese political and military leaders directed the branches of apparatus of the State of Sudan to jointly implement the common plan.[1102] An alternative conclusion reached by the Majority was that *Al Bashir* (i) played a role that went beyond coordinating the implementation of the common plan; (ii) was in full control of all branches of "apparatus" of the State of Sudan; and (iii) used such control to secure the implementation of the common plan.[1103] This finding re-affirms the crucial role and ultimate authority of *Al-Bashir* over all branches of "apparatus". Given uncertainty as to the suspect's authority in the State apparatus, the Majority established reasonable grounds to believe that he is criminally liable as an indirect perpetrator, *or* as an indirect co-perpetrator of the alleged war crimes and crimes against humanity.[1104] In her partly dissenting opinion, Judge Ušacka questioned whether such control indeed rested fully with *Al Bashir*, or whether it was shared with others. She supported the issuance of an arrest warrant based on indirect perpetration and did not find reasonable grounds to believe that *Al Bashir* was responsible through co-perpetration.[1105]

At the arrest warrant stage, the Pre-Trial Chamber established to the requisite threshold that late *Muammar Gaddafi* exercised absolute, ultimate and unquestioned control over the Libyan State apparatus of power in his capacity of the undisputed leader of Libya. By virtue of his position and acting in coordination with his inner circle, he allegedly conceived and orchestrated a plan to deter and quell, by all means, the civilian demonstration against his regime. According to the Prosecutor's submission, the combination of *Gaddafi's* absolute authority exercised

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[1102] *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad *Al Bashir*, 4 March 2009, paras 212–216.

[1103] Ibid., para. 222 (original footnote omitted).

[1104] Ibid., para. 223. The Pre-Trial Chamber established reasonable grounds to believe that the alleged war crimes and crimes against humanity were directly committed as part of the GoS (Government of Sudan) counter-insurgency campaign, by members of GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS (National Intelligence and Security Services) and the HAC (Humanitarian Aid Commission).

[1105] Ibid., Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 104 (original footnote omitted).

in a concerted effort with the inner circle qualified his responsibility within the premises of indirect co-perpetration.[1106]

An additional arrest warrant against *Gaddafi's* son, *Saif Al-Islam Gaddafi*, was issued on the same legal basis for his alleged role in exercising control over crucial parts of the State apparatus, including finances and logistics, in his capacity of a *de facto* Prime Minister.[1107] The capture and detention of *Saif Al-Islam Gaddafi* by the rebels in Libya has sparkled a procedural row between the Libyan National Transitional Council (hereinafter—NTC) and the ICC over the proper venue to try the suspect. Contrary to misleading media reports, the ICC remains seized of the admissibility challenge submitted by the Libyan authorities, whereas the Libyan government is obliged to fully cooperate with the Court.[1108]

Indirect co-perpetration is also assigned to the former President of Ivory Coast, *Laurent Gbagbo*, who currently stands trial in the ICC. The attributed mode of liability was chosen to demonstrate the interaction between *Gbagbo* and his inner circle that exploited the *pro-Gbagbo* forces to effect crimes against humanity on the ground.[1109] The advantage of the combined reading of indirect perpetration and co-perpetration is that it enables the linkage of all participants to a crime at vertical and horizontal dimensions of collective criminality. The synthesis of those modes of liability reflects a "potential fruitful vision of the culpability of senior leaders".[1110]

The illustration below graphically exemplifies the merged concept of indirect co-perpetration. Person B does not exercise any control over C (through whom the crime is committed), and thus cannot be said to commit the crime(s) by means of C. However, B acts jointly with A who actually controls C and exploits him as an instrument to commit the crime(s). The fact that C is not directly linked to B does not preclude the attribution of crimes committed by C to B. This principle of mutual attribution enables to cover all participants to a crime and to demonstrate lines of communication among them. The use of this mode of liability in the context of international criminal justice may potentially relieve the judges from the hurdle of establishing the linkage between low-ranking perpetrators ("small fish") and the very top of political/military leadership ("big fish").

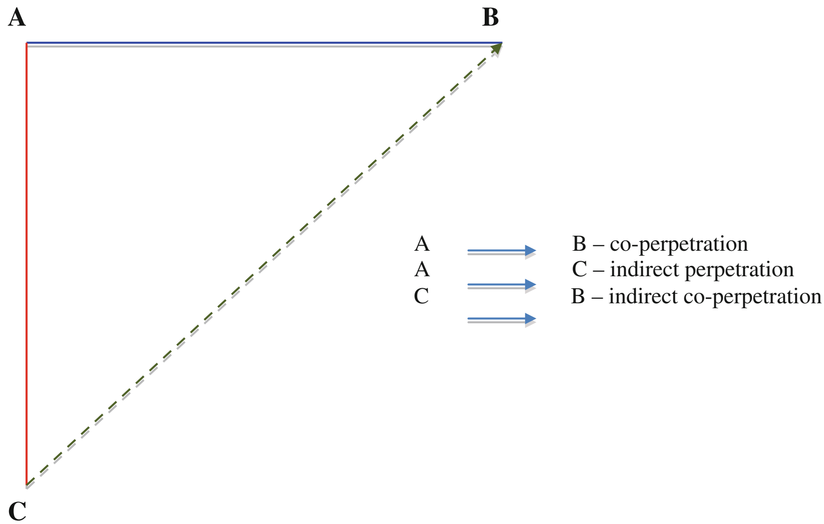
[1106] *Gaddafi* (ICC-01/11), Pre-Trial Chamber I, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, 27 June 2011.

[1107] *Gaddafi* (ICC-01/11), Pre-Trial Chamber I, Warrant of Arrest for Saif Al-Islam Gaddafi, 27 June 2011. The last arrest warrant was issued against *Abdullah Al-Senussi,* former Head of the Military Intelligence, who allegedly used his powers over the military forces, commanded the forces in Benghazi and directly instructed the troops to attack civilians during the uprising (indirect co-perpetrator within the meaning of Article 25 (3) (a) of the Rome Statute). See: *Al-Senussi* (ICC-01/11), Pre-Trial Chamber I, Warrant of Arrest for Abdullah Al-Senussi, 27 June 2011.

[1108] *Gaddafi* (ICC-01/11-01/11), State Representatives, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, 1 May 2012.

[1109] *Gbagbo* (ICC-02/11), Pre-Trial Chamber III, Warrant of Arrest For Laurent Koudou Gbagbo, 23 November 2011, para. 10.

[1110] Van Der Wilt (2009) at 312.



6.3.2.2.1 Objective Elements (*Actus Reus*) for Indirect Perpetration

The commission of a crime through another person (indirect perpetration) is a principal mode of liability that includes two parties: a principal (perpetrator-by-means) and an executor (direct perpetrator). As understood in most national jurisdictions, a direct perpetrator is merely a tool or an instrument used for the commission of a crime by a principal. However, two parties to a crime do not necessarily bear the same degree of criminal responsibility. As a general rule, a direct perpetrator is not fully criminally liable because the principal exploits him to commit a crime. National practices may treat the involvement of a direct perpetrator as a mitigating circumstance if he acted under duress or under a mistaken disbelief etc. However, some cases warrant the imposition of the same degree of responsibility upon all parties involved.

The concept of indirect perpetration is well entrenched in the criminal law theory of civil law jurisdictions. Criminal responsibility is imposed upon a person who acts through another, regardless of responsibility borne by a direct perpetrator. In German criminal law, indirect perpetration (*Mittelbare Täterschaft*) implies that a principal uses another person as a "human tool" to commit a crime. Normally, an indirect perpetrator takes advantage of the actual perpetrator's age or mental capacity.[1111] Indirect perpetration is also applied to situations when an actual perpetrator acts under duress or mistake. In addition, *Roxin* ascertains the applicability of this mode of liability in cases where an indirect perpetrator employs the

[1111] Baumann et al. (2003), p. 670

functional mechanism of an organisational apparatus to commit a crime.[1112] In Russian criminal law, indirect perpetration covers situations in which an actual perpetrator is (i) exculpated on the grounds of his age or mental capacity; (ii) mistaken as to the objective element of a crime; and (iii) acting under duress.[1113] English criminal law employs the doctrine of innocent agency that implies that the defendant deliberately uses an "innocent agent" to carry out an *actus reus* of a crime.[1114]

Despite the fact that the concept of indirect perpetration was largely ignored in the jurisprudence of the ad hoc tribunals, it may prove to be of significant relevance to the adjudication of core international crimes, thus enabling successful prosecutions of intellectual masterminds who stand behind the crimes, while hinging on the state apparatus, rebel groups and other available resources to implement their "grand" military strategies into practice. The proponents of indirect perpetration in international criminal law underline the capability of this mode of liability to adequately reflect organisational dynamics that accompany the commission of international crimes.[1115] However, the concept of indirect perpetration as understood in domestic criminal law cannot be mechanically transposed to the field of international criminal law and requires substantial adjustments to meet the needs of this demanding and complex area of international law. The main challenge warranting against the mechanical transposition is that national criminal law generally treats direct perpetrators as "innocent individuals" who were tricked into the commission of a crime.[1116] This scenario is hardly plausible in international criminal law which has a primary mandate to prosecute the most responsible individuals for core international crimes, who cannot be said to employ innocent agents to commit the crimes of extreme gravity that require a thorough level of planning and organisation.

Pre-Trial Chamber I in *Katanga* and *Chui* case rightly penned that the drafters of the Rome Statute sought to establish a mode of commission in Article 25 (3) (a) of the Rome Statute that encompassed the commission of a crime through a *non-innocent* individual acting as an instrument.[1117] *Sliedregt* submits that the coverage of both innocent and culpable agents is meant to capture a wider range of situations in international criminal law than the classic concept of perpetration through innocent agents in national criminal laws.[1118]

[1112] Roxin (2006b), p. 244.

[1113] Kosachenko (2009), pp. 336–337.

[1114] Simester and Sullivan (2007), pp. 197–199.

[1115] Jessberger and Geneuss (2008) at 866; Cryer et al. (2007), p. 303.

[1116] Baumann et al. (2003), p. 670. See also: Kosachenko (2009), pp. 336–337.

[1117] *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 499 (emphasis added).

[1118] Van Sliedregt (2003a), p. 71.

6.3.2.2.1.1 Control Over the Organisation (Organisationsherrschaft)

The *Katanga* Pre-Trial Chamber noted the incompatibility of a conventional definition of indirect perpetration in the context of the ICC, and for that reason hinged on the German criminal law theory that provides for indirect perpetration (*mittelbare Taterschaft*) by means of "control over an organisation" (*Organisationsherrschaft*).[1119] The judges noted that a number of national jurisdictions, including that of Germany, Argentina, Chile, Peru and Spain, endorse the concept of perpetration through "control over an organisation" in order to attribute principal liability to "masterminds" behind the crimes.[1120]

The fundamental difference between national practices and international criminal law is that those individuals who are further detached from the actual execution of crimes are normally considered less culpable in domestic jurisdictions, which is remarkably opposite in international criminal law that witnesses an increase in blameworthiness with a rise in the hierarchy. The District Court of Jerusalem in its notable *Eichmann* case remarked on the degree of responsibility of senior leaders in the following fashion:

> In such an enormous and complicated crime [. . .] wherein many people participated at various levels and in various modes of activities [. . .] committed in masse [. . .] the extent to which anyone 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. In the contrary, in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command.[1121]

The doctrine of indirect perpetration has not featured in the jurisprudence of the ad hoc tribunals despite a few attempts to introduce alternative modes of principal liability.[1122] To the contrary, the Rome Statute explicitly provides for indirect perpetration and co-perpetration. The judges have construed those two modes of liability through the control theory, which has provoked discussions at considerable length. Judge Van den Wyngaert does not accept the control over the organisation theory (*Organisationsherrshaft*) as a constitutive legal element of indirect perpetration as set forth in Article 25 (3) (a) of the Rome Statute, however, she submits that such type of control may be treated as an important evidentiary factor to demonstrate that the accused dominated the will of a certain physical perpetrator(s).[1123]

[1119] *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 498 citing in support Roxin (1963), pp. 193–207; Ambos (2005), p. 240.

[1120] Ibid., para. 502 (original footnote omitted).

[1121] Jerusalem District Court, *The Attorney General v. Eichmann*, Case No. 40/61, Judgement, 36 I.L.R. 5-14, 18-276, 12 December 1961, para. 197.

[1122] *Gacumbitsi* Appeal Judgement, Separate Opinion of Judge Schomburg, paras 14–22; *Stakić* Trial Judgement, para. 439.

[1123] *Ngudjolo* (ICC-01/04-02/12), Judgement pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, paras 52–57.

The criticism against the control theory voiced by individual judges may change the course of the jurisprudential developments in the ICC in favour of a more straightforward narrow reading of Article 25 (3) (a) of the Statute, rather than through complex theoretical German doctrines.[1124]

6.3.2.2.1.2 Organised and Hierarchical Apparatus of Power

The early jurisprudence of the ICC fleshes out the constitutive elements of indirect perpetration. The existence of "organised and hierarchical apparatus of power" within an organisation is the first prerequisite to prove that the crimes were committed by means of "control over an organisation". It is the structural composition of the organisation based on hierarchical relations between superiors and subordinates that guarantees the execution of superiors orders if not by one subordinate, then by another.[1125] The leader's authority is always manifest in the subordinates' compliance with his orders.[1126] The leader exploits his control over the apparatus to execute crimes, and mobilises his authority within the organisation to secure compliance with his orders that involve the commission of crime(s) within the jurisdiction of the ICC.[1127]

6.3.2.2.1.3 Execution of the Crimes by Almost Automatic Compliance

Indirect perpetration entails the execution of crimes by almost automatic compliance with orders of a superior. German criminal law speaks of the "mechanisation" of compliance with superior's orders that serves as a featuring characteristic distinguishing indirect perpetration from acting under duress or mistake.[1128]

[1124] For critical appraisal of the concept of *Organisationsherrshaft* and its relevance for the ICC, see: Weigend (2011) at 109–110.

[1125] *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 512.

[1126] The "control over the organisation" element was inferred from the dominant position of the suspect (*Mr. Ruto*) who directed the organisation ("Network") in the commission of crimes against its political opponents. See: *Ruto* et al. (ICC-01/09-01/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, para. 316. In the *Muthaura* decision, the Pre-Trial Chamber preliminary established to the requisite threshold that *Mr. Muthaura* and *Mr. Kenyatta* gained control over the *Mungiki* organisation for the purposes of the commission of the crimes charged. See: *Muthaura* et al. (ICC-01/09-02/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, para. 408.

[1127] *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 514 referring to Roxin (2006b), p. 245; BGHSt 40, 218 at 236.

[1128] Roxin (2006b), p. 245 ("Der für die Begründung der Willensherrschaft in solchen Fällen entscheidende Faktor, der sie als eine gegenüber der Nötigungs- und Irrtumsherrschaft deutlich abgegrenzten dritte form mittelbarer Täterschaft erscheinen läßt, liegt also in der Fungibilität des Ausführenden").

The existence of the organised and hierarchical apparatus enables the leader to secure the commission of crimes. The leader's control over the apparatus is of such a degree that he is capable of utilising his subordinates as "a mere gear in a giant machine" to achieve the criminal goal "automatically".[1129] The "mechanisation" of the compliance with orders ensures the successful execution of a criminal plan that would not be compromised by any particular subordinate's failure to comply with an order.[1130] In fact, a non-compliant subordinate may be replaced by another one who will follow orders.[1131] An actual executor of the order is a "weak link" and replaceable "cog" in the apparatus, which posits an indirect perpetrator at the very epicentre of the commission of a crime.[1132]

The automatic compliance with orders is secured by the sufficient supply of subordinates and their replacement, or by the implementation of intensive, strict and even violent training regimes.[1133] As an illustration, the *Muthaura* DCC established to the requisite threshold that actual perpetrators were entirely replaceable and the commission of the crimes was secured by the utilisation of a pre-existing hierarchical and organised structure.[1134] In the *Ruto* DCC, the automatic compliance was demonstrated through the payment and punishment mechanisms.[1135]

6.3.2.2.2 Objective Elements (*Actus Reus*) for Joint Commission of a Crime

There may be more than one principal offender in the same crime, which translates into the joint commission. To qualify as co-perpetrators in national criminal law, it is necessary to prove their combined joint contribution to the commission of the crime(s). As an example, two persons who attack and kill a victim by the combined effect of their blows are regarded as joint principals.[1136] In the crime of rape, a principal offender is not only a person who commits the act of penetration itself but as well a person who forcefully holds a victim during the act of rape. To be held to

[1129] *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 515 (original footnote omitted).

[1130] Ibid., para. 516 (original footnote omitted).

[1131] Ibid. (original footnote omitted).

[1132] Roxin (2006b), p. 245 ("Der Ausführende ist, so wenig an seiner Handlungsherrschaft gerüttelt werden kann, doch gleichzeitig nur ein in jedem Augenblick ersetzbares Rädchen im Getriebe des Machtapparates, und diese doppelte Perspektive rückt den Hintermann neben ihn ins Zentrum des Geschehens").

[1133] *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, paras 516, 518.

[1134] *Muthaura* et al. (ICC-01/09-02/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, para. 409.

[1135] *Ruto* et al. (ICC-01/09-01/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, paras 317, 320–332.

[1136] Ormerod and Hooper (2009), pp. 295–296. For more, see: LaFave (2003a), p. 510.

account as a co-perpetrator, it is necessary to prove that the accused accepts as his own the actions of other parties to a crime.[1137]

In the context of international criminal law, the meaning of joint commission of a crime bears a different connotation when compared to domestic practices. The involvement of high-ranking perpetrators who are normally removed from the actual scenes of crimes and thus rarely carry out the *actus reus* themselves renders it more challenging to prove joint commission of a crime. The early ICC jurisprudence construes the concept of perpetration through the level of a contribution, which should be no less than "essential". The *Lubanga* DCC was the first authority that provided some guidance as to the meaning co-perpetration under Article 25 (3) (a) of the Rome Statute:

> [t]he concept of co-perpetration is originally rooted in the idea that when the sum of the coordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.[1138]

It is clear from the above that the Pre-Trial Chamber attempted to draw a clear dividing line between principal and accessory liability on the basis of an objective element of the contribution. The *Katanga* Pre-Trial Chamber endorsed the same interpretation of co-perpetration based on "joint control over the crime" that entails the division of essential tasks between two or more persons, acting in a concerted manner, for the purposes of committing the crime(s). It was further explicated that the fulfilment of the essential task(s) can be carried out by co-perpetrators physically or, alternatively, be executed through another person.[1139] The *Bemba* Pre-Trial Chamber adopted the same line of reasoning and reiterated the necessity to prove (i) the existence of a *common plan or an agreement* with one or more persons; and the coordinated *essential contribution,* which results in the fulfilment of the material elements of the crime.[1140]

[1137] Supreme Court of Serbia, Sinan Morina, Case No. Kz. I RZ 1/08, 2nd Instance Verdict, 3 March 2009, p. 4; Belgrade District Court, Anton Lekaj, Case No. K.V. 4/05, 1st Instance Verdict, 18 Sept. 2006, p. 34.

[1138] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 341–342 (original footnotes omitted).

[1139] *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 521.

[1140] *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 350. In the same vein, *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 343–348; *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, paras 522–526; *Stakić* Trial Judgment, paras 440, 470–491.

6.3.2.2.2.1 Existence of an Agreement or Common plan

The very first objective requirement of co-perpetration is the existence of an agreement or common plan between persons who jointly embark upon the commission of a crime(s). Most legal jurisdictions uphold criminal responsibility for multiple persons acting in pursuance of a *common purpose* regardless of their degree or forms of participation insofar as all of them share the intent to perpetrate crimes envisaged in the common purpose. The common plan must include a criminal offence. In English criminal law, the doctrine of joint enterprise or venture entails that participants have an agreed purpose to commit a particular crime.[1141] The same is true across other common and continental law jurisdictions.[1142] The distinctive feature of international criminal law is that high-ranking perpetrators may agree upon the common plan, which is not inherently criminal (e.g. taking over control of the country; exploiting natural resources; seizing political power etc.), but the means to achieve non-criminal goals involve the commission of the most horrendous atrocities, including genocide, war crimes and crimes against humanity. In this context, the common plan requirement in national criminal law cannot be sweepingly equated to the same requirement in the context of international criminal law.

Pre-Trial Chamber I in the *Lubanga* DCC held that the common plan "must include an element of criminality", although it does not need to be directed at the commission of a crime.[1143] Furthermore, it was recognised that an agreement does not need to be explicit; its existence can be inferred from the concerted action of the co-perpetrators.[1144] This was challenged by the Defence that submitted the plan to be "intrinsically criminal" in order to establish criminal liability on the basis of co-perpetration. Having disagreed with the contention, the Majority in the *Lubanga* Judgement held that the common plan must, at minimum, include a "critical element of criminality, which implies that its implementation embodies a risk that a crime will be committed, if events follow the ordinary cause".[1145] Given that the default *mens rea* standard under Article 30 must include *de minimus dolus directus in the second degree* (see discussion below), co-perpetrators must *know* the implementation of the common plan will lead to the commission of crimes in the

[1141] Ashworth (2009), p. 420; Ormerod and Hooper (2009), p. 341.

[1142] See: German Criminal Code, section 25(2); Russian Criminal Code, Article 33(2).

[1143] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para. 344. The Pre-Trial Chamber also held that the "existence of the common plan" is satisfied (i) when perpetrators agreed to start to implement the common plan to achieve a non-criminal goal, and to commit crimes if certain conditions arise; and (ii) co-perpetrators are aware of the risk that implementing the common plan will result in the commission of the crime and accept such an outcome.

[1144] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para. 345; *Ruto* et al. (ICC-01/09-01/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, para. 301.

[1145] *Lubanga* (ICC-01/04-01/06), Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 984.

ordinary course of events. Hence, the proof of "a risk that a crime will be committed" is too low.

