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E. van Sliedregt

THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS
VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

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THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS
FOR VIOLATIONS OF
INTERNATIONAL HUMANITARIAN LAW

To my parents

THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

De individuele strafrechtelijke aansprakelijkheid voor
schendingen van humanitair oorlogsrecht

PROEFSCHRIFT

TER VERKRIJGING VAN DE GRAAD VAN DOCTOR
AAN DE UNIVERSITEIT VAN TILBURG,
OP GEZAG VAN DE RECTOR MAGNIFICUS,
PROF.DR. F.A. VAN DER DUYN SCHOUTEN,
IN HET OPENBAAR TE VERDEDIGEN TEN OVERSTAAN VAN
EEN DOOR HET COLLEGE VOOR PROMOTIES AANGEWEEZEN
COMMISSIE IN DE AULA VAN DE UNIVERSITEIT OP

VRIJDAG 19 SEPTEMBER 2003 OM 14.15 UUR

DOOR

ELISABETH VAN SLIEDREGT
GEBOREN OP 11 SEPTEMBER 1971 TE HENDRIK-IDO-AMBACHT

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PROF.MR. G.L. COOLEN

The Criminal Responsibility of
Individuals for Violations of
International Humanitarian Law

by

E. van Sliedregt

T · M · C · A S S E R P R E S S

The Hague

The research for this study was financed by and carried out at Tilburg University and the T.M.C. Asser Institute in The Hague. It was defended as a PhD thesis on 19 September 2003 at Tilburg University. The Supervisors were: Prof. N. Keijzer, Prof. W.J.M. van Genugten, and Prof. G.L. Coolen. Members of the board of examiners: Prof. M.S. Groenhuijsen, Prof. A. Klip, Prof. F. Thomas, Prof. O. Triffterer.

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PREFACE

With the creation of international criminal tribunals, such as the one in Nuremberg after the Second World War, and more recently the International Tribunals for the former Yugoslavia and Rwanda, international criminal law has become a rapidly developing part of the law.

Since Nuremberg, especially in relation to crimes against humanity, genocide and war crimes, the focus has been on individuals, instead of states. Such crimes are very rarely committed by single individuals, however, but mostly by organizations, or groups of cooperating persons. For a just determination of their guilt and responsibility, a fair assessment of the mutual relationships and cooperation forms of those individuals, is indispensable. The present book provides the framework for that assessment. It gives guidance to practitioners, and to scholars as well, on how to understand and to apply international criminal law concepts such as 'common purpose', 'superior responsibility', duress and the defence of superior orders. It does so by bringing to light the roots of those new concepts, which are hidden not only in earlier phases of development of the international criminal law, but also in the domestic laws of various states.

The principles of individual criminal liability under international criminal law have ancestors both in common law systems and in civil law systems. By analyzing their pedigrees in an intelligent and accessible way, Dr. Van Sliedregt has made those principles clear for lawyers educated in either of those two very different legal cultures.

The time of publication of this study could not have better been chosen. In this very year 2003, the International Criminal Court is being established, its Statute having come in force in July 2002. The book is not only an important tool for the ICC, however, but also for prosecutors, defence lawyers and judges who will be engaged in war crimes trials and the like on the domestic level. The jurisdiction of the ICC is only subsidiary; under Article 17 of its Statute, the primary jurisdiction is with states, irrespective whether they have ratified the Statute or not. Therefore, it is mainly on the domestic level that such trials can be expected to take place, now that there is an ICC more than ever in the past. Also on the domestic level, the principles of international criminal liability will have to be taken into account, if only for preventing the ICC from considering the national authorities unwilling or unable to try the accused properly.

Worldwide, the legal community can be very grateful to Dr. Van Sliedregt for this extremely valuable contribution to the literature on international criminal law.

Nico Keijzer

Justice Extraordinary, Supreme Court of the Netherlands

July 2003

ACKNOWLEDGEMENTS

When I started the research for this book in the summer of 1998, international criminal law, more particularly, substantive international criminal or war crimes law was on the verge of a considerable move forward. In the following years, it underwent major developments, such as the establishment of the International Criminal Court and the commencement of the *Milosević* trial at the International Criminal Tribunal for the Former Yugoslavia. At the same time, the interest in this field of law amongst scholars and practitioners has been growing substantially. This can be measured by the number of books and law journals that have appeared over the last years concerning this area of law. I was fortunate to be able to witness these developments and write about them. It is exciting, but also difficult, to write about a field of law that is still in a stage of development and subject to so much attention. The continuing stream of case law coming from the *ad hoc* Tribunals and other courts, and the unremitting flow of scholarly writing on the topic made it hard to conclude this research, which I eventually did on 1 May 2003.

I could not have wished for a better mentor than Professor Nico Keijzer in developing the ideas put forward in this book. His long-standing expertise and interest in national and international war crimes law, going beyond an interest in the legal aspects, have enriched my mind and views, and this study. I wish to express my gratitude for his patience and unfailingly helpful and penetrating comments on the draft texts, and the erudite way in which they were put before me. I am also greatly indebted to the supervision of Professor Willem van Genugten and Professor Guido Coolen whose valuable insights and advice have been inspirational and of continuous support. I wish to extend my thanks to the board of examiners of this thesis: Professor Marc Groenhuijsen, Professor André Klip, Professor Françoise Thomas, and Professor Otto Triffterer. Their writings have been at the basis of this study. Many thanks are due to my colleagues at Tilburg University and the T.M.C. Asser Institute, in particular, Piet Hein van Kempen, François Kristen and Machteld Boot. I am grateful to my parents and sisters for their unrelenting moral support and faith in me. Finally, I wish to thank Howard Morrison Q.C., for being a true proof-reading partner-in-law, a source of inspiration and, most importantly, a dedicated friend.

The Hague, July 2003

Elies van Sliedregt

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ABBREVIATIONS

AC	Appeal Cases, England and Wales
A Ch.	Appeals Chamber, ICTY and ICTR
AIDP	Association Internationale de Droit Pénal
AJIL	American Journal of International Law
Alberta LR	Alberta Law Review
ALC	Annotated Leading Cases
All ER	All England Law Reports
American JCL	American Journal of Comparative Law
AP I	First Additional Protocol to the 1949 Geneva Conventions (GC)
AP II	Second Additional Protocol to the 1949 Geneva Conventions (GC)
Art.	Article
BGHSt	Entscheidungen des Bundesgerichtshofes in Strafsachen (Judgements of the German Supreme Court)
BSA	Bosnian-Serb Army
BVerfG	Entscheidungen des Bundesverfassungsgerichts (Judgements of the German Federal Constitutional Court)
CA	Court of Appeal
Calif. LR	California Law Review
Can.YIL	Canadian Yearbook of International Law
Cass.	(French) Cour de Cassation
CCA	Criminal Court of Appeal
CCAIL	(German) Code of Crimes against International Law
CCL 10	Control Council Law No. 10
CE Ass. plén.	Assemblée plénière of the Conseil d' Etat
Cir.	Circuit
CLR	Commonwealth Law Reports
CM	Court Martial
CMR	Court Martial Reports
Columbia LR	Columbia Law Review
Cr App R	Criminal Appeal Reports
Crim. LR	Criminal Law Review
Croatian Annual of Crim. L & Practice	Croatian Annual of Criminal Law & Practice
DD	Delikt & Delinkwent
DH	Recueil Dalloz hebdomadaire
DMPC	Dutch Military Penal Code

Doc.	Document
D.P.P.	Director of Public Prosecutions
Duke J of Comp. & Int. L	Duke Journal of Comparative & International Law
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
Emory LJ	Emory Law Journal
Eur. J. Crime, Crim. L. & Crim. Jus	European Journal of Crime, Criminal Law & Criminal Justice
F.2d	Federal Reporter, Second Series
Fed. Cas	Federal Cases
FM	(U.S. Army) Field Manual
GAOR	General Assembly Official Records
GC	Geneva Convention
Georgetown LJ	Georgetown Law Journal
Golden Gate Univ. LJ	Golden Gate University Law Journal
Harvard ILJ	Harvard International Law Journal
Harvard LR	Harvard Law Review
HL	House of Lords
HRQ	Human Rights Quarterly
HVO	Croatian Defence Council
ICA	(Dutch) International Crimes Act
ICC	International Criminal Court
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IMFTE	International Military Tribunal for the Far East (Tokyo Tribunal)
IMT	International Military Tribunal (Nuremberg Tribunal)
IRRC	International Review of the Red Cross
ISISC	International Institute of Higher Studies in Criminal Sciences
Israel YBHR	Israel Yearbook on Human Rights
Jewish YIL	Jewish Yearbook of International Law
J of Crim. Jus	Journal of Criminal Justice
KB	Law Reports King's Bench Division
LJIL	Leiden Journal of International Law
MCC	(German) Military Criminal Code
Mich. LR	Michigan Law Review

MLR	Military Law Review
MPC	Model Penal Code
MPI	Max Planck Institute
MRT	Militair-rechtelijk Tijdschrift
NATO	North Atlantic Treaty Organization
N.C.	North Carolina Reports
N.E.	North Eastern Reporter
N.E.2d	North Eastern Reporter, Second Series
NILR	Netherlands International Law Review
NIOD	Nederlands Instituut voor Oorlogsdocumentatie (Netherlands Institute for War Documentation)
NJ	Nederlandse Jurisprudentie
NJW	Neue Juristische Wochenschrift
No.	Number
Nordic JIL	Nordic Journal of International Law
NStZ	Neue Zeitschrift für Strafrecht
N.W.	North Western Reporter
NYIL	Netherlands Yearbook of International Law
OGHSt	Entscheidungen des Oberster Gerichtshofes in Strafsachen
p.	page
pp.	pages
P.2d	Pacific Reporter, Second Series
para.	paragraph
paras.	paragraphs
PC	Privy Council
Penn State ILR	Penn State International Law Review
POW	Prisoners of War
PrepCom	Preparatory Committee
QB/QBD	Law Reports Queen's Bench Division
RCO	Responsible Corporate Officer
Res.	Resolution
RFDA	Revue Française de Droit Administratif
RGst.	Reichsgericht in Strafsachen
ROE	Rules of Engagement
RPE	Rules of Procedure and Evidence
Rutgers Univ. LJ	Rutgers University Law Journal
SC	Security Council
SCR	Supreme Court Reporter
S.E.	South Eastern Reporter
So. 2d	Southern Reporter, Second Series
Stanford JIL	Stanford Journal of International Law
Stb.	Staatsblad (Netherlands Bulletin of Acts, Orders and Decrees)
StGB	Strafgesetzbuch (German Penal Code)
Suppl.	Supplement

T.Ch.	Trial Chamber, ICTY or ICTR
Transl.	Translation
Transn. L & Contemp. Probs.	Transnational Law & Contemporary Problems
Tulsa J of Comp. & Int. L	The Tulsa Journal of Comparative & International Law
TWC	Trials of War Criminals
UCMJ	(U.S.) Uniform Code of Military Justice
Univ. of Richmond LR	University of Richmond Law Review
UN	United Nations
UN Doc	United Nations Document
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UNWCC	United Nations War Crimes Commission
U.S.	United States Supreme Court Reports
USCMA	United States Court of Military Appeals
v.	versus
Vol.	Volume
VR	Vermont Reports
WCA	(Dutch) War Crimes Act
WLR	Weekly Law Reports
Yale LJ	The Yale Law Journal
YBILC	Yearbook of the International Law Commission
YIHL	Yearbook of International Humanitarian Law

INTRODUCTION

In early July, Mladić attacked the safe Muslim haven of Srebrenica. Bosnian Serb troops entered the city on the late afternoon of Tuesday, 11 July 1995, and began to commit the single biggest crime of the Bosnian war, the murder of some 8.000 unarmed Muslim men.¹

He had been a witness to Calley's gunning down of at least three separate groups of villagers. 'It was terrible. They were slaughtering the villagers like so many sheep' (...) Exactly what did, in fact, occur in the village of 'Pinkville' in March 1968 I do not know for certain, but I am convinced that it was something very black indeed.²

Srebrenica and My Lai set the scene for this study. This research deals with mass crime constituting conduct that is criminal under international law and which generates individual responsibility. While the Srebrenica and My Lai massacres differ in scale and background, the former prompted by ethnic hatred and extreme nationalism, the latter by a degeneration and moral devaluation brought out by war, they both qualify as violations of international law entailing individual criminal responsibility. Differences may be expressed in their respective legal qualification, as genocide/crimes against humanity in the Srebrenica case and as war crimes in the case of My Lai, but not in relation to the concept of individual criminal responsibility attached to it.

The focal point of this research is the concept of individual criminal responsibility. Before taking a closer look at this concept, we should take a step backwards and concentrate on the framework within which this concept is placed and has evolved.

War and law

The waging of war seems to be inherent in mankind. As Best observes in his magnificent study on war and law,

No one can tell how war began among men but there is evidence of it from earliest times; evidence not just in the form of weapons meant for fighting and of human remains broken by weapons, which cannot of themselves signify anything as serious war, but of fighting by organized groups for collective purposes.³

The laws of war have an impressive history. Already before the emergence of the modern State the need was felt to regulate conflict behaviour. 'War' being a social phenomenon that can be found in any community of men has generated 'law' in

¹ M. Glenny, *The Balkans, 1804-1999. Nationalism, War and the Great Powers*, London (1999), p. 650.

² Extract from 'the Ridenhour Letter' in P.A. French (ed.), *Individual and Collective responsibility, the Massacre at My Lai*, Cambridge (Mass.), (1972), pp. 172-173.

³ G. Best, *War and Law Since 1945*, Oxford (1994), p. 14.

various forms, as a chivalrous code between knights, fair play rules among sportsmen and even the rules of 'vendetta' governing relationships between clans.⁴ It was not until the Westphalian State-system and the period of Enlightenment that virtues such as chivalry, honour, discipline and self-restraint started to regulate inter-State relationships. The development of the laws and customs of war has been spectacular since then, particularly in the second half of the nineteenth century with the formulation of the Lieber Code (1863), the first Geneva Convention (1864) and the acceptance of the Oxford Manual (1880). With the efforts of the International Committee of the Red Cross and within the framework of the United Nations the laws of war today consist of a plethora of treaties framing the balance between military necessity and humanitarian interests. The latter explains the name change: from laws of war or armed conflict to international humanitarian law.

The reality of warfare has changed considerably over time. While most, if not all, armed conflicts were once fought *between* States, many are now fought *within* States. Particularly since the end of the Cold War has the world witnessed an outbreak of non-international armed conflicts, often of an ethnic nature. Since the laws of war are for the most part still premised on the concept of classic international armed conflict, it proved difficult to fit this law into 'modern' war crimes trials dealing with crimes committed during non-international armed conflicts. The criminal law process has therefore 'updated' the laws of war.

The criminal judge, who is confronted with this dividing line between international law on the one hand and criminal law on the other hand, has the task to merge the two together. It is therefore in war crimes law that international law, *i.e.* international humanitarian law, has been not only applied, but also developed. This has resulted in an attempt to bring international criminal law into line with the realities of modern warfare on the one hand and, with the purpose of the laws of war (the prevention of unnecessary suffering and enforcing 'fair play') on the other hand.

Criminal responsibility

Enforcement of the laws and customs of war through punishment of individuals can be traced back to Grotius and Vattel.⁵ Their natural law theories constitute early versions of international rules that directly bind the individual. The individual may be vindicated when found to have violated the natural law.⁶ Military codes dating back to the Middle Ages and the custom that belligerents may enforce the laws of war through punishment of military personnel in their custody, provide for the legal foundation of war crimes jurisdiction in international law.⁷

With the Nuremberg and Tokyo war crimes trials after the Second World War,

⁴ Ibidem.

⁵ See L. S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations*, Dordrecht/Boston/London (1992), p. 18.

⁶ H. Grotius, *De Jure Belli Ac Pacis* (1615), Book II, Chapter XXI, para. II (ed. F.W. Kelsey c.s.), New York/London (1964), p. 523. See generally P.P. Remec and Q. Wright, *The Position of the Individual in International law according to Grotius and Vattel*, The Hague (1960).

⁷ See G. Schwarzenberger, *International law as applied by International Courts and Tribunals: Vol. II The Law of Armed Conflict*, London (1968), pp. 443-447.

war crimes law entered a new phase. The Nuremberg trial, despite its shortcomings, can be regarded the starting point of modern war crimes law on the international level. Apart from the clear recognition of the principle of individual responsibility for international crimes, the Nuremberg trial was a breakthrough in that it did away with the immunity of government officials and ended the Act of State doctrine. No one can escape criminal liability for international crimes, not even a Head of State. If the battle of Agincourt had been fought today, King Henry V could have been brought to trial for having ordered his soldiers to kill the prisoners.⁸

Since Nuremberg, war crimes law has developed into a discipline, a separate body of law that, with the establishment of the *ad hoc* Tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), has shown wide developments. This discipline is referred to as 'international criminal law', a confusing term, harbouring various meanings.⁹ International criminal law is understood in this study in the material, substantive sense: it deals with 'international crimes committed by the subjects of international law'.¹⁰

The codification-process of international criminal law has culminated in the adoption of the Rome Statute establishing the International Criminal Court (ICC). The lawmaking process through judicial interpretation is ongoing at the *ad hoc* Tribunals and about to begin at the ICC. With the ICC international criminal law has entered a new phase and it is for this reason that the present study takes the ICC Statute as the starting-point, examining its concept of individual criminal responsibility in the light of its precedents, the Nuremberg and the *ad hoc* Tribunals.

1. CENTRAL QUESTION

This study examines the *scope* and *content* of the concept of individual criminal responsibility for violations of international humanitarian law, *i.e.* genocide, crimes against humanity and war crimes. The latter are referred in the title of this study as 'violations of international humanitarian law' to express their origin, the laws and customs of war.¹¹

The principle of individual criminal responsibility was established in Nuremberg and Tokyo and was affirmed in subsequent national proceedings. It has been endorsed in the criminal law systems of the *ad hoc* Tribunals and the International

⁸ Shakespeare, *Henry V*, Act IV, scene 6.

⁹ J.M. Sjöcrona and A.A.M. Orie, *Internationaal Strafrecht*, Deventer (2002), pp. 1-10.

¹⁰ G. Schwarzenberger, 'The Problem of an International Criminal Law,' in G.O.W. Mueller and E.M. Wise (eds.), *International Criminal Law*, London (1965), pp. 3-37 and 4-14. See also J.J. Paust *et al.* (eds.), *International Criminal Law: Cases and Materials*, Durham (1996), p. 3 *et seq* and M. Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court. Genocide, Crimes Against Humanity, War Crimes*, Antwerp-Oxford-New York (2001), pp. 13-18.

¹¹ This does not mean that the term international crime is not used in this study. On the contrary, despite its equivocal meaning, it has been used as a synonym for a violation of international humanitarian law.

Criminal Court. The concept has a peculiar twofold nature. First, the hybrid character of its normative framework: international criminal law. Secondly, the nature of its object: violations of international humanitarian law, or international crimes.

Nature of norms

International criminal law is a meeting of two worlds, that of criminal law and that of international law. Rather than resulting in a natural osmosis this encounter is an uncomfortable combination of two inherently different types of law. This is obviously demonstrated in the application of the law, which will be discussed more in detail below, but also in the process of averting criminal responsibility, for instance by reliance on a defence. As will be observed when discussing the defence of self-defence the contrast between international law and criminal law is rather stark. For the moment it suffices to observe that in the individual as a subject of international criminal law these two worlds meet. If the individual acts as a State organ, his or her¹² behaviour is regulated by international law, more specifically the laws and customs of war. As an individual human being he is, however, still subject to the rules and principles of criminal law.

International criminal law shows yet another meeting of worlds, that of two legal cultures: civil law and Anglo-American law. In creating criminal law at an international level, national criminal law and doctrine serve as sources of inspiration, sometimes unconsciously. It is therefore hardly surprising that in creating and applying international criminal law, lawyers from different legal cultures have encountered misunderstandings and 'lego-cultural' gaps between them. Ideally, these two legal cultures merge into a type of supra-national criminal law, thus transcending national roots. This is a result not readily achieved. It should, however, certainly be the aim. At the moment we still need to identify a legal concept's pedigree and compare it with an equivalent that is familiar to us in order to understand its scope and substance.

The dividing lines that run between the above-mentioned layers of law are like fault lines covered under the surface of international criminal law. The attempt to merge these layers of law beyond these lines into one type of law results in dynamic law-making, but has an inherent danger of disintegration and misunderstanding. It is therefore a challenge to devise a coherent system of (substantive) international criminal law. In interpreting and applying the concept of individual criminal responsibility the underlying types of law and legal cultures surface. It is really in the process of attributing and averting criminal responsibility that these layers of law start moving.

Nature of crimes

Violations of international humanitarian law connote 'system-criminality'¹³ or 'collective wrongdoing'¹⁴. Almost by nature genocide, crimes against humanity, and war

¹² From now on, 'a person' or 'one' will be referred to as 'his'. This is for reasons of pragmatism and realism.

¹³ B.V.A. Röling, 'Aspects of the Criminal Responsibility for Violations of the Laws of War', in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Napoli (1979), p. 203.

¹⁴ A. Jokić (ed.), *War Crimes and Collective Wrongdoing. A Reader*, Oxford (2001).

crimes occur on a mass-scale or in the context of systematic violence. This separates them from most 'ordinary' crimes. System-criminality invariably connotes a plurality of offenders, particularly in carrying out the crimes. It is therefore hardly surprising that common purpose liability and complicity provide the basis for the bulk of war crimes convictions. Superior responsibility provides such a basis for those who are in a relationship of effective control to the actual perpetrator(s) and who could and should have intervened to halt the crimes. A third type of criminal responsibility, generated by system-criminality, is instigation. Systematic crime presupposes an *auctor intellectualis* pulling the strings. This can be one person, but also a group of people gathered together in a political or military structure.

The concept of individual criminal responsibility in international criminal law thus comes with a certain 'flavour'. System-criminality entails system-responsibility. System-responsibility, or responsibility for collective wrongdoing, has the danger of being interpreted as collective responsibility. This is evidenced by Bernays' collective criminality theory applied in Nuremberg. His proposal to prosecute and convict individuals for mere membership of a criminal organisation, such as the SS and SA, does not respect the principle of individual criminal responsibility. System-criminality can put pressure on the principle of individual criminal responsibility and relegate it from the sophisticated standard it has achieved after many centuries, at least in (most) national legal systems.