By endorsing the combined reading of Articles 25 (3) (a) and 30 of the Rome Statute, the Majority held that "the crime in question does not need to be the overarching goal of perpetrators".[1146] This resonates with the approach undertaken by the ad hoc and hybrid tribunals that shaped the common plan required for JCE as not necessarily including the crime(s) as its ultimate purpose but as well the criminal means which were employed to achieve a non-criminal goal. Despite apparent differences between co-perpetration and JCE, these two concepts overlap in some parts. In fact, both of them require the proof of the existence of a common plan. It is well established in the jurisprudence that the criminal plan does not need to be intrinsically criminal in order to satisfy the criteria of JCE or co-perpetration.

In *Kvočka* et al., the non-criminal plan of "the creation of a Serbian state within the former Yugoslavia"—achieved by participants of JCE through the persecution of Muslims and Croats—was recognised as properly pleaded by the Appeals Chamber.[1147] The *Haradinaj* Indictment determined the common purpose of JCE as "to consolidate the total control of the KLA over the Dukagjin Operational Zone of the Kosovo Liberation Army" which involved the commission of crimes against humanity and violations of the laws and customs of war.[1148]

The pleading of the existence of a common agreement in co-perpetration is similar to the common purpose in JCE. As an illustration, in one of the Kenyan cases, it was established to the requisite threshold at the pre-trial stage that *Mr. Ruto* and other members of the organisation (the Network) developed and executed a plan to evict members of the *Kikuyu*, *Kisii,* and *Kamba* communities because of their perception as the PNU supporters, which was implemented through the commission of a number of crimes against humanity.[1149]

6.3.2.2.2.2 Essential Contribution

The second objective requirement of co-perpetration is the coordinated *essential* contribution by each co-perpetrator, which results in the realisation of the objective elements of the crime. Pre-Trial Chamber I in the *Katanga* case elaborated on the nature of the contribution in the same fashion as the *Lubanga* Pre-Trial Chamber:

[1146] Ibid., para. 985.

[1147] *Kvočka* Appeal Judgment, para. 46.

[1148] *Prosecutor v. Ramush Haradinaj*, Fourth Amended Indictment", IT-04-84bis-PT, 21 January 201, para. 24.

[1149] *Ruto* et al. (ICC-01/09-01/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, para. 302. The same element of the common plan is pertinent to an accomplice form of liability under Article 25(3)(d) of the Rome Statute.

> When the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan, 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 - can be said to have joint control over the crime.[1150]

It is clear from the citation above that the commission of a crime is always conditional upon the required contribution by each co-perpetrator because the failure to contribute to a crime frustrates its commission. The early jurisprudence of the ICC demonstrates that the coordinated essential contribution could be evidenced by the central role of a co-perpetrator in organizing, coordinating and planning the attack against the civilian population;[1151] supervision and purchase of weapons to implement the criminal plan;[1152] establishment of the rewarding mechanism to the physical perpetrators of crimes;[1153] supply of financial funds necessary for the execution of crimes; mobilisation of supporters to carry out crimes against their political opponents etc.[1154]

The question as to the contribution threshold with respect to co-perpetration was pondered over in the *Lubanga* Judgement given the disagreement between the Prosecution and the Defence on the matter. The Prosecution argued that *substantial* contribution is sufficient for co-perpetration,[1155] whereas the Defence claimed that the contribution within the meaning of Article 25 (3) (a) must be "positive, personal and direct" without which the crime would not have existed.[1156] The restrictive test of co-perpetration as defined by the Defence requires "a positive act of participation" that is personally and directly undertaken by the accused himself.[1157] The Defence contends that the contribution by a co-perpetrator must be *essential* as well as the common plan—intrinsically criminal.[1158] The *Lubanga* Trial Chamber held that the responsibility of co-perpetrators for the crime, which results from the implementation of the common plan, arises from *mutual* contribution based on

[1150] *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 525. In the same vein, *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para. 347.

[1151] *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 526; *Ruto* et al. (ICC-01/09-01/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, para. 308.

[1152] *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 526; *Ruto* et al. (ICC-01/09-01/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, para. 310.

[1153] *Ruto* et al. (ICC-01/09-01/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, para. 311.

[1154] *Muthaura* et al. (ICC-01/09-02/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, paras 404–406.

[1155] *Lubanga* (ICC-01/04-01/06), Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 937.

[1156] Ibid., para. 948.

[1157] Ibid., para. 949 (original footnote omitted).

[1158] Ibid., paras 950–955.

the joint agreement or common plan, thus acknowledging *Roxin's* interpretation in that regard.[1159]

Shortly after the Judgment, the discussion as to the contribution level was revived by the Prosecution that submitted observations on the law of indirect co-perpetration under Article 25 (3) (a) in which it challenged the existing interpretation of the legal framework developed in the jurisprudence.[1160] The Prosecution contested the *Lubanga* Majority opinion as to the requisite contribution within the meaning of Article 25 (3) (a) of the Statute. In contrast to the pronouncement of the Trial Chamber that defined the contribution threshold as *essential,* the Prosecution suggests lowering the contribution standard to *substantial*, which means that "the crime may have been possible to commit absent the accused's contribution, but such commission would have been significantly more difficult".[1161]

In response to the submissions, the Defence sought the Prosecution to be estopped from challenging the legal elements of co-perpetration which is at odds with its own stated position before the Pre-Trial Chamber in the same case and thus "militates against legal certainty and the principle that parties should be expected to maintain consistent and principled position in the same case throughout the process".[1162] The Defence maintains that the contribution of a co-perpetrator must be *essential*, which implies that he has the power to frustrate the commission of the crime. According to the Defence, the Prosecution proposition on the sufficiency of *substantial* contribution to prove indirect co-perpetration "blurs the lines between principal and accessory forms liability" and thus "renders meaningless the graduating scale of blameworthiness enshrined in the Statute".[1163]

The discussion posits a question on the hierarchy of modes of liability in Article 25 (3) of the Statute. Given that the *substantial* contribution satisfies the criteria of accomplice form of liability in the jurisprudence of the ad hoc tribunals, the Defence observation on blurring the distinction between principal and accessory forms of liability is particularly relevant.

6.3.2.2.2.3 Hierarchy of Modes of Liability Based on the Level of the Contribution?

The *Lubanga* Judgement confirmed the predominance of principal liability over secondary liability. The Majority differentiated between the degrees of the

[1159] Ibid., para. 994.

[1160] *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Prosecution's submissions on the law of indirect co-perpetration under Article 25 (3) (a) of the Statute and application for notice to be given under regulation 55 (2) with respect to the accused's individual criminal responsibility, ICC-01/09-02/11-444, 3 July 2012.

[1161] Ibid., para. 12.

[1162] *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Defence Response to the "Prosecution's submissions on the law of indirect co-perpetration under Article 25 (3) (a) of the Statute and application for notice to be given under regulation 55 (2) with respect to the accused's individual criminal responsibility", ICC-01/09-02/11-460, 25 July 2012, para. 3.

[1163] Ibid., para. 36.

contribution to a crime, which ranges from "essential" under Article 25 (3) (a) to "any" under Article 25 (3) (d). The Majority held that by lowering the threshold of "essential" with respect to the contribution of a co-perpetrator, it would unnecessarily expand the concept of principal liability, and deprive it of the "capacity to express blameworthiness of those persons who are *most* responsible for the most serious crimes of international concern".[1164] The assessment as to whether the contribution elevates to the required threshold of "essential" is carried out with the consideration of the common plan and the role assigned to the co-perpetrator on a case-by-case basis.[1165]

The divergence of opinions as to whether the level of contribution defines the hierarchy of modes of liability illustrates the clash between competing common law and continental law traditions, which inspire the formation of the substantive part of international criminal law. Common law pays little attention to the distinction between a principal(s) and an accomplice(s) to a crime. Although such distinction is firmly entrenched in criminal law theory, it becomes insignificant at the sentencing stage. The leading authority, the Accessories and Abettors Act 1861, provides that anyone who "shall aid, abet, counsel or procure the commission of any indictable offence [. . .] shall be liable to be tried, indicted and punished as a principal offender". In other words, an aider or abettor to the crime of murder deserves the same punishment as a murderer. However, it is increasingly acknowledged that the equal treatment of principals and accomplices in English criminal law is "compared unfavourably to such systems as the German", which provides for a hierarchy of penalties depending upon whether a person was a principal or an accomplice. *Ashworth* advocates for a more regulated approach towards sentencing, which would realistically reflect the accomplice's role and his contribution to a crime[1166]

The US Model Code divides all parties of a crime into principals and accomplices. The significant procedural impediment in American criminal law is that the conviction of a principal used to be an absolute prerequisite in order for the accomplice to be held criminally liable. This approach has been mostly abrogated in modern criminal law, which means that an accomplice may be tried notwithstanding that the principal has not been convicted yet.[1167] As a general rule, accomplices are equally held liable with principals to a crime. Hence, the judges might not actually pay attention as to whether they refer to somebody as a principal or an accomplice. It was noted in *People v McCoy* that the "dividing line between the actual perpetrator and the aider and abettor [was] often blurred" given the complexity of the relationship between two parties who jointly embark upon the commission of a crime, as "both may act in part as the actual perpetrator *and* in

[1164] *Lubanga* (ICC-01/04-01/06), Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 999.

[1165] Ibid., paras 1000–1001.

[1166] Ashworth (2009), p. 406.

[1167] US Model Penal Code, § 2.06(7).

part as the aider and abettor of the other, who also acts in part as an actual perpetrator".[1168]

The legal theory of continental law jurisdictions enforces a strict hierarchy of modes of liability that reflects a greater degree of blameworthiness of principals in comparison to that of accomplices. In Russian criminal law, criminal responsibility of parties to a crime is determined according to the character and degree of the actual participation in the commission of a crime.[1169] An accomplice is responsible for his own contribution to the crime and not for a substantive crime committed by a principal.[1170] Likewise, in German criminal law, every participant to a crime shall be punished based upon his guilt irrespective of the guilt of the other.[1171] In other words, the judges shall determine criminal responsibility upon the evaluation of the blameworthiness of an individual, which stems from his level of contribution to the crime. The establishment of correct determinations of culpability that reflect upon the blameworthiness of political/military leadership involved in the commission of the most abhorrent crimes would definitely benefit the theory of international criminal law in adopting a more nuanced approach towards criminal responsibility of principals and accomplices.

The perceived existence of the hierarchy of forms of liability in Article 25 (3) in the Rome Statute is still the prevalent opinion among the ICC judges, however, the approach was challenged by Judge Fulford in his separate opinion who emphatically disagrees with the differentiation between the level of blameworthiness attributed to principals and accessories to a crime. Judge Fulford's argument was mostly construed as his reluctance to relate to the continental law theory that offers a differential treatment of principals and accomplices in terms of blameworthiness.[1172] The same argument was advanced by Judge Van den Wyngaert, a continental law trained lawyer and an established academic, who finds no compelling reason to believe that modes of liability in Article 25 (3) are arranged in a hierarchy of seriousness.[1173] It remains to be seen whether the jurisprudence will take another turn and abandon the control over the crime theory employed as a distinguishing criterion between principals and accessories.

6.3.2.2.3 Subjective Elements (*Mens Rea*)

The default *mens rea* requirement of "intent and knowledge" as laid down in Article 30 of the Rome Statute applies to all crimes within the jurisdiction of the Court. The

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[1168] *People v. McCoy* et al., 25 June 2001, 24 P.3d 1210, 1215-16.

[1169] Russian Criminal Code, Article 34 (1).

[1170] Brilliantov (2010), p. 109.

[1171] German Criminal Code, § 29.

[1172] Ambos (2012) at 142–143.

[1173] *Ngudjolo* (ICC-01/04-02/12), Judgement pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, paras 28, 30.

early jurisprudence ignores the semantic difference between "intent" and "knowledge" by merging these two different categories into the fully-fledged definition of intent.[1174] This is akin to the approach endorsed by continental law jurisdictions that treat "intent" as a fusion of both cognitive element and volitional elements.[1175] Given that the knowledge requirement is subsumed by the category of intent, the default *mens rea* standard of "intent and knowledge" under the Rome Statute shall be read as the cumulative term.

Article 30 of the Rome Statute favours an "element analysis" in determining criminal responsibility rather than an "offence analysis" which was routinely applied in the jurisprudence of the ad hoc tribunals. This means that the default requirement of "intent and knowledge" shall be proved with respect to *each* material element of a crime, that is conduct, consequence and/or attendant circumstances. The approach of the drafters of the Rome Statute resonates with that of the US Model Penal Code that defines all culpability terms in relation to material elements of an offence, which may include conduct, attendant circumstances, and/or result.[1176] Notwithstanding that Article 30 is constructed in common law terms, the judges of the Court have departed from the strictly common law approach by merging the categories of knowledge and intent into the cumulative term of *dolus* which may exist in different forms, in particular *dolus directus* in the first degree, *dolus directus* in the second degree and much-debated *dolus eventualis*.[1177]

6.3.2.2.3.1 Subjective Elements for Co-Perpetration

Co-perpetration based on joint control requires each co-perpetrator to carry out his contribution with the subjective elements of the crimes charged. It is a further requirement that the perpetrator shall *intentionally* engage in the design of the common plan, which will eventually lead to the fulfilment of the objective elements of a crime. Given that the common plan in the context of domestic criminal law always involves the commission of a crime, it is necessary to prove joint *intentional* participation in the commission of an *intentional* crime. In international criminal law, the common plan may be non-criminal in nature, although achieved through the commission of international crimes as the means to achieve the ultimate goal.

[1174] Ambos in Cryer and Bekou (2004), p. 22.

[1175] Badar and Marchuk (2013), § 3.6 (*Intent*).

[1176] Pursuant to § 1.13(9) of the US Model Penal Code, an "element of an offence" means such conduct, attendant circumstances or results as is included in the description of the offence; or establishes the required kind of culpability; or negatives an excuse or justification for such conduct; or negatives a defence under the statute of limitations; or establishes jurisdiction or venue.

[1177] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 351–352. *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 357 (original footnotes omitted). See also: Badar and Marchuk (2013), § 3.6 (*Intent*).

Hence, the proof of the twofold *mens rea* standard, which is *mens rea* with regard to the crime(s) charged as well as the common plan, is required.

In the *Lubanga* DCC, the *mens rea* in support of co-perpetration was formulated in the following fashion: (i) the suspect must fulfil the subjective elements of the crime in question;[1178] (ii) the suspect and the other co-perpetrators must all be aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime;[1179] (iii) the suspect must be aware of the factual circumstances enabling him or her to jointly control the crime.[1180]

Although the co-perpetration test based on "joint control over the crime" survived in the subsequent jurisprudence, the supporting subjective elements were extended to (i) co-perpetrators who are mutually aware that implementing the common plan *will* result in the fulfilment of the material elements of the crimes; and yet (ii) they carry out their actions with the purposeful will (intent) to bring them about, or are aware that in the ordinary course of events, the fulfilment of the material elements will be a virtually certain consequence of their actions.[1181] The standard here is higher than the one endorsed by the *Lubanga* Pre-Trial Chamber which treated *dolus eventualis* as a form of intention in Article 30 of the Statute that captures situations in which co-perpetrators accepted the idea that implementing the common plan *may* result in the realisation of the objective elements of the crime.

On the same subject, the *Lubanga* Trial Chamber clarified that co-perpetrators must know about the existence of a risk and the consequence it entails at the time they agree on a common plan and throughout its implementation.[1182] The degree of "risk" is defined as being no less than awareness that the consequence "will occur in the ordinary course of events" (at least *dolus directus* in the second degree).[1183] The proof of a low risk does not suffice. Yet again, it is erroneous to define the requisite *mens rea* standard in terms of "risk", since co-perpetrators must be aware that the consequence(s) will occur in the ordinary course of events at the time they agree upon the common plan. By accepting the terms of the common plan, they are certain of what kind of prohibited consequences will ensue.

[1178] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, paras 349–360.

[1179] Ibid., paras 361–365.

[1180] Ibid., paras 366–367.

[1181] *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, paras 351, 370. In the same vein, *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 533; *Muthaura* et al. (ICC-01/09-02/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, para. 410.

[1182] *Lubanga* (ICC-01/04-01/06), Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 1012.

[1183] Ibid.

In the Chamber's opinion, the twofold *mens rea* requirement of co-perpetration with respect to the crimes charged in the *Lubanga* case[1184] entails that (i) the accused and at least one other perpetrator meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities *or* they were aware that in implementing their common plan, this consequence will occur in the ordinary course of events, and (ii) the accused was aware that he provided an essential contribution to the implementation of the common plan.[1185]

The first *mens rea* standard is provided in the alternative: it is necessary to prove either *dolus directus* in the first degree or *dolus directus* in the second degree. *Ambos* notes that an alternative reading in the *Lubanga* Judgement of section (i) above clashes with the "element analysis" approach towards the definition of a crime and makes an application of Article 30 (2) of the Rome Statute impossible.[1186] It is unclear why the *mens rea* standard is formulated in disjunctive terms. In fact, the Trial Chamber should have acknowledged the twofold nature of the *mens rea* of co-perpetration, which means that it is necessary to prove the *mens rea* in relation to crime charged (enlistment, conscription or use of chid soldiers) as well as with respect to the common plan.

The position of the author of this book is that it is necessary to prove that co-perpetrators must carry out their *essential* contributions with (i) the subjective elements of the crime charged (that is *dolus directus in the first degree* for the enlistment, conscription and use of child soldiers); and (ii) awareness that the implementation of the common plan will lead to the commission of crimes (the Accused must have been aware that the implementation of the common plan [to build an effective army to ensure the UPC/FPLC's dominion in Ituri] will result in the enlistment, conscription and use of child soldiers).

The second *mens rea* element of co-perpetration, as defined in the *Lubanga* Judgment, is the awareness on the part of a perpetrator that he provided an essential contribution to the implementation of the common plan. This criterion is at odds with the *awareness* definition in the Rome Statute that is formulated in relation to a consequence and/or a circumstance. The co-perpetrator's essential contribution is neither a consequence nor a circumstance; it belongs to the conduct element. The proof of knowledge with regard to the *contribution* does not suffice. As a result, the inclusion of section (ii) renders the *mens rea* standard meaningless and in conflict with the "element analysis" approach endorsed in Article 30 of the Statute.

[1184] Mr. Lubanga was charged with enlisting, conscripting of children under the age of 15 years into armed forces and using them to participate actively in hostilities (Article (8) (2) (e) (vii) of the Rome Statute).

[1185] *Lubanga* (ICC-01/04-01/06), Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 1013.

[1186] Ambos (2012) at 149.

6.4 Accomplice Liability in the Jurisprudence of International Criminal Courts and Tribunals

Most national jurisdictions penalise complicity in the commission of a crime, which means that all those who aid, abet, procure or otherwise facilitate the commission of a criminal offence by a principal are held criminally liable. Accomplice liability, which is derivative from that of the perpetrator, is an integral part of the substantive part of international criminal law. The transposition of various forms of accomplice liability from domestic jurisdictions into international criminal law has not been smooth, and generated discussions as to how international criminal court and tribunals are expected to adjust the classic law doctrine of accomplice liability to qualify responsibility of those who render support to the culprits of core international crimes.

6.4.1 Complicity Provisions in Retrospective

The legal instruments of the Nuremberg and Tokyo Tribunals were pivotal legal authorities that introduced a legal provision governing the attribution of individual criminal responsibility. Article 6 of the Nuremberg Charter and corresponding Article 5 of the Tokyo Charter assigned criminal liability to "leaders, organisers, instigators and accomplices" who engaged into the commission of the most serious crimes. Accomplices were separated from leaders, organisers and, most surprisingly, even instigators to a crime. In the aftermath of the Nuremberg trial, the ILC Principles recognised complicity in the commission of a crime against peace, a war crime, or a crime against humanity as a distinct crime under international law.[1187] The formulation is somehow misleading because the complicity rule does not add a separate crime, rather it points to the collective dimension of core international crimes that normally requires the coordinated cooperation of multiple perpetrators.[1188]

Law No. 10 of the Allied Control Council imposed criminal responsibility upon a person who (i) was a principal; (ii) was an accessory to the commission of a crime or ordered or abetted the same; (iii) took a consenting part therein; (iv) was connected with plans or enterprises involving the commission of a crime; (v) was a member of any organisation or group connected with the commission of a crime; and (vi) with the reference to paragraph 1 (a), i.e. crimes against peace, held a high political, civil or military position or a high position in financial, industrial or economic life.[1189] The overall language is contradictory because it is not obvious

[1187] Principles of the Nuremberg Charter and Judgment Formulated by the ILC, GA Res. 177A (II), Principle VII.

[1188] For more, see: Report of the ILC on Its Second Session, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth Session, Supplement, No. 12 UN Doc. A/1316, Principle VII, pp. 377–378.

[1189] Law. No. 10 of the Allied Control Council, Article 2(2).

what exact categories of persons were supposed to be treated as accomplices. By seeking to criminalise all nuances of criminal conduct, the drafters of the legal provision on individual criminal responsibility inadvertently included a number of synonymous and often overlapping terms that denote accomplice liability.

The centrepiece of complicity is the provision of assistance or encouragement with the intent that such aid is used to commit a criminal offence.[1190] The *Zyklon B* case of the British Military Court is an excellent example on the construal of accomplice liability in the post World War II jurisprudence.[1191] The two accused—*Bruno Tesch* and *Karl Weinbacher*—were found guilty of the crimes charged and sentenced to death by hanging. Their conviction was based on the evidence that both accused acted as accomplices to the crimes committed by Nazis. While arranging for the supply of poison gas to Auschwitz, *Tesch* and *Weinbache*knew knew that it was used for mass exterminations in the concentration camps.[1192]

In another case, the United States Military Tribunal acquitted some German industrialists of the crimes charged in the absence of specific evidence that demonstrated their awareness of the purpose behind gas deliveries to concentration camps:

> [...] neither volume of production nor the fact that large shipments were destined to concentration camps would alone be sufficient to lead us to conclude that those who knew of such facts must also have had knowledge of the criminal purposes to which this substance was being put.[1193]

The 1996 ILC Draft Code assigned individual criminal responsibility for core international crime(s) to an individual who (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 (Responsibility of the Superior); (d) knowingly aids, abets or otherwise

[1190] Perkins and Boyce (1982), pp. 766–769.