System-criminality not only leaves its traces in *attributing* criminal responsibility, it also reflects in *averting* criminal responsibility. The nature of war crimes, crimes against humanity and genocide has left scholars and practitioners in the field of international criminal law reluctant to allow those accused of such crimes to resort to a defence excluding criminal responsibility. The underlying idea is that to commit these crimes, perpetrators and participants of genocide, crimes against humanity and war crimes would have a higher culpability than 'ordinary' perpetrators. War criminals are considered to have bad or, at least, no moral principles and by this reasoning should not profit from any ground excluding their responsibility. The exclusion of the defence of superior orders in Nuremberg, and at the *ad hoc* Tribunals and the absence of any mention of other defences in their respective Statutes may be seen as evidence of this idea. Another more tangible reason for this restrictive approach stems from criminal policy considerations. The interest of general prevention and the assurance of maximum obedience to the rules of international humanitarian law may be regarded as prompting this restrictive approach.

Individual criminal responsibility

It seems that in establishing criminal responsibility most national criminal legal systems distinguish the following steps:

- 1) the conduct (act or omission) satisfies the definitional elements of a crime;
- 2) the conduct is not justified by law;
- 3) the perpetrator cannot be excused.

Not every legal system, however, makes the same distinction. Those systems that do not differentiate between justifications and excuses, such as the Anglo-American le-

gal systems, do not discern step 2) from 3). However, one way or another, as a two or as a three-stage process, every legal system distinguishes between attributing and averting responsibility in finding a person criminally responsible. If the answer to 1) is in the affirmative and to 2) and 3) in the negative a person is found criminally responsible and the question of an appropriate reaction rises, *viz.* what punishment does the criminal deserve for his behaviour? This is another phase of the criminal process, which will not be dealt with in the ambit of this research.

In determining whether a person's conduct can be qualified as criminal under law, one needs to establish that his act or omission can be traced back to a guilty mind and constitutes voluntary conduct, which is blameworthy. Individual criminal responsibility turns on culpability and requires proof of *personal* guilt (i) relating to one's *own* conduct (ii). This is what distinguishes individual from collective responsibility. Another element often mentioned in association with the previous two is that criminal responsibility can only attach to precisely defined conduct.¹⁵ This relates to the principle of *nullum crimen sine lege*, which is left outside this research and has been discussed elaborately elsewhere.¹⁶ The other two elements, however, are central to it. They constitute the 'parameters of culpability' that underlie the process of attributing and averting criminal responsibility and as such play a vital role in the two- or three-stage process described above. To qualify as a sophisticated and coherent criminal law system where the concept of criminal responsibility is respected and endorsed, international criminal law should respect the parameters of culpability as well.

The above brings us to the central question of this research: do the parameters of culpability underlie the concept of individual criminal responsibility in international criminal law? More specifically: do the nature of international crimes (system criminality) and the nature of the normative framework (international law, in particular international humanitarian law) generate a concept of international individual criminal responsibility that deviates from individual criminal responsibility in national law?

2. APPLICABLE LAW

In answering the central question of this study recourse has been found to various legal sources, of national and international origin. The sources of international law, as listed in Article 38 of the Statute of the International Court of Justice, are conventions, customs, general principles and the writings of the most distinguished publicists.¹⁷ This is not an exhaustive list. The International Court of Justice recognises

¹⁵ See M.S. Groenhuijsen, 'Schuld en Boete. Een beschouwing over strafrechtelijke verantwoordelijkheid', in M.A.P. Bovens *et al.*, *Verantwoordelijkheid: Retoriek en Realiteit*, Zwolle (1989), p. 43.

¹⁶ See for an elaborate study Boot (2001), in particular, pp. 75-396.

¹⁷ Article 38:

1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:

other sources of international law as well, such as (binding) decisions of international organisations and *ius cogens*.¹⁸ These sources reflect the special character of international law as law, requiring ‘a consensual regulation of relations between co-equal sovereign states’¹⁹ and stand in contrast to the nature of criminal law, which is concerned with vertical relationships between individuals and judicial authorities and is based on coercive rules of legal certainty. Be that as it may, being international in nature and applying (primarily) international law, international tribunals and courts cannot but rely upon the well-established sources of international law.²⁰ This means that when studying the sources of international criminal law one needs to adopt an ‘international law approach’ and have regard for their validity and status in international law.

The Statutes of the international military tribunals of Nuremberg and Tokyo, the Yugoslavia and Rwanda Tribunals and the International Criminal Court have been the primary objects of study. These instruments qualify as sources of international law.²¹ Case law based on these instruments also served as an object of study. A few remarks should be made on its status in international law.

According to international law, judgements can only be a source of law when they constitute a rule of customary international law, or alternatively reflect general principles of law pursuant to respectively Article 38(1)(b) and (c) of the ICJ Statute. The existence of a rule of customary law needs to be evidenced through State practice (*usus*) and *opinio iuris*.²² The showing of State practice proves problematic in the context of armed conflicts since it is difficult to deduce *usus* from conduct of troops on the battlefield, not in the least because lawyers are often far removed from

a. international conventions, whether general or particular, establishing rules expressly recognised by the contracting States;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognised by civilised nations;

d. subject to the provision of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if parties agree thereto.

¹⁸ See further M.E. Villiger, *Customary international law and treaties: a manual on the theory and practice of the interrelation of sources*, The Hague/Boston/London (1997).

¹⁹ M. C. Bassiouni, *International Criminal Law*, Vol. I (Crimes) New York (1999), p. 11.

²⁰ ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, T. Ch. II, (*Kupreškić Judgement*) 14 January 2000, para. 540.

²¹ The ICC Statute, being a treaty, qualifies as a source of international law pursuant to Art. 38(1)(a) of the ICJ Statute, whereas the Statutes of the Nuremberg and Tokyo Tribunals can be said to constitute international custom under Article 38(1)(b) of the ICJ Statute. The Statutes of the *ad hoc* Tribunals qualify as sources of law by being based on binding decisions of international organisations, viz. the Security Council of the United Nations.

²² *Asylum Case*, (*Columbia v. Peru*), Judgement, 20 November 1950, ICJ Reports (1950), p. 266; *North Sea Continental Shelf (Fed. Rep. Of Germany v. Denmark; Fed. Rep. of Germany v. The Netherlands)*, Judgement, 20 February 1969, ICJ Reports (1969), paras. 70-78; *Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v. U.S.*), Judgement, 27 June 1986, ICJ Reports (1986), paras. 183-186.

the battlefield. The *Tadić* Appeals Chamber recognised this when it admits that ascertaining State Practice is extremely difficult,

[b]y the fact that not only is access to the theatre of military operations normally refused to independent observers (often even the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments.²³

Another approach is warranted in establishing customary international law in the field of international humanitarian law.²⁴ The ICTY Appeals Chamber in *Tadić* deduced the existence of a rule of customary law through State practice by looking at official pronouncements of States, military manuals and judicial decisions.²⁵ This approach seems to blur the distinction between State practice and *opinio iuris* and it has even been suggested that it 'entails some disregard for the *usus* element of custom in favour of *opinio juris*'.²⁶ In any event, the approach of the *Tadić* Appeals Chamber underlies the observations in this study on customary international law.

If a judgement cannot constitute evidence of a customary rule, it may be indicative of the emergence of a general principle of law, or be a persuasive authority concerning the existence of a rule or principle. This was the position taken by the ICTY Trial Chamber in *Kupreškić*, and is equally endorsed in this study.

Recourse has further been found in this research to national law, jurisprudence and doctrine. Their value in international law, however, is contentious and application of national (case) law and doctrine requires a cautious approach. Again the *Kupreškić* judgement is of guidance. The Trial Chamber held that when custom and treaty are of no avail, international tribunals must resort to a process of deriving general principles of criminal law from the domestic laws of States.²⁷ General principles of law can be useful in some areas of international criminal law that are underdeveloped and where no international law definitions exist. National case law and statute law have further served as means to understand the scope and content of certain international concepts. The same can be said of Draft Codes of the International Law Commission and the International Law Association.

The concept of individual criminal responsibility as laid down in the ICC Statute is not defined in its constitutive elements in the same way as the crimes are. Under the Rome Statute, elements of crime 'shall assist the Court in the interpretation and application of Articles 6, 7 and 8'.²⁸ These elements, listed in a separate instrument, are a further elaboration of the definitions of the crimes of genocide, crimes against

²³ ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, A.Ch. (*Tadić* Jurisdiction Decision) 2 October 1995, para. 99.

²⁴ T. Meron, 'The Geneva Conventions as Customary Law', 81 *AJIL* (1987), p. 354 *et seq.*

²⁵ *Tadić* Jurisdiction Decision, para. 99.

²⁶ I. Bantekas, *Principles of direct and superior responsibility in international humanitarian law*, Manchester (2002), p. 15.

²⁷ *Kupreškić* Judgement, para. 540.

²⁸ Article 9(1) ICC Statute.

humanity and war crimes. No 'elements' exist with regard to the concept of criminal responsibility. The only provision within the ICC framework that further defines the concept of individual criminal responsibility is Article 30 of the Statute on the mental element. No other elements shape its content. There is therefore a greater margin to find recourse to instruments outside the ICC Statute in interpreting concepts of individual responsibility than there is with regard to the crimes codified in the Statute. This is of particular importance in instances where the ICC drafters have not dealt with a certain matter and that void gives room for interpretation. An example of this is liability by omission.

3. METHOD AND STRUCTURE

The ICC Statute is taken as the point of departure of this study. It is through this Statute that the law of its predecessors is examined. The evaluation of the concept of individual criminal responsibility in this work commences in Nuremberg and ends in Rome. The format used varies with the object of research and serves the object of study, rather than the other way around. For instance, the defences encapsulated in Article 31, and Articles 32-33 of the ICC Statute all have a different nature and pedigree. Some have a national origin with no (relevant) prior application on the international level (mental incapacity and intoxication) and still bear clear signs of their constituent national parts. Others have an international source and no national equivalent (reprisals, *tu quoque* and military necessity). A third group of defences has a solid basis on the international level and has moved away from 'national roots' (self-defence, duress, and superior orders). These differences account for the fact that, unlike the discussion of the various participation modes in Article 25 of the ICC Statute which are analysed in a fixed manner, the format of this study, when analysing defences, differs from one defence to the other.

The consecutive way in which the participation modes and defences are discussed, evaluating them in the light of international jurisprudence and subsequently of national underpinnings, is not applied with regard to superior responsibility. This concept, encapsulated in Article 28 of the ICC Statute, is evaluated in the international context in one chapter and compared to analogous national concepts in another chapter. This proved to be the best way to describe and analyse the jurisprudence of the *ad hoc* Tribunals, which proved essential in developing the concept of superior responsibility and was instrumental in drafting the ICC concept of superior responsibility. The separate chapter on analogous concepts in national law helps to uncover the nature and scope of superior responsibility, something that has caused many misunderstandings over the years.

The research covers the two sides of criminal responsibility: attributing and averting responsibility. It is subdivided in three parts: Modes of Individual Criminal Responsibility (I), Superior Responsibility (II), and Defences (III). Each part concludes with an evaluation, which is intended to not only evaluate the preceding chapters, but also to link the three parts together.

Part I

The first part discusses the modes of individual responsibility, and deals predominantly with criminal participation. Discussing the collective criminality theory at Nuremberg shows that the concept of individual responsibility at Nuremberg was shaped in group terms and makes the question pertinent of how *individual* criminal responsibility at Nuremberg was. The subsequent analysis of the various participation modes listed in the ICC Statute in the light of the jurisprudence of the *ad hoc* and Nuremberg Tribunals allows an analysis of the content of these participation modes in international criminal law and shows the progress that has been made since Nuremberg. Comparing them to national concepts of criminal participation enables an evaluation of the various modes of individual criminal responsibility as to their scope.

Part II

The second part is exclusively dedicated to superior responsibility. This concept, of military origin, is a particular type of criminal participation and is employed to attribute responsibility to superiors who have failed to prevent or punish crimes committed by subordinates. Unlike common purpose liability and complicity, it requires a vertical relationship with the actual perpetrator by definition. It differs from a concept such as instigation in that it is liability by *omission*. The concept underwent a spectacular development since the establishment of the *ad hoc* Tribunals. The latter have identified the concept as a specific type of individual criminal responsibility, which paved the way for the founding fathers of the ICC Statute to draft the superior responsibility concept as a crime of omission, thereby ending controversies and misunderstandings about the nature of the concept.

Part III

The third part deals with averting criminal responsibility, *viz.* defences. The ICC Statute is unique among international courts in that it provides for a list of defences. None of its predecessors list grounds for excluding criminal responsibility in their Statute. On the contrary, the Nuremberg and Tokyo, and the *ad hoc* Tribunals only mention defences by expressly *excluding* them from their respective jurisdiction. The adoption of the defences encapsulated in Articles 31-33 of the ICC Statute therefore is a breakthrough and can be regarded a step closer to making international criminal law a sophisticated and balanced system of criminal law.

4. LIMITATIONS

When analysing such a fundamental and vast topic as individual criminal responsibility, it is essential to set boundaries and make choices. First of all, a choice in criminal justice systems. International criminal law is also applied outside the international level, namely on the national and 'semi-international' level. However, this study is only concerned with international criminal law as applied on the *international* level. National war crimes trials have merely served as a guidance rather than an object of study. Semi-international law systems such as the UN special Courts of

East-Timor and Sierra-Leone have been completely left outside this research. The Statutes of both courts largely represent the law of the *ad hoc* Tribunals and case law has been scarce, in the case of Sierra Leone so far non-existent.

A second limitation relates to the confined understanding of individual criminal responsibility that underlies this study. The concepts of attempt and abandonment, which can be brought under the theory of individual criminal responsibility in a broad understanding, have been left aside. An analysis of these notions was not thought indispensable in answering the above-formulated central question. Somewhat related to the previous point, was the choice not to further examine the participation concept of the crime of genocide. This participation concept is part of the definition of the crime of genocide and an analysis of this concept would have changed the focus from forms of criminal responsibility to the crime of genocide.

A final point relates to the various defences contained in the ICC Statute. In the third part of this study only the 'substantive' defences are described and analysed. Other defences, such as the 'exclusion of jurisdiction over persons under eighteen' (Article 26 ICC Statute) and (the 'irrelevance of) official capacity' (Article 27 ICC Statute) have not been object of research.

PART I

MODES OF INDIVIDUAL RESPONSIBILITY

Holmes: 'I must take the view, your Grace, that when a man embarks upon a crime, he is morally guilty of any other crime which may spring from it'.

Duke: 'Morally, Mr. Holmes. No doubt you are right. But surely not in the eyes of the law. A man cannot be condemned for a murder at which he was not present, and which he loathes and abhors as much as you do'.

SIR ARTHUR CONAN DOYLE

INTRODUCTION TO PART I

Any study on *individual* responsibility in international criminal law should at some point discuss the *collective* criminality theory of Colonel Bernays which was devised at Nuremberg and proved instrumental in prosecuting and convicting Nazi war criminals. This theory illustrates ‘system responsibility’ in all its peculiarities. It is for that reason that in the first Chapter of this study Bernays’ theory is examined. Alongside, or shortly after the enforcement of Bernays’ theory, a process of codification of individual criminal responsibility took place. This process, which is described in the second half of Chapter 1, led to a differentiation in modes of individual criminal responsibility and has – at least for the time being – culminated in Article 25 of the ICC Statute.

Chapter 2 takes as its starting point Article 25 of the ICC Statute. This provision covers various types of perpetration and participation. These types of criminal conduct are analysed and compared, while mirrored with equivalents in national and international criminal law. The first part of Chapter 2 is a ‘general part’ on individual criminal responsibility. It sets out the tools and terms that are used to analyse and appraise individual criminal responsibility in international law. As such it pertains to the other parts of this study as well.

Part I is the core of this study on *attributing* responsibility. Superior responsibility, which constitutes part II of the study, is understood as a special form of criminal responsibility. It is premised on the basic elements and structures of individual criminal responsibility, as set out in part I.

CHAPTER 1

HISTORICAL SURVEY: COLLECTIVE CRIMINALITY AND INDIVIDUAL RESPONSIBILITY

1. INTRODUCTION

War criminality often connotes a plurality of offenders. As one commentator said, 'as distinct from common crimes, international crimes are almost always committed not by one person, but by several or many persons – a group, a band, a clique'.²⁹ This explains why in the Nuremberg Judgement and the subsequent proceedings many of the convictions were based on accomplice liability or criminal participation. Yet the concept of accomplice liability – at least as understood in certain national legal systems – has shortcomings when applied to a certain category of war criminals. Consider the following statement:

The accomplices in international crimes are extremely peculiar in their official position and their social composition. These are not some Tom, Dick or Harry of unknown lineage, without hearth or home. These are 'titled personages', upper classes, Ministers, generals, 'leaders'. But the particularly complicated character of responsibility for complicity in international crimes is determined, of course, not by the high ranks and titles of the accomplices. The complexity and exceptional peculiarity of the structure of complicity, in international crimes are caused by the extremely complex connections between the individual accomplices in international offences.³⁰

The theory of accomplice liability is not wholly sufficient in adjudicating the culprits of system criminality. Those behind the scene of the crime, pulling the strings, do not fit the picture of accomplices who facilitate a crime as aiders and abettors or participate in the crime as joint (physical) perpetrators. They are perpetrators themselves, albeit not physical perpetrators. Moreover,

The peculiarity of the role of perpetrator of an international crime consists in this: that he acts not only himself but also with the help of a complex executive machinery. In the hands of international criminals, masses of peoples become an instrument of the most heinous crimes, just as a knife becomes an instrument of crime in the hands of a murderer.³¹

This 'executive machinery' may be considered culpable as well. While it would be incorrect to suggest that the entire German people were guilty as a collective tool of Hitler, there were certainly large numbers of people, organised in groups or not, who can be said to have been responsible for supporting and carrying out Hitler's policy. How can this species of mass crime best be dealt with?

²⁹ A. N. Trainin, *Hitlerite Responsibility under International Law*, London (1944). p. 79.

³⁰ *Ibidem*.

³¹ *Ibidem*.

In Nuremberg, the above considerations led to the so-called collective criminality theory. On the basis of this theory, the International Military Tribunal (IMT) convicted the 'major war criminals' of the crime of conspiracy while the lower and mid-level accused were prosecuted and convicted for membership of a criminal organisation by the allied military courts and tribunals in subsequent proceedings. Although the concept of criminal organisations proved contentious in the context of the IMT, it led to a considerable number of trials and convictions for membership of a criminal organisation. These judgements are still relevant in present day war crimes prosecution. They have been a source of law for the ICTY in devising its common purpose doctrine and for this reason we will discuss them below and analyse the collective criminality theory.

In the second half of this chapter, the codification-process of the concept of individual criminal responsibility post-Nuremberg is described by listing the relevant provisions. It is noteworthy that the two concepts underlying the collective criminality theory, the concept of criminal organisations and the conspiracy concept, are lacking in most of these (draft) provisions. Accomplice liability and criminal participation on the other hand, do feature in these (draft) texts.

2. THEORY OF COLLECTIVE CRIMINALITY

In his memorandum entitled 'Trial of European War Criminals', Colonel Murray C. Bernays proposed a trial that dealt with pre-war as well as with wartime atrocities.³² Bernays' plan was unique in that on the basis of individual responsibility it enabled conviction of, not only the perpetrators of crimes, but also their superiors and the thousands of lower rating Nazi culprits who had been passive observers. As Bernays wrote in his proposal,

The basic difficulty with the suggestions heretofore considered is in the approach. It will never be possible to catch and convict every Axis war criminal, or even any great number of them, under the old concepts and procedures. Even if this could be done it would not, of itself, be enough. The ultimate offence, for example, in the case of [the village of, *EvS*] Lidice, is not alone the obliteration of the village, but even more, the assertion of the right to do it. The ordinary thug does not defend on the ground that thuggery is noble; he only contends that the police have arrested the wrong man. Behind each Axis war criminal, however, lies the basic criminal instigation of the Nazi doctrine and policy. It is the guilty nature of this instigation that must be established, for only thus will the conviction and punishment of the individuals concerned achieve their moral and juristic significance. In turn, this approach throws light on the nature of the individual's guilt, which is not dependent on the commission of specific criminal acts, but follows inevitably from the mere fact of voluntary membership in organisations devised solely to commit such acts.³³

³² B.F. Smith, *The American Road to Nuremberg. The Documentary Record 1944-1945*, Doc. 16, New York (1982), pp. 33-37.

³³ *Ibidem*, p. 35.

This approach set the tone of the collective criminality theory at Nuremberg. Both crimes and criminals were collectivised. In Bernays' plan, collectives, like the Gestapo and the Nazi cabinet, would stand trial through their individual representatives. The latter would be responsible for being part of a criminal conspiracy.

The judgement should adjudicate: (...) that every member of the Government and organisations on trial is guilty of the same offence. Such adjudication of guilt would require no proof that the individuals affected participated ('affected participation') in any overt act other than membership in the conspiracy.³⁴

The concept of conspiracy and the notion of criminal organisations were two pillars of the 'theory of collective criminality'. The plan was to be carried out in two phases. First, before an international court entrusted with the task of adjudicating major war criminals for having participated in the commission of crimes against humanity and war crimes, and for conspiring to commit crimes against peace. This International Court would then declare Nazi organisations such as the Nazi government, the Nazi party, Gestapo, SS, and SA to be criminal. In the second phase, national courts of the Allied Powers would try individual members of the criminal organisations declared criminal by the International Military Tribunal, proof of membership being sufficient for establishing guilt.³⁵

3. CONSPIRACY

The key concept in the collective criminality theory before the IMT was the concept of conspiracy.³⁶ This notion, of common law origin, proved to be controversial amongst the civil law allies. It was considered broad, vague and unfamiliar.³⁷ The German scholar Jescheck even considered it a concept contrasting continental traditions of criminal law.³⁸ Despite the scepticism, the conspiracy concept survived. It was incorporated in Article 6 of the Nuremberg Charter.

³⁴ B.F. Smith, *Reaching Judgment at Nuremberg*, New York (1977), p. 36.