[1191] *Trial of Bruno Tesch and Two Others* (The Zyklon B Case), British Military Court, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. I, London: HMSO, 1947. p. 102.

[1192] Ibid. Pleading in mitigation of sentence, counsel for *Tesch* submitted that although the defendant knew the use to which the gas was being put, and had consented to it, this happened only under enormous pressure from the S.S. In his evaluation, *Tesch* was merely an accessory before the fact, and even so, an unimportant one. Counsel for *Weinbacher* pleaded that in his capacity of a business employee the defendant might have thought that the ultimate use of the gas was *Tesch's* responsibility; and that if he had refused to supply Zyklon B the S.S. would immediately have handed him over to the Gestapo. For duress as a defence in international criminal law, see: Chap. 7.4 (Duress and Necessity).

[1193] *United States v. Krauch and Twenty Two Others* (The I.G. Farben Trial), United States Military Tribunal, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Volume X, London: HMSO, 1949, p. 24. The defendants were all officials of I.G. Farben, a large German conglomerate of chemical companies. Out of twenty four defendants, ten were acquitted on all counts. The thirteen convicted, including *Carl Krauch*, were sentenced to various terms of imprisonment ranging from seven to one and a half years.

assists, directly or 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 incited another to commit such a crime which in fact occurs.[1194] The Draft Code Commentary clarifies that complicity also extends to aiding, abetting or assisting *ex post facto*, if such assistance was agreed upon between a perpetrator and an accomplice prior to the commission of a crime.[1195] The Commentary observes that the *mens rea* of complicity is reflected in the jurisprudence of the Nuremberg Tribunal and customary law: "an accomplice must *knowingly* provide assistance to a perpetrator".[1196] An individual cannot be held accountable if he provides some type of assistance to another individual without *knowing* that this assistance will facilitate the commission of a crime.[1197] In addition, such assistance is meant to directly and substantially contribute to the commission of a crime.[1198] The Commentary does not specify what is covered by the term "substantially", noting only that the contribution ought to have had an effect on the commission of a crime. The legal instruments of modern international criminal courts and tribunals encompass complicity provisions applicable to the crimes within their jurisdiction, although their approaches are not uniform as to what conduct is covered by accomplice liability.

6.4.2 Elements of Complicity

There are three basic requirements that warrant the imposition of criminal responsibility upon an accomplice. Firstly, complicity requires proof that an underlying crime was committed by another person. This does not mean that a principal has to be *a priori* charged or convicted to hold an accomplice to account.[1199]

Secondly, there must be a material act *(actus reus)* by which an accomplice contributed to the commission of a crime by a principal. The degree of participation remains a bone of contention in the jurisprudence. The ICTY endorsed the ILC approach that requires the assistance to be *substantial*. The *Tadić* Trial Chamber clarified that participation may be considered substantial if the criminal act most probably would not have occurred in the same way, had not someone acted in the role that the principal assumed.[1200]

[1194] Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries, text adopted by the ILC at its forty-eighth session, 6 May-26 July 1996, Article 2(3). The same legal provision also proscribes "attempts to commit a crime".

[1195] Ibid., p. 21 (12).

[1196] Ibid., p. 21 (11).

[1197] Ibid.

[1198] Ibid.

[1199] *Akayesu* Trial Judgment, para. 531.

[1200] *Tadić* Trial Judgment, para. 688.

Thirdly, the accomplice's act must be carried out with knowledge of the principal's act. The same *Tadić* Trial Chamber held that the requisite *mens rea* of an accomplice involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, or otherwise aiding and abetting in the commission of a crime.[1201] The assignment of specific *mens rea* standard depends upon a form of accomplice liability, which is explicated in greater detail in the subsequent sub-sections.

6.4.3 Forms of Complicity

The existence of various forms of complicity is necessary to accurately describe the nature of the accomplice's contribution to a crime. All forms of accomplice liability have been extensively exploited and construed in the jurisprudence of international criminal courts and tribunals. Whereas the practice of the ad hoc tribunals is mostly uniform on the attribution of accomplice liability, the Rome Statute of the ICC introduces a number of innovative provisions governing accomplice liability.

6.4.3.1 Planning

Planning implies that one or several persons contemplate designing the commission of a crime at the preparatory and execution stages.[1202] The *Akayesu* Trial Judgment makes it clear that planning is only criminal if the underlying crime is committed.[1203] Furthermore, the substantial level of the accused's participation is required,[1204] even if the crime is actually committed by another person. Planning incorporates features of complicity as known in civil law jurisdictions and characteristics of a common law notion of conspiracy. However, insofar as complicity is concerned, one person is capable of planning, in contrast to conspiracy that covers multiple individuals who significantly contribute to the commission of the crime by participating jointly in formulating a plan to commit a crime.[1205]

Planning resonates with the complicity rule as understood in continental law jurisdictions in light of the necessity to prove the existence of hierarchical relations between a leader(s) and actual perpetrators within the given organisational

[1201] Ibid., para. 674.

[1202] *Akayesu* Trial Judgment, para. 480; *Blaškić* Trial Judgement, para. 279; *Kordić and Čerkez* Trial Judgement, para. 386; *Krstić* Trial Judgment, para. 601.

[1203] *Akayesu* Trial Judgment, para. 473. The finding was also reaffirmed by the ICTY Appeals Chamber, see: *Kordić and Čerkez* Appeal Judgement, para. 26.

[1204] *Kordić and Čerkez* Appeal Judgement, para. 26.

[1205] Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries, text adopted by the ILC at its forty-eighth session, 6 May-26 July 1996, Article 2(3), p. 21 (13).

framework.[1206] The inchoate crime of conspiracy requires an agreement of two or more persons to commit a crime accompanied by the basic fault requirements: (i) knowledge of any facts or circumstances specified in the substantive offence (either knowing that the fact exists or intending that certain facts will exist); and (ii) intention as in regards to conspiracy to be carried out and the substantive offence to be committed.[1207] The vagueness surrounding the notion of conspiracy stems from uncertainty as to the level of agreement shared by parties to a crime and the requisite *mens rea* standard. Despite the criticism directed at the concept of conspiracy, its utility as a preventive tool to strike against dangerous group crime is widely acknowledged.[1208]

Mettraux suggests that planning is more akin to the crime of conspiracy in common law and criticises the interpretation of the *Akayesu* Trial Chamber as "based on a misunderstanding as to the required degree of realisation of the offence".[1209] He observes that planning constitutes in most legal systems an inchoate crime, which is realised and complete once all of its elements are satisfied without a need for the offence planned to have been committed.[1210] The jurisprudence of the ad hoc tribunals treats planning as a distinct mode of accomplice liability, which is attributed only when the underlying crime is committed, rather than an inchoate offence.

If a planner and a perpetrator of a crime coincide, that person will be ultimately charged with the commission of the crime because planning is absorbed by a stronger form of principal liability. If an accused is found guilty of having committed a crime, he cannot also be convicted of having planned the same crime. However, involvement in planning may be considered as an aggravating factor.[1211] Interestingly, planning as a mode of liability has not been embedded into the Rome Statute, thus it is completely irrelevant for the prosecutions before the ICC.

[1206] "Planner" is termed as "organiser" (*организатор*) in Russian criminal law. His role presupposes the organisation of the commission of crime(s); establishment of a criminal organisation; overall direction of the commission of crime(s) or activities of the criminal organisation etc. "Organiser" always acts with direct intent. See: Raroga (2010), pp. 209–211.

[1207] Ashworth (2009), pp. 453–457. The author clarifies that the rationale behind the assignment of the highest *mens rea* standard to the crime of conspiracy is rooted in the nature of inchoate crimes, which are an extension of criminal sanction to more remote offences. This, according to him, calls for attribution of the higher degree of fault to justify criminalisation.

[1208] LaFave (2003a), pp. 467, 471.

[1209] Mettraux (2005), p. 244.

[1210] Ibid.

[1211] *Brđanin* Trial Judgement, para. 268; *Stakić* Trial Judgement, para. 443; RUF Trial Judgement, para. 269.

6.4.3.1.1 Objective Elements (*Actus Reus*)

The *actus reus* requires that the accused, alone or together with others, designed the criminal conduct that constitutes one or more crimes and the crime is later perpetrated.[1212] It is necessary to demonstrate that planning was a factor substantially contributing to such criminal conduct.[1213] The *Bagilishema* Trial Judgment interprets the term "substantial" as "formulating a criminal plan or endorsing a plan proposed by another".[1214]

6.4.3.1.2 Subjective Elements (*Mens Rea*)

The *mens rea* requires that the accused acted with direct intent in relation to his planning, or with the awareness of the substantial likelihood that a crime would be committed in the execution of that plan.[1215] In addition, the accused must be shown to have possessed the required intent for the underlying offence that he directly or indirectly intended to be committed.[1216] Hence, if a person acts with the *mens rea* lower than *dolus eventualis* towards the commission of a crime, planning cannot be attributed. The *mens rea* standard in regards to planning itself is much higher because it calls for direct or at minimum indirect intent.

6.4.3.2 Instigating, Inducing and Soliciting

Instigating means prompting another to commit an offence, which is recognised as an inchoate crime in common law and a form of complicity in continental law jurisdictions. German criminal law defines an instigator (*Anstifter*) as a person who *intentionally* induces another to *intentionally* commit an unlawful act.[1217] Russian criminal law treats an instigator (*подстрекатель)* as a person who prompted another person to commit a crime by means of persuasion, bribery, threat, or by any other method.[1218] Instigation is synonymous with the term incitement in English law that implies one party manipulating another into a state of mind conducive to

[1212] *Kordić and Čerkez* Appeal Judgement, para. 26.

[1213] Ibid.

[1214] *Bagilishema* Trial Judgment, para. 30.

[1215] *Kordić and Čerkez* Appeal Judgement, paras 29, 31.

[1216] *Semanza* Trial Judgment, para. 381; *Ndindabahizi* Trial Judgment, para. 456; *Kordić and Čerkez* Trial Judgment, para. 386.

[1217] StGB § 26 (Anstiftung) reads: "Als Anstifter wird gleich einem Täter bestraft, wer vorsätzlich einen anderen zu dessen vorsätzlich begangener rechtswidriger Tat bestimmt ist".

[1218] Article 33 (4) of the Russian Criminal Code provides: "Подстрекателем признается лицо, склонившее другое лицо к совершению преступления путем уговора, подкупа, угрозы или другим способом".

the commission of a crime.[1219] The crime of incitement was replaced with broader offences of assisting and encouraging a crime in the Serious Crime Act 2007, but it had not invalidated a range of long-standing statutory offences of incitement.[1220] As to the supporting *mens rea*, English criminal law requires (i) an intention by the instigator that another person carry out the course of conduct that the former has incited, and (ii) knowledge or belief by the instigator that at the time of another person's conduct, any circumstances required for the *actus reus* of the incited crime will be present.[1221] In American criminal law, the closest form to instigation is a crime of solicitation, which requires that the actor—acting with intent that another person commits a crime—have enticed, advised, incited, ordered or otherwise encouraged that person to commit a crime.[1222] The crime of solicitation clearly calls for the intent requirement, which means that if the person does not intend the prohibited result, the crime has not been solicited.[1223]

The jurisprudence of the ad hoc tribunals defines instigation as prompting another to commit an offence if the instigator's actions are shown to have been causal to the actual commission of the crime.[1224] Instigation as a form of criminal participation differs from the crime of "direct and public incitement to commit a genocide", since the latter constitutes a distinct crime in its own right. Instigation does not need to be "public" or "direct" in the sense those terms are applied to "direct and public incitement to commit genocide".[1225] The overall interpretation of instigation as a mode of accomplice liability in international criminal law is more consonant with the continental law theory. The ICTR jurisprudence underlines that instigation constitutes complicity only when it is accompanied by gifts, promises, threats, abuse of authority or power, machinations or culpable artifice.[1226] If this is not the case, the mere fact of prompting another to commit a crime does not amount to complicity, even if a person committed a crime as the result of it.

The terms "solicits" and "induces" in the Rome Statute bear a similar contextual meaning as the term "instigating" in the jurisprudence of the ad hoc tribunals. Given that the jurisprudence of the ICC is still in its nascent form, it is yet unclear how far the jurisprudence will depart from the interpretation of "instigating" endorsed by the ad hoc tribunals. The *Harun* Pre-Trial Chamber established reasonable grounds to believe that the suspect in his capacity as the Minister of State had personally incited Militia/Janjaweed to attack the civilian populations on

[1219] Simester and Sullivan (2007), pp. 270–271. In English criminal law, incitement is treated as an inchoate crime.

[1220] Ashworth (2009), pp. 457–463.

[1221] Simester and Sullivan (2007), pp. 277–278.

[1222] LaFave (2003b), p. 569.

[1223] Ibid., p. 573.

[1224] *Kordić and Čerkez* Appeal Judgement, para. 27; *Akayesu* Trial Judgment, paras 481–482; *Rutaganda* Trial Judgment, para. 38; *Musema* Trial Judgment, para. 120.

[1225] *Akayesu* Appeal Judgment, para. 482; *Kajelijeli* Trial Judgement, para. 762.

[1226] *Akayesu* Trial Judgment, para. 534.

several occasions upon the consideration of a number of evidentiary factors, among others, his speech against the *Fur* group, promises of a large amount of money to the Militia/Janjaweed, and continuous support of the government.[1227] Similarly, all suspects in the situation in Uganda, including *Kony*, *Otti*, *Odhiambo* and *Ongwen*, who represent the leadership of the notorious LRA (Lord's Resistance Army) are charged with inducing the commission of multiple crimes against humanity and war crimes.[1228] A standing warrant of arrest against *Vincent Otti*, Second-in-Command to the LRA's Chairman, describes him as a commander who was allegedly directly involved with the implementation of the objectives and strategies of the LRA.[1229] The strong language of the warrant arrest does not tally well with the chosen form of accomplice liability. The suspect may well qualify as a co-perpetrator if it is to be proved that he acted in a concerted effort with *Kony* to implement the campaign of the brutalisation of civilian population. Given that all suspects who are charged on the basis of Article 25 (3) (b) of the Statute are at large, there is lack of clarity how the provision will be construed and applied in practice. The language of the early jurisprudence favours a rather broad interpretation of "inducement" which appears to be synonymous with incitement, encouragement, and even abetting.[1230]

6.4.3.2.1 Objective Elements (*Actus Reus*)

The *actus reus* requires that the accused prompted another person to commit the offence and that instigation was a factor substantially contributing to the conduct of the other person or persons committing the crime.[1231]

6.4.3.2.2 Subjective Elements (*Mens Rea*)

The *mens rea* requires that the accused acted with direct intent in relation to his instigation, or with the awareness of the substantial likelihood that a crime would be committed in the execution of that instigation.[1232] The instigator must be shown to have possessed the requisite criminal intent, in particular that "he directly or

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[1227] *Harun* et al., (ICC-02/05-01/07), Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, para. 90 (original footnote omitted).

[1228] *Kony* (ICC-02/04-01/05), Warrant of Arrest for Joseph Kony, 8 July 2005 as amended on 27 September 2005, paras 10, 42. An overview of charges levied against other suspects in the situation in Uganda may be found at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/Pages/uganda.aspx.

[1229] *Otti* (ICC-02/04), Warrant of Arrest for Vincent Otti, 8 July 2005, paras 10, 13.

[1230] Schabas (2010), p. 433.

[1231] *Kordić and Čerkez* Appeal Judgement, para. 27; *Gagumbitsi* Appeal Judgement, para. 129.

[1232] *Kordić and Čerkez* Appeal Judgement, paras 29, 32.

indirectly intended that the crime in question be committed".[1233] Given the absence of the special *mens rea* clause in the text of the Rome Statute as to the forms of complicity, the general *mens rea* requirement under Article 30 of the Rome Statute has to be proved. It means that an instigator must exert his influence on another person with intent and knowledge.[1234] The instigator must also presuppose that a principal will carry out the crime in a state of mind required by the Rome Statute. The Rome Statute commentary notes that the instigator is acting with a "double intent" with regard to his own conduct and that of a principal.[1235] In domestic criminal law, "instigator" always acts intentionally because the volitional element of the instigator's conduct involves the desire/will to see the crime materialise, thus he cannot act negligently.[1236]

6.4.3.3 Ordering

Ordering as a form of complicity materialises through instructions given by a person in a position of authority to a direct perpetrator of a criminal offence. In domestic criminal law, ordering is normally absorbed by "instigation". As an illustration, ordering is treated as a form of instigation in Russian criminal law that captures situations of a person abusing his position of authority to prompt another to commit a crime. It is important to bear in mind that the execution of the order entirely depends upon the will of the person who is being prompted to commit a crime. If a person is coerced to engage in the commission of a crime, then indirect perpetration as a principal mode of liability is assigned to a person who gave an order.[1237] The same distinction is true for German criminal law that construes the notion of free will (*Willen*) as a crucial feature that differentiates instigation (*Anstiftung*) from indirect perpetration (*mittelbarer Täterschaft*).[1238] Similarly, the ICC Pre-Trial Chamber clearly distinguished ordering as an accomplice form of liability (Article 25 (3) (b) of the Rome Statute) from a different type of ordering when the leader in command of an organisation commits crimes "through another person", thus incurring criminal liability as a principal perpetrator within the meaning of Article 25 (3) (a) of the Rome Statute.[1239] In American criminal law, ordering—on a par with enticement, advice, and encouragement—shapes the crime

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[1233] *Blaškić* Trial Judgment, para. 278; *Bagilsihema* Trial Judgment, para. 31.

[1234] Cassese et al. (2002), p. 797.

[1235] Ibid.

[1236] In Russian criminal law, see: Raroga (2010), pp. 212–213; Kosachenko (2009), p. 344. In German criminal law, see: Baumann et al. (2003), p. 719.

[1237] Kosachenko (2009), p. 343.

[1238] Baumann et al. (2003), p. 731.

[1239] *Katanga* et al. (ICC-01/04-01/07), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, para. 517.

of solicitation.[1240] In the jurisprudence of the ad hoc tribunals, ordering entails a person in a position of authority who uses that position to convince another to commit an offence.[1241]

6.4.3.3.1 Objective Elements (*Actus Reus*)

The *actus reus* of ordering requires that a person exploits his authority to instruct another to commit a crime.[1242] A superior who orders the commission of the crime by his subordinate(s) fails to ensure the lawful conduct of his subordinates, and thus abuses the authority inherent to his position.[1243] The order may be given either implicitly or explicitly, while the fact of its existence may be established circumstantially.[1244] The ICTY *Blaškić* Trial Chamber clarified that the order does not need to be illegal on its face to engage the responsibility of the person who has issued it, nor does it have to be given directly or personally to the individual, in order to be criminally responsible.[1245]

No formal superior-subordinate relationship between a person who gives the order and a direct perpetrator is necessary.[1246] It is sufficient that the accused had the authority (*de jure* or *de facto*) to order the commission of a criminal offence and such authority can be reasonably inferred.[1247] The causal link between the act of ordering and the physical perpetration of a crime is part of the *actus reus* of this mode of liability, but it does have not to be such as to show that the offence would not have been perpetrated in the absence of that order.[1248] The Rome Statute lists ordering in the same sub-section as soliciting and inducing, which indicates that ordering is viewed as the strongest form of instigation. The Rome Statute commentary pinpoints that ordering appears to be more appropriately dealt with in other legal provisions of the Statute. It submits that active ordering to commit a crime is a typical case of indirect perpetration, whereas the omission on the part of a commander to prevent or repress the commission of the crimes committed by his subordinates is governed by Article 28 of the Rome Statute.[1249]

[1240] LaFave (2003b), p. 569.

[1241] *Krstić* Trial Judgment, para. 601; *Rutaganda* Trial Judgment, para. 39; *Kordić and Čerkez* Appeal Judgement, para. 28.

[1242] *Kordić and Čerkez* Appeal Judgement, para. 28.

[1243] 1996 ILC Commentary, Article 2 (3) (b), at 20 (8).

[1244] *Blaškić* Trial Judgment, para. 281.

[1245] Ibid., para. 282.

[1246] *Galić* Appeal Judgement, para. 176; *Semanza* Appeal Judgement, para. 361; *Kamuhanda* Appeal Judgement, para. 75.

[1247] *Limaj* Trial Judgement, para. 515; *Brđanin* Trial Judgement, para. 270.

[1248] *Strugar* Trial Judgement, para. 332; RUF Trial Judgement, para. 273.

[1249] Cassese et al. (2002), p. 797.

6.4.3.3.2 Subjective Elements (*Mens Rea*)

It was rightly penned in the ILC commentary that a superior who orders the commission of the crime is in some respects more culpable than the subordinate, who merely carries out the order and thereby commits a crime that he would not have committed on his own initiative.[1250] With respect to the *mens rea* of ordering, what really matters is the state of mind of the person giving the order and not that of the person who is obeying it.[1251] It is required that the accused acted with direct intent in relation to his ordering, or with the awareness of the substantial likelihood that a crime will be committed in the execution of that order.[1252] The default *mens rea* standard of "intent and knowledge" applies to ordering within the meaning of the Rome Statute.

6.4.3.4 Aiding and Abetting

The Accessories and Abettors Act 1861 is an English legal authority which lists aiding, abetting, counselling and procuring as separate modes of secondary/accomplice liability. However, the jurisprudence has often failed to capture semantic distinctions among these modes of liability. In general terms, "aiding" means helping/assisting the principal at the time when the offence is committed, whereas "abetting" implies encouragement to commit a crime.[1253] American criminal law broadly speaks of "assisting or encouraging the crime" accompanied by the requisite *mens rea* of an accomplice who must intentionally assist or encourage the principal in the commission of a crime.[1254] A certain degree of confusion exists as to what degree of *mens rea* is required on the part of an accomplice with respect to his assistance or encouragement and the crime perpetrated by a principal.

The ICTR jurisprudence outlines "aiding" in terms of "giving assistance to someone", while it construes abetting as "facilitating the commission of an act by being sympathetic thereto".[1255] Semantic distinctions between these two terms are often neglected in the jurisprudence. The evolved case law of the ICTY treats "aiding and abetting" as a cumulative term: "an aider and abettor carries out acts directed to assist, encourage, or lend moral support to the perpetration of a certain crime, which have a *substantial* effect on the perpetration of a crime".[1256]

[1250] 1996 ILC Commentary, Article 2 (3) (b), at 20 (8).

[1251] *Blaškić* Trial Judgement, para. 282.

[1252] *Blaškić* Appeal Judgement, para. 42; *Galić* Appeal Judgement, para. 152; *Kordić and Čerkez* Appeal Judgement, paras 29–30.

[1253] Elliott and Quinn (2008), pp. 273–275.

[1254] LaFave (2003a), p. 519.

[1255] *Akayesu* Trial Judgment, para. 484.

[1256] *Blagojević* Appeal Judgement, para. 127; *Simić* Appeal Judgement, paras 85–86; *Vasiljević* Appeal Judgement, para. 102; *Blaškič* Appeal Judgement, para. 45; *Tadić* Appeal Judgement, para. 229 (emphasis added).

6.4.3.4.1 Objective Elements (*Actus Reus*)

The *actus reus* of "aiding and abetting" requires that an accomplice gave practical assistance, encouragement or moral support which had a *substantial* effect on the perpetration of a crime. Aiding and abetting may involve planning, preparation or execution of a criminal offence. The *actus reus* may occur before, during or after the principal crime has been committed and at a location geographically removed from the location of the principal crime.[1257] If aiding and abetting occurs after the crime, it must be established that a prior agreement existed between a principal and a person who subsequently aided and abetted in the commission of the crime.[1258] The contribution to the crime may be provided directly, or through an intermediary, and irrespective of whether the participant was present or removed both in time and place from the actual commission of the crime.[1259]

"Aiding and abetting" does not always require a positive act of an accomplice and may also consist of an omission.[1260] Mere presence at the scene of a crime does not usually constitute "aiding and abetting", however, it may be the case in situations when the physical presence of the accomplice, combined with his position of authority and non-interference, amounts to tacit approval and encouragement to commit the crime.[1261] Likewise, the superior's failure to punish subordinates for the crimes may constitute instigation or "aiding and abetting" to commit further crimes.[1262] In order to prove that the omission qualifies as "aiding and abetting", it is necessary to demonstrate that (i) the omission had a *substantial* effect on the crime in the sense that the crime would have been substantially less likely, had the accomplice acted; and (ii) the accomplice knew that the commission of the crime was probable and his inaction assisted it.[1263]

"Aiding and abetting" is stipulated as an accomplice form of liability in the Rome Statute. The Rome Statute commentary notes uncertainty as to the interpretation of the "substantiality" criterion in the prospective jurisprudence of the Court, but predicts the "influential and even persuasive" impact of the practices of the ad hoc tribunals upon the jurisprudential development.[1264]

[1257] *Blaškić* Appeal Judgement, para. 48.

[1258] *Blagojević* Trial Judgement, para. 731.

[1259] *CDF* Appeal Judgement, para. 72.

[1260] *Orić* Appeal Judgement, para. 43.

[1261] *Brđanin* Appeal Judgement, para. 273; *Orić* Appeal Judgement, para. 42; *Kayishema* Appeal Judgement, paras 201–202.

[1262] *Blaškić* Trial Judgement, para. 337.

[1263] *Mrkšić and Šljivančanin* Appeal Judgement, paras 97, 101; *Orić Appeal Judgement*, para. 43.

[1264] Schabas (2010), p. 435.

6.4.3.4.2 Subjective Elements (*Mens Rea*)

The *mens rea* of "aiding and abetting" comprises knowledge that the acts performed by an aider/abettor assist the commission of the crime by the principal offender.[1265] Such knowledge may be inferred from all relevant circumstances.[1266] The aider/abettor does not need to share the *mens rea* of the principal offender, although he must be aware of the principal offender's intention.[1267] The mental element in support of this mode of liability rests on the accessory's *knowledge* that his actions assist the principal in the commission of the crime.[1268] The principal does not need to be aware of the involvement of the aider/abettor.[1269]

When it comes to specific intent offences, the aider/abettor does not need to share the principal offender's intent, but he must be aware of the principal's specific intent.[1270] It must be shown that the aider/abettor was aware of the essential constitutive elements of the crime that was ultimately committed by the principal".[1271] However, the aider/abettor does not need to know about the precise crime intended by the principal offender. If he is aware that one of a number of crimes will *probably* be committed by the principal offender, and one of those crimes is in fact committed, then he has intended to assist or facilitate the commission of that crime, and may be found guilty of "aiding and abetting".[1272]

Article 25 (3) (c) of the Rome Statute reads that "aiding and abetting" shall be committed "for the purpose of facilitating the commission of a crime". The wording suggests the existence of specific intent "to facilitate the commission of a crime" that accompanies this mode of liability. The specific intent requirement in support of "aiding and abetting" has not been examined in the jurisprudence of the ad hoc tribunals and appears to be a novice criterion introduced in the Rome Statute. It was affirmed that "aiding and abetting" must be accompanied by intent in the *Mbarushimana* DCC. This was done in order to distinguish between "aiding and abetting" proper and "any contribution to a group crime" under Article 25 (3) (d)

[1265] *Brđanin* Appeal Judgement, para. 484*; Blaškič* Appeal Judgement, para. 49; *Vasiljević* Appeal Judgement, para. 102; *Aleksovski* Appeal Judgement, para. 162; *Tadić* Appeal Judgement, para. 229.

[1266] *Limaj* Trial Judgement, para. 518; *Čelebići* Trial Judgement, para. 328; *Tadić* Trial Judgement, para. 676.

[1267] *Aleksovski* Appeal Judgement, para. 162; *Furundžija* Trial Judgement, para. 245; *Limaj* Trial Judgement, para. 518; *Brđanin* Trial Judgement, para. 273; *Kunarac* Trial Judgement, para. 392.

[1268] *Furundžija* Tria1 Judgment, para. 249; *Musema* Trial Judgment, para. 126; *Kunarac* Trial Judgement, para. 391.

[1269] *Tadić* Appeal Judgement, para. 229.

[1270] *Ntakirutimana* Appeal Judgement, para. 501; *Krstić* Appeal Judgement, para. 140; *Vasiljević* Appeal Judgement, para. 142; *Krnojelac* Appeal Judgement, para. 52; *Semanza* Appeal Judgement, para. 316.

[1271] *Aleksovski* Appeal Judgement, para. 162.

[1272] *Blaškić* Appeal Judgement, para. 50; *Simić* Appeal Judgement, para. 86 (emphasis added).

that may be satisfied by the knowledge requirement alone.[1273] The *mens rea* requirement envisaged in the Rome Statute is undoubtedly higher when compared to the jurisprudence of the ad hoc tribunals. The "purpose" element requires that the aidor/abettor knows and wishes that his assistance facilitated the commission of the crime.[1274]

6.4.3.5 Complicity in Group Crimes Under Article 25 (3) (d) the Rome Statute

Complicity in group crimes is an innovation of the Rome Statute that has not *a priori* featured in the jurisprudence of other international criminal courts and tribunals. This form of accomplice liability is commonly regarded as a substitute for the concept of conspiracy that has been applied in the jurisprudence of the Nuremberg Tribunal and henceforth. The 1998 Draft Code of the Rome Statute failed to include conspiracy as an inchoate crime and opted for "complicity in group crimes", an offspring of the continental law theory.[1275] Given the novelty of the concept in international criminal law, the ICTY Appeals Chamber erroneously referred to the respective provision of the Rome Statute to support its finding on the existence of JCE in customary law.[1276] The ICC judges pondered over the distinction between JCE and "complicity in group crime", as both of them are often confused because of the collective dimension of criminality that they are used to convey. It is helpful to answer a number of questions in order to draw an accurate distinction between those modes of liability: (i) whether a defendant who is found guilty is convicted as a principal or accessory; (ii) whether a defendant must be in the group acting with the common purpose or not; (iii) whether the contribution is to the common purpose or to the crimes committed; and (iv) whether some form of intent or mere knowledge is sufficient for responsibility".[1277] If all questions are answered in the affirmative, then the responsibility of the accused qualifies as the participation in JCE, a principal mode of liability that pertains to the statutory framework of the ad hoc and hybrid tribunals.

Despite often-voiced concerns about the utility of "complicity in group crime", it has already been employed to qualify criminal conduct of a few suspects, although winning convictions on its basis remain to be seen. In the *Harun* et al. case, it was alleged that two suspects personally contributed to "a common plan to pursue a shared and illegal objective of attacking civilian populations in Darfur" within the

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[1273] *Mbarushimana* (ICC-01/04-01/10), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, para. 289.

[1274] Cassese et al. (2002), p. 801.

[1275] Ibid., p. 802.

[1276] *Tadić* Appeal Judgement, para. 222.

[1277] *Mbarushimana* (ICC-01/04-01/10), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, para. 282 (original footnotes omitted).

meaning of Article 25 (3) (d) of the Statute.[1278] Pre-Trial Chamber I established reasonable grounds to believe that, by reason of his position on the Darfur Security desk and personal participation in key activities of the Security Committees, *Ahmad Harun* intentionally contributed to the commission of the crimes charged, knowing that his contribution would further the common plan of attacking the civilian population in Darfur which was carried out by the Sudanese Armed Forces and the Militia/Janjaweed.[1279] The same mode of liability was invoked by the Prosecution with respect to one of the suspects in the DRC situation, *Calixte Mbarushimana*, on the basis of his alleged contribution to the commission of crimes by a group of persons acting with a common purpose. However, the Majority was not satisfied to the threshold of "substantial grounds to believe" that the FDLR (Forces Démocratiques de Libération du Rwanda) pursued the policy of attacking the civilian population.[1280] Upon the evaluation of specific evidence, the Majority did not find that the FDLR leadership constituted "a group of persons acting with a common purpose" within the meaning of Article 25 (3) (d) of the Statute, and failed to establish that the suspect provided contribution to the commission of such crimes.[1281] In her dissenting opinion, Judge Monageng found that the evidence record supported the required standard of proof with regards to the common purpose of the FDLR, which included the commission of the crimes charged.[1282] The common purpose, in her respectful opinion, was devised with the view to create a humanitarian catastrophe and to exert pressure on the Government of the DRC, the Government of Rwanda and the international community, so that they would succumb to the political demands of the FDLR.[1283]

On appeal, the Prosecutor submitted that the Pre-Trial Chamber committed an error of law in its interpretation of the contribution threshold required under article 25 (3) (d) of the Statute.[1284] The thrust of the Prosecution argument is that, by evaluating the suspect's conduct in terms of its *significance*, the Pre-Trial Chamber misconstrued the statutory language and the drafter's intent which criminalises "any" contribution to a crime.[1285] The Defence dismissed the Prosecution's argument as "purely academic" speculation with respect to the required level of contribution, since the Pre-Trial Chamber found that *Mr. Mbarushimana* did not

[1278] *Harun* et al., (ICC-02/05-01/07), Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58 (7) of the Statute, 27 April 2007, para. 76.

[1279] Ibid., para. 88.

[1280] *Mbarushimana* (ICC-01/04-01/10), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, para. 291.

[1281] Ibid., para. 292.

[1282] Dissenting Opinion of Judge Sanji Mmasenono Monageng, para. 43.

[1283] Ibid., para. 47.

[1284] *Mbarushimana* (ICC-01/04-01/10), Appeals Chamber, 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, para. 59 (original footnote omitted).

[1285] Ibid., para. 60 (original footnote omitted).

contribute *at all* to the alleged crimes.[1286] The Appeals Chamber chose not to venture into the disputed area of the contribution threshold, and clarified that the issue *only* arises when there was a crime committed or attempted by a group acting with a common purpose.[1287]

In a separate opinion, Judge Fernandez de Gurmendi disagreed with the Majority not to address the alleged error of law as to the construal of the contribution threshold, and concluded that the Pre-Trial Chamber erred in finding that the contribution to the crimes within the meaning of Article 25(3)(d) must be *significant*.[1288] Although Judge Fernandez de Gurmendi did not delve deeper into the discussion of how the required contribution level within the meaning of Article 25 (3) (d) correlates with the level of contribution required for other forms of accomplice and principal liability, she advanced an important argument on the need to ensure certainty of definitions on which the jurisprudence of the Court offers little guidance.[1289]

The case against *Joshua Arap Sang* is awaiting trial on the charges of crimes against humanity on the basis of Article 25 (3) (d) of the Rome Statute.[1290] In another Kenyan case, the judges declined to confirm charges against *Mohammed Hussein Ali* by failing to establish to the requisite threshold the existence of an identifiable course of conduct of the Kenyan police amounting to participation, by way of inaction, in the attack perpetrated by the *Mungiki* against the political opponents of the PNU coalition.[1291]

6.4.3.5.1 Objective Elements (*Actus Reus*)

It is necessary to flesh out the provision of Article 25 (3) (d) of the Rome Statute in order to establish the objective elements of this mode of participation. Firstly, the crime shall be committed by “a group acting with a *common purpose*”. The judges noted that the common legal ingredient of “an agreement or common plan between two or more persons” pertains to “co-perpetration” and “complicity in group crimes” alike, although those modes of liability serve different purpose. Co-perpetration is reserved for principals of core international crimes, whereas a form of liability under Article 25 (3) (d) captures accomplice(s) in group crime.[1292]

[1286] Ibid., paras 61–62 (original footnotes omitted).

[1287] Ibid., para. 65.

[1288] Ibid., Separate Opinion of Judge Silvia Fernandez de Gurmendi, para. 15.

[1289] Ibid., para. 5.

[1290] *Ruto* et al. (ICC-01/09-01/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, para. 367.

[1291] *Muthaura* et al. (ICC-01/09-02/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, paras 420–427.

[1292] *Mbarushimana* (ICC-01/04-01/10), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, para. 271 (original footnote omitted).

As to the "link" between the suspect and the group requirement, the Defence referred to *Cassese* who construed Article 25 (3) (d) as applicable only to non-group members.[1293] The Pre-Trial Chamber rejected such a narrow interpretation of accomplice liability for the reason that it "would unnecessarily restrict the responsibility of group members who make non-essential contributions *within* the group", which was reckoned to run contrary to any literal, systematic or teleological interpretation of the principles in the Rome Statute.[1294]

Secondly, there must be a contribution to the commission of a crime that must be rendered in any *other* form than provided in sub-sections (a)-(c) of Article 25(3) of the Statute. Given the absence of any clarification on the "contribution" requirement, which satisfies Article 25 (3) (d) of the Statute, the judges grappled with the question in the *Mbarushimana* DCC in which it was held that the contribution to a crime (crimes) must reach a certain threshold of significance in order to be within the Court's ambit.[1295] Such interpretation was meant to warn against situations when "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" satisfies the legal elements of Article 25 (3) (d) liability.[1296]

The *Mbarushimana* DCC implies the existence of a strict hierarchy of modes of liability in the Rome Statute by submitting that "complicity in group crime" is a residual form of accessorial liability supported by the level of the contribution which is much lower than required for other overarching forms of liability in Article 25 (3) (a)-(c) of the Statute.[1297] The finding was re-affirmed in the subsequent case law that defined Article 25 (3) (d) as a "catch all form liability" that covers the contribution done "in any other way".[1298] The *Ruto* Pre-Trial Chamber held that the assumption of the contribution to be "substantial" for purposes of Article 25 (3) (d) is in conflict with an overarching accomplice liability of "aiding and abetting".[1299]

In contrast to the jurisprudence of the ad hoc tribunals that defines "aiding and abetting" as an accomplice form of liability accompanied by the *mens rea* standard of knowledge, the ICC statutory framework as well as the developed jurisprudence seem to reserve a similar function to the residual form of accomplice liability laid down in Article 25 (3) (d) of the Statute.

One of the suspects in the Kenyan case was recognised, by virtue of his position as a key broadcaster, as contributing to the commission of crimes against humanity

[1293] Ibid., para. 273 citing in Cassese (2008), p. 213.

[1294] Ibid., paras 273–275.

[1295] Ibid., para. 276.

[1296] Ibid., para. 277 (original footnote omitted).

[1297] Ibid., paras 278–279.

[1298] *Ruto* et al. (ICC-01/09-01/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, para. 354.

[1299] Ibid.

within the meaning of Article 25 (3) (d) through, *inter alia*, the spreading of hate messages to expel the *Kikuyus*, broadcasting false news regarding alleged murders of *Kalenjin* people, and broadcasting instructions during the attacks in order to direct the physical perpetrators to the targeted areas.[1300] The evidence is indicative of the suspect's role in soliciting the commission of crimes against humanity that seems to be an excellent fit for the qualification under Article 25 (3) (b) of the Rome Statute. However, the preference is clearly given to a "less demanding" form of liability that does not lay a heavier burden of proof with respect to the requisite *mens rea* standard and the contribution requirement.

It is noteworthy to mention that the contribution to a crime may occur *post factum* insofar as it has been agreed between the group acting with a common purpose and the suspect *prior* to the commission of the crime.[1301]

6.4.3.5.2 Subjective Elements (*Mens Rea*)

The contribution to a crime is always intentional. The *Mbarushimana* Pre-Trial Chamber clarified that the suspect must (i) mean to engage in the relevant conduct that allegedly contributes to the crime; and (ii) be at least aware that his/her conduct contributes to the activities of the group of persons for whose crimes he or she is alleged to bear responsibility.[1302]

Apart from the "intentionality" aspect of the contribution, it must be carried out either (i) 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(s) within the jurisdiction of the Court; or (ii) in the knowledge of the intention of the group to commit the crime. It is clear from the above that those scenarios are formulated in disjunctive terms. This provision has generated much confusion as to the requisite *mens rea* standard attached to the crimes, which form part of the common purpose of the group. The *Mbarushimana* Pre-Trial Chamber held that the sufficiency of knowledge requirement rendered it unnecessary to prove that the accomplice entertained the intent to commit any specific crime(s).[1303]

In the Kenyan case, the contribution of one of the suspects was reckoned to satisfy the specific intent requirement set out in Article 25 (3) (d) (i).[1304] This is a rather complex scenario when the *mens rea* of the suspect is at the highest, whereas the contribution to the crime is non-essential. Had the facts been put forward before the judges of the ad hoc tribunals, the conviction on the basis of JCE would be

[1300] Ibid., para. 355.

[1301] *Mbarushimana* (ICC-01/04-01/10), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, para. 287 (emphasis added).

[1302] Ibid., para. 288.

[1303] Ibid., para. 289.

[1304] *Ruto* et al. (ICC-01/09-01/11), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, para. 364.

guaranteed. It is clear that the ICC judges try to maintain a delicate balance between the theories of objective and subjective liability. On the one hand, they resolutely wish to distance themselves from the purely subjective concept of JCE, a "darling" of the ad hoc tribunals. On the other hand, they seem to have struggled with the construal of the contribution criterion not only with respect to Article 25 (3) (d) but also other modes of liability.

The jurisprudence distinguishes between a lower *mens rea* standard of knowledge laid down in Article 25 (3) (d) (ii) and other higher *mens rea* standards required for the overarching modes of participation.[1305] Given that "aiding and abetting" must be accompanied by specific intent pursuant to Article 25 (3) (c) of the Statute, which is a much higher *mens rea* threshold than the knowledge requirement in the ad hoc tribunals, Article 25 (3) (d) performs a function of "catch all form liability". The use of different *mens rea* standards in Article 25 (3) (d) is not entirely clear, but it has been taken as the lack of expertise in criminal law theory by the drafters of the Rome Statute.[1306]

6.5 Command Responsibility as a Mode of Criminal Liability in International Criminal Law

The doctrine of command responsibility is an important pillar of individual criminal responsibility that has acquired the level of international customary law.[1307] It enables the provision of "valuable legal responses to mass atrocities" that are normally directed by the generals and presidents who bear a greater share of moral responsibility than foot soldiers carrying out the crimes on the ground.[1308] The concept of command responsibility was originally devised in the military context and strictly reserved for war crimes. It has been gradually expanded to genocide and crimes against humanity in the jurisprudence of the ad hoc tribunals that construes command responsibility more broadly by equally applying it to *de jure* and *de facto* commanders. Notwithstanding the acknowledged advantages in the qualification of criminal conduct under the umbrella of command responsibility in the jurisprudence of international criminal courts, there are very few successful convictions on the basis of command responsibility alone. The ad hoc tribunals appear to be "comfortable" with the attribution of command responsibility if there is enough sufficient evidence that supports convictions on the basis of other more

[1305] *Mbarushimana* (ICC-01/04-01/10), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, para. 289.

[1306] Cassese et al. (2002), p. 803.

[1307] *Blaškić* Trial Judgement, para. 290; *Čelebići* Trial Judgement, para. 343; *Kayishema* Trial Judgement, para. 209.

[1308] Martinez (2007) at 639.

direct modes of liability. Some early developments on the use of command responsibility may already be discerned in the evolving jurisprudence of the ICC.

6.5.1 Command Responsibility in Retrospective

The concept of command responsibility has been a stumbling block in the jurisprudence of the post World War II tribunals and modern international criminal courts, particularly when it comes to the discussion of the requisite *mens rea* standard. How is it feasible to demonstrate the link between the actual crimes and high-ranking commanders? Could a superior be held criminally liable if he remains wilfully blind to the commission of the crimes by his subordinates? The threshold of the burden of proof is contentious as well. Neither the Nuremberg Charter nor Control Council Law No. 10 encompass legal provisions on criminal responsibility of commanders. The doctrine of command responsibility got a second wind in the jurisprudence of the post World War II military tribunals, which is briefly discussed below.