³⁵ S. Pomorski, 'Conspiracy and Criminal Organization', in G. Ginsburg and V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law*, Dordrecht (1977), pp. 215-216. See also H. Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle en application de la loi no. 10 du Conseil de Contrôle Allié*, Paris (1960), pp. 417-473.

³⁶ A definition valid at the time was that of C.S. Kenny, *Outlines of Criminal Law*, Cambridge (1966), p. 335: 'Conspiracy is the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it'.

³⁷ Smith, (1977), p. 51.

³⁸ 'Es kommt hinzu, daß der Begriff der conspiracy in sich alle diejenigen Eigenarten des anglo-amerikanischen Strafrechts vereinigt, die wegen ihres grundsätzlichen Gegensatzes zur kontinentalen Strafrechtstradition nicht für das Völkerstrafrecht vorbildlich sein können', H.H. Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht*, Bonn, (1952), p. 276.

Article 6

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- a) *crimes against peace*: namely planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or *participation in a common plan or conspiracy* for any of the foregoing;
- b) *war crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or [persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- c) *crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organisers, instigators and accomplices *participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes* are responsible for all acts performed by any persons in execution of such plan. (italics added, EvS)

The controversies that existed over the concept of conspiracy, however, left their mark. It was not mentioned in the Charter as one of the principal separate offences and thus lost much of its prominence. The Charter did not define the concept of conspiracy, leaving much room for argument and interpretation as to its meaning. The reference to 'common plan' in Article 6(a) seemed to have been a compromise to the continental unfamiliarity with conspiracy as a legal concept. The last clause of Article 6(c) is of interest in that it incorporates conspiracy as a ground for conviction of substantive offences. Here, participation in a conspiracy is a type of criminal participation, whereas in Article 6(a) it is an inchoate crime, punishable *per se*. As Pomorski puts it, 'it rather defines liability of conspirators as accomplices to crimes actually committed by other persons in furtherance of the common design'.³⁹ In this way, participation in a conspiracy became the legal equivalent of complicity.⁴⁰

³⁹ Pomorski (1977), p. 223.

⁴⁰ According to Donnedieu de Vabres, the French judge at Nuremberg, the final clause of Article 6 refers to what in French criminal law, is known as 'complicité': 'Cette disposition n'a pas pour objet de prévoir un crime distinct, ce qui serait en contradiction avec l' énumération précédente. Son seul but est de déterminer *les personnes* qui sont responsables, en qualité de participants principaux ou accessoires, des crimes précédemment énumérés. En visant les dirigeants, organisateurs, provocateurs ou complices, elle se réfère au droit commun de la participation criminelle. Les chefs, les organisations sont des auteurs moraux ou des complices par fourniture des moyens, suivant le degré de leur participation. Les instigateurs ou provocateurs sont, en droit français les complices, et forment dans d'autres législations continentales, une catégorie distincte de participants. La seule particularité du texte consiste à rattacher la participation au complot, au lieu de la relier directement à chacun des crimes que le complot a pour

The part of the Nuremberg Judgment concerning conspiracy is short. The issue resulted in a split among the Nuremberg judges.⁴¹ The French judge, Donnedieu de Vabres, proved a strong opponent. He was of the opinion that,

Ni le droit français, ni le droit allemand, ni le droit international ne connaissent cette infraction spécifiquement britannique. En visant l'acte d'accusation heurte de front le principe de légalité des délits et des peines.⁴²

The Soviet Judge, Nikitchenko, however, once a leading critic now turned out to be a strong supporter of the conspiracy charge. As soon as he understood that the concept of conspiracy offered the only basis on which to convict certain Nazi officials, such as the Propaganda Ministry official, Fritzsche, he supported the conspiracy charges.⁴³

After months of deliberations, a compromise was found and the judges were able to speak in one voice. The conspiracy charge was limited to crimes against peace. By emphasising the planning of an aggressive war and at the same time preventing the inclusion of a reference to the existence of a *general* conspiracy, both extremes – Nikitchenko and Donnedieu de Vabres – could be brought together. As to the scope and content of the conspiracy, the Judgement displayed a narrower view than the Prosecution:

The Prosecution says, in effect, that any significant participation in the affairs of the Nazi party or Government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party program, such as are found in the 25 points of the Nazi party, announced in 1920, or the political affirmations expressed in *Mein Kampf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.⁴⁴

The argument of the defence that conspiracy requires that the participants be equal and is incompatible with dictatorship was addressed in the Judgement as follows:

The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; acted under the direction of the man

objet de commettre (...) En somme, c'est la notion française de la complicité que consacre la disposition finale de l'article 6',

⁴¹ Smith (1977), pp. 119-136.

⁴² Donnedieu de Vabres, cited in H.H. Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht*, Bonn, (1952), p. 276. See also Donnedieu de Vabres in *Recueil des Cours 1947-I* (70), pp. 528-577.

⁴³ Smith (1977), p. 127.

⁴⁴ Nuremberg Judgment in L. Friedman, *The Law of War. A Documentary History*, Vol. II, New York (1972), p. 941.

who conceived it. Hitler could not make aggressive war by himself. He had to have co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.⁴⁵

This excerpt of the Nuremberg Judgement, which rejects the argument known as the 'Führerprinzip', underlines Trainin's observations mentioned in the introduction of this chapter that war criminality generates a specific class of war criminals, who are 'extremely peculiar in their official position and their social composition'.⁴⁶ It was for this class of perpetrators that the removal of sovereign immunity was required.

The Pacific counterpart of the Nuremberg Trial, the International Military Tribunal for the Far East, or the Tokyo Tribunal, also penalised the participation in a common plan or conspiracy to commit crimes.⁴⁷ All but two of the twenty-eight defendants were convicted of conspiracy. In Tokyo, the concept of conspiracy did not encounter the same civil law scepticism as in Nuremberg. Unlike the Nuremberg conspiracy concept, which was blended with continental elements of complicity, the Tokyo Judgement left its broad character and Anglo-American features untouched.⁴⁸

4. CRIMINAL ORGANISATIONS

The conspiracy concept at Nuremberg was central in convicting those who could be seen as the major war criminals. However, as Leventhal *et al.* wrote:

⁴⁵ Ibidem, p. 942.

⁴⁶ Trainin, (1944), p. 79.

⁴⁷ Article 5 of the Charter of the Tokyo Tribunal is in spirit and harmony with Article 6 of the Nuremberg Charter:

(a) *Crimes against Peace*: namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *Conventional War Crimes*: namely, violations of the laws and customs of war;

(c) *Crimes against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

⁴⁸ K. Noboru in C. Hosoya *et al.* (eds.), *The Tokyo War Crimes Trial. An international symposium*, Tokyo (1986), pp. 108-109 and p. 76.

Punishment of war criminals necessarily involved more than the trial of a handful of Nazi leaders. The few men at the head of the regime were not alone responsible for such crimes as the mass extermination of Jews and the deportation of some 5.000.000 persons for forced labour. Nor did guilt rest only upon the concentration camp guards, operators of gas vans, and lynchers of Allied aviators who committed murders with their own hands. A multitude of enthusiastic collaborators, at all levels of the Nazi hierarchy, had cooperated in organizing and executing the systematic criminal program.⁴⁹

Through the notion of criminal organisations, an offshoot of the concept of conspiracy and the other pillar of the collective criminality theory, it was possible to prosecute the thousands of 'second-level' Nazi members who had been involved in the commission of crimes, if only by *knowing* of the criminal acts of their fellow-members and party leaders, and *acquiescing* in them. In a memorandum signed by the American Secretaries of War and State as well as the Attorney General, Bernays' idea of criminal membership was endorsed:

In these subsequent trials (...) the only necessary proof of guilt of any particular defendant would be his membership in one of these organisations. Proof would also be taken of the nature and extent of the individual's participation. The punishment of each defendant would be made appropriate to the facts of his particular case.⁵⁰

The idea of penalising membership can be traced back to a French proposal in the sub-committee for war crimes. By referring to the destruction of the village of Lidice, where nearly all its inhabitants were massacred by units of a German Division, leaving no witnesses and making it almost impossible to prove what part each individual played in the atrocities, the French delegation demonstrated that, if the general principles of criminal law were to be applied in a strict sense, collective crime could not be fought.⁵¹ In such a case, it would be useful to apply the concept of criminal organisations.

The proposal included two solutions to face the problem of mass crime. The first introduced a presumption of guilt, reversing the onus of proof. The second was to rely on the concept of *association de malfaiteurs*, holding individuals responsible for being part of a criminal organisation. French criminal law required that membership of such an association was voluntary and that the association had the purpose of committing crimes.⁵² The proposal was amended, inserted into a recommendation,

⁴⁹ H. Leventhal *et al.*, 'The Nuernberg Verdict', 60 *Harvard LR* (1947), p. 887.

⁵⁰ Smith, (1982), Doc. 35, 22 January 1945, p. 121.

⁵¹ UNWCC, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London (1948), p. 294.

⁵² The relevant provisions are Article 265: 'Toute association formée, quelle que soit sa durée, ou le nombre de ses membres, toute entente établie dans le but de préparer ou de commettre des crimes contre les personnes ou les propriétés, constituent un crime contre la paix publique'. Article 266: 'Sera puni de la peine de travaux forcés à temps, quiconque se sera affilié à une association formée ou aura participé à une entente établie dans le but spécifié à l'article précédent (...)'. Article 267: 'Sera puni de réclusion quiconque aura sciemment et volontairement favorisé les auteurs des crimes prévus à l'article 265, en leur fournissant des instruments de crime, moyens de correspondance, logement ou lieu de réunion (...)'.

and adopted by the Commission on 16 May 1945.⁵³

The provisions in the Nuremberg Charter on criminal organisations are neutral in that they don't pronounce on the burden of proof and presumption of guilt like the French proposal. They establish a division of labour between the Tribunal and national courts in adjudicating members of criminal Nazi organisations:

Article 9

At the trial of any individual member of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation.

After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organisation will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organisation. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10

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.

Article 11

Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organisation and such court may, after convicting him, impose upon him a punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organisation.

It follows from Article 9 that a declaration of criminality of a group or organisation could only be made by the Tribunal when the defendant before it was a member of such a group or organisation. The defendants at the Nuremberg Trial were all members of one or more Nazi groups or organisations. The declaration was to be regarded a pronouncement of criminality of the group, not of the individual. The legal effect of the declaration in subsequent proceedings was that the criminal nature of such an organisation was considered proved and could not be questioned. Article 10 provided for the second phase in prosecuting criminal groups; it offered the basis for national courts to prosecute members of organisations declared criminal by the IMT. The individual brought before the court would be prosecuted for the crime of 'membership'.

Article 2 of the Ordinance of 24 August 1944, containing rules for the trial of war criminals to be tried by French courts, is based on the above provisions. Article 2 reads as follows: Par interprétation des dispositions du code pénal et du code de justice militaire, sont considérés comme (...) (2) l'association de malfaiteurs prévue par les articles 265 et suivants du code.

⁵³ UNWCC (1948), pp. 293-297.

In interpreting these provisions, the United States prosecutor before the IMT, Justice Jackson, argued that the declaration of criminality created a rebuttable presumption of guilt for its individual members, and thus reversed the burden of proof. He rejected, however, the suggestion that the declaration before the IMT would entail 'automatic guilt' for individual members in subsequent proceedings. The element of voluntariness was part of the criminality test he put forward. No one could be held criminally responsible for being a member of a criminal organisation when he was drafted into it.⁵⁴

When presenting the prosecution case against criminal groups or organisations Jackson observed that the concept of criminal organisations was not a new concept. He referred to the national legislation of different countries to argue that penalising membership of certain collective bodies, as well as penalising the bodies themselves, was not completely unknown.⁵⁵ While Jackson used these national precedents to support his contention that criminal membership was not a new concept, he maintained that the notion was to be regarded a part of the concept of conspiracy, which is a firmly established principle in Anglo-American law. As soon as an organisation is found to have criminal ends, each member is responsible for the acts of any other member, as in a criminal conspiracy.

The four Allied prosecutors qualified the following Nazi groups or organisations as criminal organisations: the Nazi cabinet, the leadership corps of the Nazi party, the SS, the Gestapo, the SA, the General Staff and High Command. The Tribunal declared three of the six accused organisations to be criminal: the Gestapo, the SD,

⁵⁴ His test of collective criminality consisted of five elements: (1) The group or organisation must be 'some aggregation of persons associated in identifiable relationship with a collective, general purpose', or as this was put by another United States prosecuting officer, with 'a common plan of action'. The notions of 'group' or 'organisation' are non-technical. They 'mean in the context of the Charter what they mean in the ordinary speech of the people'. The term 'group' is used 'as a broader term, implying a looser or less formal structure or relationship than is implied in the term organisation'. (2) Membership in such group or organisation 'must be generally voluntary' that is 'the membership as a whole, irrespective of particular cases of compulsion against individuals or groups of individuals within the organisation must not have been due to legal compulsion'. (3) The aims of the organisation 'must not have been criminal in that it was designed to perform acts denounced as crimes in Article 6 of the Charter', that is crimes against peace, war crimes or crimes against humanity. The organisation 'must have participated directly and effectively in the accomplishment' of these criminal aims and 'must have committed' crimes from Article 6. (4) The criminal 'aims or methods of the organisation must have been of such character that its membership in general may properly be charged with knowledge of them'. (5) 'Some individual defendant must have been a member of the organisation and must be convicted of some act on the basis of which the organisation was declared to be criminal'. See UNWCC (1948), p. 305.

⁵⁵ In his own system, it was unlawful for any person to organise or help to organise any society, group, or assembly of persons to teach, advocate, or encourage the overthrow or destruction of any Government in the United States by force or violence, or to become a member of any such society or group knowing its purposes (on the basis of the 'Smith Act' of 28 June 1940). Jackson also referred to the British legal system, where an example was found in the British India Act No. 30 of 1836, penalising the participation in a 'gang of thugs'. French laws provided for the concept of *associations de malfaiteurs*, as mentioned above. Soviet and German criminal laws contained provisions on 'banditry' and 'secret organisations'. UNWCC (1948), pp. 303-304.

and the SS. The Tribunal was aware of the danger that the declaration of criminality could pose to the principle of personal guilt. It would make such a declaration only 'in a manner to insure that innocent persons will not be punished'.⁵⁶ The relevant part of the judgement reads as follows:

Article 9, it should be noted, uses the words: 'The Tribunal may declare', so that the Tribunal is vested with discretion as to whether it will declare any organisation criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. If satisfied of the criminal guilt of any organisation or group, this Tribunal should not hesitate to declare it to be criminal because the theory of 'group criminality' is new or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.

A criminal organisation is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the state for membership unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.⁵⁷

According to the Judgement, knowledge of the criminal nature of the organisation and some degree of voluntariness is required before one can be convicted of 'membership of a criminal organisation'. The Prosecution's suggestion of reversing the burden of proof was not endorsed. It was, however, not unequivocally dismissed either. As defence lawyers observed,

Under this ruling, lack of guilty knowledge and legal compulsion became more than mere matters of defence. Apparently, to establish that a defendant was even a member of the criminal group, there must be affirmative proof that he had not been drafted and that either he had had actual knowledge of the group's criminality or had himself committed unlawful acts. The burden of producing evidence as to each individual's personal status is thus placed on the prosecution and the whole purpose of Articles 9 and 10 of the Charter in fact nullified.⁵⁸

The IMT judges seemed to have left the issue of criminal organisations to the competent courts in subsequent proceedings.

There are no provisions on criminal organisations in the Charter of the Tokyo

⁵⁶ The Nuremberg Judgment in Friedman (1972), Vol. II, p. 963.

⁵⁷ Ibidem, pp. 962-963.

⁵⁸ Leventhal *et al.* (1947), p. 899.

Tribunal. The only reference to membership of an organisation can be found in Article 5 on the jurisdiction of the Tribunal: 'The Tribunal shall have the power to try and punish war criminals who as individuals or as members of organisations are charged with offences (...)'.⁵⁹ The prosecutors in the Far East did not indicate any of the groups or organisations to which the Japanese defendants belonged.

5. SUBSEQUENT PROCEEDINGS

Two sets additional sets of rules covered criminal organisations in addition to the rules contained in the Nuremberg Charter. The first concerned the rules enacted in the British and American zones of Germany, based on Allied Control Council's Law No. 10 (CCL 10) enforcing Article 10 of the Nuremberg Charter, and the second related to national legal concepts on criminal organisations.

With regard to the first, Article II of CCL 10 reads:

Article II

1. Each of the following acts is recognized as a crime:

- (a) Crimes against peace. (...)
 - (b) War Crimes. (...)
 - (c) Crimes against Humanity. (...)
 - (d) Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal.
- (2) Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organisation or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a), if he held a high political, civil or military (including General Staff) position in the financial, industrial or economic life of any such country (...).⁶⁰

Despite some differences, the definitions of crimes against peace, war crimes, and crimes against humanity are to a great extent similar to those of the IMT Statute. The crime of membership mentioned in Article 1(d) was not part of the IMT Charter. Penalising membership of an organisation connected with any such crimes in Article II 2(e), is a *sui generis* type of criminal participation. The British rules implementing CCL 10 left unanswered the undecided matter in the IMT Judgement of who was to bear the burden of proof, the prosecutor or the defence.⁶¹ Unsurprisingly, the American provisions were in line with the approach of the United States Chief

⁵⁹ Charter of the Tokyo Tribunal in Friedman (1972), Vol. I, p. 896.

⁶⁰ Friedman (1972), Vol. I, pp. 908-909.

⁶¹ The relevant rule of Ordinance No. 69 law reads: 'The accused persons will be charged with having been a member of a criminal organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter of the International Military Tribunal'. UNWCC (1948), p. 321.

Prosecutor and put the onus on the accused.⁶² The United States, Great Britain, Australia, and Canada relied exclusively on CCL 10, which can be termed international law. Provisions of domestic law were used and quoted as analogies, but the violation of any set of legal rules other than the laws and customs of war needed not be shown. When national concepts were relied upon they would either be put in inverted comma's, or the Judge-Advocate or another legal member of the court would point out to the parties that whenever English legal concepts were used at trial, they were to be regarded as providing a quotation or an analogy.

The second set of 'additional' rules on criminal organisations consisted of national provisions on accomplice liability and membership responsibility. Some of these States, such as Norway and France, relied exclusively on their national general criminal law in adjudicating war criminals.⁶³ Others, like the Netherlands, relied on national law as a supplementary source of law alongside specific regulations devised for war crimes trials.⁶⁴ National concepts of membership responsibility and criminal participation were applied to groups that had not been declared criminal in the Nuremberg Judgement. They could apply to any other group (formation, unit, body) of persons joined together to commit war crimes. After all, some Allied States were not signatory states to the Nuremberg Charter and – strictly speaking – not bound by the declaration of criminality of the SS, SD, and Gestapo and the non-declaration of criminality other Nazi groups like the Nazi cabinet or the General Staff.⁶⁵

6. JURISPRUDENCE

Having discussed the collective criminality theory and its status at Nuremberg, two other points need to be addressed: firstly, the non-conspiracy related charges in

⁶² Upon proof of membership within any of the incriminated groups of the organisations found criminal, a *presumption* shall arise that the member joined or remained a member with knowledge of the criminal acts and purposes of the organisation. This presumption is rebuttable and may be overcome by evidence to the contrary in accordance with Article 34 of the Law (De-Nazification Law of 5 March 1946). UNWCC (1948), p. 323.

⁶³ Norway, for instance, relied on common penal law. UNWCC (1948), pp. 328-329. France referred in its Ordinance of 24 August 1944 to provisions in common criminal law on '*associations de malfaiteurs*'. In French war crimes trials, it was first decided whether a provision of the French Criminal Code had been violated and, secondly whether this breach was justified by the laws and customs of war. UNWCC, *Law Reports of Trials of War Criminals*, London (1947-1949) (UNWCC), Vol. III, pp. 93-102.

⁶⁴ The Dutch legislator enacted extraordinary legislation altering existing provisions on sentencing and adding two new types of offences to those of the common penal law. Matters of substantive law are regulated by the Extraordinary Penal Law Decree of 22 December 1943 (regulating matters of substantive law), a Decree of 29 May 1945 (dealing with the functions of the Netherlands Commission for the Investigation of War Crimes and containing a definition of the concept of war crimes, which was later replaced by a definition given in Article 24a of the Extraordinary Penal Law Decree D.61) and three Decrees regulating the jurisdiction, composition, and procedure of the courts competent to try war criminals. UNWCC, Vol. XI, pp. 88-91. The Netherlands East Indies legislation relied on rules of international law as did Canada, Australia, the United States, and the United Kingdom. UNWCC, Vol. XI, pp. 91-95.

⁶⁵ The Polish courts declared criminal groups or organisations which had not been declared criminal by the IMT, such as the concentration camp staff of Auschwitz, UNWCC, Vol. VII, pp. 20-24.

Nuremberg and, secondly, the implementation of the collective criminality theory in subsequent proceedings.

As to the first point, in the Nuremberg judgement, individual responsibility was put under the heading of criminal participation. Any voluntary co-operation or role in Hitler's war machine and any knowledge of its results and plans gave rise to criminal responsibility under a broad and uniform concept of participation. Participation could range from, on the one hand, active support to non-opposition (willing) and, on the other hand, from actual knowledge of crimes to deliberately ignoring them (knowing).

As to the second point, Bernays' collective criminality theory had become the framework within which national courts and tribunals applied analogous concepts such as common design and complicity. This resulted in a disparate body of law in which membership responsibility was also attributed to defendants in terms of common design and complicity.

(a) Membership of a criminal organisation

In the trial of *Altstötter et al. (Justice case)*,⁶⁶ like in *Pohl & Others*,⁶⁷ the American military court attributed participatory liability on the basis of the division of tasks in an organisation or bureaucratic apparatus. Defendants who did not physically commit crimes were held responsible as accomplices to the crimes because of their functional involvement in carrying out the Nazi policy. Principals and accomplices were not distinguished:

(...) the person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of the commission, and the person who pulls the trigger are all principals or accessories to the crime.⁶⁸

In establishing the guilt of the various participants in exterminating and deporting Jews, in *Pohl* the U.S. military court drew the analogy of four men robbing a bank where 'the acts of any of the four, within the scope of the overall plan, become the acts of all the others'.⁶⁹ In this way, 'the various participants in the programme tossing the shuttlecock of responsibility from one to the other'⁷⁰ could be found individually responsible. All forms of participation were treated equally and each of the participants was liable as a direct perpetrator. Altstötter, the chief defendant in the *Justice* case, was found guilty on the count of membership only. The court held that it was proved that he had knowledge of the criminal purpose and acts of the SS while voluntarily remaining a member.

The concept of criminal organisations was (explicitly) applied in the *Mauthausen*

⁶⁶ *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg, Washington (1949-53) (TWC)*, Vol. III, pp. 954-1201.

⁶⁷ TWC, Vol. V, pp. 958-1163.

⁶⁸ TWC, Vol. III, p. 1063.

⁶⁹ TWC, Vol. V, p. 1173.

⁷⁰ *Ibidem*.

Concentration camp case. The U.S. military court judged that membership of the staff of a concentration camp was regarded as membership of a criminal organisation where a position high up in the hierarchy implied a rebuttable presumption of knowledge of atrocities.⁷¹ Every official who was engaged in the operation of running a camp was presumed to have had knowledge of the criminal practices therein. Another instance of membership responsibility was the trial of *Karl Brandt et al.* (*Medical* case), where Brandt and eight others were found guilty of membership of the SS.⁷²

(b) Common design

In the *Trial of Martin Gottfried Weiss & Thirty-Nine Others (Dachau Concentration Camp)* case, a U.S. court attributed participatory responsibility to the defendants along the lines of the *Pohl* and *Justice* cases, but used different legal wording.⁷³ The defendants, all staff members of the Dachau concentration camp, were charged of having acted in pursuance of a 'common criminal design'. Neither the system of ill-treatment nor knowledge of it was contested by the defence. It was thought impossible to be part of the staff of the concentration camp for a substantial period of time without being aware of the system of ill-treatment. It was the *actus reus*, the participation, that was the point at issue. The prosecution established guilt in two ways:

- (a) if his duties were such as to constitute in themselves an execution or administration of the system that would suffice to make him guilty of participation in the common design, or,
- (b) if his duties were not in themselves illegal or interwoven with illegality he would be guilty if he performed these duties in an illegal manner.⁷⁴

If an accused held the position of deputy camp commander or of an SS doctor, this was sufficient to establish guilt. If, on the other hand, the accused was merely a guard or a prisoner administrator then the prosecutor had to prove that the accused used his position to ill-treat prisoners. The *actus reus* of the crime was merely holding a certain position in the hierarchy.

In dealing with a number plurality of participants, the British courts used the analogy of the common design doctrine derived from English criminal law. It was applied in cases in which defendants were found guilty for being 'concerned in' committing war crimes.⁷⁵ In the trial of *Otto Sandrock & three others*, concerning the killing of a British prisoner of war and a Dutch civilian, the Judge Advocate stated that,

⁷¹ UNWCC, Vol. V, p. 15.

⁷² TWC, Vol. II, pp. 171-300.

⁷³ UNWCC, Vol. XI, pp. 5-17.

⁷⁴ Ibidem, p. 13.

⁷⁵ As the war crimes trials were regarded as trials under international law and not under English law, concepts derived from English law like 'concerned in' were used in inverted commas.

[i]f people were all present together at the same time taking part in a common enterprise which was unlawful, each one in his own way assisting the common purpose of all, they were all equally guilty in law.⁷⁶

The Prosecutor argued that the case was comparable to that of a crime committed by a gang: 'every member of the gang being equally responsible with the man who actually fired the gun'.⁷⁷ In *Werner Rohde & Eight others*, like in *Karl Adam Golkel & Thirteen Others*, it was held that, to be concerned in the killing, does not require presence at the scene of the crime. The Judge Advocate reasoned as follows:

If two or more men set out on a murder and one stood half a mile away from where the actual murder was committed, perhaps to keep guard, although he was not actually present when the murder was done, if he was taking part with the other man with knowledge that that other man was going to put the killing into effect then he just as guilty as the person who fired the shot or delivered the blow.⁷⁸

The case law on common design demonstrates that to generate culpability for being 'concerned in' a crime, it must be shown that, first, the defendant knew of the crime (*mens rea*), and, secondly, that his conduct amounted to a certain degree of criminal participation in the crime (*actus reus*). The *Trial of Bruno Tesch & Others* (the *Zyklon B* case) is instructive as to the first element. In finding the suppliers of poison gas guilty, the Judge Advocate pointed out that the prosecutor had to prove that the accused knew that the gas was to be used for the purpose of killing human beings.⁷⁹ As to the *actus reus*, it was found in *Max Wielen & Seventeen others* (the *Stalag Luft III* case) that

[t]he persons concerned must have been part of the machine doing some duty, carrying out some performance which went on directly to achieve the killing, that it had some real bearing on the killing, would not have been so effective or been done so expeditiously if that person had not contributed his willing aid.⁸⁰

Thus, co-operation in the war machine can result in participation in war crimes, as long as the act had some 'real bearing' on the crime establishing a degree of causation.

The meaning of participation may vary within the term 'concerned in the killing'.

⁷⁶ UNWCC, Vol. IV, p. 40. The provision invoked by the Prosecuting Officer was Army Order 127/1945: 'Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group, may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime. In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court'. UNWCC, Vol. IV, p. 43.

⁷⁷ UNWCC, Vol. IV, p. 43.

⁷⁸ UNWCC, Vol. V, p. 56.

⁷⁹ UNWCC, Vol. I, p. 101.

⁸⁰ UNWCC, Vol. XI, p. 46.

In the *Max Wielen* case, for instance, all participants were found equally guilty. The variance in role was reflected in the sentence. The commander who ordered the shooting and the men who shot, were sentenced to death. The two drivers, however, were sentenced to 10 years of imprisonment.⁸¹

(c) Complicity

Complicity was the French interpretation of participating in group crime and membership responsibility. This was a result of the unfamiliarity with the concept of conspiracy. Through complicity a more differentiated participation concept was applied in cases of jointly committed crimes. Unlike the American and English courts, the French tribunals did not treat the different forms of participation in an equal manner. A distinction was made between the perpetrator and the accomplice in *Robert Wagner & Six Others*. In that case some accused were found guilty as accomplices in premeditated murder, and one was found guilty for actually having committed the crime as principal.⁸² In the trial of *Franz Holstein & Twenty-Three Others*, the military tribunal in Dijon divided the accused, who were all charged with crimes against the French resistance, into three categories: 'those found guilty as instigators, mainly by issuing orders; those found guilty as perpetrators; and those found guilty as their accomplices'.⁸³ The accused who had been in command of the men who committed the crimes were held responsible as instigators.⁸⁴ Those who could not be labelled as instigators were found guilty as accomplices, for having facilitated and prepared the crimes before the fact, whereas others were found guilty as accomplices for supplying means during the crime.⁸⁵ The court made clear, however, that no fundamental distinction existed between these two types of accomplices:

It is a universally recognised principle of modern penal law that accomplices during or after the fact are responsible *in the same manner* as actual perpetrators or as instigators, who belong to the category of accomplices before the fact.⁸⁶ (*italics added, EvS*)

Complicity in war crimes was also made punishable by other continental war crimes tribunals, like the Norwegian⁸⁷ and the Dutch military courts. Again no fundamental

⁸¹ Ibidem.

⁸² UNWCC, Vol. III, p. 24.

⁸³ UNWCC, Vol. VII, p. 26.

⁸⁴ The relevant provision for this was Article 60 (1) of the French Penal Code: 'Those who, by gifts, promises, threats, abuse of authority of powers, guilty machination, or artifices, provoke an act constituting a crime or a delict, or give instructions to commit it, shall be punished as accomplices', in UNWCC, Vol. VII, p. 32.

⁸⁵ Their liability was regulated by Article 60 (2) and (3) of the French Penal Code: 'Those who have furnished arms, instruments or any other means which have served in the action knowing that they would serve this purpose; Those who knowingly have aided or assisted the perpetrator or perpetrators of the action in the facts which have prepared or facilitated or in those which have consummated the action', in UNWCC, Vol. VII, p. 33.

⁸⁶ UNWCC, Vol. VII, p. 32.

⁸⁷ Article 4 of the Norwegian War Crimes Law, UNWCC, Vol. XV, p. 89.

distinction between facilitators and other accomplices was made, sometimes in deviation from general criminal law.⁸⁸

In dealing with group crime and collective criminality the French courts relied on accomplice liability rather than membership responsibility. This is noteworthy, as it was the French delegation in Nuremberg that had proposed the concept of criminal membership, a notion analogous to the French concept of *association de malfaiteurs*.

The Nuremberg Judgement leaves us with an undifferentiated and fairly factual concept of criminal participation. The common design doctrine of the British and American courts in the subsequent proceedings gave the participation concept legal meaning and was as such the Anglo-American interpretation of Bernays' collective criminality. No distinction in parties to a crime was made, variance in role and degree of participation was expressed in the sentence. French and other 'continental' courts allowed for a more differentiated approach in attributing individual responsibility by relying on the concept of complicity, distinguishing between perpetrators and accomplices. A distinction between, on the one hand, accomplices as mere facilitators, and on the other hand, as full participants, was not made.

Having described how individual responsibility and criminal participation was shaped in post-Second World War case law, it is now time to turn to its development in codified law.

7. CODIFICATION

Before the outbreak of World War II, the concept of individual criminal responsibility had been formulated in a number of international legal documents.⁸⁹ It was, however, Article 6 of the Charter of the Nuremberg Tribunal and the Judgement itself that really triggered the development of a theory and practice on individual criminal responsibility in international law.

In one of its first resolutions, the UN General Assembly affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal.⁹⁰ The International Law Commission (ILC) was established to formulate these principles in the framework of a Code of Offences against the Peace and Security of Mankind. The ILC completed its formulation of the 'Nuremberg Principles' in 1950, at its sec-

⁸⁸ Article 12 of the Decree of 22nd December 1943 encapsulates the rule that facilitators are liable to the same penalties as those prescribed for the crime itself. It is left to the court to decide whether the same penalty will actually be imposed. This rule deviates from Articles 45 and 49 of the Dutch Penal Code, where the maximum penalty for complicity is reduced by one-third of the punishment prescribed for the crime. A similar adaptation was made in Netherlands East Indies legislation with Article 5 of the Statute Book Decree No. 45 of 1946. See UNWCC, Vol. XI, pp. 97-98.

⁸⁹ See for an overview, F. Malekian, 'International Criminal Responsibility', in Bassiouni (1999), p. 157, footnote 32.

⁹⁰ UN General Assembly Res. 95(I), 11 December 1946.

ond session, and submitted them to the General Assembly.⁹¹ Within the context of this chapter, three principles are of interest: firstly, that ‘any person who *commits* an act which constitutes a crime under international law is responsible therefor and liable to punishment’ (Principle I); secondly, that ‘*participation in a common plan or conspiracy*’ to commit an act constituting a crime against peace is punishable (Principle VI(a)(ii)); thirdly, that ‘*complicity* in the commission of a crime against peace, a war crime, or a crime against humanity (...) is a crime under international law’ (Principle VII). In other words, direct perpetration, conspiracy and complicity (participation) were accepted as modes of individual criminal responsibility. The building stones were supplied for a theory of individual criminal responsibility in international law.

Another important international instrument affirming the principle of individual responsibility for perpetrating and participating in crimes under international law is the Genocide Convention. The relevant provision in the Genocide Convention⁹² reads as follows:

Article III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Conspiracy to commit genocide is listed as a punishable act. This is the inchoate, Anglo-American, type of conspiracy that caused so much problems at Nuremberg. The drafters of the Genocide Convention seemed to have had less problems with the concept of conspiracy. After all, as Schabas submits, ‘by its very nature, the crime of genocide will inevitably involve conspiracy and conspirators’.⁹³ Incitement to commit genocide is, like conspiracy, an inchoate crime, yet it can also be a form of complicity (‘abetting’) pursuant to Article III(e) requiring that the underlying crime occurs.⁹⁴ As the Genocide Convention lacks a command or superior responsibility provision, the criminal responsibility of those who did not themselves ‘wield machine guns or machetes’,⁹⁵ but ordered, organised, directed or otherwise encouraged genocide are subsumed under Article III(e). This is somewhat unsatisfactory and

⁹¹ Formulation of the Nuremberg principles, 1950 UN GAOR, 5th Sess. Supp. No. 12 (A/1316); ILC Report in *YBILC*, Vol. II (1950). Although the General Assembly did not formally adopt these principles, they are generally regarded as a recognition of the rule that individuals can be held criminally responsible directly under international law. See M. Boot, *Nullum Crimen Sine Lege and the Subject matter Jurisdiction of the International Criminal Court*, Antwerp-Oxford-New York (2002), pp. 313-315.

⁹² Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1948).

⁹³ W.A. Schabas, *Genocide in International Law*, Cambridge (2000), p. 259.

⁹⁴ *Ibidem*, p. 266.

⁹⁵ *Ibidem*, p. 286.

goes back to the earlier observation that since war crimes criminality generates a certain class of perpetrators *general* criminal law concepts, such as complicity, do not suffice as the basis of liability of 'major war criminals'. This accounts for Schabas' comment that,

Complicity is sometimes described as secondary participation, but when applied to genocide, there is nothing 'secondary' about it. The 'accomplice' is often the real villain, and the 'principal offender' a small cog in the machine.⁹⁶

The 1949 Geneva Conventions and the 1977 First Additional Protocol (AP I) contain rules on the punishment of violations of rules of international humanitarian law amounting to 'grave breaches' of the Conventions and the Protocol.⁹⁷ Grave breaches of Geneva law are termed 'war crimes' generating individual criminal responsibility.⁹⁸ The 'grave breaches system' obliges every State Party to '(...) enact any legislation necessary to provide effective penal sanctions for persons *committing*, or *ordering to be committed*'⁹⁹ any of the grave breaches and to search for those persons in order to either bring them before its own courts or hand them over for trial to another State Party.¹⁰⁰

Two things can be understood from this provision. Firstly, that, while relying on national jurisdictions, the Geneva Conventions and the AP I implemented a system of individual criminal responsibility for international crimes. Secondly, that Geneva law is not restricted to those who *perpetrate* war crimes, it also applies to those who *ordered* them. Article 86 of the AP I even provides for a separate provision on superior responsibility. Not only are the executors of orders and those who ordered those crimes, criminally responsible for committing war crimes under Geneva law, but additionally the superior who fails to prevent his subordinates from committing crimes.¹⁰¹ According to the Commentary to the AP I, anyone who has not taken part as a direct or principal actor in physically committing the crime amounting to a grave breach, but who has helped the offender or joint offenders in preparing or perpetrating the breach, and who has incidentally co-operated, is criminally responsible.¹⁰²

The Torture Convention¹⁰³ is another source of international law that provides us with a provision on individual criminal responsibility:

⁹⁶ Ibidem.

⁹⁷ The 'grave breaches provisions' are Article 50 of GC I; Article 51 of GC II; Article 130 of GC III; Article 147 of GC IV; and Article 85 of API.

⁹⁸ Article 85(5) API: 'Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes'.

⁹⁹ Article 49 of GC I; Article 50 of GC II; Article 129 of GC III; and Article 146 of GC IV.

¹⁰⁰ With regard to these crimes the maxim '*aut dedere aut judicare*' principle applies, i.e. 'extradite or prosecute'.

¹⁰¹ For command/superior responsibility see Part II of this study, in particular Chapter 4.

¹⁰² C. Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva (1987), p. 979, available through < <http://www.icrc.org>. >.

¹⁰³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly Res. 39/46 (10 December 1984), 1456 UNTS 85.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

On the basis of this provision, State Parties are obliged to penalise the commission of, or participation in, acts of torture.¹⁰⁴

A fifth codification source concerns the Statutes of the *ad hoc* Tribunals for the Former Yugoslavia (ICTY), and for Rwanda (ICTR). In the report accompanying the ICTY Statute, the Secretary General made it clear that the principle of individual criminal responsibility is not limited to those who actually committed the crimes.¹⁰⁵ The understanding that international crimes like genocide, war crimes, and crimes against humanity are rarely committed in isolation, by an individual on his own account is reflected in the provisions on individual criminal responsibility at both Tribunals. Article 7(1) and Article 6(1) of the ICTY¹⁰⁶ and the ICTR¹⁰⁷ Statutes, respectively, read as follows:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.¹⁰⁸

The principle of individual responsibility is extended to all those who contribute to the commission of crimes. The article identifies five types of criminal conduct: planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, the preparation, or the execution of a crime. It encompasses every stage at which an individual may engage in conduct that leads to the eventual commission of the crime.¹⁰⁹

In 1996, the ILC engaged in drawing up a Statute for a permanent International Criminal Court, listed in Article 2(3) of its Draft Code of Crimes various forms of participation in, or contribution to, the crimes:

An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:

¹⁰⁴ See J.H. Burgers and H. Danelius, *The United Nations Convention against Torture; A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dordrecht (1998).

¹⁰⁵ *Report of the Secretary General*, para 54, in R. Dixon *et al.* (eds.), *Archbold International Criminal Courts*, London (2003), § B2-010, p. 776.

¹⁰⁶ 32 *ILM* 1150.

¹⁰⁷ 33 *ILM* 1598.

¹⁰⁸ Article 6 of the ICTR Statute reproduces *mutatis mutandis* Article 7 of the ICTY Statute.

¹⁰⁹ V. Morris and M.P. Scharf, *An insider's guide to the International Criminal Tribunal for the Former Yugoslavia*, New York (1995), p. 235.

- (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; (command responsibility, *EvS*)
- (d) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for commission;
- (e) directly participates in planning or conspiring to commit such a crime which in fact occurs;
- (f) directly and publicly incites another individual to commit such a crime which in fact occurs;
- (...),¹¹⁰

Article 2(3) of the Draft Code distinguishes five modes of participation: (i) ordering, (ii) failing to prevent, (iii) aiding and abetting, or otherwise assisting, (iv) planning, and (v) inciting. The five types of criminal conduct distinguished in the Statutes of the *ad hoc* Tribunals reappear in Article 2(3) of the 1996 ILC Draft Code. Command or superior responsibility, however, is listed in the latter instrument amongst the participation modes, whereas the Statutes of the *ad hoc* Tribunals address the concept in a separate paragraph, in Article 7(3) of the ICTY Statute and Article 6(3) of the ICTR Statute.

The most recent provision on individual criminal responsibility in international law is Article 25(3) of the ICC Statute:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

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

¹¹⁰ 1996 *Draft Code of Crimes Against the Peace and Security of Mankind*, Report of the International Law Commission to the General Assembly (1996 ILC Draft Code), UN Doc. A/51/10 (1996).

pendent 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.¹¹¹

This provision marks the culmination of a process of differentiation in criminal participation modes since Nuremberg, at least in codified law. Subparagraphs (a)-(c) of paragraph (3) encompasses the main concepts of criminal behaviour. Subparagraph (a) refers to perpetration, while (b) deals with participation in general and (c) with complicity in particular. Subparagraphs (d)-(f) provide separate heads of responsibility: group responsibility, incitement to commit genocide, and attempt liability, respectively. The concept of group responsibility in subparagraph (d) is reminiscent of the above-mentioned concept of common design and reflects, albeit weakly, ICTY *case law* on group crime, which will be discussed in the next chapter. Superior or command responsibility is encapsulated in a separate provision (Article 28) complementing individual responsibility as codified in Article 25.

Having described the *nature* of the principle of individual criminal responsibility in international law, we should now turn our attention to its *context*.

8. CONFLICT CLASSIFICATION¹¹²

Individual criminal responsibility pertaining to crimes committed in *non-international* armed conflicts does not have the same 'status' in customary and codified international law as individual criminal responsibility for crimes committed in *international* armed conflicts. This is particularly true with regard to war crimes that find their origin in treaties regulating conduct during international armed conflicts. Genocide never had this 'treaty link' to international armed conflicts. Nowadays, neither genocide nor crimes against humanity have to have a link with an armed conflict.

With regard to war crimes, however, States have traditionally insisted on maintaining a clear distinction between international and non-international armed conflicts. To date such an approach can still be found. The ICC Statute provides for war crimes committed in international armed conflicts in Article 8(a) and (b) and in non-international armed conflicts in Article 8(c) and (e). The hesitance at State level to regulate internal matters is largely due to guarding State sovereignty. This explains

¹¹¹ United Nations: Rome Statute of the International Criminal Court, (adopted July 17, 1998), 37 *ILM* 999.

¹¹² For more elaborate writings on this topic: Bantekas (2002), pp. 125-148; T. Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout', 92 *AJIL* (1998), pp. 236-241; T. Meron, 'International Criminalization of Internal Atrocities' 89 *AJIL* (1995), pp. 554-577; L. Moir, 'The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949', 47 *ICLQ* (1998), p. 337 *et seq.*; D. Plattner, 'The Penal Repression of Violations of International Humanitarian Law in Non-International Armed Conflicts', 30 *IRRC* (1990), pp. 409-420.

the abundance of rules pertaining to international armed conflicts and the relatively summary regulation of non-international armed conflict. This is most obvious with regard to the concept of criminal responsibility. The 'grave breaches system' of the Geneva Conventions and the AP I concerns international armed conflicts, while Article 3, common to all four Geneva Conventions, and the AP II, which regulate non-international armed conflicts, do not contain an explicit reference to criminal liability for violation of its provisions.

Nowadays, however, most armed conflicts are internal in nature. A shift took place in the latter part of the twentieth century from inter-state armed conflict to 'intra-state', or, internal armed conflict. This effectively means that modern war crimes law is likely to relate to crimes committed in a non-international armed conflict. The international Tribunals of Nuremberg and Tokyo, and the military commissions and courts set up after the Second World War tried defendants who had committed crimes during an international armed conflict. The ICTY has been called upon to deal with crimes committed during an armed conflict that was partly of an internal, and partly of an international nature. Bearing in mind the above, it is not surprising that one of the first issues the ICTY had to settle was related to criminal responsibility for offences committed during a non-international armed conflict.