The most controversial command responsibility case involves the commanding general *Tomoyuki Yamashita* of the Imperial Japanese Army in the Philippines who was found criminally liable by the US Military Commission in Manila for the failure to provide effective control over his troops that committed widespread atrocities.[1309] The debate dwelled on the requisite *mens rea* standard, as it was questioned whether the general had knowledge of the crimes committed by his subordinates due to the apparent lack of any supporting evidence that attested to the general's exercise of effective control over his troops.[1310] The Military Commission held him liable for the lawless acts of his troops and sentenced him to death.[1311]

The case was further brought under *habeas corpus* to the US Supreme Court that eventually upheld the disputed conviction,[1312] thus having set a controversial precedent of criminal responsibility being imputed to a commander on the basis of his military position alone. The Supreme Court recognised that the law of war imposed on a commander the duty to take any appropriate measures within his power to control the troops under his command in order to prevent acts, which constituted violations of the law of war. In the Majority's opinion, the commander

[1309] *Trial of General Tomoyuki Yamashita*, United States Military Commission, Manila (8th October-7th December 1945), and the Supreme Court of the United States, Judgement, 4th February 1946 (327 US 1, 66 S.Ct. 340, 90 L.ed. 499 (1946)), reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. IV, London: HMSO, 1948 at 35.

[1310] Ibid., at 28–29.

[1311] Ibid., at 35.

[1312] Ibid., at 37.

was legitimately charged with personal responsibility arising from his failure to take such measures.[1313]

Apart from a number of procedural issues discussed by the Court, the focal question was whether the law of war imposes on an army commander a duty to take appropriate measures within his power to control the troops under his command for the prevention of violations of the law of war.[1314] Another fundamental question was whether a superior may be charged with personal responsibility for his failure to take such measures when violations occur.[1315] The Chief Justice held that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations.[1316] The purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection.[1317] He continued that the law of war presupposes to avoid violations through the control of the operations of war by commanders who are to some extent responsible for their subordinates.[1318] Having failed to draw express conclusions on the commander's *mens rea*, the Majority ruled in favour of the culpable failure on the part of the general to perform the duty imposed on him by the law of war.[1319] The *Yamashita* precedent stands out in the history of international criminal justice as a "warning against the unrestrained temptation of making law to fit a preferred judicial result".[1320]

The US Military Tribunal in the *Hostages* Trial[1321] re-affirmed the primary responsibility of a commanding general to prevent the commission of crimes and punish those responsible, which he cannot escape by denying his authority over perpetrators.[1322] The judges noted similarities between the factual background of the given case and the *Yamashita* case, as both of them dealt with the extent of a commander's responsibility over the crimes committed by subordinates. In stark contrast to the approach endorsed

[1313] Ibid., at 43. The US Supreme Court invoked Article 1 of the Hague Convention No. IV of 1907, Article 19 of the Hague Convention No. X, Article 26 of the 1929 Geneva Convention (for the amelioration of the condition of the wounded and sick in armies in the field) and Article 43 of the Regulations annexed to The Hague Convention No. IV.

[1314] Ibid.

[1315] Ibid.

[1316] Ibid.

[1317] Ibid.

[1318] Ibid.

[1319] Judge Rutledge appended a dissenting opinion in which he contested the general's conviction in the absence of proof of knowledge with respect to the crimes committed by his subordinates. See: ibid., at 59–61.

[1320] Mettraux (2009), p. 8.

[1321] *United States v. List and Others* (Hostage case), United States Military Tribunals sitting at Nuremberg, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. VIII, London: HMSO, 1949.

[1322] Ibid., at 89.

by the Majority in the *Yamashita* case, the judges acknowledged the importance of examining the extent of the accused's *knowledge* of offences being committed by troops.[1323] The proof of constructive knowledge was deemed sufficient to satisfy the requisite *mens rea* standard. It was held that an army commander would not be permitted either to deny knowledge of reports received at his headquarters or happenings within the area of his command during his presence therein.[1324] Likewise, the judges found improbable that a high-ranking military commander would permit himself to get out of touch with current happenings in the area of his command during war time. Said that, the attribution of criminal responsibility to a commander in his temporary absence would require the proof that the crimes resulted from orders, directions or a general prescribed policy formulated by a military commander.[1325] It is clear from the discussion above that the subjective test of liability was upheld, since a commander could not be held responsible unless he knowingly approved of the action taken by his troops.

The *High Command* Trial dealt with high-ranking German commanders who were indicted on multiple charges of crimes against peace, war crimes and crimes against humanity committed in the countries occupied by Germany during the war.[1326] While examining the responsibility of the accused for the crimes committed by their subordinates, the judges averred that an officer who merely stands by when his subordinates execute a criminal order of his superiors, which he knows is criminal, violates a moral obligation under international law.[1327] It was deemed intolerable for the commander to wash his hands of international responsibility by doing nothing.[1328] It was rightly penned that the responsibility of commanders was not unlimited. In order to impute responsibility to a commander, his act or neglect to act must have been voluntary and criminal.[1329] The extent of command responsibility was brilliantly summarised in the following fashion:

> Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.

As to the *mens rea* standard, it was held that a commander must have knowledge of the crimes and acquiesce or participate or criminally neglect to interfere in their commission.[1330] It is commendable that the judges in the *Hostages* and *High*

[1323] Ibid. (emphasis added).

[1324] Ibid., at 70.

[1325] Ibid.

[1326] *United States v. Wilhelm von Leeb* et al., (High Command Case), United States Military Tribunal sitting in Nuremberg, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. XII, London: HMSO, 1949.

[1327] Ibid., at 75.

[1328] Ibid.

[1329] Ibid., at 75.

[1330] Ibid., at 77.

Command trials distanced themselves from the controversial precedent laid down in the *Yamashita* case that attributed command responsibility on the basis of the superior's position in the military hierarchy, rather than his knowledge of the crimes committed by subordinates.

6.5.2 Command Responsibility in the Jurisprudence of the Ad Hoc Tribunals

Command responsibility is a form of criminal participation when a commander in a hierarchically responsible position can be held criminally liable for the failure to interfere with the acts of his subordinates. Command responsibility is not to be confounded with other more direct modes of liability. It is rightly penned in the academic literature that the developed jurisprudence of the ad hoc tribunals is not exactly a "paragon of clarity" when it comes to the distinction between command responsibility and ordering.[1331] Ordering as a form of liability requires a positive act by a person in a position of authority. To the contrary, command responsibility involves a failure to act, which means that superiors are liable for the breach of the duty arising from their position of authority over subordinates. The statutory framework of the ad hoc tribunals upholds the subjective test of liability by requiring that a superior knew or had reason to know that the subordinate was about to commit a crime(s) or had done so.[1332] The applicability of the doctrine has generated much debate in the ad hoc tribunals with respect to the interpretation of a commander's *mens rea*, the inference of knowledge from circumstantial evidence, the attribution of command responsibility to specific intent crimes etc.

To impute command responsibility to a commander, it is necessary to satisfy the following three-pronged test:

(i) Superior-subordinate relationship between the accused and the perpetrator of the offence;
(ii) The accused knew or had reason to know that the perpetrator was about to commit the offence or had done so; and
(iii) Accused failed to take the necessary and reasonable measures to prevent the offence or to punish the perpetrator.[1333]

[1331] Bonafe (2007) at 612.

[1332] ICTY Statute, Article 7 (3); ICTR Statute, Article 6 (3).

[1333] *Aleksovski* Appeal Judgement, para. 72; *Krnojelac* Trial Judgement, para. 92; *Kvočka* Trial Judgement, para. 314; *Krstić* Trial Judgement, para. 604; *Kordić* and Čerkez Trial Judgement, para. 401; *Kunarac* Trial Judgement, para. 395; *Blaškić* Trial Judgement, para. 294.

6.5.3 *Superior Responsibility Under Article 28 of the Rome Statute*

Article 28 of the Rome Statute unequivocally distinguishes between two major forms of command responsibility in contrast to the approach advanced by its predecessors. The first scenario involves a *military commander* who is held liable for not having prevented or repressed the commission of crimes, even though he either knew, or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.[1334] The second scenario concerns a *superior* who is held liable for crimes committed by subordinates under his effective authority and control as a result of his failure to exercise control properly, even though he either knew, or consciously disregarded information, which clearly indicated that the subordinates were committing or about to commit such crimes.[1335] It is clear from the above that there is a clear watertight distinction between the responsibility of military commanders *stricto sensu* and superiors in a much broader sense of the word. Pre-Trial Chamber II clarified that Article 28 of the Rome Statute was drafted in a manner that distinguishes between two main

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[1334] Article 28 of the Rome Statute reads:

(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.

[1335] Article 28 of the Rome Statute continues:

(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.

categories of superiors and their relationships, namely, a military or military-like commander (paragraph (a)), and those who fall short of this category such as civilians occupying *de jure* and *de facto* positions of authority (paragraph (b)).[1336]

The *mens rea* standard fluctuates depending upon the imputed form of command responsibility. Article 28 (a) of the Rome Statute encompasses two *mens rea* standards, in particular actual knowledge and negligence.[1337] The sufficiency of the negligence standard imposes heavy weight of responsibility on the commander's shoulders who may be held to account in the absence of knowledge of the crimes committed by his subordinates. The required *mens rea* standard with respect to *de facto* commanders under Article 28 (b) of the Statute is set much higher, as it should be proved at minimum that a commander consciously disregarded information which indicated of the crimes committed or to be committed by subordinates.

Article 28 (a) responsibility was invoked for the first time in the history of the Court in the *Bemba* case that spelled out the constitutive elements of command responsibility in the following fashion:

(a) The suspect must be either a military commander or a person effectively acting as such;
(b) The suspect must have effective command and control, or effective authority and control over the forces (subordinates) who committed one or more of the crimes within the jurisdiction of the Court;
(c) The crimes committed by the forces (subordinates) resulted from the suspect's failure to exercise control properly over them;
(d) The suspect either knew or, owing to the circumstances at the time, should have known that the forces (subordinates) were committing or about to commit one or more of the crimes within the jurisdiction of the Court; and
(e) The suspect failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.[1338]

6.5.3.1 Superior-Subordinate Relationship

The post World War II jurisprudence, as discussed earlier in this chapter, was mostly concerned with the attribution of command responsibility to *de jure* commanders. The existence of a superior-subordinate relationship was often inferred from the commander's position in the military hierarchy. The ad hoc tribunals approached the concept of command responsibility more broadly by assigning command responsibility to *de jure* and *de facto* commanders alike. The ICTY in the *Čelebići* case underlined the importance of the effective control that ultimately determines a commander's authority over his subordinates:

[1336] *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 406.

[1337] Ibid., para. 429. See also: Saland in Lee (1999), p. 206.

[1338] Ibid., para. 407.

> [. . .] a position of command is indeed a necessary precondition for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position cannot be determined by reference to formal status alone. Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates.[1339]

The jurisprudence of the ad hoc tribunals has evolved around the notion of effective control exercised by a superior rather than his formal position or rank.[1340] "Effective control" is defined as the material ability to prevent and punish the commission of criminal offences committed by subordinates.[1341] The persons under the temporary command of a superior are regarded as subordinates if "at the time when the acts [. . .] were committed, these persons were under the effective control of that particular individual".[1342] The *Čelebići* Trial Chamber held that the mere absence of formal legal authority to control the acts of subordinates does not preclude the imposition of command responsibility.[1343] The term "superior" is not deemed to be limited to commanders who were directly superior to the perpetrators within the regular chain of command, rather a superior is any person who exercised effective control over subordinates.[1344] The existence of effective control translates into the commander's ability to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators.[1345]

The ICC pre-trial jurisprudence deconstructs the concept of command responsibility into the constitutive elements where it is recognised that the suspect must be either a military commander or a person effectively acting as such (military-like commander). The term "military commander" refers to a category of persons who are formally or legally appointed to carry out a military commanding function. The concept captures all persons who have command responsibility within the armed forces, irrespective of their rank or level.[1346] The term "person effectively acting as a military commander" is a broader category that extends to those who are not elected by law to carry out a military commander's role, yet they perform it *de facto* by exercising effective control over a group of persons through a chain of command.[1347]

The second criterion—consonant with the jurisprudence of the ad hoc tribunals—is that the suspect must have effective command and control, or

[1339] *Čelebići* Trial Judgement, para. 370.

[1340] *Čelebići* Appeal Judgement, paras 196–198.

[1341] *Čelebići* Trial Judgement, para. 378; *Blaškić* Appeal Judgement, para. 69.

[1342] *Kunarac* Trial Judgement, paras 399, 628. The Trial Chamber found that the Prosecutor failed to prove that *Kunarac* exercised effective control over the soldiers (which were under his command on a temporary ad hoc basis) at the time they committed the offences.

[1343] *Čelebići* Trial Judgement, para. 354.

[1344] *Blaškić* Trial Judgement, paras 300–301.

[1345] *Blaškić* Appeal Judgement, para. 69; *Aleksovski* Appeal Judgement, para. 76.

[1346] *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 408 (original footnote omitted).

[1347] Ibid., para. 409.

effective authority and control over his subordinates. Article 28 (a) of the Rome Statute encompasses two alternative expressions, namely "effective command and control" or "effective authority and control", to describe authority of military commanders *stricto sensu* and military-like commanders. Pre-Trial Chamber II held that the use of additional words "command" and "authority" in the Statute has no substantial effect on the required level or standard of "control". The finding was reached by means of the literal reading of two phrases that employ the words "effective" and "control" as a common denominator under both alternatives.[1348]

6.5.3.2 *Mens Rea* Standard in the Jurisprudence of the Ad Hoc Tribunals

The *mens rea* requirement to sustain the charge of command responsibility has been subject of impassioned debate in the ad hoc tribunals with the ICTY taking the lead in the discussion. The commonly agreed standard is that a superior "knew or had reason to know that a subordinate was about to commit a prohibited act or had done so".[1349] The wording implies the proof of actual or constructive knowledge. Actual knowledge is defined in terms of the awareness that the relevant crimes were committed or were about to be committed[1350] that may be established through either direct or circumstantial evidence.[1351] The *mens rea* standard encapsulated in the words "had reason to know" means that a superior had in his possession information, which at least would put him on notice of the risk of the commission of a crime(s) by his subordinates. The information is meant to alert a superior of the need for additional investigation to establish whether alleged crimes had been committed or were about to be committed by his subordinates.[1352] Whereas the *mens rea* of actual knowledge is quite straightforward, an alternative standard of constructive knowledge generates uncertainty as to the quality of evidence to be produced by the Prosecution in order for the judges to be able to infer the existence of the required notice.[1353]

Although the jurisprudence of the ad hoc tribunals is settled as to what constitutes the knowledge requirement, it is nonetheless worthwhile to cast a glance at some early controversial case law on the construal of *mens rea* in support of command responsibility. The *Akayesu* Trial Chamber defined the *mens rea* standard in terms of "malicious intent" or "negligence [...] so serious as to be tantamount to acquiescence or even malicious intent"[1354] to sustain the command responsibility

[1348] Ibid., para. 412.

[1349] *Čelebići* Appeal Judgement, para. 222; *Čelebići* Trial Judgement, para. 383.

[1350] *Kordić and Čerkez* Trial Judgement, paras 427–428; *Čelebići* Trial Judgement, paras 383, 386.

[1351] *Kordić and Čerkez* Trial Judgement, paras 427–428.

[1352] *Čelebići* Appeal Judgement, paras 223–226.

[1353] Mettraux (2009), p. 199.

[1354] *Akayesu* Trial Judgement, paras 488–489.

charge. The *Blaškić* Trial Chamber endorsed the standard according to which criminal liability could be imposed upon a commander for crimes committed by his subordinates if he failed to exercise the means available to him to learn of the offence and, under the circumstances, he should have known that such failure to know constitutes criminal dereliction.[1355] The wording "should have known", which was employed to elaborate on the supporting *mens rea* standard for command responsibility, prompted an outcry among practitioners and academics, as the standard of negligence for the most serious international crimes was deemed to be too low and thus unsatisfactory.

The Appellant contested the legal findings of the Trial Chamber on *mens rea* by submitting that the requisite standard under Article 7 (3) of the ICTY Statute was "actual knowledge" or "information which, if at hand, would oblige the commander to conduct further inquiry".[1356] In the Appellant's view, the Trial Chamber failed to look beyond the Appellant's rank and status to establish his knowledge.[1357] Furthermore, the Appellant claimed that the *mens rea* standard encapsulated in the words "had reason to know" neither contributed to negligence nor implied a general duty to know on the part of a commander.[1358] The *Blaškić* Appeals Chamber comported with the Appellant's arguments and reversed the prior findings of the Trial Chamber on the requisite *mens rea* standard. The judges did not recognise "neglect of a duty to acquire knowledge" as being envisaged in Article 7 (3) of the ICTY Statute. In the Appeals Chamber's words, a superior was not liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.[1359] The negligence standard for command responsibility has been abandoned in the jurisprudence of the ad hoc tribunals. The Rome Statute marks a step backwards in the development of the subjective test of command responsibility by lowering the requisite *mens rea* standard to negligence.

An interesting issue from the standpoint of culpability, which gripped the minds of practitioners and academics, is whether a superior is actually punished for the crimes of his subordinates, or whether he is held liable for a separate crime of dereliction of duty, in particular his failure to prevent or punish crimes committed by his subordinates. The ICTY jurisprudence avers that a superior is held responsible for his neglect of duty with regard to the crimes committed by subordinates.[1360] In this respect, superior responsibility resembles the concept of perpetration: a superior is held liable for his failure to exercise effective control over his subordinates that resulted in the prohibited consequence(s).[1361] It may also

[1355] *Blaškić* Trial Judgement, para. 322.

[1356] *Blaškić* Appellant's Brief, p. 136

[1357] Ibid.

[1358] Ibid., pp. 136–139.

[1359] *Blaškić* Appeal Judgement, para. 62; *Čelebići* Appeal Judgement, para. 226.

[1360] *Orić* Trial Judgement, para. 293; *Halilović* Trial Judgement, para. 54.

[1361] Nerlich (2007) at 682. See also: Meloni (2007) at 633–637.

resemble accomplice liability if a superior knew about the crimes prior to their commission. In this case, a superior is blamed for the criminal conduct of his subordinate as well as the wrongful consequences caused by it.

6.5.3.3 *Mens Rea* Standard in the ICC

Prior to engaging into the discussion on the *mens rea* standard for command responsibility, Pre-Trial Chamber II made it clear that the concept of strict liability was not part of the Rome Statute and thus not applicable to command responsibility.[1362] Pre-Trial Chamber II delineated the requisite *mens rea* standard for command responsibility in a different manner than in the jurisprudence of the ad hoc tribunals:

> [...] in order to hold the suspect criminally responsible under Article 28(a) of the Statute for a crime committed by forces (subordinates) under his control, it must be proven *inter alia* that the suspect "either *knew* or, owing to the circumstances at the time, *should have known* that his subordinates were committing or about to commit" one or more of the crimes embodied in Articles 6 to 8 of the Statute. This means that the suspect must have *knowledge* or *should have known* that his forces were about to engage or were engaging or had engaged in a conduct constituting the crimes referred to above.[1363]

Having construed the fault element as requiring "knowledge" or "negligence", the judges added less clarity but more uncertainty as to the interpretation of command responsibility. On the one hand, it is clear that the judges are bound by the statutory framework of the Rome Statute and cannot overlook the boundaries of the concept of command responsibility as set forth in Article 28 of the Statute. However, the judges could have been more critical of shaping the concept of command responsibility through the objective test of liability. The analysis of the *mens rea* requirement was not more than a quick remark on the difference between the "had reason to know" standard of the ad hoc tribunals and "should have known" standard under Article 28 (a) of the Rome Statute. The negligence standard, concerned with the objective characteristics of a crime, is an insufficiently low *mens rea* threshold to convey the seriousness of core international crimes within the jurisdiction of the Court. The *mens rea* standard under Article 28 (b) does not encompass the negligence standard but seems to welcome "recklessness" as the minimum threshold to justify the imputation of criminal liability to *de facto* commanders. Article 28 (b) liability has not yet been invoked by the Prosecution.

[1362] *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 427.

[1363] Ibid., para. 427 citing for the opposite viewpoint the latest ICTY and SCSL jurisprudence, *inter alia*, *Orić* Appeal Judgment, paras 57–60; *Milutinović* Trial Judgment, para. 120; RUF Trial Judgement, para. 309.

6.5.3.4 Can the Requisite *Mens Rea* Standard for Command Responsibility be Reconciled with *Dolus Specialis*?

The utility of command responsibility as a form of criminal participation in genocide cases remains uncertain. The *Akayesu* Trial Chamber acquitted the accused on command responsibility charges due to the absence of the clear superior-subordinate relationship.[1364] In the *Kayishema* and *Ruzindana* case the accused was found guilty of command responsibility genocide, only after the Trial Chamber acknowledged that he had planned, instigated, ordered, committed or otherwise aided and abetted in the planning, perpetration or execution of the crimes.[1365]

The jurisprudence is divided as to whether the command responsibility charge may be reconciled with the crime of genocide. Speaking in theoretical terms, one can contemplate a situation when a superior knows about *dolus specialis* of his subordinates, although he does not share it. The qualification of criminal conduct on the basis of constructive knowledge in genocide cases is more difficult because a superior may be found criminally liable for genocide without having full knowledge of a crime(s). This undoubtedly puts the superior in a very disadvantaged position.[1366] The latest developments in the ICC are even more troublesome because one can hardly imagine the possible reconciliation of *dolus specialis* with the negligence standard under Article 28 (a) of the Statute.

6.5.3.5 Necessary and Reasonable Measures

A superior must take all necessary and reasonable measures to meet his obligation to prevent offences or punish offenders under Article 7 (3) of the ICTY Statute and Article 6 (3) of the ICTR. The same holds true for the concept of command responsibility under the Rome Statute. The adequacy of these measures is commensurate with the material ability of a superior to prevent or punish.[1367] The actual ability or effective capacity of the superior to take action rather than his legal or formal authority shall be considered.[1368] In fact, a superior is not obliged to perform impossible. However, he has a duty to exercise the powers he has within the confines of those limitations.[1369] It is necessary to prove that a superior failed to fulfil one of three duties as laid down in Article 28 (a) (ii) of the Rome Statute: the

[1364] *Akayesu* Trial Judgement, para. 691.

[1365] *Kayishema* Trial Judgement, paras 473–475.

[1366] Mettraux (2009), pp. 226–228.