In the *Tadić* case, the Defence raised the argument that the Tribunal had no jurisdiction over the crimes, as the conflict during which these offences had (allegedly) been committed was a non-international armed conflict and the Tribunal only had jurisdiction over crimes committed during or in connection with international armed conflicts. The Defence based its argument on the absence of *treaty* provisions on criminal responsibility for breaches of rules applicable in non-international armed conflict. On appeal, the Tribunal, however, decided that *customary* international law imposes criminal liability for violations enumerated in Article 3 of the ICTY Statute and confers upon the Tribunal jurisdiction in relation to *any* serious offence against international humanitarian law regardless of its context: international or non-international armed conflict.¹¹³ The Appeals Chamber relied on national legislation implementing the Geneva Conventions, military manuals, and international practice derived from statements such as UN resolutions in drawing the conclusion that

All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.¹¹⁴

The Rwanda Tribunal has merely jurisdiction over crimes committed on the territory of Rwanda, which means that it has jurisdiction over crimes committed in an *internal* armed conflict.¹¹⁵ The chapeau of Article 4 of the ICTR Statute provides that

¹¹³ *Tadić* Jurisdiction Decision, para. 137.

¹¹⁴ *Ibidem*, para. 134.

¹¹⁵ See Article 1 ('Competence of the International Tribunal for Rwanda') and Article 7 ('Territorial and Temporal Jurisdiction') of the ICTR Statute.

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977.

In *Akayasu*, the ICTR Trial Chamber followed the *Tadić* Jurisdiction decision and found that

The list of serious violations which is provided in Article 4 of the Statute is taken from common Article 3 – which contains fundamental prohibitions as a humanitarian minimum of protection for war crimes – and Article 4 of Additional protocol II which equally outlines ‘Fundamental Guarantees’. The list in Article 4 of the Statute thus comprises serious violations of the fundamental humanitarian guarantees which, as has been stated above, are recognized as part of international customary law. In the opinion of the Chamber, it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.(...) The Chamber, therefore, concludes the violation of these norms entails, as a matter of customary international law, individual responsibility for the perpetrator.¹¹⁶

Having established that the crimes listed in the Statutes of the Yugoslavia and Rwanda Tribunals entail criminal responsibility in both international and internal armed conflicts, it is only reasonable to assume that Article 6/7(1) of the ICTR/Y Statutes, encapsulating the principle of individual criminal responsibility, applies in both types of conflict. This conclusion applies to perpetrating as well as participating in a crime. In *Tadić*, the Trial Chamber, judging on the merits, held that the various ways of participating in the crimes of the Statute provided for in Article 7 can be based on customary international law.¹¹⁷ In this way, it (implicitly) accepted that criminal participation could be a ground for establishing liability in internal armed conflicts as well.¹¹⁸ The only serious objection to deleting the distinction between international and non-international armed conflict, is that it might give rise to a violation of the principle *nullum crimen sine lege*.¹¹⁹

9. CONCLUSION

Although the concept of individual criminal responsibility for violations of international humanitarian law was already accepted before the Second World War, with the Treaty of Versailles and the trial of Wilhelm II just after the First World War, its

¹¹⁶ ICTR, *Prosecutor v. Akayesu*, Judgement, Case No. ICTR-96-4-T, T. Ch.I, 2 September 1998 (*Akayesu* Judgement), paras. 616-617.

¹¹⁷ ICTY, *Prosecutor v. Tadić*, Opinion and Judgement, Case No. IT-94-1-T, T. Ch.II, 7 May 1997, paras. 663-669. See for the relevant findings at the ICTR on this point, *Akayesu* Judgement, paras. 471-485 and paras. 611-617.

¹¹⁸ See also L. Zegveld, *The Accountability of Armed opposition Groups in International Law*, Cambridge (2002), pp. 111-112.

¹¹⁹ See further Boot (2002), pp.223-308 and pp. 537-608.

development started in Nuremberg. The concept had originally a rather factual outlook, in attributing responsibility the Nuremberg Tribunal adopted a pragmatic rather than a dogmatic approach. In its judgement, it did not clearly distinguish between perpetrators and participants. Any form of participation in Hitler's military or administrative apparatus was considered sufficient to generate responsibility. The International Military Tribunal limited its observations on criminal participation to 'participation in a common plan or conspiracy'.¹²⁰

The collective criminality theory devised by Colonel Bernays provided the basis for, on the one hand, the conspiracy convictions of the major war criminals in Nuremberg and, on the other hand, the conviction of second- and third-level Nazi criminals for 'membership responsibility' in subsequent proceedings. In the latter trials, Bernays' theory was processed in terms of common design and complicity liability and applied as such to a wide range of cases. In the subsequent proceedings the Anglo-American approach, in which all forms of contribution to a crime were treated equally, was predominant. Some 'continental' courts in treating facilitators and perpetrators equally, explicitly deviated from their own national complicity law. In that sense the line of a broad and undifferentiated concept of criminal responsibility, set out in Nuremberg, was continued, or to put in Ambos' words, subsequent trials did not 'leave the common ground of the Nuremberg and Tokyo law'.¹²¹

While post-Nuremberg *case law* provided broad, singular concepts constructing liability with regard to group crime, *codified law* in the post-Nuremberg era showed a differentiation of criminal participation. Refining the principle of individual criminal responsibility into a comprehensive and more differentiated concept of criminal liability commenced with the codification-efforts in the post-Nuremberg period and has recently culminated in Article 25(3) of the ICC Statute. The Article provides an exhaustive list of participation modes covering every possible way in which a person can contribute to the commission of a crime. The latter provision also provides a concept of membership responsibility by penalising an individual's contribution to the commission of a crime by 'a group of persons acting with a common purpose'.¹²²

¹²⁰ See Articles 6(a) and 6(c) of the Nuremberg Statute.

¹²¹ K. Ambos, 'Individual criminal responsibility', in G.K. McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law*, The Hague/Boston/London (2000), pp.7-8.

¹²² Article 25(3)(d) ICC Statute.

CHAPTER 2

PERPETRATION AND PARTICIPATION

1. INTRODUCTION

The International Military Tribunals of Nuremberg and Tokyo and military tribunals and courts in subsequent proceedings, laid down the foundations of the doctrine of individual criminal responsibility. The Tribunals for the Former Yugoslavia and Rwanda have built on these foundations. By expanding on some parts and leaving out others, they construed a more refined and coherent concept of criminal responsibility, reflecting principles of national criminal law, but retaining its international origin. The ICC Statute, in establishing ‘a general part’ of substantive international criminal law with elaborate provisions on criminal responsibility, reflects the development of the concept of individual criminal responsibility in international law as it has taken place since Nuremberg.

Below, Article 25 of the ICC Statute will be analysed against the background of the distinction between perpetration and participation. Article 25, the most recent and elaborate international provision on individual criminal responsibility, will be interpreted and explained by considering the text and the ‘legal history’ of the provision, the jurisprudence of (predominantly but not exclusively) the Tribunals of the Former Yugoslavia and Rwanda, and various national legal systems. However, before, embarking on an analysis of Article 25 of the ICC Statute, some preliminary remarks should be made on legal terminology and different models of criminal participation.

2. TERMINOLOGY

While the Nuremberg and Tokyo Judgements and the subsequent proceedings are important sources of law and indispensable in developing a theory of individual responsibility in international criminal law, they do not provide us with a system of criminal law and doctrine. For that, we need to turn to municipal law. National criminal law and doctrine not only serve as guidance and inspiration in developing a theory of individual responsibility in international criminal law, they also assist in understanding and describing current international criminal law concepts. It is clear from the jurisprudence emanating from the *ad hoc* Tribunals that the judges have recourse to, and draw inspiration from national law and doctrine in forming and founding their judgement, and in interpreting certain notions and concepts.

The jurisprudence of the Tribunals of the Former Yugoslavia and Rwanda feature the terms *actus reus* and *mens rea* to describe the objective and subjective elements of the crimes within the Tribunals’ jurisdiction. The terms *mens rea* and *actus reus*,

which are of Anglo-American origin, have proved equally useful at the Tribunals to analyse individual, participatory, and superior responsibility.

Although some scholars have found the *mens rea/actus reus* distinction to have shortcomings and accordingly legal doctrine has searched for other ways to construct the conditions of criminal liability, these are still the terms most Anglo-American lawyers utilise to describe crimes and criminal responsibility.¹²³ Smith and Hogan describe a crime's basic structure as follows:

It is a general principle of criminal law that a person may not be convicted of a crime unless the prosecution have proved beyond reasonable doubt both (a) that he has caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbidden by criminal law, and (b) that he had a defined state of mind in relation to the causing of the event or the existence of the state of affairs.¹²⁴

The state of affairs or the event is referred to as *actus reus* and the state of mind as *mens rea*. The principle that underlies this parameter is that a man is not criminally liable for his conduct unless the prescribed state of mind is present. This is encapsulated in the classic maxim, *Actus non facit reum, nisi mens sit rea*.¹²⁵ *Actus reus* connotes the external element of the crime. It includes '(a)ll the elements in the definition of the crime except the accused's mental element'.¹²⁶ It, is however, closely connected with the mental state. After all, 'it is not the *actus* which is *reus*' but the man and his mind respectively'.¹²⁷

A continental equivalent of the rule encapsulated in the maxim *Actus non facit reum, nisi mens sit rea* is worded as follows:

L'infraction (est vue comme, *EvS*) une notion complexe, faite à la fois d'un comportement matériel et d'un état d'esprit (...).¹²⁸

Behaviour (objective element) requires a certain mental state (subjective element) to qualify as criminal behaviour, *i.e.* as a criminal offence. This means that, to generate criminal responsibility, the objective 'behavioural' and subjective 'fault' element(s) of a defined crime, often laid down in a Statute or a Code, must be fulfilled and

¹²³ As Ashworth submits: 'The distinction is nothing more than an analytical tool'. A. Ashworth, *Principles of Criminal Law*, Oxford (1999), p. 98. See for 'other ways': P.H. Robinson, 'Should the Criminal Law abandon the Actus Reus/Mens Rea Distinction?' in S. Shute, *et al.*, *Action and Value in Criminal Law*, Oxford (1993), pp. 187-211; A.T.H. Smith, 'On *Actus Reus* and *Mens Rea*', in P.R. Glazebrook (ed.), *Reshaping the Criminal Law*, London (1978), pp. 95- 107.

¹²⁴ J.C. Smith, *Smith & Hogan. Criminal Law*, London-Edinburgh-Dublin (1996), p. 29.

¹²⁵ Quoted in Smith & Hogan (1996), p. 30, footnote 7. They translate it as, 'An act does not make a man guilty of a crime, unless his mind be also guilty'.

¹²⁶ Smith & Hogan (1996), p. 31. Sometimes the state of mind is part of the *actus reus* of a crime. For instance, the state of mind of a victim of rape; the absence of consent is an essential element in the definition of rape.

¹²⁷ *D.P.P. for Northern Ireland v. Lynch* (1975) AC 653, p. 690; 1 All ER 913, at 934.

¹²⁸ J. Pradel, *Droit Pénal Comparé*, Paris (1995), p. 232.

proved. A person can only be punished when there is evidence of a personal fault.

Some legal systems, like the German and the Dutch systems, construct a crime in three stages or units. Conduct is only punishable when, first, it satisfies the definitional elements of a crime, secondly, it is unlawful, and, finally, it is blameworthy. When analysing defences and the distinction between justifications and excuses, the effect of distinguishing between the second and third stages, between wrongdoing in the sense of the wrongfulness of the act, and culpability in the sense of the blameworthiness of the actor, will be made clear.¹²⁹ The *mens rea* and *actus reus* theory does not allow for this distinction.

It is necessary to take a closer look at the subjective and the objective elements in national law and international criminal law.

(a) Subjective element

Anglo-American law

Mens rea means 'a guilty mind'. In more modern terms, it refers to the mental or fault element required for a particular crime. Kenny submits that 'the "guilty mind" need not be any consciousness of wickedness nor any malevolent intent: in most cases it is simply a knowledge of what one is doing, where what one is doing is something illegal'.¹³⁰ According to Justice Devlin, 'Mens rea consists of two elements. It consists first of all of the intent to do an act and secondly of the knowledge of the circumstances that makes that act a criminal offence'.¹³¹ In general, the concept means 'the state of mind which must accompany an act which on the face of it is criminal if the agent is to be held responsible, and therefore liable for punishment, for the action'.¹³² *Mens rea* can be established by a third fault requirement: recklessness. Unlike intent and knowledge, recklessness covers *unintentional* behaviour. Negligence also implies an unintentional way of committing an offence. Negligently causing an *actus reus* by failing to take reasonable care is regarded by some as not legally blameworthy.¹³³ This seems to be based on the idea that unawareness is not a state of mind and therefore not *mens rea*.¹³⁴ In the following, negligence (i) will be considered a fault requirement like intention (ii), knowledge (iii) and recklessness (iv).

Before taking a closer look at each of the four fault requirements, it should be recalled that in law, in general, desire (as motive) is separated from intent. In Anglo-American law, desire can, however, be brought within the ambit of criminal intent through 'specific intent'. The latter notion designates a special mental element that goes beyond a general mental state and is required with respect to the *actus reus* of the crime. Common law larceny, for instance, not only requires that the defendant's

¹²⁹ See Chapter 6 para. 2(b).

¹³⁰ A. Kenny, *Freewill and Responsibility*, London (1978), pp. 1-2.

¹³¹ Cited in J. Hall, *General Principles of Criminal Law*, Indianapolis/New York (1960), p. 71.

¹³² Kenny (1978), p. 2.

¹³³ Smith & Hogan (1996), p. 56.

¹³⁴ See Kenny (1978), p. 6.

mental state is established as to his taking of property (general intent including volition), but also that he had 'an intent to steal' the property.¹³⁵ In principle, however, elements connoting desire are excluded from intent.

At present, Anglo-American law does not provide a definition of 'intention'. In *Moloney*,¹³⁶ it was held that the judges should refrain from defining intention beyond explaining that it differs from desire and motive.¹³⁷ In *Nedrick*,¹³⁸ however, it was held that one could depart from this rule when the essence of the defence was that 'it was not the defendant's purpose to cause injury'.¹³⁹ The jury should be instructed to decide whether the accused knew that the prohibited consequence was a virtually certain consequence of his act and that he realised that such was the case. If the answer to the latter is 'yes', intention can be inferred from that.¹⁴⁰ In *Woollin*, this test was slightly changed by the House of Lords.¹⁴¹ Where the '*Nedrick*-test' required *inference* of intent when the defendant foresaw the consequence as virtually certain, *Woollin* stated that the Court is *entitled to find* intention, leaving it to the Court to also decline finding intention despite virtually certain foresight.

Knowledge has the same intensity as intention, though knowledge relates to circumstances forming part of the crime, and intention to the consequences specified in the definition of the crime. In the words of Glanville Williams,

As applied to bodily movement the notion of intention means that the movement was willed or volitional or purposive or done in a state of normal consciousness. (A sleep-walker does not intentionally walk, for legal purposes, because he is not in a state of normal consciousness.). As applied to the circumstances of an act, the notion of intention, according to the usual understanding, means that these circumstances were known to the actor.¹⁴²

There is support for the view that 'knowledge' includes 'wilful blindness'. In the latter case, the prosecutor will have to 'base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed'.¹⁴³

¹³⁵ Similar specific intents are required for common law burglary and statutory crimes such as assault 'with intent to kill' or kidnapping 'for the purpose of ransom or reward'. W.R. LaFare, *Modern Criminal Law cases, Comment and Questions*, St. Paul, Minn. (1988), p. 106.

¹³⁶ (1985) AC 905

¹³⁷ Juries are instructed that 'intent is something quite different from motive or desire'. *Archbold* (2000), § 17-35.

¹³⁸ (1986) 83 Cr App R 267.

¹³⁹ The accused had set a woman's house on fire by pouring paraffin through the letter-box and on the front door and setting it alight. One of the woman's children died in the ensuing fire. When asked why he did it, the accused replied that he just wanted to 'wake her up and frighten her'. Ashworth (1999), pp. 180-181 and p. 269.

¹⁴⁰ Ashworth (1999), p. 181.

¹⁴¹ (1999) AC 82.

¹⁴² G.L. Williams, *Textbook of Criminal Law*, London (1983), p. 116.

¹⁴³ *Westminster City Council v. Croyalgrange Ltd.* [1986] 2 All ER 353 at 359. See Smith & Hogan (1996), p. 107, and Archbold (2000), § 17-49.

Recklessness is regarded a 'less culpable mental state than intention'.¹⁴⁴ Instead of intentional, purposeful behaviour it denotes risk-taking, which is also a feature of negligence. Recklessness, however, constitutes *conscious* risk-taking, whereas negligent risk-taking denotes *unawareness* of the risk. English courts have faltered on the idea of recklessness as gross negligence, where it is irrelevant whether the accused was aware of the possibility of a risk (inadvertent recklessness), and the idea of recklessness as consciously disregarding a risk (advertent recklessness).¹⁴⁵ The latter is nowadays the dominant test and requires that 'the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it'.¹⁴⁶

Negligence is the failure to behave like a prudent person and requires an objective test of reasonableness.¹⁴⁷ As it is not regarded as a mental state to which the *mens rea* doctrine applies, the term is not found in national statute law without qualifying words such as 'wilful neglect'. The standard of negligence required for manslaughter is peculiar to the crime and cannot be regarded as a general concept of negligence.¹⁴⁸

Civil law

The mental element in civil law systems also covers various forms and fault gradations with a dividing line between *intentional*, *dolus/dol/intention*, and *unintentional*, *Schuld/culpa/négligence*, criminal conduct. Intent includes an element of knowledge and volition. The standard German definition of intention is 'knowing (Wissen) and wanting (Wollen) the realisation of the definition of the offence' and is referred to as *dolus directus in the first degree*.¹⁴⁹ Dutch law defines intention in

¹⁴⁴ Williams (1983), p. 98.

¹⁴⁵ Inadvertent recklessness stems from the landmark case of *R. v. Caldwell* (1982) AC 34 and is referred to as 'Caldwell recklessness'. Lord Diplock formulated it as follows: a person is guilty of causing damage recklessly if: '(i) he does an act which in fact creates an *obvious* risk that property would be destroyed or damaged and (ii) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognized that there was some risk involved and has nonetheless gone on to do it.' (italics added, *EvS*) 'Caldwell recklessness' is of little practical significance because of its limited scope of application.

Advertent recklessness was the standard established in *R v. Cunningham* (1957) 2 QB 396, 41 Cr App R 155, CCA and is referred to as 'Cunningham recklessness'. Its elements can be found in the Model Penal Code's (MPC) definition of recklessness. MPC § 2.02 (2)(c): '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'.

¹⁴⁶ Cited in Ashworth (1999), p. 184.

¹⁴⁷ The Law Commission's Consultation Paper No. 31 (1970), p. 7: 'A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation would exercise'. See Williams (1983), pp. 88-95 and Archbold (2000), § 17-44.

¹⁴⁸ Archbold (2000), § 17-43 and § 17-47.

¹⁴⁹ H.H. Jescheck and T. Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil*, Berlin (1996), p. 293 *et seq.*; G.P. Fletcher, *Rethinking Criminal Law*, Boston (1978), pp. 440-442.

similar wording (*willens en wetens*) and is referred to as ‘*opzet*’ (intention).¹⁵⁰ The French concept of ‘*dol*’ also involves both knowledge and willingness.¹⁵¹ All these notions comprise a volitional and a cognitive component and will be referred to here as ‘full intent’ constituting the first gradation of the mental element in the above-mentioned civil law legal systems.¹⁵²

The second grade of intention leaves the volitional element aside and centres around the cognitive aspect. At this level, knowledge must amount to ‘being certain’, which is a higher threshold than that of *dolus eventualis*, which will be discussed in detail below. Thus, a person who aims at destroying a building, knowing for sure that the ‘collateral damage’, which he does not wish and at which he is not aiming (to a group of civilians hiding in the targeted object) will occur and accepting it as an *inevitable* part of the attack, does intend this damage.¹⁵³ This is known in German law as *dolus directus* (in the second degree) and in Dutch criminal law as ‘intent with the awareness of inevitability’ (‘*opzet met noodzakelijkheidsbewustzijn*’).¹⁵⁴ French criminal law does not recognise this type of *dolus directus*. On the other hand, it makes a distinction between a general intention to act unlawfully (*dol général*) and the specific intent required for certain offences (*dol spécial*). General intention underlies specific intention and involves the constituent elements of the offence. ‘*Préméditation*’ is an example of specific intent.¹⁵⁵

A third fault degree is *dolus eventualis*, which can also be referred to as ‘risk responsibility’. *Dolus eventualis* differs from *dolus directus* in that it applies a test in respect of the harm which *might* occur, whereas the latter requires that the defendant was aware that the harm *would* occur. Possible tests range from being ‘indifferent’ to the result, to ‘being reconciled’ with the result as a possible cost of attaining one’s goal. *Dolus eventualis* resembles recklessness in that they are both a type of ‘risk responsibility’. Recklessness is, however, broader than *dolus eventualis* as it also extends to negligent (inadvertent) recklessness, thus denoting *culpa*. In German and Dutch law, *dolus eventualis* is included within the definition of intention. French law, on the other hand, rejects *dolus eventualis* as a degree of intention.¹⁵⁶

¹⁵⁰ J. Rummelink, *Mr. D. Hazewinkel-Suringa's Inleiding tot de studie van het Nederlandse Strafrecht*, Deventer (1996), pp. 201-202; J. de Hullu, *Materieel Strafrecht*, Deventer (2000), pp. 205-206.

¹⁵¹ ‘Il consiste (...) en la volonté de commettre un acte en ayant la conscience de violer la loi pénale’, F. Desportes and F. Le Guehec, *Le Nouveau Droit Pénal droit pénal général*, Vol. I, Paris (2000), p. 399; J.S. Bell *et al.*, *Principles of French Law*, Oxford (1998), p. 225.

¹⁵² See also A. Eser, ‘Mental Elements-Mistake of Fact and Mistake of Law’, in Cassese *et al.* (eds.), *The Rome Statute, a commentary*, Oxford (2002) (Eser in Cassese *et al.* (2002b)), pp. 905-906.

¹⁵³ Example taken from Eser in Cassese *et al.* (2002b), p. 906

¹⁵⁴ Jescheck and Weigend (1996), pp. 298 *et seq.*; Rummelink/Hazewinkel-Suringa (1995), pp. 203-204.

¹⁵⁵ Article 132-72 Code Pénal: ‘La préméditation est le dessein formé avant l’action de commettre un crime ou un délit déterminé’. (‘Premeditation is the design formed before the act to commit a definite felony or misdemeanour’. Translation: *The American Series of Foreign Penal Codes, France*, Vol. 31 (1999)).

¹⁵⁶ It is regarded as a ‘faute non intentionnelle délictuelle’. Its wording, however, seems to suggest the intentional commission of a crime. Article 121-3(2): ‘Toutefois, lorsque la loi le prévoit, il y a délit en cas d’imprudence, de négligence ou de mise en danger *délibérée* de la personne d’autrui’. (italics added,

Only in cases of gross negligence where the accused has deliberately turned a blind eye to the consequences of his actions, has gross indifference been likened to intention,¹⁵⁷ for instance, as in the infamous case in which the director of a blood transfusion service permitted potentially HIV-contaminated blood to be given to haemophilia patients, despite being told that a method existed for detecting risk, which he did not use.¹⁵⁸

Culpa denotes unintentional, negligent action. The essential aspect of negligence is not what a person’s state of mind was, but what it *should* have been. The element dividing *culpa* and *dolus* is ‘will’, the volitional element. *Faute consciente/bewusste Schuld/conscious* (advertent) negligence is generally regarded as the highest degree of *culpa* in civil law.¹⁵⁹ It differs from *dolus eventualis*, the lowest degree of *dolus*, in that, in the former case, the defendant D being aware of the risk, calculates that it will not occur. Unlike in *dolus eventualis* cases, D didn’t deliberately expose himself to the risk. D thought the consequence would not occur and had he known that it would, he would probably have acted differently. I agree with Fletcher that the Anglo-American inadvertent recklessness is the equivalent of ‘conscious negligence’.¹⁶⁰

Faute inconsciente/bewusste Schuld/unconscious (inadvertent) negligence lacks both the volitional and the cognitive elements. This refers to the defendant who did not even realise the occurrence of circumstances or consequences.

The previous analysis can be put in the following scheme. Above the dividing line, we find the various *intentional* elements connoting conscious wrongdoing; under the line are listed the unintentional elements that connote *culpa*.

<i>French</i>	<i>German</i>	<i>Anglo-American</i>
dol général	Dolus directes 1 st degree (full intent)	Intention
dol spécial	Dolus directus 2 nd degree (dolus directus) bedingte Vorsatz (dolus eventualis)	Knowledge advertent recklessness
dol éventuel	bewusste Schuld (conscious negligence)	inadvertent recklessness negligence
faute consciente	unbewusste Schuld (non-conscious negligence)	
faute inconsciente		

The war crimes trials that have been conducted in some of the above-mentioned legal systems demonstrate that recourse was found to concepts derived from common criminal law in establishing the requisite mental element. After all, neither the Nu-

EvS) (‘However, when the law so provides, there is a misdemeanor in the case of deliberately endangering the person of another’. Translation: *The American Series of Foreign Penal Codes, France*, Vol. 31 (1999). See Desportes and Le Guehec (2000), pp. 410-412.

¹⁵⁷ Bell *et al.* (1998), pp. 225-227.

¹⁵⁸ See also Chapter 5 para. 3(c).

¹⁵⁹ French law: Bell *et al.* (1998), pp. 227-228; Pradel (1995), pp. 261-262; German law: Jescheck and Weigend (1996), pp. 452-453; In Dutch law, ‘bewuste schuld’, Rummelink/Hazewinkel-Suringa (1995), pp. 233-234.

¹⁶⁰ Fletcher (1978), p. 261.

remberg Statute nor CCL 10 provided a definition of mental element. Ambos, in his thorough study of a general part of (substantive) international criminal law, observes that the fault requirement in national prosecutions of war crimes and crimes against humanity ranged from *dolus eventualis* (Supreme Court for the British Zone) to full intent (Dutch Court in *Menten* case and Israeli Court in *Eichmann*).¹⁶¹ In the *Barbie* and *Touvier* cases, French courts required knowledge of the criminal plan and full intent for the substantive acts.¹⁶² In the *Finta* case, a Canadian court required knowledge, which also included wilful blindness, of the broader context in which the perpetrator's act occurred.¹⁶³

Ad hoc tribunals

Unlike the ICC Statute, the founding documents of the Former Yugoslavia and Rwanda do not provide for a separate provision on *mens rea* or the mental element. This can, however, be found in the jurisprudence of the *ad hoc* Tribunals. The *case law* of both Tribunals has been of immense value in developing the law on this point. It has contributed to the clarification and definition of *mens rea* for the crimes of genocide, crimes against humanity, war crimes, and specific grounds of responsibility, which will be discussed below. I will not go into detail as to the *mens rea* of the crimes, as that has been done elsewhere by others,¹⁶⁴ yet a short overview is useful as it enables a categorisation of the mental elements.

In order to convict a person for the crime of genocide, it must be proven that the person had the specific intention (*dolus specialis*) to 'destroy, in whole or in part, a national, ethnical, racial or religious group'. In drafting the definition of genocide, the specific intention gave rise to a difficult discussion on in- or exclusion of motive as a constituent element of the crime of genocide.¹⁶⁵ The matter was not unequivocally decided and it was left to (national and international) courts to decide whether proof of motive must accompany the intent to commit genocide. The *ad hoc* Tribunals seem to have been averse to including an element of motive in the definition.¹⁶⁶

¹⁶¹ K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung*, Berlin (2002), pp. 171-175, 184, 190, 223.

¹⁶² *Ibidem*, pp. 192-195.

¹⁶³ '[k]nowledge of the circumstances or facts which bring an act within the definition of a war crime or crime against humanity constitutes the mental component which must coexist with the prohibited acts to establish culpability for those acts'. Ontario Court of Appeal, *ILR* 98, pp. 520-663, cited in Ambos (2002), p. 203.

¹⁶⁴ See for an elaborate account of the definitions of the crimes and their respective *mens rea* and *actus reus*: Boot (2002). Also: K. Kittichaisaree, *International Criminal Law*, Oxford (2001).

¹⁶⁵ See Schabas (2000), pp. 245-256; Boot (2002), paras. 386-392, pp. 410-419.

¹⁶⁶ In *Jelisić*, the ICTY Trial Chamber focused on the cognitive aspect of the genocidal intent, namely: 'the clear knowledge that he was participating in genocide, that is the destruction, at least in part, of a national, ethnic, racial or religious group'. ICTY, *Prosecutor v. Goran Jelisić*, Judgement, Case No. IT-95-10, T. Ch.I, 19 October 1999 (*Jelisić* Judgement), cited in Kittichaisaree, (2001), p. 72. In *Akayesu*, the ICTR also focused on the cognitive aspect of the genocidal intent: 'With regard to the crime of genocide, the offender is culpable only when he has committed one of the offences charged under Article 2(2) of the Statute with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he *knew or should have known* that the act committed would destroy, in whole or in part, a group'. (italics added, *EvS*). *Akayesu* Judgement, para. 520.

It seems that the volitional element is less prominent an element of the *dolus specialis* than the cognitive component of genocidal intention.

The *mens rea* or mental element required for crimes against humanity has a predominantly cognitive character as well. The *case law* of the Tribunals requires a defendant to have actual knowledge that his act is part of a widespread or systematic attack on a civilian population and pursuant to a policy or plan.¹⁶⁷ Motive need not to be proved. The widespread or systematic nature of crimes against humanity even negates the requirement of a personal motive.¹⁶⁸ The latter concurs with the ICC Elements of Crime on crimes against humanity where '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' is not required.¹⁶⁹ The ICTY Trial Chamber in *Blaškić* phrased the specific (cognitive) intent for crimes against humanity in 'risk' terms. It was deemed sufficient 'that he (Blaškić) knowingly took the risk of participating in the implementation of the ideology, policy or plan'.¹⁷⁰

It follows from the Tribunals' jurisprudence that *mens rea* for war crimes,¹⁷¹ such as murder and killing, includes recklessness as well as intent.¹⁷² It is not wholly clear how recklessness is to be understood in the context of the *ad hoc* Tribunals,¹⁷³ as inadvertent recklessness and, therefore, like the French 'dol éventuel'; as a serious form of *culpa*¹⁷⁴ (gross negligence); or as *dolus eventualis*, which in some civil law

¹⁶⁷ ICTR, *Prosecutor v. Kayishema and Ruzindana* Judgement, Case No. ICTR-95-IT, T. Ch. II, 21 May 1999 (*Kayishema and Ruzindana* Judgement), paras. 133-134; *Tadić* Judgement, paras. 626, 638, 656-657; ICTY *Prosecutor v. Tadić*, Judgement, Case No. IT-94-1-A, A. Ch. 15 July 1999 (*Tadić* Appeal Judgement); ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, T. Ch., 6 December 1999, (*Rutaganda* Judgement), para. 69; *Kupreskić* Judgement, paras. 556-557; ICTR, *Prosecutor v. Musema*, Judgement, Case No. ICTR-96-13-T, T. Ch. I, 27 January 2000 (*Musema* Judgement), para. 206; ICTR, *Prosecutor v. Georges Ruggiu*, Judgement, Case No. ICTR 97-32-I, T. Ch. I, 1 June 2000 (*Ruggiu* Judgement), para. 20.

¹⁶⁸ 'The conclusion is therefore warranted that the relevant *case law* and the spirit of international rules concerning crimes against humanity make it clear that under customary law, "purely personal motives" do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated. (...) and "[t]he Appeals Chamber does not consider it necessary to further require, as a substantive element of *mens rea*, a nexus between the specific acts allegedly committed by the accused and the armed conflict, or to require proof of the accused's *motives*'. *Tadić* Appeal Judgement, paras. 270 and 272.

¹⁶⁹ PCNICC/2000/INF/3/Add.2, p. 9.

¹⁷⁰ ICTY, *Prosecutor v. Tihomir Blaškić*, Judgement, Case No. IT-95-14-T, T. Ch. I, 3 March 2000 (*Blaškić* Judgement), para. 257.

¹⁷¹ War crimes relate to both grave breaches (Article 2 ICTY Statute) and 'other violations of the laws or customs of war' (Article 3 ICTY and Article 4 ICTR Statute).

¹⁷² *Akayesu* Judgement, para. 589; ICTY, *Prosecutor v. Delalić et al.*, Judgement, Case No. IT-96-21-T, T.Ch. II, 16 November 1998 (*Čelebići* Judgement), para. 439; *Blaškić* Judgement, paras. 152 and 182. See Boot (2002), paras. 563-564, pp. 580-583.

¹⁷³ The Commentary on the API expressly includes 'recklessness' as an element of wilfulness in both Articles 11 and 85 of the Protocol, Pilloud *et al.* (1987), para. 3437.

¹⁷⁴ The French translation of the *Blaškić* Judgement supports this conclusion. Recklessness in the above-cited clause is translated as 'l'imprudence délibérée' (para. 152) and later in the judgement, in the context of responsibility for ordering crimes, as 'le dol éventuel' (para. 474), which – as we saw earlier – is not considered a form of intent. We must bear in mind that the *Blaškić* trial was presided over by a Frenchman, Judge Jorda.

systems, connotes intent (*dolus*) corresponding to advertent recklessness. The confusion at the Tribunals regarding the scope and meaning of the different fault degrees derived from national law appears complete when we consider that the Trial Chambers adopt differing standards. The *Blaškić* Trial Chamber's understanding of recklessness as 'indirect intent' was not endorsed by the Trial Chamber in *Aleksovski*, which considered recklessness as a fault degree that falls short of intent. With regard to the act of committing outrages upon personal dignity, the *Aleksovski* Trial Chamber held that proof of intent was required and that

[r]ecklessness cannot suffice; the perpetrator must have acted deliberately or deliberately omitted to act but deliberation alone is insufficient.¹⁷⁵

It is submitted here that we should take the *Tadić* Appeal Judgement as the authoritative statement in understanding and interpreting the various fault degrees applied in the law of the Tribunals. The findings of the Appeals Chamber in *Tadić* on the requisite *mens rea* with regard to common purpose liability is instructive:

It should be noted that more than negligence is required. What is required is 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*. In other words, the so-called *dolus eventualis* is required (also called 'advertent recklessness' in some national legal systems) (*italic added, EvS*).¹⁷⁶

It can be understood from this statement that 1) *dolus eventualis* is part of the law of the Tribunals, 2) it is a fault degree that falls between full intent and negligence, 3) it can be equated with advertent recklessness, which seems to suggest that it is part of intent, and, finally, 4) *dolus eventualis* has the same scope at the Tribunals as in some national legal systems: it covers situations in which consequences that are likely to occur are accepted.

*ICC Statute*¹⁷⁷

The ICC Statute contains a separate provision on the mental element in Article 30.¹⁷⁸ It is noteworthy that the article is entitled 'mental element' rather than *mens rea*. As

¹⁷⁵ ICTY, *Prosecutor v. Aleksovski* Judgement, Case No. IT-95-14/1, 25 June 1999 (*Aleksovski* Judgement), para. 56.

¹⁷⁶ *Tadić* Appeal Judgement, para. 220.

¹⁷⁷ For an elaborate Commentary on Article 30: Eser in Cassese *et al.* (2002b) pp. 889-948; D. Piragoff, 'Article 30 of the ICC Statute', in O. Triffterer (ed.), *Commentary on the Rome Statute of the ICC. Observers' Notes, Article by Article*, Baden-Baden (1999), margin Nos. 1-28, pp. 527-535. See also Ambos (2002), pp 758-804.

¹⁷⁸ Article 30 ICC Statute:

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

(2) For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

a more neutral term, it was probably easier to accept for the civil law drafters of the Statute than *mens rea*. The article was the subject of a much discussion as a result of conceptual differences between *dolus eventualis* and a probability requirement, and between recklessness and gross negligence.¹⁷⁹

Article 30 excludes fault degrees that fall short of intention. Paragraph (1) requires the material element to be 'committed with intent and knowledge'. Article 30 thus requires full intent (1st degree *dolus directus*) for the crimes enumerated in Articles 6-8 of the ICC Statute. Intent and knowledge can constitute the required mental element independently from one another as they each have their own significance.¹⁸⁰ While proof of both is required for the crime of murder under Article 7(1)(a) of the Statute, knowledge as the awareness of widespread or systematic attack suffices with regard to crimes against humanity. In the latter case, the volitional element is implied in the cognitive.

The ICC drafting history demonstrates that delegates in Rome were of the opinion that, in principle, all crimes listed in the ICC Statute require intent and knowledge. Had some delegates been in favour of defining recklessness in a separate provision, 'after it was pointed out that the word recklessness did not appear anywhere in the definition of crimes, it was agreed that a definition of that concept was unnecessary'.¹⁸¹ Paragraph (2)(b) of Article 30, however, leaves room for – in German legal terminology – *dolus directus*: 'A person has intent where, in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events'.¹⁸² The perpetrator knows with certainty that the action will result in the prohibited consequence, irrespective of whether he desires it or not. Again, we can use the example of a person who aims at destroying a building while not wishing to kill civilians but knowing, that he cannot reach his military aim without inevitably killing innocent civilians. The cognitive aspect thus outweighs the volitional element.

Article 30 (2)(b) excludes *dolus eventualis* as it explicitly requires awareness that the consequence 'will occur', whereas strictly, speaking *dolus eventualis* requires that the perpetrator is aware of the risk that his conduct is likely to bring about a certain result and that he is prepared to accept that. While some seem to take the view that *dolus eventualis* is part of Article 30, covered by the concept of intent in

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

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

¹⁷⁹ Per Saland in R.S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague (1999), p. 205.

¹⁸⁰ See also Eser in Cassese *et al.* (2002b), p. 907

¹⁸¹ *Ibidem*.

¹⁸² It is noteworthy that the latter half of this provision is copied almost *verbatim* from the English Law Commission's definition of 'intention' in its Draft Criminal Code: 'A person acts "intentionally" with respect to (...) a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events (The Law Commission's Report No. 177 (1989), *A Criminal Code for England ad Wales*, clause 18(b))'.

paragraph (1),¹⁸³ others¹⁸⁴ for the reason mentioned above, deem it to be excluded from Article 30 of the ICC Statute. Bearing in mind the drafting history of Article 30 and the understanding of *dolus eventualis* as 'risk responsibility' rather than intent, it is submitted here that *dolus eventualis* cannot be considered part of the mental element laid down in Article 30 of the ICC Statute.

It should be noted here that Article 30 leaves room for other mental elements regulated elsewhere in the Statute. The provision commences with the words '*unless otherwise provided*, a person shall be criminally responsible for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge'. Crimes such as murder and killing, containing the element 'wilful(ly)', have been interpreted by the Tribunals of the Former Yugoslavia and Rwanda to require recklessness instead of only intent. Recklessness, however, seems to fall outside the scope of Article 30 of the ICC Statute. This means that the Court, in principle, has no jurisdiction over reckless killing and reckless murder as war crimes. When we aim at developing international criminal law into a consistent and coherent body of law, this should be viewed as an undesirable outcome of the strict wording of Article 30. It is therefore submitted here that the ICC should take the *ad hoc* jurisprudence on these crimes into account and apply the Tribunals' findings in interpreting these crimes. This means that the latter crimes, listed in Article 8, can be understood to fall under Article 30 as 'otherwise provided'.¹⁸⁵

As to the grounds of responsibility, which are studied more closely below, Article 28 is an example of providing a lower mental standard than required by Article 30. The provision on responsibility of commanders and other superiors, negotiated and drafted *after* Article 30, explicitly provides in paragraph 1(a) for a mental standard amounting to gross negligence or recklessness.¹⁸⁶

The scheme set out below lists the different degrees of *mens rea*/mental element at the Tribunals and the ICC. Two things should be stated in advance. Firstly, for reasons of convenience, I have used terms of *national* origin to refer to the various fault degrees. *Dolus directus* is used here to refer to the fault standard in Article 30(2)(b). However, the term as such cannot be found in the ICC Statute. The same is true for the Statutes of the *ad hoc* Tribunals. Although it features in either the case law or the Statutes, the inclusion may be implied through the acceptance of the lower standard of *dolus eventualis*.

Secondly, when one combines the two ICC schemes as an overall scheme for the ICC, it seems similar to that of the *ad hoc* Tribunals. However, this would depict a distorted picture as Article 30 is the *rule* and Article 8 and 28 are the *exceptions* to it. Thus, bearing in mind that Article 30 applies to the crimes laid down in Articles 6-8 we are left in general with a higher mental standard for the crimes than that applied by the *ad hoc* Tribunals. Interestingly, the mental standard for superior respon-

¹⁸³ Boot (2002), para. 564, p. 583; Piragoff in Triffterer (1999), margin No. 22, pp. 533-534.

¹⁸⁴ Ambos (2002), p. 771; Eser in Cassese *et al.* (2002b), p. 915 and pp. 932-933.

¹⁸⁵ See also Kittichaisaree (2001), p. 142.

¹⁸⁶ See Saland (1999), p. 206.

sibility, applicable in the context of the ICC, is lower than that of the ICTY and ICTR.

<i>Article 30 ICC Statute</i>	<i>Articles 8 and 28 ICC Statute</i>	<i>ICTY & ICTR</i>
Intent (general and specific)		Intent (general and specific)
Knowledge		Knowledge
Dolus Directus		(Dolus Directus)
	Dolus eventualis/ Advertent recklessness	Dolus eventualis/ Advertent recklessness
	Recklessness/wilful blindness Negligence	Negligence

(b) Objective element¹⁸⁷

Commission and omission

In general, the *actus reus* or objective-external side of criminal offences consists of three elements: conduct, its consequences, and the circumstances in which the conduct takes place. Those crimes can be grouped under two main headings: 'conduct crimes', penalising the conduct, and 'result crimes', penalising the consequence.¹⁸⁸ Criminal conduct can further be divided into (positive) acts and omissions.

The jurisdiction of the *ad hoc* Tribunals and that of the ICC extends to both acts and (genuine) omissions. The only statutory provision explicitly encapsulating criminal omission at the Tribunals for the Former Yugoslavia and Rwanda is the superior responsibility concept in subparagraph 3 of Article 6 of the ICTR Statute, and Article 7 of the ICTY Statute. The ICC Statute provides for criminal liability for omission in Article 28, penalising a superior's failure to prevent or punish crimes committed by subordinates, and in Article 8(2)(b)(xxv), where the intentional starvation of civilians as a method of warfare is defined as a war crime.

Most national legal systems accept that 'omissive behaviour' is implied in provisions penalising positive criminal conduct, provided verbs suggesting action are part of the crime's definition.¹⁸⁹ This type of omission, which is referred to as 'commission by omission', in German terminology, 'unechte Unterlassungsdelikete'¹⁹⁰ or, in Anglo-American terms, 'indirect' omissions,¹⁹¹ should be distinguished from 'genu-

¹⁸⁷ For a comprehensive study of the *actus reus*/material element of war crimes, crimes against humanity, and genocide, see Boot (2002), paras. 371-596, pp. 399-608. See also Kittichaisarree (2001), pp. 67-229.

¹⁸⁸ Smith & Hogan (1996), p. 31; Williams, (1983), p. 78; Jescheck and Weigend (1996), pp. 260-261.

¹⁸⁹ Pradel (1995), pp. 235-236; Jescheck and Weigend (1996), pp. 612-613.

¹⁹⁰ See Jescheck and Weigend (1996), pp. 605-612.

¹⁹¹ A classic example of 'commission by omission' in national law is the case of the parent who neglects to feed her or his child. Not feeding the child causes it to die, which amounts to murder. For instance, *Emery* (1993) 14 Cr App R (S) 394 in Ashworth (1999), p. 115.

ine' or 'direct' omissions. In the latter case, the definition of the crime constitutes criminal inaction, *e.g.* the failure of a subpoenaed person to appear as a witness or the failure of a commander to prevent offences committed by his subordinate. Genuine crimes of omission are usually conduct crimes, while crimes that qualify as commission by omission are often result crimes.