[1367] *Blaškić* Trial Judgement, para. 335; *Čelebići* Trial Judgement, para. 395; Schabas (2009), p. 363.

[1368] *Kordić and Čerkez* Trial Judgement, para. 443; *Blaškić* Trial Judgement, para. 335; *Čelebići* Trial Judgement, para. 395; *Blaškić* Appeal Judgment, para. 72.

[1369] *Čelebići* Appeal Judgement, para. 226; *Krnojelac* Trial Judgement, para. 95.

duty to prevent crimes, the duty to repress crimes or the duty to submit the matter to the competent authorities for investigation and prosecution.

The duty to prevent or to punish encompasses at least an obligation to investigate the crimes, to establish the facts and to report them to the competent authorities if a superior himself does not have the power to sanction.[1370] Whether the superior's effort to prevent or punish the crimes committed by his subordinates reaches the level of "necessary and reasonable measures" is at the discretion of the judges who evaluate the facts of the particular case.[1371] The duty to prevent is triggered at any stage prior to the commission of crimes.[1372] The duty to repress is twofold because it incorporates the duty to stop on-going crimes from being committed[1373] and the obligation to punish subordinates after the commission of crimes.[1374]

The duty to submit the matter to the competent authorities, similar to the duty to punish, arises after the commission of a crime(s). It requires a commander to undertake active steps in order to ensure that the perpetrators are brought to justice.[1375]

6.6 Interim Conclusions

The main concern of international criminal courts has been to find the adequate modes of criminal liability that are well suited to describe culpability of high-ranking perpetrators of international crimes. The introduction of JCE as a principal mode of liability in the ad hoc tribunals was hailed with enthusiasm, since it equipped the Prosecution with an effective tool to capture the complexity and collective dimension of international crimes. The poor and somehow controversial articulation of *actus reus* and *mens rea* of different forms of JCE in the jurisprudence has shattered the foundation of the doctrine. It has often been subject to criticism for attributing the same degree of culpability regardless of the position or contribution of a participant to a crime. Despite the flaws of the JCE doctrine, the ad hoc and hybrid tribunals—much concerned with the adherence to customary law—are still applying the concept, whereas the attempts to introduce alternative modes of commission liability into the jurisprudence have been futile.

The drafters of the Rome Statute brushed aside the JCE doctrine in favour of more direct references to the commission liability as known in domestic jurisdictions. The judges of the ICC interpret principal liability in Article 25 (3) (a) of the Statute

[1370] *Kordić and Čerkez* Trial Judgement, para. 446; *Blaškić* Trial Judgement, para. 302.

[1371] *Čelebići* Trial Judgement, para. 394.

[1372] *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 437 citing in support *Delić* Trial Judgment, para. 72.

[1373] Ibid., para. 439 (original footnote omitted).

[1374] Ibid. (original footnote omitted).

[1375] Ibid., para. 440.

through the "control of the crime" theory. This means that the major focus is on the control over the crime, which is exercised by each co-perpetrator through his contribution to the common plan. In other words, the crime would never materialise absent the *essential* contribution of a co-perpetrator. The proponents of the doctrine submit that it is capable of defining blameworthiness of senior leaders upon the evaluation of their contribution as well as the level of control exercised by each participant to a crime. The sceptics doubt the utility of the concept, which was domestically tailored to meet the needs of German courts.

Whereas the judges may depart from the "control over the crime" theory, the concept is a significant improvement to the JCE doctrine, which was incapable of accurately defining links between parties to a crime, thus failing to reflect upon the blameworthiness of all parties. By raising the threshold to the *essential* contribution, the control theory determines culpability of each participant through the evaluation of his contribution. Had a co-perpetrator not *intentionally* contributed, the crime would have been frustrated. The correct determinations of culpability are particularly important for international criminal law, which shall condemn in the strongest terms the conduct of high-ranking perpetrators, and clearly separate their conduct from those who aid, abet or assist in any other way *en route* to the ultimate goals.

The enforcement of a strict hierarchy of modes of liability, that it the predominance of principal over secondary liability, will definitely benefit the ICC judges in determining the blameworthiness of culprits of international crimes based upon their level of contribution. This will convincingly demonstrate the *greater* weight of the contribution of a perpetrator within the meaning of Article 25 (3) (a) as opposed to the contribution of a secondary party.

Apart from the concept of co-perpetration based on the joint control, indirect perpetration within the meaning of the Rome Statute was construed through another German inspired concept of the control over the organisation (*Organisationsherrschaft*). In the context of international crimes, it has been notoriously difficult to link the crimes committed by soldiers to the top military and political leadership. By pleading two distinct concepts of co-perpetration and indirect perpetration together, the judges introduced the merged concept of indirect co-perpetration that is capable of revealing both horizontal and vertical dimensions of collective criminality. Modes of principal liability as set out in the Rome Statute seem to be better articulated and more precisely defined in terms of constitutive elements than the JCE doctrine. However, it is still premature to make any final determinations on the aptness of those modalities of liability to the field of international criminal law with only one winning conviction on the basis of co-perpetration in the *Lubanga* case.

Another contentious concept featured in the jurisprudence of international courts and tribunals is that of superior or command responsibility that was specifically tailored to capture commanders who exercise effective control over subordinates but fail to prevent the commission of crimes or punish the offenders. The practice of international criminal courts shows that convictions based on command responsibility alone are rare. The uncertainty as to the requisite *mens rea* standard makes the applicability of the concept somewhat unreliable. Therefore, command

responsibility has been normally pleaded in conjunction with other modes of liability that are more likely to land the winning conviction. *Schabas* submits that superior or command responsibility has generated more heat than light on the face of very few convictions on its basis alone, its limitation to war crimes, and relatively light sentences imposed.[1376]

The *mens rea* for command responsibility under the Rome Statute may be satisfied by the negligence standard with respect to *de jure* commanders, which is a much lower threshold than that of "had reason to know" in the ad hoc tribunals. The Prosecution in the *Bemba* (CAR) case invoked the concept of command responsibility to sustain charges of two counts of war crimes and three counts of crimes against humanity. It is the very first case before the ICC on the basis of command responsibility alone that will demonstrate the utility of the concept.

The legal instruments of international criminal courts and tribunals provide a plethora of accessory/accomplice modes of liability. The Rome Statute includes its own catalogue of accessory forms of liability that do not replicate the tried-and-tested modes of liability of the ad hoc tribunals. As a compromise to the notion of conspiracy, the drafters of the Rome Statute introduced Article 25 (3) (d) liability of "complicity in group crime". Despite earlier outspoken criticism of the concept, it has already been attributed in a number of on-going cases. "Aiding and abetting" as enunciated in the Rome Statute requires to be accompanied by specific intent, which is a higher standard compared to that of "knowledge" in the ad hoc tribunals. For that reason, "complicity in group crime" seems to perform a similar function of "catch-all liability" in the ICC given a less demanding *mens rea* threshold and a low level of required contribution.

[1376] Schabas (2009), p. 365.

Chapter 7
Grounds Excluding Criminal Responsibility in International Criminal Law

7.1 Introductory Words: Justifications v Excuses

The substantive part of criminal law distinguishes between excuses and justifications.[1377] The harm caused by the justified behaviour remains a legally recognised harm that breaches certain fundamental values protected by criminal law, however, the infliction of that harm is motivated by the need to avoid an even greater harm. In other words, justificatory defences apply in rather exceptional situations that require a proportional and necessary response. If such triggering conditions are non-existent, a person engages in illegal conduct that entails criminal responsibility. The classic example of a justificatory defence is the exercise of the right to self-defence.[1378] The right is triggered by the imminent attack or a threat of violence directed against an individual, which gives him a legitimate right to protect himself or others. The right to self-defence is not absolute and has certain boundaries. The two mandatory conditions are that the response towards any form of violence is necessary and proportional.[1379] This warrants against the arbitrary use of violence towards others. One can hardly justify stabbing another person with a knife if one was merely slapped in the face.

Excuses apply to the situations that satisfy the formal criteria of criminal offences, however, an offender is excused from criminal responsibility due to his inability to appreciate the unlawfulness of his conduct.[1380] In the words of

[1377] In common law, the distinction was revived with the publication of Fletcher's authority in 1978: Fletcher (2000) (reprint of the book first published by Little, Brown in 1978). The distinction is noted in many academic sources on the subject: Cassese (2008), pp. 255–258; Lippman (2009), pp. 228–229, 282; Ashworth (2009), pp. 84–87.

[1378] Danish Criminal Code (Straffeloven), § 13; French Criminal Code, Article 122-5; German Criminal Code, § 32–33; Russian Criminal Code, Article 37.

[1379] Tröndle and Fischer (2006) (in German), Commentary on § 32; Greve et al. (2009) (in Danish), Commentary on § 13; Simester and Sullivan (2007), pp. 704–708.

[1380] Tadros (2001) at 498.

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Robinson, excuses cover situations when the conduct is clearly harmful, but the aggressor is blameless on account of his psychotic condition.[1381] Though the conduct corresponds to the description of an offence in all instances, the main distinction between justifications and excuses is that a person knowingly engages in otherwise criminal conduct upon the existence of certain triggering conditions that justify his acts, whereas in the case of an excuse the person does not have the ability to appreciate the seriousness of his acts. The most common example of an excuse is the insanity defence. Other excuses include intoxication and duress. Given that human behaviour, even criminalised, is a symbiosis of cognition and will, in the case of an excuse it is either a cognitive element or a volitional element, which is impaired. In other words, a person is not aware that he engaged in criminal conduct, or he lacks control over his acts.

The distinction between justifications and excuses was particularly relevant in early common law, since the justification defence led to the acquittal of a person, whereas the existence of an excuse entitled the Crown to grant a pardon.[1382] The distinction is less relevant in modern criminal law today, but it is a helpful tool to attribute the correct level of blameworthiness in each individual case. The justified conduct is not deemed blameworthy in the eyes of the society. On the contrary, it is generally accepted and encouraged. In the case of an excuse, a person is blamed for his conduct by the society, but the person's disability precludes the imposition of criminal responsibility because otherwise it would be in breach of the fundamental principle of *nullum crime sine culpa* in criminal law.

7.1.1 Insanity, Automatism and Burden of Proof

The insanity defence is used in criminal law with respect to a person who does not appreciate the unlawfulness of his conduct due to a disease of mind.[1383] The conviction of a mentally challenged person would clearly defeat the purpose of criminal law that attributes criminal responsibility only to those who are guilty in the commission of an offence prohibited by criminal law. The main difference between insanity and other excuses lies in the legal consequences for the defendant. The mentally challenged person is normally committed to a medical institution, whereas defendants who successfully invoke other defences in criminal law are acquitted.

In common law jurisdictions, it is normally the *M'Naghten* rule that governs the applicability of the insanity defence. The defendant, *Daniel M'Naghten*, shot his victim in the state of morbid delusion and was subsequently found not guilty on the

[1381] Robinson (1982) at 274–275.

[1382] LaFave (2003b), p. 448.

[1383] Danish Criminal Code (Straffeloven), § 16; French Criminal Code, Article 122-1; German Criminal Code, § 20; Russian Criminal Code, Article 21.

insanity ground.[1384] A number of interrelated questions of law were propounded to the House of Lords on the interpretation of the criminal conduct of persons who acted in the state of insane delusion.[1385] In order to invoke the insanity defence, it was considered necessary to prove that "at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong".[1386] The centrepiece of the *M'Naghten* rule is the lack of cognition on the part of the defendant. The justified criticism against the rule is its narrow scope that captures only the cognitive defects, whereas does not additionally consider the lack of control on the part of the defendant. The American jurisprudence is not uniform on the insanity standard with some states following the *M'Naghten* rule and other states abiding by a broader approach introduced by the Model Penal Code.

The Code does not recognise the defendant criminally liable if at the time of his conduct, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.[1387] The courts have pondered over a list of diseases that satisfy the insanity criteria. The overview of the jurisprudence shows that any mental abnormality ranging from epilepsy to brain disorder is sufficient to invoke the defence.[1388] The jurisprudence distinguishes between those illnesses and defects that trigger the insanity defence, and those that do not reach the required level of seriousness. As an example, temporary insanity induced by the excessive alcoholic intoxication or emotional insanity caused by jealousy does not serve as a defence but may be considered in mitigation of sentence.

The lack of volition on the part of the defendant is signified by the automatism defence. The automatism defence indicates that a person was not conscious while performing a criminally prohibited act and thus acted involuntarily. The Model Penal Code explicitly states that a person is not guilty of an offence unless his liability is based on conduct, which includes a voluntary act or the omission to perform an act of which he is physically capable.[1389] Like in the case of insanity,

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[1384] *R v McNaughten*, 8 E.R. 718; (1843) 10 Cl. & F. 200, at 201.

[1385] Ibid., at 203.

[1386] Ibid., at 210.

[1387] Model Penal Code, § 4.01(1).

[1388] In *Sullivan* [1984] AC 156, *Lord Diplock* construed the phrase "disease of mind" as encompassing any disease which affects the functioning of the mind—whether its cause be organic or functional, and whether its effect be permanent or intermittent—so long as it was operative at the time of the alleged offence. In the same case, the defendant successfully invoked the insanity defence on the account of his epileptic state at the time he caused grievous bodily harm. In *R v Kemp* 1957 1 QB 399, "arteriosclerosis" was recognised as amounting to the disease of mind. In *R v Quick & Paddison* (1973) 3 AER 397 and *R v Hennessy* (1989) 1 WLR 287, both defendants were entitled to the insanity defence because they engaged in criminal conduct in a state of hyperglycaemia caused by diabetes.

[1389] Model Penal Code, § 2.01 (1).

the imposition of criminal responsibility upon the person who performed an involuntary act is in breach of the principle of culpability in criminal law. The Model Penal Code lists the following non-voluntary acts: (a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestion; and (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.[1390] The aforementioned acts reflect a number of serious medical conditions, such as epilepsy, somnambulism, hypnotism, concussional states and even some acute emotional disturbances. Lord *Denning* in the Bratty case brilliantly summarised the plea of automatism in the following fashion:

> No act is punishable if it is done involuntarily: and an involuntary act in this context-some people nowadays prefer to speak of it as "automatism" - means an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking.[1391]

This *dictum* clearly accommodates non-insane automatism within the framework of the insanity defence in English criminal law. In civil law jurisdictions, insanity (often termed as mental incapacity) implies the lack of the cognitive or volitional elements. The mental state of a person is evaluated by the judges upon the consideration of medical expert reports.[1392]

An interesting procedural issue connected to the insanity ground revolves around the concept of the burden of proof. It is generally accepted that the burden of proof rests with the prosecution, however, in the cases dealing with insanity the burden seems to shift from the prosecution to the defendant. A defendant is presumed to be sane in criminal proceedings until he produces evidence to the contrary.[1393] Hence, it appears that the defendant is supposed to convince the panel of his insanity. A number of varying approaches are employed in American jurisprudence with some states explicitly laying the burden of proof upon the prosecution and some placing the burden on the defendant.[1394] The latter comes across as being unfair to the accused because the entire issue on *mens rea*, including the lack of it, shall be proved beyond a reasonable doubt by the prosecution.

The insanity defence has been rarely invoked in the context of international criminal courts and tribunals. This might be explicated by the fact that the magnitude and gravity of international crimes is such that it almost precludes the absence of cognition and will on the part of the defendant. In the Nuremberg Tribunal, one of the defendants, *Rudolf Hess*, unsuccessfully raised the insanity defence. Though the judges acknowledged that the defendant acted in an abnormal manner and

[1390] Model Penal Code, § 2.01 (2).

[1391] *Bratty v Attorney-General for Northern Ireland* [1963] A.C. 386 at 412.

[1392] German Criminal Code, § 20; Russian Criminal Code, Article 21; French Criminal Code, Article 122-1.

[1393] *Davis v United States*, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895).

[1394] LaFave (2003b), pp. 427–428.

suffered from the loss of memory, which deteriorated during the trial, they concluded that there was no suggestion that he was not completely sane when the acts he had been charged with were committed.[1395]

The diminished mental capacity claim was brought before the *Čelebići* Appeals Chamber. The defendant assumed the existence of such a defence by referring to Rule 67(A)(ii), which entitles the Defence to notify the Prosecution of their intent to invoke any special defence, including that of diminished or lack of mental responsibility.[1396] The judges scrutinised the plea of diminished responsibility in light of the existing practices of common and continental law jurisdictions as well as the legal provisions of the Rome Statute.[1397] The Chamber clearly distinguished between the insanity defence, which serves as a complete defence, and diminished mental capacity, which does not constitute a defence, thus being relevant only in mitigation of sentences.[1398] Upon the careful consideration of all arguments, the Chamber rejected the existence of the diminished capacity defence and recognised its relevance only as a matter in mitigation of sentence.[1399] In addition, it was acknowledged that a defendant bears the onus of establishing matters in mitigation of sentence.[1400]

The Rome Statute provides for insanity as a ground excluding criminal responsibility: a person is relieved from criminal responsibility if he "suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law".[1401] The insanity concept is framed in terms of the destruction of the cognitive or volitional aspects of behavior, similar to the approach adopted by the Model Penal Code. The Statute does not indicate as to who shall bear the burden of proof in the cases when the insanity plea is raised.

7.1.2 Voluntary and Involuntary Intoxication

The intoxication defence implies that a person was acting under the influence of alcohol or any narcotic substance.[1402] The person's ability to reflect was destroyed

[1395] Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30th September and 1st October, 1946, Defendant Hess, p. 489. The judgement is also available at http://avalon.law.yale.edu/imt/judhess.asp.

[1396] *Čelebići* Appeal Judgement, para. 580.

[1397] Ibid., paras. 585–588.

[1398] Ibid., para. 588.

[1399] Ibid., para. 590.

[1400] Ibid., para. 590.

[1401] Rome Statute, Article 31(1).

[1402] Ashworth (2009), p. 197. Article 23 of the Criminal Code of the Russian Federation does not exculpate a person who acts in the state of intoxication, whereas it accepts it as a defence only in a situation of pathological drunkenness. See: Brilliantov (2010), pp. 67–68.

which caused him to engage in a criminally prohibited act, which he would not have committed, had he been sober. Though the cognitive element of knowledge is lacking in both cases of intoxication and insanity, these two defences cannot be equated. The insanity defence is triggered by the disease of mind, whereas the state of drunkenness or drug intoxication is temporary and cannot be compared in its seriousness to insanity.

Depending on whether intoxication is voluntary or involuntary, different legal consequences may ensue. Voluntary intoxication, which is self-induced drunkenness or drug consumption, is generally no defence to the person's unlawful conduct. However, in the state of voluntary intoxication, a person might not have entertained the requisite specific intent or knowledge. Given that criminal responsibility cannot be attributed in the absence of the requisite legal elements of a crime, it seems counter-intuitive to impute responsibility in the situation as outlined above. *LaFave* dismisses the approach of treating voluntary intoxication as no defence in the situation when the requisite *mens rea* state is negated.[1403] Less controversial is the defence of involuntary intoxication. A person acts in this state of mind when he is not aware of what he is doing due to the involuntary consumption of substances. This may occur for different reasons: the person's drink was spiked with drugs; a person was mistaken as to the substance taken; a person consumed the substance according to the medical prescription but was unaware of the side effects etc. Finally, a person may have been forced to consume alcoholic or drug substances. This defence is particular relevant in the context of an armed conflict with the rise of the exploitation of child soldiers who are often given drugs and alcohol in order to engage them to take part in hostilities.

The latest Rome Statute Commentary treats the legal provision on voluntary intoxication in Article 31(1)(b) of the Statute as bordering "absurd" given the nature of the crimes within the jurisdiction of the Court, which are "virtually inconsistent with a plea of voluntary intoxication".[1404] The defence has not been properly raised in the context of the ad hoc tribunals. Only on one occasion, has the ICTY Trial Chamber considered the plea of voluntary intoxication and recognised intentional drug or alcohol consumption as an aggravating rather than a mitigating factor.[1405]

The accompanying note to the draft Rome Statute illustrates the existence of opposing views on the subject of voluntary intoxication. On the one hand, the plea of voluntary intoxication was recognised as not being a defence, but a possible mitigating factor in the situation when a person was not able to form specific intent. On the other hand, voluntary intoxication was treated as a defence with an exception when a person became intoxicated to commit a crime (*actio libera in causa*). The drafters warned of the possible rise of unpunished crimes against humanity and war crimes, should the second approach be adopted. The final text of the Rome Statute, however, lists voluntary intoxication as a possible exculpatory ground.

[1403] LaFave (2003b), pp. 474–475.

[1404] Schabas (2010), p. 486.

[1405] *Kvočka* Trial Judgement, para. 706.

Pursuant to Article 31(1)(b), a person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court. It is clear from the text of the legal provision that if a person consumes alcohol to acquire "Dutch courage" in order to engage in criminal conduct, this cannot serve as an exculpatory ground.

7.1.3 Duress and Necessity

The duress defence implies that a person is coerced into the commission of a legally prohibited act under the threat of imminent death or serious bodily injury directed against him or another.[1406] A person is excused on the ground that he was not able to withstand the pressure and thus was forced into the commission of a criminal offence. The person does not have sufficient ability to control his acts due to the threat of imminent violence if he chooses to act differently. In common law, the duress defence is not applicable to the crime of intentional killing of an innocent third person. It may serve as a defence when a person (read "accomplice") aided another person in the commission of a lesser felony.[1407] As an illustration, a person is coerced under the gunpoint to drive an offender to the bank where the latter commits robbery and shoots a bank employee. It is logical that a person who was forced into the commission of robbery shall not bear responsibility for murder, an incidental crime to the crime of robbery. In the situation when the defendant was coerced into killing an innocent third person, this may serve as a mitigating circumstance and downgrade first-degree murder—which requires to be accompanied by premeditation—to manslaughter.

The Model Penal Code lays down an objective test to determine whether the duress defence is relevant: a person is excused for committing a criminal offence if the threat which compels him to commit it is such that a person of reasonable

[1406] In English criminal law, consult: Ashworth (2009), pp. 205–206. The requirement of death or serious harm is upheld in the jurisprudence of English courts, whereas threats to property or reputation do not trigger the application of the duress defence. See: *Graham* (1982) 74 Cr App R 235; *Howe* (1987) AC 417; *DPP v Lynch* (1975) AC 653. In American criminal law, consult: Lippman (2009), p. 309. In Russian criminal law, consult: Kosachenko (2009), pp. 387–390. In French criminal law, see: Soyer (2004), p. 113.

[1407] LaFave (2003b), pp. 493–495 citing in support, among others, *United States v LaFleur*, 971 F.2d 200 (9th Cir.1991); *Hunt v State,* 753 So.2d 609 (Fla.App.2000); *Arp v State*, 97 Ala. 5, 12 So. 301 (1893); *People v Merhige*, 212 Mich. 601, 180 N.W. 418 (1920); *People v Pantano*, 239 N.Y. 416, 146 N.E. 646 (1925).

firmness in his situation would have been unable to resist it.[1408] The key element of duress is the existence of a real threat that instils reasonable fear in the defendant. The threat of harm may be directed not only against a defendant but against his family members as well. The defendant may lose his right to invoke the duress defence when he does not take an advantage of a reasonable opportunity to escape, provided there was no risk of death or serious bodily harm connected thereto.[1409] The definition of the duress defence may vary in different jurisdictions. The overwhelming consensus is that the defence may be invoked when the threat is imminent, although some jurisdictions deem it sufficient that the defendant "reasonably believed" that the harm would occur.[1410]

The issue on the extent of responsibility of an accomplice in the crime of murder who was acting under duress has been variously construed in the jurisprudence of English courts. In the context of factual circumstances in the case of *D.P.P v Lynch*, which dealt with the appellant who was forced to drive the IRA members to the place where they killed a policeman, it was conceded that the defence of duress was applicable to an accessory of murder, while the judges did not deliberate on the plea with regard to perpetrators.[1411] The subsequent case of *Abbott v The Queen* clarified the applicability of duress to principals by rejecting its availability to a principal in the first degree as well as to a principal in the second degree. The exculpation of the latter was reckoned to be in breach of criminal law principles as it was capable of "import[ing] the possibility of great injustice into the common law".[1412] *R v Howe*, which reflected upon the legal findings of the previous two cases, concluded that duress should never be a defence to murder irrespective of the defendant's degree of participation.[1413] The Law Commission afforded a complete defence on the duress ground to all crimes, including the crime of murder. The drafters refused to stigmatise the conduct of "a person who, on the basis of a genuine and reasonably held belief, intentionally killed in fear of death or life-threatening injury in circumstances where a jury is satisfied that an ordinary person of reasonable fortitude might have acted in the same way".[1414]

The duress defence requires the imminence of the threat directed against a person or a third party. There is a variety of approaches as what kind of "threat" qualifies as "imminent", and whether it must be contemporaneous with the attack. In the perjury case of *R v Hudson and Taylor*,[1415] two teenage girls of 17 and 19 years gave false testimonies that led to the acquittal in another case. They

[1408] Model Penal Code, § 2.09 (1).

[1409] Lippman (2009), p. 310.

[1410] LaFave (2003b), p. 497.

[1411] *D.P.P. v Lynch* [1975] A.C. 653 (House of Lords).

[1412] *Abbott v The Queen* [1977] A.C. 755 (Privy Council).

[1413] *R. v Howe* [1987] 1 A.C. 417 (House of Lords).

[1414] The Law Commission, Murder, Manslaughter and Infanticide, (Law Com No.304), (2006), paras 6.36–6.53.

[1415] *R v Hudson and Taylor* [1971] 2 All ER 244.

confessed about telling lies but invoked the duress defence on the ground that they were frightened of the threatening men in the public gallery during their testimony. *Lord Widgery CJ* acknowledged that the imminence of the threat requirement was satisfied in the case. Notwithstanding that the execution of threats could not have been effected in the courtroom, there was a real risk that the threats could have been carried out the same night.[1416] In *R v Safi and others*, the defendants claimed that it was their fear of persecution in the hands of the Taliban that exculpated their hijacking of a plane (ultimately landed in Stansted, United Kingdom) on the duress ground.[1417] The direction of the trial judge to evaluate evidence in terms of the existence of an imminent peril to the defendants or their families was challenged by the defendant who submitted that the defence should be made available if he *reasonably* believed of the existence of death or serious injury threat to him and/oh his family. The Court of Appeal reaffirmed the subjective approach to the interpretation of duress and allowed the appeal.[1418]

The discussion above provides an outline of the duress plea that arises out of imminent threats from another person. It has been increasingly acknowledged in the jurisprudence that the situation of duress may be triggered by circumstances. The so-called "necessity or duress by circumstances" has been mostly developed in the context of road traffic offences. In the case of *R. v Martin*, a disqualified driver was forced to drive his stepson to work because his wife threatened to commit suicide otherwise. In order to invoke the defence of necessity, the judges directed the jury to determine whether (i) the accused was, or may have been, impelled to act as a result of what he reasonably believed to be the situation which could entail death or serious physical injury; and (ii) a sober person of reasonable firmness would have responded to the situation in the same manner.[1419] This defence is closely related to the defence of duress by threats, although it is not applicable to a range of serious crimes such as murder, attempted murder and treason in English criminal law.[1420]

In civil law jurisdictions, the defence triggered by external circumstances falls under the category of necessity, which is regarded as a justificatory conduct. Broadly, the necessity defence applies to the situation when a person is confronted with the necessity to cause harm in order to avoid even a greater harm.[1421] This behaviour is justified because the society favours the reduction of a greater harm, notwithstanding that the defendant was put into the situation where he had to choose between two evils. In other words, a person acts under the pressure of circumstances. In that respect, necessity is akin to duress, however, the fundamental distinction between these two categories is that the necessity defence is invoked under the

[1416] Ibid.

[1417] *R v Safi and others* [2003] EWCA Crim 1809, (2003) LR 721.

[1418] Ibid.

[1419] *R. v Martin* (1989) 88 Cr.App.R.343 (Court of Appeal, Criminal Division).

[1420] *R v Pomell* [1995] 2 Cr.App.R.607 (Court of Appeal, Criminal Division).

[1421] German Criminal Code, § 34; French Criminal Code, Article 122-7; Russian Criminal Code, Article 39.

pressure of natural physical forces, whereas the duress defence is triggered by the human pressure, in particular the threat of death or serious bodily harm. The justificatory defence of necessity as known in most jurisdictions is different from the excusatory defence of "duress by circumstances" in English criminal law. The major difference is that the person's conduct acting in the state of necessity is justified because he chooses the most favourable outcome to the society by opting for lesser evil. In the case of "duress of circumstances", the person's will is overborne by the circumstances which impel him to commit a criminal offence.[1422]

The necessity defence is broadly equated to the concept of "choice-of-evils" in the Model Penal Code which justifies conduct if "the harm or evil thought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged".[1423] In some circumstances, the choice is very obvious to the defendant: if one has to save the life of another by means of destroying the property, or if one kills another person but saves lives of at least two others. It is within the judicial discretion to determine the value of the harm avoided and establish whether the defendant's conduct was justified. It may prove to be a particularly vexed issue if a person kills another in order to save his own life. In *R v Dudley & Stephens*, two sailors murdered a cabin boy when they were adrift in the lifeboat following the shipwreck; that was done in order to feed upon his body as they had been without food and water for over a week. The judges convicted two defendants of murder which, in their belief, was not justified by necessity.[1424] In another case, the defendant together with other crew members threw fourteen male passengers from the overloaded lifeboat in order to lighten it and stay afloat during the storm. Upon reaching the land, the defendant was tried on manslaughter charges. The Court concluded that in an equal situation the determination of who are to be sacrificed for the safety of the whole group ought to be determined by lot.[1425]

The necessity defence may be invoked if the following criteria are satisfied: (i) the harm avoided is greater than the harm done; and (ii) the defendant must have acted with the intention to avoid the greater harm. The majority of situations arise out of circumstances when the defendant could not exercise the control over external forces of nature (e.g. earthquake, flood, fire etc.). However, it may occur that the defendant created the situation in which he was forced to choose between two evils. As an illustration, by exceeding the speed limit, the defendant is in the difficult situation to choose whether to run down two persons on the road or strike one person on the sidewalk. Having chosen the latter, he avoided the greater harm of killing or seriously injuring two persons. Depending upon the legal jurisdiction, this may serve as a mitigating circumstance, or the defendant may not be entitled to claim the necessity defence at all.

[1422] Clarkson et al. (2007), pp. 360–361.

[1423] Model Penal Code, § 3.02.

[1424] *R v Dudley & Stephens,* L.R. 14 Q.B.D. 273 (1884).

[1425] *United States v Holmes*, 26 F.Cas. 360 (No. 15-383) (C.C.E.D.Pa. 1842).

The duress defence was raised many times in the context of the prosecution of war crimes, particularly in the cases when subordinates claimed to have acted on the order(s) of their superiors. The notable *Llandovery Castle Case*, adjudicated before the German Supreme Court at Leipzig (1921) on the basis of German municipal law, dealt with the pleas of superior orders and duress.[1426] When the British hospital ship was sunk by a German submarine, the submarine commander gave orders to fire on the lifeboats, which led to the killing of all persons in two out of the three lifeboats. The duress defence was pleaded by the two lieutenants who executed the order. Having carefully analysed the legal provisions of the German Military Penal Code,[1427] the Court clarified that the order is illegal if it is known to everybody to be without any doubt whatever against the law. Upon the evaluation of the factual circumstances of the case, the judges were convinced beyond a reasonable doubt that it was perfectly clear to the accused that "killing defenceless people in the lifeboats could be nothing else but a breach of the law". From the point of view of either duress or necessity, the defendant could not claim that they did not have any moral choice. The judges further expounded that if the commander had been faced by a refusal on the part of his subordinates he would have been compelled to desist from his criminal purpose. It was made it clear in the judgement that the combined defences of superior orders and duress would not be available to the defendant if there was no threat uttered and where the accused could have frustrated the criminal intention of his superior, had he refused to obey the illegal order.

A number of cases which dealt with the duress defence appear in the jurisprudence of post-World War II military tribunals. In *Stalag Luft III*, the British Military Tribunal expressly denied the duress defence in regards to the killing of innocent persons.[1428] In the *Hostages* trial, it was upheld that the existence of a superior order was not a defence to a criminal act, especially with regards to the crime of murder, which could at best mitigate punishment but not justify the subordinate's conduct.[1429] The judges, however, applied the subjective approach to evaluate the state of mind of a subordinate: if he could not *reasonably* have been expected to

[1426] *Llandovery Castle Case*, German Supreme Court at Leipzig, Annual Digest of International Law Cases, 1923–1924, Case No. 235, British Command Paper (1921) Cmd. 1422, p. 45.

[1427] According to paragraph 47 (2) of the *German Military Penal Code*: "a subordinate obeying [. . .] an order is liable to punishment if it was known to him that the order of his superior involved the infringement of civil or military law".

[1428] *Trial of Max Wielen and 17 Others* (The Stalag Luft III Case), British Military Court, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. XI, London: HMSO, 1949, p. 49. The judgement held that "the killing of enemies in war is in accordance with the will of the State that makes war *only* insofar as such killing is in accordance with the conditions and limitations imposed by the law of nations".

[1429] *United States v. List and Others* (Hostage case), United States Military Tribunal, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. VIII, London: HMSO, 1949, p. 50.

know of the order's illegality, he was entitled to invoke the defence due the lack of the requisite *mens rea* to justify the imposition of punishment.[1430] Members of armed forces were not entitled to claim impunity if they obeyed a clearly unlawful order in breach of international law.[1431] By integrating the "manifest unlawful" requirement, the judges narrowed down the applicability of the superior order plea. To the contrary, in the *Einsatzgruppen* case, the United States Military Tribunal denounced the law, which "requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns".[1432]

The duress defence was unsuccessfully raised by the Accused in the ICTY *Erdemović* case who claimed the hopelessness of the situation, in which he could not refuse to kill the victims during the *Srebrenica* massacre because Bosnian Serb military command would have executed him, had he acted otherwise.[1433] The Trial Chamber dismissed the Accused's arguments with respect to the duress defence and sentenced him to 10 years of imprisonment.[1434] On appeal, he sought the revision of the sentencing judgement on the ground of the commission of crimes "under duress and without the possibility of another moral choice".[1435] In response, the Prosecution claimed that the Appellant possessed freedom of moral choice in the execution of Muslims and thus could not plead extreme necessity arising from duress and superior orders.[1436] In light of the parties' submissions, the Appeals Chamber examined whether duress may afford a complete defence to a charge of crimes against humanity and war crimes, and whether the successful pleading of the defence leads to an acquittal.[1437] The Majority, Judges Cassese and Stephen dissenting, did not recognise duress as a complete defence to crimes against humanity and war crimes, which involved the killing of innocent human beings.[1438]

Judges McDonald and Vohrah attached their joint separate opinion in which they examined in elaborate terms the duress defence by scrutinizing the relevant sources of international law. Having consulted customary international law, the judges did not deduce the existence of duress as a complete defence to the killing of innocent persons.[1439] In addition, they conducted a survey of national jurisdictions in order to discern general principles, which comport with the objectives of international

[1430] Ibid.

[1431] Ibid.

[1432] *The United States v Otto Ohlendorf et al.* (The Einsatzgruppen Case), Nuremberg Military Tribunals under Control Council Law No, Law Reports of Trials of War Criminals, Volume IV, Nuremberg October 1946-April 1949, p. 480.

[1433] *Prosecutor v Erdemović*, Case No. IT-96-22-T, 31 May 1996, Trial Transcript, at 9.

[1434] *Erdemović* Trial Judgement, para. 91.

[1435] *Erdemović* Appeal Judgement, para. 11.

[1436] Ibid., para. 13.

[1437] Ibid., para. 16.

[1438] Ibid., para. 19.

[1439] Ibid., Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 49.

criminal law. An overview of substantive criminal laws in civil law jurisdictions revealed that duress is regarded as a complete defence to all the crimes.[1440] To the contrary, common law jurisdictions do not render a complete defence to the crimes of murder and treason, although they acknowledge the relevance of the duress defence to other less serious crimes.[1441] It is with the consideration of all sources of international law and objectives of international criminal law that the judges dismissed duress as a complete defence to crimes against humanity and war crimes.[1442] In addition, they examined the interrelation between duress and superior orders, having underlined the distinctiveness of those concepts. The obedience to superior orders was not determined as amounting to a defence, rather it was acknowledged as a factual circumstance which may be considered in conjunction with other circumstances of the case.[1443]

Judge Cassese condemned "practical policy considerations" in English criminal law on the irrelevance of the duress defence to killings of innocent human beings, and labelled such an examination "extraneous to the task of the Tribunal".[1444] He firmly maintained the position on the applicability of duress to *all* crimes, including the crime of murder, provided that the stringent requirements were satisfied.[1445] Judge Stephen arrived at the same conclusion by following another interpretation path. He recognised the relevance of duress in the situation of the accused who was forced to take innocent lives which he could not save, and who could only add to the toll by sacrificing of his own life.[1446]

The legal provision in the Rome Statute does not differentiate between necessity and duress; it accommodates both concepts under a broader definition of duress. According to Article 31(1)(d), a person is not held criminally liable if his conduct has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person. In order to invoke the defence, a person is expected to act necessarily and reasonably to avoid the threat, which means that he does not intend to cause a greater harm than the one sought to be avoided. The threat may either be (i) made by other persons; or (ii) constituted by other circumstances beyond that person's control. Interestingly, the draft Rome Statute treats the duress caused by other

[1440] Ibid., para. 59.

[1441] Ibid., para. 60.

[1442] Ibid., para. 88.

[1443] Ibid., para. 34.

[1444] Ibid., Dissenting Opinion, Judge Cassese, para. 11.

[1445] Ibid., para. 12. Judge Cassese expounded that in the context of international criminal law is not often a question of saving your own life by killing another person, but of simply saving your own life when the other person will inevitably die. With respect to the factual circumstance of the case, he maintained that the right approach would be to determine "whether the choice faced by the Appellant was between refusing to participate in the killing of the Muslim civilians and being killed himself *or* participating in the killing of the Muslim civilians *who would be killed in any case by other soldiers* and thus being allowed to live" (See: ibid., para. 50).

[1446] Ibid., Separate and Dissenting Opinion of Judge Stephen, para. 67.

persons and duress triggered by circumstances beyond that person's control as two separate defences, although the distinction was not imported to the final text of the Statute.[1447]

7.1.4 Self-Defence

It is a generally recognised principle in national jurisdictions that a person is entitled to use force if he encounters violence against himself. In English criminal law, an individual who is either attacked or threatened with a serious physical attack is accorded the legal liberty to repel that attack, thus preserving his fundamental right to life and/or bodily integrity.[1448] The right to self-defence is an indispensable right of an individual enshrined in the Constitution of the Russian Federation that recognises the universal right of a person to protect his rights and freedoms by all means, which are not prohibited by law.[1449] While exercising the right to self-defence, an individual is inflicting harm upon an attacking person, which formally corresponds to the legal elements of a criminal offence. However, the conduct is not socially harmful. To the contrary, it safeguards the fundamental value and interests enshrined by law.[1450]

The protected interests in the context of self-defence include the protection of self and other people. Some jurisdictions permit self-defence in order to protect property, however, it appears unclear what degree of force may be applicable in such cases.[1451] To invoke the right to self-defence, a person shall reasonably believe that he faces an *imminent danger* of unlawful bodily harm.[1452] The danger of the attack shall be objectively existent in real life; any imaginable threat does not

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[1447] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, A/CONF.183/2/Add.1 14 April 1998. Article 31 (1)(d) speaks of the concept of duress *stricto sensu*, whereas Article 31(1)(e) embraces the necessity defence which is triggered by external circumstances.

[1448] Ashworth (2009), p. 114.

[1449] Constitution of the Russian Federation, Article 45 (2).

[1450] Brilliantov (2010), p. 118. See also: French Criminal Code, Article 122-5; German Criminal Code, § 32.

[1451] Clarkson et al. (2007), pp. 302–303. See also: *D.P.P v Bayer* [2004] 1 Cr.App.R. 38; *Hussey* [1924] 18 Cr.App.R.160.

[1452] French Criminal Code, Article 122-5. See also: Crim. 17 Juin 1927: "*L'agression consiste dans un mal imminent qui n'a pu être autrement qu'en commettant le délit*". An interesting discussion arose in the domestic violence case when a wife killed her husband as a result of his incessant mistreatment, which is commonly referred to as the "battered woman syndrome". The commentators are generally divided into two categories: those who argue that the imminence of the attack requirement shall be abolished in such cases, and those who wish to keep the requirement as the way to discourage the unnecessary taking of human life (see: LaFave (2003b), pp. 545–546). In English criminal law, the only defence available in such a situation may be diminished responsibility. Clarkson et al. (2007), p. 319.

fit within the premises of self-defence. In the case of the latter, the defendant may attract criminal responsibility, however, he may be excused if he acted with due diligence on the evaluation of all the circumstances, but was wrong in his estimate of the danger of the violence.[1453] The main purpose of a person who acts in self-defence is to repress the attack and not to punish an attacker.

The degree of the response shall be *reasonable* and *proportionate* to the severity of the attack. As an illustration, one can hardly justify the use of a deadly weapon against an unarmed attacker. The use of deadly force is justified if a person reasonably believes that an attacker is about to inflict unlawful death or serious bodily harm against him. A person is supposed to act in reasonable belief of the imminent danger in order to use force against his attacker. Said that, the defendant may be mistaken in his belief. In such circumstances, he may still invoke the self-defence justification if he was honestly mistaken as to the circumstances. It is within judicial discretion to evaluate the factual background of each case to determine whether the defendant exceeded the limits of self-defence, while being honestly mistaken as to the circumstances.

The reasonableness criterion has been examined on many occasions in the jurisprudence of English courts. In *Rose*, it was decided that the mistake should be reasonable in order in escape criminal liability, whereas in *Williams (Gladstone)*, it was held that defendant was supposed to be judged according to his view of the facts.[1454] The current understanding of the reasonableness standard in English criminal law merges subjective and objective standards. On the one hand, it seems unfair to apply a purely objective standard, which appraises the conduct of the defendant according to the reasonable person standard. On the other hand, a purely subjective approach is capable of justifying any ill-founded belief of the defendant, despite the fact that he honestly believed in the necessity to apply the particular, albeit excessive, degree of force. In *Owino*, the jury was instructed to decide whether the force used by the defendant was reasonable in the circumstances as he believed them to be.[1455] The jury was tasked to determine whether the conduct of the defendant meets the reasonableness standard, since leaving this to the defendant would justify the disproportionate degree of force, albeit applied in the honest belief of its reasonable standard. This approach appears to be consonant with the latest jurisprudence of the European Court of Human Rights that determined that the honest belief of the defendant must be based on "good reason".[1456] The Model Penal Code requires that the actor

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[1453] Waaben (2011), pp. 139–140; Brilliantov (2010), p. 120.

[1454] *R v Rose* [1884] 15 Cox 540; *R v Williams (Gladstone)* [1984] 78. Cr.App.R.276.

[1455] *R. v Owino* [1996] 2 Cr.App.R.128.

[1456] *Gul v Turkey* (2002) 34 E. H. R. R. 28.

believes that the use of force is *necessary*.[1457] The *necessity* element is intimately linked to the *reasonableness* standard.