Commission by omission is a construction of doctrine and has its basis in jurisprudence. This explains why French courts and commentators reject the concept. Endorsing a very strict legality principle, French courts maintain that, in principle, there is no liability for commission by omission.¹⁹² We must understand the French position against the historical importance of individual freedom, the concomitant strict legality principle, and the slow recognition of the principle of solidarity. This explains the relatively late acceptance of a general offence of omission, such as the failure to assist a person in peril comprised in Article 223-6(2) of the Code Pénal of 1994.¹⁹³

Commission by omission supposes three elements: 1) the realisation of a result, for instance, a person's death; 2) the existence of a duty to act; and 3) a causal link between the passive behaviour and the result. It is not always clear who has a duty to act. Duties of care may arise from relationships established by law, contract, balance of power, agency, or previous conduct.¹⁹⁴

Taking a closer look at the crimes encapsulated in Articles 2-4 of the ICTR and Articles 2-5 of the ICTY Statute, we see that these provisions read more like 'general pronouncements of policy than like normal penal statutes'.¹⁹⁵ Most provisions are loosely defined, requiring the Judges to '(s)upplement by providing the additional elements found in most penal statutes, such as the mental state that must be proved along with the acts and the specific elements of the offences'.¹⁹⁶ This resulted in a broad interpretative, rather than a strict linguistic, approach to recognising omission liability for the crimes listed in the respective Statutes. The Judges at the *ad hoc* Tribunals have held that most of the offences listed in the Statutes can be committed by both, acts and omissions. Indeed, in the *Blaškić* case the ICTY Trial Chamber ruled that the offence of 'inhuman treatment' (Article 2(b) of the ICTY Statute, qualifying as 'grave breach of the Geneva Conventions') and 'cruel treatment' (Article 3 of the Statute, qualifying as a war crime) could consist of both, acts and omissions.¹⁹⁷ The

¹⁹² Pradel (1995), p. 236.

¹⁹³ 'Sera puni des mêmes peines quiconque s'abstient volontairement de porter à une personne en péril l'assistance que, sans risque pour lui ou pour les tiers, il pouvait lui prêter soit par son action personnelle, soit en provoquant un secours'. ('Any person who wilfully abstains from rendering assistance to a person in peril when he or she could have rendered that assistance without risk to himself, herself, or others, either by acting personally or by calling for aid, is liable to the same penalties'. (Translation: *The American Series of Foreign Penal Codes. France*, Vol. 31 (1999)). See K. Ambos, 'Superior Responsibility', in Cassese *et al.* (2002) (Ambos in Cassese *et al.* (2002a)), p. 850.

¹⁹⁴ Rummelink/Hazewinkel-Suringa (1996), pp. 166-168.

¹⁹⁵ J.E. Ackerman and E. O'Sullivan, *Practice and Procedure of the International Criminal Tribunals for the Former Yugoslavia*, The Hague (2000), p. 11.

¹⁹⁶ *Ibidem*.

¹⁹⁷ *Blaškić* Judgement, paras. 154 and 186.

ICTR Trial Chamber in *Kambanda* ruled that all the acts of genocide could be committed by omission.¹⁹⁸

At the Rome Conference, the delegations attempted to draw up a definition of omission contained in a general provision on *actus reus*.¹⁹⁹ This endeavour failed, as it proved impossible to reach consensus.²⁰⁰ It was argued that only Article 28 creates, and should create, liability by omission.²⁰¹ Bearing in mind the strict formulation of the *nullum crimen sine lege* principle in Article 22 of the ICC Statute, requiring the provisions to state exhaustively the subject-matter and prohibiting application by analogy, it is thought to be doubtful whether liability by omission in respect of the crimes within the Court's jurisdiction are recognised as part of the Statute.²⁰² A strict 'French-like' interpretation of the legality principle in the ICC context would certainly plead against its inclusion.

It is submitted here that such a strict interpretation is undesirable. Commission by omission should be regarded as *conduct* and should as such be subjected to the sphere of action of every criminal law system, including that of the ICC. The crimes enumerated in the ICC Statute would lose much of their scope if the Statute were limited to physical, positive acts. This is certainly true for result crimes such as 'murder'.²⁰³ It is also relevant for those conduct crimes that describe the criminal conduct in neutral terms, such as 'causing (...) great suffering'.²⁰⁴ Commission by omission could also play a role with regard to the crime of genocide as 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.²⁰⁵ It is not hard to imagine that 'inflicting conditions on the group' can be done through active and passive behaviour.²⁰⁶ It seems, on the

¹⁹⁸ ICTR, Judgement, *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, 23 September 1998 (*Kambanda* Judgement), para. 40. See further Schabas (2000), p. 156.

¹⁹⁹ UN Doc. A/CONF.183/2/Add.1 (14 April 1998).

²⁰⁰ *The Report of the Working Group on General Principles of Criminal Law*, 29 June 1998 (1998 Working Group Report), UN Doc. A/CONF.183/C.1/WGPP/L.4/Add.1 (1998) contained a (later deleted) provision entitled 'Actus reus (act and/or omission)', p. 4.

²⁰¹ E. Wise in L.S. Wexler (ed.), *Model Draft Statute for the International Criminal Court based on the Preparatory Committee's Text to the Diplomatic Conference, Rome, June 15-July 17 1998*, Toulouse (1998), pp. 48-50.

²⁰² As Boot observes: 'The formulation of the principle emphasises that the jurisdiction of the International Criminal Court *ratione materiae* is limited to what the states have wanted it to be. For this reason, it appears that the Court will have to take this principle even more seriously than national courts (and the *ad hoc* Tribunals, added *EvS*) are obliged to do'. Boot (2002), para. 370, p. 396.

²⁰³ Article 7(1)(a) of the ICC Statute qualifying as a crime against humanity.

²⁰⁴ Article 8(2)(a)(iii) of the ICC Statute qualifying as a war crime, and more specifically, a grave breach of the Geneva Conventions of 12 August 1949.

²⁰⁵ Article 6(c) of the ICC Statute.

²⁰⁶ For instance, systematically withholding medical treatment, food, etc. See the *Akayesu* Judgement: 'For purposes of interpreting Article 2(2)(c) of the Statute, the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement', para. 506. These methods are referred to as 'slow death measures' see N. Robinson, *The*

other hand, difficult to include omission liability in definitions of crimes that contain verbs implying action, such as ‘destroying the enemy’s property’²⁰⁷ or ‘pillaging a town or place’.²⁰⁸ It is only with respect to these definitions that the legality principle of Article 22 should come into play and caution the Court in applying a progressive interpretation as to include omission liability. Besides, it seems Article 22 applies only to the crimes listed in the ICC Statute and not to the various modes of criminal responsibility enumerated in Article 25.²⁰⁹ A final argument in favour of inclusion of omission liability in the ICC Statute outside the codified ‘genuine’ crimes of omission concerns the jurisprudence of the *ad hoc* Tribunals. As we saw earlier, the Tribunals have accepted that certain crimes can be committed by act or omission. To build a coherent and complete body of international criminal law, the ICC should not deviate from these findings but rather endorse them.

Material element

The mental element has its counterpart in the notion of material element. The latter is mentioned in Article 30 of the ICC Statute and needs to be examined more closely as its interpretation is not only important in attributing, but also in averting responsibility: it determines the scope of the defence of mistake, which will be discussed in Chapter 7.

There are two ways of interpreting ‘material element’; in a broad or in a narrow sense. Understood in its narrow sense, the material element comprises only the *positive* definitional elements of a given crime: the act, its consequences, and attending circumstances. When it is understood in its broad sense, it also covers the *negative* material element: the absence of justifications or other exclusions of criminal responsibility. The latter concept can be found in German law and doctrine.²¹⁰ This seems to be the understanding of material element in the MPC as well. It is there defined in § 1.13 (10) as follows:

‘material element of an offense’ means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct.

The broad interpretation has the advantage of exempting from criminal liability a person who errs with regard to a ground of justification or excuse. In this way, one could rely on the defence of mistake, for instance self-defence.

It is doubtful whether the material element in Article 30 of the ICC Statute com-

Genocide Convention: A Commentary, New York (1960), p. 123. See also *Kayishema and Ruzindana Judgement*, para. 115.

²⁰⁷ Article 8(2)(b)(xiii) of the ICC Statute qualifying as a war crime.

²⁰⁸ Article 8(2)(b)(xvi) of the ICC Statute qualifying as a war crime.

²⁰⁹ See further para. 4 of this Chapter.

²¹⁰ Through the doctrine of ‘negative Tatbestandsmerkmalen’, German criminal law adopts the broad interpretation of material element. Jescheck and Weigend (1996), p. 251 *et seq.* See also Eser in Cassese *et al.* (2002b), p. 909.

prises the negative material element as well. A number of points suggest otherwise.²¹¹ Firstly, the broad interpretation of material element is not widely accepted in national law. The definition of material element in the MPC, for instance, is not consistently applied. The American Law Institute in its Commentary excludes the reference to justifications and excuses in its definition of material element as ‘those characteristics of the actor’s behaviour that, when combined with the appropriate level of culpability, will constitute the offense’.²¹² A narrow interpretation of material element corresponds with the French doctrine of ‘l’élément matériel’, to which ‘material element’ of Article 30 is translated in the French version of the ICC Statute. In French law and doctrine, the ‘élément matériel’ does not comprise the unlawfulness and the absence of justification, but merely concerns the external manifestation of criminal intent (‘une intention criminelle qui est concrétisée par une manifestation extérieure’),²¹³ *i.e.* the positive material element.²¹⁴ Secondly, it can be taken from the drafting history of Article 30 of the ICC Statute that ‘physical’ was held to be a synonym for ‘material’ and was in fact regarded as *actus reus*. The legal history of Article 30 of the ICC Statute demonstrates that material element connotes only the positive definitional elements of a crime.²¹⁵

(c) Principal/direct and derivative/indirect responsibility

Criminal behaviour is not limited to perpetration. It extends to participation as well. Participatory liability has been termed as *derivative* or *indirect* responsibility.²¹⁶ It is said to rest on the liability of the actual perpetrator of the criminal act.²¹⁷ The responsibility of the latter is referred to as *principal* or *direct* responsibility. Those who commit a crime directly can be referred to as principals, while those who par-

²¹¹ See Eser in Cassese *et al.* (2002b), pp. 909-910.

²¹² Comment (1) to § 2.02 MPC, referred to by Eser in Cassese *et al.* (2002b), p. 909.

²¹³ Desportes and Le Gunehec (2000), p. 361.

²¹⁴ It is further defined as: ‘Une infraction est nécessairement définie comme une action, une manière d’agir, un fait que l’on a pu autrefois désigner sous l’expression imagée de “corps du délit”’. It is noteworthy, that French criminal law recognises the negative material element in a separate concept, namely the ‘élément légal’. Desportes and Le Gunehec (2000), p. 361 *et seq.*

²¹⁵ Article H of Proposal 1 in *Report of the Preparatory Committee on the Establishment of an ICC*, compilation of proposals, 1 January 1996, A/51/22 (Vol. II)(suppl.): ‘Unless otherwise provided, a person is only criminally responsible and liable for punishment for a crime under this Statute if the *physical* elements are committed with intent [or] [and] knowledge (...)’ [italics added, *EvS*].

²¹⁶ S.H. Kadish, ‘Complicity, Cause and Blame: A study in the interpretation of doctrine’, 73 *Calif. LR* (1985), pp. 337-342; K.J.M. Smith, *A Modern Treatise on the Law of Criminal Complicity*, Oxford (1991), pp. 94-141; Williams (1983), pp. 175-177; Fletcher (1978), pp. 581-683.

²¹⁷ French law expresses the derivative character of participation as ‘l’emprunt de criminalité’ which supposes the existence of a principal crime in order for an accomplice to be criminally liable. In German law this is encapsulated in the principle of *Akzessorietät*, and in Dutch law as *accessorietiet*, both of which can be translated as ‘dependancy’. See on French law: H. Angevin and A. Chavanne, *Editions du Juris-Classeur Pénal*, Paris (1998), Complicité, Art. 121-6 et 121-7, Introduction, A et B, 1 à 16; German law: Jescheck and Weigend, pp. 655-661; Dutch law: T.J. Noyon, G.E. Langemeijer and J. Remmelink (eds.), *Het wetboek van strafrecht*, Arnhem (Suppl. 108/April 2000), Art. 47, para. 1a, pp. 324a-326a.

ticipate in a crime by aiding, abetting, instigating, or in any other way helping or prompting the perpetrator to commit the crime can be called secondary parties. As we will come to see, the terms 'principal' and 'secondary party' is misleading in that it might connote more or less culpable. This is incorrect, as the distinction principal/secondary party is a legal technical distinction rather than a normative one. A secondary party might be more culpable than a principal, for instance when he is the instigator or the man behind the scene pulling the strings to prompt the principal into actually perpetrating the crime.²¹⁸

One of the fundamental principles underlying modern criminal law is the principle of individual *autonomy*: 'each individual should be treated as responsible for his or her own behaviour'.²¹⁹ It is based on the assumption that individuals have the capacity and free will to make their own choices.²²⁰ From this follows the principle of *personal responsibility*. In Kenny's words, 'it is unjust to hold individuals criminally responsible for their acts and omissions unless those acts and omissions are themselves voluntary acts and omissions'.²²¹ The principle that a person can only be held responsible to the degree and extent of his own personal fault can already be found in the bible and is that sense not that 'modern'.²²²

The question arises as to how the maxim of individual autonomy and personal responsibility accords with participatory responsibility, which provides for criminal liability for (in part) another person's conduct?²²³ The principle is respected in the sense that the perpetrator and the participant are both regarded as responsible for their *own* behaviour. As Kadish reminds us, the principle of responsibility for volitional acts equally underlies participatory liability:

The nature of complicity liability follows from the considerations that called it forth. The secondary party's liability is derivative, which is to say, it is incurred by virtue of a violation of law by the primary party to which the secondary party contributed. It is not direct, as it would be if causation analysis were applicable. That is ruled out by our concept of human action, which informs much of complicity doctrine. Volitional actions are the choices of the primary party. Therefore they are his acts, and his alone. One who 'aids or abets' him to do those acts, in the traditional language of the common law, can be liable for doing so, but not because he has thereby *caused* the actions of the principal or because the actions of the principal are his acts. His liability must rest on the violation of law by the principal, the legal consequences of which he incurs because of his own actions.²²⁴

²¹⁸ See Williams (1983), p. 329.

²¹⁹ Ashworth (1999), p. 27.

²²⁰ This approach is contrasted by the determinist claim that all human action is compelled and determined by causes that an individual cannot control. For a more elaborate discussion: Kenny (1978), pp. 22-44.

²²¹ Kenny (1978), p. 34.

²²² Deuteronomy 24:16, 'Every man shall be put to death for his own sin' and Ezekiel 18: 19-20 'The soul that sins shall die (...) The wickedness of the wicked man shall be put upon himself'.

²²³ I refer to this as the 'participation model', which is applied in the majority of legal systems as we will see below in para. 4.

²²⁴ Kadish (1985), p. 337.

Therefore, he stresses that it is important to distinguish derivative liability from vicarious liability:

Accomplice liability does not involve imposing liability on one party for the wrongs of another solely because of the relationship between the parties. Liability requires action by the secondary actor (...) that makes it appropriate to blame him for what the primary actor does. The term 'derivative' as used here merely means that his liability is dependent on the principal violating the law. Unless the latter occurs there can be no accomplice liability. Perhaps 'dependent' would be a better term. I choose derivative because it has gained some currency.²²⁵

The distinction between principal/direct and derivative/indirect responsibility is recognised in most criminal law systems and constitutes a subsistent part of the concept of individual criminal responsibility. The wording in the ICTY judgements on this, however, has been somewhat unclear. The Tribunal has referred to the five types of criminal conduct in Article 7(1) of the ICTY Statute, 'planned, instigated, ordered, committed or otherwise aided and abetted', as *direct* responsibility.²²⁶ If we understand direct responsibility as 'actual perpetration', however, the only true direct responsibility mode in Article 7 would be 'committing'. The other four types of criminal conduct could then be referred to as *indirect* responsibility. When we take a closer look at the ICTY rulings on the concepts of individual and superior responsibility, we understand where the confusion comes from. Individual responsibility encapsulated in Article 7(1) of the ICTY Statute, is termed 'direct' to distinguish it from superior or command responsibility laid down in Article 7(3) of the ICTY Stat-

²²⁵ Ibidem.

²²⁶ The *Blaškić* Trial Chamber observed that 'A reading of the provisions of the Statute reveals the existence of two distinct types of responsibility: the one referred to in Article 7(1), which will be called *direct* command responsibility and the one referred to in Article 7(3) which will be called *indirect* responsibility. The latter may encompass several facets in the elements required (the theoretical or actual knowledge of the act on the point of being committed, the failure to prevent and the failure to punish). The question is therefore one of knowing whether an accused can, by a single criminal act, violate both legal provisions.' (italics added, *EvS*). ICTY, *Prosecutor v. Blaškić*, Decision on Defence Motion to Dismiss the Indictment Based Upon Defects in the Form thereof (Vagueness/Lack of Adequate Notice of Charges), Case No. IT-95-14-PT, T. Ch. I, 4 April 1997 (*Blaškić*, Decision), para. 31. In *Kordić and Cerkez*, the Trial Chamber ruled as follows: 'Article 7(1) is concerned with persons *directly* responsible for planning, instigating, ordering, committing, or aiding and abetting in the planning, preparation or execution of a crime. Thus, both the individual who himself carries out the unlawful conduct and his superior who is involved in the conduct not by physical participation, but for example by ordering or instigating it, are covered by Article 7(1). For instance, a superior who orders the killing of a civilian may be held responsible under Article 7(1), as might a political leader who plans that certain civilians or groups of civilians should be executed, and passes these instructions on to a military commander. The criminal responsibility of such superiors, either military or civilian, in these circumstances is personal or *direct*, as a result of their direct link to the physical commission of the crime. The criminal responsibility of a superior for such positive acts, except where the superior orders the crime in which case he may be more appropriately referred to as primarily responsible for its commission, may be regarded as "following" from general principles of accomplice liability'" (italics added, *EvS*). ICTY, *Prosecutor v. Dario Kordić and Mario Cerkez*, Judgement, Case No. IT-95-14-PT/2-T, 26 February 2001 (*Kordić and Cerkez* Judgement), para. 367.

ute, which is referred to as 'indirect'. It seems that direct/indirect responsibility connotes another distinction as well, namely; between acts and omissions. Take, for instance, the Trial Chamber's reasoning in *Čelebići* on the distinction between the responsibility of a superior for ordering crimes (Article 7(1) ICTY Statute) and for not having prevented crimes (Article 7(3) ICTY Statute):

That military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law. This criminal liability may arise either out of the positive acts of the superior (sometimes referred to as 'direct' command responsibility) or from his culpable omissions ('indirect' command responsibility or command responsibility *strictu sensu*).²²⁷

And,

The distinct legal character of the two types of superior responsibility must be noted. While the criminal liability of a superior for *positive acts* follows from general principles of accomplice liability, as set out in the discussion of Article 7(1) above, the criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for *omissions* is incurred only where there exists a legal obligation to act. As is most clearly evidenced in the case of military commanders by article 87 of Additional Protocol I, international law imposes an affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility under Article 7(3) of the Statute.²²⁸ (italics added, *EvS*)

The direct/indirect terminology can be misleading when it suggests that direct responsibility is active and indirect responsibility is omissive. As a consequence, some have interpreted Article 7(1) of the ICTY Statute as reserved exclusively for acts and Article 7(3) for omissions.²²⁹ This is a too narrow view. Apart from the fact that it is confusing to apply the direct/indirect terminology to acts and omissions, it is inappropriate to refer to command responsibility as 'imputed responsibility', as was done in the above-cited judgement. The term 'imputed responsibility' should be avoided as it might cloud the view of superior responsibility as a type of personal responsibility.²³⁰ As we will see later, command or superior responsibility is a *sui generis* type of participation in a crime or even a genuine crime of omission connoting direct responsibility.²³¹ It is derivative rather than imputed; liability is incurred by virtue of failing to prevent a violation of law by a subordinate.

²²⁷ *Čelebići* Judgement, para. 333.

²²⁸ *Ibidem*, para. 334.

²²⁹ For instance, I. Bantekas, 'The Contemporary Law of Superior Responsibility', 93 *AJIL* (1999), p. 577.

²³⁰ See further Chapter 5 para. 5.

²³¹ See Chapter 5 para. 4.

Below, the distinction direct and indirect responsibility will be used in the same way as it is used in national law and doctrine: referring to perpetration and participation, respectively. This terminology should be considered separate from direct and indirect *perpetration*, which serves to distinguish between physical perpetrators and perpetrators by means.

3. DIFFERENT MODELS OF PARTICIPATION

Different models of responsibility for participation in crimes exist on the national level. Firstly, there is the model of 'individual agency' ('Einheitstätermodell').²³² This model is based on the premise that a plurality of persons implies a plurality of offences.²³³ The liability of every participant stands on its own. A person's liability relates to his contribution to the crime. Strictly speaking the participant should be referred to as 'principal'.²³⁴ Questions of causation, *mens rea*, justification and excuse arise out of his own right and a conviction is of the crime proper.

Secondly, there is the 'participation model'.²³⁵ This model is based on the theory that participation in a crime implies a plurality of people who each perform a role in the commission of a crime. This participation can range from full co-perpetration to mere facilitation. Unlike the 'Einheitstätermodell', the participation model presupposes a multitude of persons and one single offence. A distinction is made between the principal who actually commits the crime, and the secondary party who assisted in, or prompted, its commission. The responsibility of the latter is dependant upon, or derivative of, the responsibility of the former. This model provides a distinction between those punishable for the crime proper and those punishable for their participation in the crime.²³⁶

Within the participation model, we can detect a sub-division. There are those le-

²³² Pradel (1995), pp. 274-276 and J. Gardner, 'Aid, Abet, Counsel, Procure: an English View of Complicity' in A. Eser *et al.* (eds), *Einzelverantwortung und Mitverantwortung im Strafrecht. European Colloquium 1996 on Individual, Participatory and Collective Responsibility in Criminal Law*, Freiburg (1998), p. 227. This model originated in Germany and has been the object of extensive study in German doctrine. 'Der Einheitstäterbegriff betrachtet jeden Beteiligten, der einen ursächlichen Beitrag zur Verwicklung des Tatesbestandes leistet, als Täter, ohne Rücksicht darauf, welche Bedeutung seiner Mitwirkung im Rahmen des Gesamtgeschehens zukommt' (The concept of individual agency considers every participant who causally contributes to the performance of an offence, a perpetrator, irrespective of the weight or substance of his co-operation in the totality of events, *EvS*), Jescheck and Weigend (1996), p. 645.