With respect to the *proportionality* requirement, the force used by the defendant must be proportionate to the value being upheld.[1458] In other words, there should be an assessment of the relative value of the rights at stake. It is determined on a case-by-case basis with the consideration of all surrounding circumstances whether a person applied disproportional force to repel the attack. In Russian criminal law, a person will bear criminal responsibility for murder and intentional infliction of serious harm when it was the result of exceeding the limits of self-defence.[1459] In this particular case, a person acting in self-defence attracts a penalty that is less harsh than a murderer who acted with the requisite intention.[1460] The issue of excessive self-defence has generated some controversy in English criminal law. In *R v Clegg*, the House of Lords rendered that the defendant who employed greater force than was necessary should be found of guilty of murder.[1461] The finding prompted the debate on whether the law review was necessary to downgrade the defendant's conduct from murder to manslaughter in cases of excessive use of force. The Law Commission advocated for the compromise solution—that is to find the defendant guilty of second-degree murder on the grounds of provocation, leaving the judge with the discretion over sentence.[1462]

There is no mention of self-defence in the legal instruments of international criminal courts and tribunals, except for the Rome Statute. Notwithstanding the absence of the relevant provision in the statutes of the ad hoc tribunals, the issue of whether self-defence serves as a defence to serious violations of international humanitarian law was raised before the ICTY Trial Chamber.[1463] The Chamber recognised it necessary to consider defences, as they form part of general principles of criminal law.[1464] It further referred to the self-defence provision in the Rome Statute and relevant national practices in that regard.[1465] The ICTY Chamber

[1457] Model Penal Code, § 3.04(1).

[1458] As an example, in the French jurisprudence, it was reckoned proportional to injure a burglar in the thigh who was breaking into the person's house (Crim. 11 Oct. 1994). In another case, it was recognised disproportional to shoot with a pistol in response to the person's slap (Crim. 4 Août 1949).

[1459] Any other less serious consequences caused by a person who exceeds the limits of self-defence do not attract criminal responsibility.

[1460] Brilliantov (2010), p. 123. The Criminal Code encompasses a special legal provision on the crime of murder committed in exceeding the limits of the right to self-defence, which attracts the maximum imprisonment term of 3 years (Article 108) in comparison to the maximum term of 15 years for murder (Article 105).

[1461] *R. v Clegg* [1995] 1 A.C. 482.

[1462] Law Commission, Murder, Manslaughter and Infanticide, Law Com No.304, paras 5.53-5.57.

[1463] *Kordić and Čerkez* Trial Judgement, para. 448.

[1464] Ibid., para. 449.

[1465] Ibid., para. 451.

concluded that military operations in self-defence did not render a justification for serious violations of international humanitarian law.[1466] The same position towards defensive military operations is reflected in the Rome Statute.[1467]

Article 31(1)(c) of Statute does not impose criminal responsibility on the person who "acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected".[1468] The definition is very much consonant with domestic practices on the construal of self-defence. The necessity and proportionality requirements are embedded into the definition. It is reckoned controversial that the right to self-defence may be triggered in order to defend property in the context of war crimes, which means that the value of human life is equal to that of property. There are voiced concerns as to the justification of the commission of war crimes in order to safeguard military property. Does it imply that the military personnel may be exculpated from crimes directed against the civilian population if they invoke the self-defence justification in the protection of military property? Such an overly broad interpretation is capable of unnecessarily stretching the reach of the self-defence doctrine. It would be interesting to witness the construal of the "reasonableness" standard in the ICC jurisprudence. It seems unlikely that the judges would opt for a strictly objective approach to evaluate the person's behaviour, since in the turbulent situations of an armed conflict or a widespread attack against the civilian population one can hardly measure up the conduct to that of the reasonable person standard. The subjective approach would be better suited to address the complexity of the context in which international crimes occur.

7.1.5 Mistake of Fact

Generally, a mistake may render a defence if it negates the mental element of a crime. The area of substantive law dealing with the mistake of fact or law has been plagued by uncertainties as to the applicability of those defences in practice. The mistake of fact is recognised as an excuse in various national jurisdictions, provided that the *mens rea* of the defendant is negated.[1469] English criminal law distinguishes between a mistake as to the element of *actus reus* and mistake as to a defence

[1466] Ibid., para. 452.

[1467] Rome Statute, Article 31(c).

[1468] The category of "property" was put in brackets in the draft of the Rome Statute. See: Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, A/CONF.183/2/Add.1 14 April 1998, Article 31(1)(c).

[1469] German Criminal Code, § 16.

element. In the first instance, the defendant is mistaken as to the legal element (e.g. while committing the offence of "damaging property belonging to another", he believed that it was his property but in fact it belonged to another).[1470] The defendant may invoke the defence if he believes that he buys valuable goods from the authorised seller, but it turns out that the goods were stolen. Another type of mistake as to a defence element applies to the situation when the defendant wrongfully assumes his right to self-defence or assumes that he acts under duress.[1471] The mistake of fact is irrelevant when the defendant intends to kill A but accidentally shoots another person B whom he had no desire to kill. In this case, the *mens rea* of the defendant is described as transferred intent. If a man by mistake, or for example, by bad aim, causes injury to a person or property other the person or property which he intended to attack, he is guilty of a crime of the same degree as he had originally intended.[1472] The concept of transferred intent is distinct from the justificatory ground of the mistake of fact. In the case of the former, the defendant is fully aware that he engages in the unlawful act but does not achieve his goal by chance, whereas in the case of the latter the defendant is not aware that he engaged in the criminal conduct.

Having recognised the mistake of fact and mistake of law as possible exculpatory grounds, German criminal law defines that the mistake may occur with regard to the descriptive or normative elements of a crime. The descriptive elements are physical characteristics of a criminal offence which could be perceived by human senses. The normative elements require the evaluation of certain circumstances on the part of a perpetrator.[1473] They are particularly relevant to international crimes which occur in the certain context, and thus the evaluation of normative elements becomes of utmost importance, e.g. "attack", "protected persons", "protected property" etc. A number of war crimes must be committed "unlawfully", which as well requires the judgement on the part of a perpetrator of whether his conduct was unlawful or not. The classic example of the mistake of fact in wartime situations is when a perpetrator is attacking the civilian population acting in the honest belief that he was attacking combatants.

English criminal law has been caught in the discussion on the attitude of the defendant towards the mistake of fact. In *Tolston*, the defendant was convicted of bigamy, although the conviction was quashed because the woman believed "in good faith and on reasonable grounds" that her first husband was dead.[1474] The issue of whether the defendant's belief had to be based on reasonable grounds was

[1470] Clarkson et al. (2007), pp. 187–188.

[1471] Ashworth (2009), p. 217.

[1472] Davenport (2008), p. 44. The author defines "transferred intent" as the type of intent in which a person tries to harm one person and as a result harms someone else.

[1473] The distinction is acknowledged in a number of academic pieces on defences in international criminal law. See: Ambos in Brown (2011), p. 318; Van Sliedregt (2003b), p. 27.

[1474] *R v Tolston* [1889] 23 Q.B. 168.

re-appraised in *D.P.P. v Morgan* that favoured the standard of "honest belief" rather than the reasonableness standard.[1475] The latter was recognised as belonging to the law of evidence which was necessary to determine whether the belief was honestly held. The shift from the objectivism to the subjectivism was re-affirmed in the subsequent jurisprudence that leaned towards the honest belief standard.[1476] The Sexual Offences Act 2003, however, departed from the subjectivism and endorsed the reasonableness standard. *Ashworth* advocates for a more context-sensitive approach that would allow applying both standards depending upon the factual circumstances of the case with the preference for the reasonableness standard with regard to the consent requirement in rape offences and age requirement for consensual sexual conduct.[1477]

The draft Rome Statute recognised a mistake of fact as a ground for excluding criminal responsibility only if it negates the mental element required by the crime. The provision was accompanied by the text in the square brackets: [provided that said mistake is not inconsistent with the nature of the crime or its elements] and [provided that the circumstances a person reasonably believed to be true would have been lawful]. Some delegations reckoned that the provision on the mistake of fact was redundant, as it had already been covered by the general *mens rea* requirement. The final version of the Rome Statute allows for the defence of the mistake of fact only if it negates the mental element required by the crime, whereas it remains silent whether the reasonableness standard is attached thereto. The implications of the legal provision on the mistake of fact are sometimes perceived as potentially far-reaching and even damaging, given that the mistake could be pleaded with respect to each legal element of the crimes within the jurisdiction of the Court.[1478] Despite predictions of the rise of cases that plead the mistake of fact as an excuse, this has not been hitherto observed in the early jurisprudence of the Court. It seems that concerns about the excessive reliance on the mistake of fact are unwarranted.

7.1.6 Mistake of Law

Whereas there is more agreement on the recognition of the mistake of fact as a valid excuse from criminal responsibility, ignorance of law does not normally serve as a defence, which is expressly stated in the renowned Latin phrase "*ignorantia juris non excusat*". In order to determine whether the defence of the mistake of law may be invoked by the defendant, it is necessary to inquire into the required state of

[1475] *D.P.P. v Morgan* [1976] A.C. 182.

[1476] *B (A Minor) v D.P.P.* [2000] A.C. 428; *R v K* [2002] 1 A.C. 462.

[1477] Ashworth (2009), pp. 217–218. The approach was welcomed in Clarkson et al. (2007), pp. 200–201.

[1478] Heller (2008) at 445.

mind for a particular crime and then establish whether *mens rea* is negated by such ignorance. The ignorance of law or facts does not serve as a defence in strict liability crimes, since the latter do not have any *mens rea* connected thereto.[1479] In *Grant v Borg*, *Lord Bridge* submits that the recognition of ignorance of law as no defence to a crime is so fundamental that to construe the word "knowingly" in a criminal statute as requiring not merely knowledge of the facts material to the offender's guilt, but also knowledge of the relevant law would be wholly unacceptable.[1480] It was noted that the acknowledgement of the mistake of law as a defence would be to encourage ignorance where the lawmaker has determined to make men know and obey.[1481] It is certainly true that invoking the defence of the mistake of law with regard to the most serious crimes, such as murder, infliction of serious bodily harm or rape, does not seem to resonate with the general spirit of criminal law. English criminal law seems to oscillate between the complete denial of the mistake of law and its limited recognition as a defence in the cases in which the constitutive element of "knowingly" was negated.[1482] *Ashworth* favours a nuanced approach that makes the defence of the mistake of law relevant to an array of regulatory offences when a person was ill advised by officials as to the correctness of the law.[1483]

In German criminal law, the mistake of law may serve as an exculpatory ground if a perpetrator was not aware that he engaged in the illegal conduct, while being assured that his conduct was legally permissible.[1484] Though it may seem puzzling for a lawyer with a continental law background that the defence is applicable in German law, the jurisprudence of German courts upholds a very high standard of proof with regard to the existence of the mistake of law on the part of the defendant, thus preventing the leeway to escape from criminal liability for those who shield behind the ignorance of law.[1485] The mistake must be unavoidable, which means that the person had no means to reach the conclusion of the unlawfulness of his conduct. The particularly rigid standard is applied to certain professional categories (medical, military personnel etc.) that, by virtue of their position, must exercise particular vigilance as not to engage in the conduct proscribed by law.

The mistake of law is difficult to assume by military personnel in the context of an armed conflict, since they are expected to be more knowledgeable than an average bystander. In the words of the judge in the *Peleus* trial: "it is quite obvious that no [...] soldier can carry with him a library of international law, or have

[1479] A classic example of a strict liability crime is statutory rape that imposes criminal responsibility for engaging in sexual acts with minors. The claim that a person was mistaken as to the age of a victim does not serve as a defence.

[1480] *Grant v Borg* [1982] 1 W.L.R. at 646.

[1481] Robinson (1984), pp. 375–376 (original footnote omitted).

[1482] Clarkson et al. (2007), pp. 202–203.

[1483] Ashworth (2000) at 637–641.

[1484] Lackner and Kühl (2004), pp. 115–116.

[1485] Youngs (2000) at 339.

immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one".[1486] However, the killings of civilians (helpless survivors in the *Peleus* trial) are manifestly unlawful, which must have been obvious to the person of the rudimentary intelligence.[1487] The mistake of law cannot be assumed on the face of such manifestly unlawful orders. A number of trials adjudicated before the military tribunals in the aftermath of World War II reaffirmed the responsibility of military commanders to be knowledgeable about the rules of war.[1488]

The Rome Statute encompasses both the mistake of law and mistake of fact under the umbrella of grounds excluding criminal responsibility. A mistake of fact is regarded as a ground for excluding criminal responsibility only if it negates the mental element required by the crime.[1489] The general rule is that a mistake of law is not a ground for excluding criminal responsibility. However, it may apply when the mental element is negated.[1490] During the drafting process of the Rome Statute, delegates were in discord as to the formulation of the legal provision on the mistake of law. The original wording that "mistake of law may not be cited as a ground for excluding criminal responsibility [except where specifically provided for in this Statute]" was considered as leaving room for ambiguity. The amended draft of the Rome Statute provided that "[reasonable] mistake of law may be a ground for excluding criminal responsibility if it negates the mental element required by such crime".[1491] The word "reasonable" was omitted in the final text of the Statute.

Article 30 of the Rome Statute endorses the "element analysis" of a crime by requiring that *each* material element shall be accompanied by "intent and knowledge". Given that each international crime is a complex combination of legal constitutive elements (contextual elements, *actus reus*, *mens rea*), an obvious question is whether the failure to understand the definition of the requisite legal element renders a valid defence. *Werle* assumes the existence of a mistake of law in the situation where a perpetrator, who holds a trial of prisoners of war, determines an objectively insufficient hearing to be sufficient.[1492] *Sliedregt* submits that

[1486] *The Peleus Trial, Trial of Kapitanleutnant Heinz Eck and Four Others for the Killing of Members of the Crew of the Greek Steamship Peleus, Sunk on the High Seas*, British Military Court for the Trial of War Criminals Held at the War Crimes Court, Hamburg, 17th-20th October 1945, para. 12.

[1487] Ibid.

[1488] *United States v. List and Others* (Hostage case), United States Military Tribunal, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. VIII, London: HMSO, 1949, pp. 69–70; *United States v. Wilhelm von Leeb et al.,* (High Command Case), United States Military Tribunal, reprinted in Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. XII, London: HMSO, 1949, p. 74.

[1489] Rome Statute, Article 32(1).

[1490] Rome Statute, Article 32(2).

[1491] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, A/CONF.183/2/Add.1 14 April 1998, Article 30.

[1492] Werle (2005), p. 152.

ignorance as to the recognition of distinctive emblems may serve as a mistake of law in certain circumstances.[1493]

In the *Lubanga* case, the Defence Counsel case initiated a debate on the breach of the principle of legality by claiming the suspect's ignorance as to the prohibition of enlistment and conscription of child soldiers under the age of 15 years.[1494] In addition, the Counsel asserted the ignorance of law on the part of the suspect, given that the ratification of the Rome Statute and its implementation into national laws was not widely communicated to the general public, and thus *Lubanga* was unaware of the existing prohibition of the crime of child soldiers.[1495] The Pre-Trial Chamber shunned both arguments by pointing out that the principle of legality was satisfied in respect to charging the suspect with the crime after the date of entry of the Rome Statute, and, by virtue of his position, the suspect was aware of the general prohibition against the recruitment and conscription of child soldiers.[1496] Having noted the limited purport of the legal provision on the mistake of law in the Rome Statute, the judges held that the defence could succeed only if *Lubanga* was unaware of a normative objective element of the crime by not realizing its social significance (its everyday meaning).[1497] More guidance would have been given by the judges on the subject, had the Defence Counsel been more creative in his argument and claimed that his client was aware of the general prohibition but thought that it was only applicable to the *forcible* recruitment (mistake as to the normative element).[1498] Though the argument would most probably fail, it would at least compel the judges to construe what is exactly meant by the normative objective element of war crimes.

It is clear from the above that the plea of the ignorance as to the prohibition of particular crimes in the Rome Statute would not render any defence, unless the person is mistaken towards the *normative* element of a crime which negates the requisite *mens rea* standard. *Ambos* reckons that such interpretation is overly narrow, as it is on "the verge of absurd to require knowledge of most highly normative elements within complex regimes of criminal law".[1499] The most obvious solution for the judges, if the mistake of law is invoked in future proceedings, will be to measure the mistake of law according to the reasonableness standard.

[1493] Van Sliedregt (2003b), p. 29.

[1494] *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, para. 294.

[1495] Ibid., paras 296–297.

[1496] Ibid., paras 303, 306–307 and 312.

[1497] Ibid., para. 316 citing in support Cassese et al. (2002), p. 961.

[1498] Weigend (2008) at 475.

[1499] Ambos in Brown (2011), p. 321.

7.1.7 Superior Orders

One of the most commendable achievements of the Nuremberg Charter was the repudiation of the superior orders plea. Most defendants in Nuremberg contended that they were acting under the orders of Hitler and sought the relief from criminal responsibility for the acts charged against them. To address the defendants' arguments, the justices referred to Article 8 of the Charter, which prohibited the reliance upon the superior order plea and only acknowledged its possible relevance in mitigation of punishment. The judges dismissed the idea that the soldier's engagement in killing or torture in violation of international law of war had ever been recognised as a defence given the brutality of such acts: "the true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible".[1500]

The principle has been recapitulated in the subsequent post Second World War II jurisprudence and a number of international instruments, including the Nuremberg Principles and the ILC Draft Codes. In the *High Command* case, the military tribunal rejected the plea of superior orders, although it accepted its possible relevance in mitigation of punishment.[1501] The judges dismissed the defendants' argument that all the blame for their actions rested with Hitler alone as absurdity:

> Nor can it be permitted even in a dictatorship that the dictator, absolute though he may be, shall be the scapegoat on whom the sins of all his governmental and military subordinates are wished; and that, when he is driven into a bunker and presumably destroyed, all the sins and guilt of his subordinates shall be considered to have been destroyed with him.[1502]

Any directive in violation of international law was reckoned void and by no means appropriate to afford protection to those who violate international law in reliance on such a directive.[1503] The judges pondered over the interrelation between superior orders and duress, particularly in the situation when a subordinate had no moral choice but to commit the crime. It was concluded that the defendants could not invoke the duress defence because they were in servile compliance with (clearly criminal) orders for fear of some disadvantage or punishment, (albeit) not immediately threatened. The duress defence, which was recognised inapplicable to the facts of the case, was outlined in objective terms: "a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong".[1504]

[1500] Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30th September and 1st October, 1946, p. 447. It is also available at http://avalon.law.yale.edu/imt/judlawch.asp.

[1501] Control Council Law No. 10, Art. II, Sections 4 (a) and 4 (b).

[1502] *United States v. Wilhelm von Leeb et al.,* (High Command Trial), United States Military Tribunal sitting in Nuremberg, *Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No. 10*, Volume XI, pp. 71–72.

[1503] Ibid.

[1504] Ibid.

The contemporary international criminal courts and tribunals firmly maintain the position that the commission of core international crime(s) on the order of a superior cannot relieve the subordinate from criminal responsibility. The same principle is upheld in the Rome Statute with a number of exceptions thereto if a person: (a) was under a legal obligation to obey orders of the Government or the superior in question; (b) did not know that the order was unlawful; and (c) the order was not manifestly unlawful. The wording of the provision entitles the subordinate to plead that the execution of an order was accompanied by duress or his reasonable mistake as to the facts, thus triggering the applicability of additional exculpatory grounds. As an example, if a subordinate was ordered by a superior to shoot prisoners of war, who were in his reasonable belief court-martialed but in fact were civilians, the subordinate may invoke the mistake of fact as a defence.

The Rome Statute does not allow for the superior order defence if the order was manifestly unlawful. Orders to commit genocide and crimes against humanity satisfy the criterion of "manifestly unlawful", which means that purport of the plea is limited and may only be invoked in relation to war crimes.

7.1.8 Interim Conclusions

An overview of defences in international criminal law reveals a great complexity of this rather unexplored legal terrain. With the very scarce jurisprudence as to the construal of exculpatory grounds in the jurisprudence of the ad hoc tribunals (the only exception is the elaborate discussion of the duress defence in the ICTY *Erdemović* case), the ICC judges are expected to pick up the mantle and construe an array of legal provisions on exculpatory grounds in the Rome Statute when such defences are invoked by the suspect/accused.

The legal analysis of the concept of a crime in common law and continental law jurisdictions shows that defences form an integral part of the definition of the conceptual framework of a crime. Clearly, the commission of a crime by a person who suffers from a serious mental condition is blameworthy in the eyes of the society, although the imposition of criminal responsibility would do nothing to achieve the goals of punishment, since the person lacks the capacity to appreciate the criminality of his conduct. Conversely, a person who acts in his self-defence, provided that a set of the necessary criteria are satisfied, is not condemned by society; his conduct is accepted and justified. The dichotomy between excuses and justifications offers a nuanced approach towards the evaluation of the conduct of the accused, and facilitates to determine which legal consequences will ensue, once the defence is successfully invoked.

The legal provisions of the Rome Statute resonate with the substantive law on exculpatory grounds in national jurisdictions. The incorporation of a set of articles dealing with exculpatory grounds augments the reach of the substantive part of international criminal law and affords the person charged a possibility to invoke a range of defences, similar to those available in domestic criminal law. From the

standpoint of the accused, it is certainly a step forward in securing his right to a fair trial. However, the relevance of some defences to the field of international criminal law is highly questionable. It seems unlikely that the prosecution would ever charge a person suffering from a serious mental disorder who could not appreciate the commission of war crimes or crimes against humanity. Given that international criminal courts and tribunals are concerned with the prosecution of the political and military leadership for core international crimes, which require a thorough level of organisation, the reliance upon the insanity or intoxication defences seems technically impossible. Other defences such as duress, acting in self-defence or upon superior orders may be successfully pleaded by mid- or low-ranking perpetrators, which are more likely to be prosecuted in domestic courts. The colossal cost of the administration of international criminal justice dictates that only those who bear *the greatest* responsibility for core international crimes should face justice in international criminal courts and tribunals. Hence, pleading of the aforementioned defences by the high-ranking perpetrators is unlikely.

The early jurisprudence reaffirms that complete ignorance of law does not afford any defence within the meaning of the Rome Statute; it is only the mistake as to the normative element of a crime that may qualify as the mistake of law. Despite the predictions of far-reaching repercussions of the legal provision on the mistake of fact, this has not been observed in the cases before the ICC yet. It remains to be seen as to what extent exculpatory grounds in the Rome Statute would be relevant for the adjudication of core international crimes within the jurisdiction of the Court. However, the expansion of substantive law provisions is commendable, since it offers much greater predictability on the direction of the jurisprudence in future and safeguards indispensable procedural rights of the accused to a fair trial.

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