²³³ This model is represented in the following criminal law systems: the Austrian, Brazilian, Danish, German (only in relation to a certain type of offences), Italian, Norwegian, and Swedish legal systems. See Pradel (1995), pp. 275-276. See further M. Burgstaller (Austria), V. Greve (Denmark), N. Jareborg (Sweden) H. Jung (Germany) and S. Seminara (Italy) in Eser *et al.* (1998); See also M.M. van Toorenburg, *Medeplegen*, Deventer (1998), pp. 260-261.

²³⁴ Gardner calls him the 'remote principal'. Gardner in Eser *et al.* (1998), p. 227.

²³⁵ Pradel (1995), pp. 276-278 and Gardner in Eser *et al.* (1998) p. 227 *et seq.* This model is found in the majority of legal systems.

²³⁶ Pradel (1995), pp. 274-276.

gal systems that distinguish different degrees of assistance, employing two or even more types of secondary parties.²³⁷ These systems often provide for a separate category of instigators and co-perpetrators, who are generally considered more closely involved in the actual crime than aiders and abettors, who are regarded as mere facilitators. The qualification of participants as instigators, co-perpetrators, or aiders and abettors (as mere facilitators) is often reflected in the sentence: mere facilitators are generally punished less severely while instigators and co-perpetrators are punished analogous to or as perpetrators.²³⁸ Those systems that recognise the separate status of instigators and co-perpetrators, as distinct from mere aiders and abettors, can be referred to as representatives of a 'differentiated participation model'.

There are, on the other hand, systems that provide for just one type of secondary party, accomplices.²³⁹ This is the approach adopted in French and Anglo-American complicity law. There is a fundamental distinction between perpetrators (principals) and accomplices (secondary parties). This does not mean that these systems do not recognise different contributions to the principal crime. In French law a distinction is made between a person who consciously, by aid or assistance, facilitates the commission of a crime (Article 121-7(1) Code Pénal) and a person who 'by gift, promise, threat, order, abuse of authority or power, incites an offence or gives instruction for its commission' (Article 121-7(2) Code Pénal).²⁴⁰ The two types of assistance, however, are brought under one term: 'complicité'. This participation model represents of what I would call a 'dual participation model', wielding a singular distinction between principals and accomplices. In these systems, the difference in degree of participation is expressed in the sentencing stage rather than in the attribution stage as with the differentiated participation model.

In the previous chapter it became clear how Anglo-American law influenced the Nuremberg and post-Nuremberg proceedings. This influence extends to the *ad hoc* Tribunals as well. As we will see below, the model of participatory liability relied upon at ICTY and the ICTR is an Anglo-American 'dual participation model'. A closer look at the English legal system as a representative of the latter is therefore appropriate. Gardner submits that the concept of participatory liability in English

²³⁷ One group of legislations recognises three types of participants in that they provide for two categories of secondary parties: mere facilitators (accessories) and those fully aiding and abetting in the commission of a crime (co-authors, or instigators) (Netherlands, Germany, Spain, Japan). Another participation model relies on four categories: two types of principals, moral and actual, and two types of accomplices: facilitators and instigators (Poland), or one principal and three types of accomplices: primary accomplices, instigators, and secondary accomplices (Argentina, Uruguay, Peru, Chile, Venezuela, and Bolivia). See Pradel (1995), p. 278; Fletcher, (1978), pp. 640-645.

²³⁸ For example, the German and the Dutch systems distinguish two types of secondary parties: those that merely facilitate a crime and those who are more fully involved in the crime by aiding or abetting in its commission. The former, are less severely punished than the latter. However, as Dutch practice has shown, it is difficult to distinguish between a secondary party as an aider or abettor, on the one hand, and as a co-perpetrator, on the other hand. Van Toorenburg (1998), pp. 196-210; Jescheck and Weigend (1996), pp. 684-697.

²³⁹ See Pradel (1995), p. 278; Fletcher (1978), pp. 640-645.

²⁴⁰ Bell *et al.* (1998), pp. 234-235; Desportes and Le Guehec (2000), paras. 537-549, pp. 477-494.

law borrows elements of both the 'Einheitstätermodell' and the participation model.²⁴¹ On the one hand, it is built on the premise of the participation model that accomplice liability is secondary. A perpetrator's *contribution* to the commission of a crime must be proved. As a learned English commentator observed,

[w]hen the law relating to principals and accessories as such is under consideration there is only one crime, although there may be more than one person criminally liable in respect of it (...) There is one crime and that it has been committed must be established before there can be any question of criminal guilt of participation in it (...).²⁴²

On the other hand, accomplices in Anglo-American law are convicted of the offence they have participated in, without any special qualification to mark their status as accomplices. As Gardner observes in respect of English complicity law,

Someone against whom it is proved that they aided, abetted, counselled or procured the commission of murder by another – for example, by supplying the gun which fired the fatal shot – is herself convicted of murder. So far as her conviction goes, it is just as if she had pulled the trigger herself.²⁴³

This approach, that the accomplices are punished as principals, can also be found in some civil law legal systems. French law, for instance, provides in Article 121-6 of the Code Pénal: 'Sera puni *comme auteur* le complice de l'infraction'.²⁴⁴ In German law, only the secondary party who is a full partner in the crime (joint or co-perpetrator) or an *auctor intellectualis* (instigator) is considered a perpetrator.²⁴⁵ In Dutch law, however, a co-perpetrator or instigator would qualify as a participant.²⁴⁶ These variances can be traced back to a different conception of 'perpetration'. The doctrinal discussion on the perpetrator-status of secondary parties goes beyond the ambit of this research and shall not be addressed separately. It follows from the above that

²⁴¹ Gardner in Eser *et al.* (1998), pp. 227-228.

²⁴² Russell, cited in Smith & Hogan (1996), p. 126.

²⁴³ Gardner in Eser *et al.* (1998), pp. 227-228.

²⁴⁴ Angevin and Chavanne (1998), Complicité, Art. 121-6 et 121-7, Introduction, A et B, 1 à 16. A similar formula exists in Dutch law on criminal participation. Article 47(1) Dutch Penal Code: 'Als daders van een strafbaar feit worden gestraft: 1° zij die het feit plegen, doen plegen of medeplegen; 2° zij die door giften, beloften, misbruik van gezag, geweld, bedreiging, of misleiding of door het verschaffen van gelegenheid, middelen of inlichtingen het feit opzettelijk uitlokken'. (The following persons are liable as principals: 1° those who commit a criminal offence, either personally or jointly with another or others, or who cause an innocent person to commit a criminal offence; 2° those who, by means of gifts, promises, abuse of authority, use of violence, threat or deception or providing the opportunity, means or information, intentionally solicit the commission of a crime. Translation: *The American Series of Foreign Penal Codes, The Netherlands*, Vol. 30 (1997)) Dutch law on criminal participation (apart from co-perpetration) is centred around the principle of *accessoriteit* (dependency) stipulating that the liability of the accomplice is based on the crime committed by the principal. Noyon/Langemeijer/Remmeling (2000), Art. 47, para. 1a, pp. 324a-326a.

²⁴⁵ Jescheck and Weigend (1996), pp. 645-646.

²⁴⁶ Noyon/Langemeijer/Remmeling (2000), Art. 47, para. 1a., pp. 324a-326a. Also in English law: Smith & Hogan (1996), pp. 147-148.

the distinction between principal and secondary responsibility underlying the participation model does not necessarily entail a uniform perpetrator/participant distinction. It is sufficient to keep in mind that both the differentiated and the dual participation models are based on the premise that the punishability of the secondary party is based on the principal offence.

The fact that Anglo-American complicity law is reflected by the law of the *ad hoc* Tribunals is largely due to the reliance on (post-)Nuremberg case law regarding participatory liability, which was dominated by English and U.S. law. The American and British war crimes trials provide the bulk of the cases upon which the Tribunals base their findings. As to the nature of liability of those who participate in committing crimes within the jurisdiction of the *ad hoc* Tribunals, this is clearly secondary. Aiding and abetting a crime is regarded as a *contribution* to the perpetration of the principal offence.²⁴⁷ However, a person who is found to have aided or abetted in genocide, war crimes, or crimes against humanity is convicted of the principal offence. For instance, *Furundžija* was found guilty, not of having aided and abetted a rape perpetrated by his associate, but of rape, which constituted a violation of the laws and customs of war, penalised in Article 3 of the ICTY Statute.²⁴⁸ This approach can be found in the formulation of Article 6/7(1) of the ICTR/Y Statutes:

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

Article 25 paragraph 3 of the ICC Statute seems to adopt a different approach:

In accordance with this Statute, a person shall be *criminally* responsible and liable for punishment for a crime, within the jurisdiction of the court if that person: commits such a crime, whether as an individual, jointly with another or through another person, etc (...). (italics, *EvS*).

While subparagraph 3(a) is reserved for direct and indirect perpetrators (joint perpetrators and perpetrators by means), aiders and abettors pursuant to subparagraph 3(c) qualify as participants in a crime. If we were to attach any value to the above-drawn distinction between ‘individually’ and ‘criminally’ responsible, we could argue that under the ICC Statute aiders and abettors are held criminally liable for their contributions to the crime rather than for the crime itself.

²⁴⁷ In *Tadić*, the Trial Chamber identified the *actus reus* of criminal participation as ‘[t]he conduct of the accused contributed to the commission of the illegal act’. *Tadić* Judgement, para. 674.

²⁴⁸ ICTY, *Prosecutor v. Furundžija*, Judgement, Case No. IT-95-17/1-T, T.Ch. II, 10 December 1998 (*Furundžija* Judgement), para. 296.

4. ARTICLE 25 OF THE ICC STATUTE²⁴⁹

Article 25 of the ICC Statute, entitled 'individual criminal responsibility', is the most recent and comprehensive provision on individual criminal responsibility in international criminal law. It contains four paragraphs. The first three paragraphs shall be analysed below. The fourth paragraph of Article 25 deals with attempt to commit a crime and is not part of this study. The third paragraph of Article 25 shall be discussed *in extenso*. It served as the basis for an examination of the concept of individual and participatory liability. Within the framework of Article 25, the jurisprudence of the *ad hoc* Tribunals was examined, in order to see whether there is a coherent concept of individual criminal responsibility on the international level. To fill gaps, note inconsistencies, and prevent misunderstandings, national case law was relied upon to provide examples of developed general parts of the law on criminal responsibility from which inspiration could be drawn. When these principles were recognised as constituting *general* principles of law, they served as an additional source of applicable law, as they have done at the *ad hoc* Tribunals.²⁵⁰

²⁴⁹ Article 25 of the ICC Statute:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

²⁵⁰ 'General principles' constitute one of the sources of law to be applied by the ICC. Article 21(1)(c) of the ICC Statute reads: '[g]eneral principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards'. As Bassiouni observed: 'ICL (International Criminal Law, *EvS*) is a complex legal discipline consisting of overlapping and concurrent sources of law and emanating from the international legal system and from national legal system', Bassiouni (1999), p. 4.

The first paragraph provides that the Court has jurisdiction over natural persons. A difficult issue that arose when the article was being drafted was whether it should include legal entities alongside natural persons. Some delegations whose legal systems do not provide for the criminal responsibility of legal entities refused to accept the inclusion.²⁵¹ Others, like the French, pursued inclusion as they considered it important for restitution and compensation for victims.²⁵² It is of interest for historical purposes that the French were also the driving force behind the acceptance of the concept of criminal organisations in Nuremberg. Indeed, they considered it a step back from the Nuremberg trial not to include the concept of legal entities in Article 25 of the ICC Statute. Eventually, it was recognised that the issue could not be settled by consensus and the proposal was withdrawn.²⁵³

The second paragraph of Article 25 of the ICC Statute reiterates the principle of individual criminal responsibility. 'Commit' is used here in a broad sense, as extending to perpetration and participation. 'Commits' in this provision should also be seen to extend to omission liability. This was submitted earlier when discussing omission liability in general.²⁵⁴ The failed attempt of the ICC drafters to draw up a general provision on omission should not be interpreted as negating omission liability altogether. In other words, silence on the part of the legislators should not be taken to exclude omission liability from Article 25 of the ICC Statute. The above-mentioned strict interpretation of the legality principle cannot be an obstacle to extending criminal responsibility as laid down in Article 25 to include criminal omission. Article 22 of the ICC Statute does not relate to (modes of) criminal responsibility but to crimes. As Boot observes,

The Statutory provision in Article 22, containing *nullum crimen sine lege*, does not concern Article 25 containing provisions on individual criminal responsibility. Article 25 only comes into play after it has been established that the 'conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court'.²⁵⁵

Moreover, interpreting 'commits' in Article 25(2) as to include omission liability accords with the jurisprudence of the *ad hoc* Tribunals. In *Kvočka*, the ICTY Trial Chamber, endorsing the *Tadić* Appeal Judgement, held that:

²⁵¹ In Anglo-American law corporate crime is prosecuted on the basis of strict and vicarious liability. The criminal responsibility of legal entities is not recognised as such. Some civil law systems, such as the German, Spanish, Italian, and Belgian systems are averse to the idea of criminal legal entities because of the principle of personal guilt. Others, such as the Dutch and the French systems, allow for it in their criminal laws. Pradel (1995), pp. 307-313. See also A. Eser *et al.* (eds.), *Criminal Responsibility of Legal and Collective Entities*, Freiburg (1999).

²⁵² K. Ambos, 'Article 25 of the ICC Statute', in Triffterer (1999), margin No. 4, pp. 477-478; The French Proposal: UN Doc. A/CONF.183/C.1/L.3 (1998).

²⁵³ Saland (1999), pp. 198-199.

²⁵⁴ See para. 2 (b) of this Chapter.

²⁵⁵ Boot (2002), para. 369, p. 395.

The *actus reus* required for committing a crime is that the accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal's Statute, through positive acts or omissions, whether individually or jointly with others. The requisite *mens rea* is that, as in other forms of criminal participation under Article 7(1), the accused acted in the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.²⁵⁶

It appears from the above that 'committing' in the context of the *ad hoc* Tribunals covers direct perpetration and joint perpetration by positive acts or omissions.²⁵⁷ It is not clear whether aiding and abetting as accomplice liability can be referred to in terms of 'committing'. With regard to omission liability and participation/complicity, the position of the ICTY and ICTR is, however, very clear. Aiding and abetting and instigation are considered sufficiently broad to comprise both acts and omissions.²⁵⁸ As was argued earlier, the ICC should incorporate the jurisprudence of the *ad hoc* Tribunals on omission liability rather than deviate from it.

A final argument in favour of an inclusion of omission liability in the context of Article 25 of the ICC Statute, concerns national legal systems. As appears below, the latter provide for criminal participation/complicity by omission and by reflecting general principles of law, they are a source of law the Court cannot deny.²⁵⁹

The concept of State Responsibility falls outside the jurisdiction of the ICC. This follows implicitly from the fourth paragraph of Article 25, according to which 'no provision in this Statute shall affect the responsibility of States under international law'. The paragraph affirms that the concept of State Responsibility is regarded a parallel but separate concept of individual criminal responsibility.²⁶⁰

²⁵⁶ ICTY, *Prosecutor v. Kvočka et al.*, Judgement, Case No. IT-98-30/1-T, 2 November 2001 (*Kvočka* Judgement), para. 251; ICTY, *Prosecutor v. Krstić*, Judgement, Case No. IT-98-33-T, 2 August 2001 (*Krstić* Judgement), para. 601; ICTY, *Prosecutor v. Kunarac et al.*, Judgement, Case No. IT-96-23-T&IT-96-23/1-T, 22 February 2001 (*Kunarac* Judgement), para. 390; ICTY, *Prosecutor v. Krnojelac*, Judgement, Case no. IT-97-25-T, 15 March 2002 (*Krnojelac* Judgement), para. 73.

²⁵⁷ The Trial Chamber in *Kunarac*, on the other hand, seemed to reserve the term 'commission' for physical perpetration, excluding participation: 'An individual can be said to have "committed" a crime when he or she physically perpetrates the relevant criminal act or engenders a culpable omission in violation of a rule of criminal law. As opposed to the "commission" of a crime, aiding and abetting is a form of accessory liability. The contribution of an aider and abettor may take the form of practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime. The act of assistance need not have caused the act of the principal. It may consist of an act or an omission and take place before, during or after the commission of the crime'. *Kunarac* Judgement, paras. 390-391, endorsed in the *Krstić* Judgement, para. 601.

²⁵⁸ *Akayesu* Judgement, para. 482; *Blaskić* Judgement, para. 280; *Furundžija* Judgement, paras. 232-235.

²⁵⁹ See Article 21(1)(c) of the ICC Statute: '1. The Court shall apply, (c) (...) general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime (...)'.

²⁶⁰ For more details on the development of State Responsibility in international law, in particular the relationship between State and individual Responsibility for international crimes, see N.H.B. Jørgensen, *The Responsibility of States for International Crimes*, Oxford (2000). On the concept of State Responsi-

5. PERPETRATION, INCLUDING PERPETRATION BY MEANS (OF AN 'AGENT')

Article 25 3(a): Commits such a crime, whether as an individual (...) or through another person, regardless of whether that other person is criminally responsible

(a) Text and legal history

While 'commits' is used in paragraph 2 of Article 25 in a broad sense and extends to perpetration and participation, 'commits' is used in paragraph 3(a) 'as an individual, or through another person' in the strict sense, and is thus limited to direct and indirect perpetration and co- or joint perpetration. Indirect perpetration refers to 'perpetration by means', *i.e.* acting through an agent, and presupposes that the person who actually commits the crime can be used as an instrument of the individual in the background. The typical case of perpetration by means, a term derived from civil law systems and analogous to the Anglo-American doctrine of innocent agency, presupposes an instrumental person who is not criminally liable. Therefore, if A, intending to kill B, gives B's daughter a poison which, he says, will cure P's cold, and she innocently gives it to her father, causing B's death, then A is guilty as the principal offender.²⁶¹ The fact that perpetration by means in the ICC Statute is not limited to perpetration by means of innocent agents allows it to apply to a broad range of situations, like the Dutch concept of functional perpetration and the German doctrine of 'hegemony-over-the-act' ('Tatherrschaft'), which will be discussed below.

(b) Jurisprudence

Rather than adopting the terms of direct and indirect perpetration, the *ad hoc* Tribunals use the verb 'commit' to express the nature of the various contributions to a crime. 'Committing' at the *ad hoc* Tribunals covers direct perpetration and joint participation as in the common purpose doctrine, leaving aiding and abetting outside it. Perpetration by means is not recognised as such. In *Tadić*, the Appeals Chamber worded it as follows:

This provision (article 7(1)) covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose.²⁶²

bility, see *Report of the ILC on the work of its fifty-fourth session*, UN GAOR, 54th Sess., Supp. No. 10 (A/54/10 and corr.1 &2), paras. 49 ff.

²⁶¹ The example is based on the facts of the case of *Stringer and Banks* (1991) Crim. LR 639, Smith & Hogan (1996), p. 128, n. 16.

²⁶² *Tadić* Appeal Judgement, para. 188.

(c) National underpinnings

According to Black's Law Dictionary, to 'commit' means 'to perpetrate, as a crime'.²⁶³ The same source defines 'perpetration' as 'the act of one committing a crime either with his own hands, or by some means or instrument or through some innocent agent'.²⁶⁴ Black's Law Dictionary recognises the indirect perpetrator as the one who, rather than using his own hands, uses the hands of an (innocent) agent to commit a crime. This seems to reflect the position of Anglo-American law on indirect perpetration. The direct perpetrator on the other hand, is defined as 'the party whose actions satisfy the relevant offence's definitional requirements'.²⁶⁵

'Perpetration by means' has its Anglo-American counterpart in the doctrine of innocent agency. Where the primary actor (direct perpetrator) becomes merely an instrument of the secondary actor (indirect perpetrator) who intentionally manipulates the former to perpetrate what would be a crime if the innocent agent's act were not justified or excusable, we have a case of innocent agency.²⁶⁶ The act of the innocent agent is as much the act of the indirect perpetrator as if the latter were present and did the act himself.²⁶⁷ Under Anglo-American law, the perpetrator by means is guilty as a principal:

The *actus reus* may be directly brought about by the act of someone who is not a participant in the crime at all (that is, who has no *mens rea*, or who has some defence, such as infancy or insanity). Such a person is usually described as an 'innocent agent' and, in such a case, the principal is the participant in the crime whose act is the most immediate cause of the innocent agent's act.²⁶⁸

If the agent is not 'innocent', he is considered a principal and the perpetrator by means a secondary party.

²⁶³ Black's Law Dictionary, 6th ed., St. Paul, Minn. (1990), p. 273.

²⁶⁴ Ibidem, p. 1141.

²⁶⁵ Smith (1991), p. 27. In Archbold the following definition can be found: 'A principal is one who is the actor or actual perpetrator of the fact'. Archbold (2000), § 18-7.

²⁶⁶ Kadish (1985), pp. 369-372. Hart and Honoré demonstrate that the causation principle is not limited to the law on direct perpetration, but equally underlies indirect perpetration. Where the principal induces another to do harm, the causal connexion, rather than being of the 'simplest kind like that between two physical events', can 'exist in certain cases where the harm is brought about by the act of another, viz. where it can be said that the accused (*i.e.* the principal, *EvS*) caused the second act. This is the case only when accused intends the intervening actor to do what he does and the intervening actor's conduct is not wholly voluntary. If this is correct, a person may be guilty of homicide by inducing another to kill or to do an act dangerous to life which in the exercise of authority; but not if mere persuasion of an adult responsible person is employed, or if the accused's conduct operates, without his intending it as a reason for the other's act'. H.L.A. Hart and A.M. Honoré, *Causation in the Law*, Oxford (1959), pp. 323-324.

²⁶⁷ Limits to this doctrine are twofold. First, in the case of 'nonproxyable' actions (rape or drunkenness, actions that an actor can only perform with his own body) and second, in the case of actions limited by a defined class of persons (*e.g.* an employee). Kadish (1985), pp. 372-374.

²⁶⁸ Smith & Hogan (1996), p. 128.

Civil law systems also recognise 'perpetration-by-means'. In French law, the 'auteur médiat' is not codified, but is recognised in case law as the responsible perpetrator when the actual perpetrator is used as an instrument. German law refers to perpetration by means as 'mittelbaren Täterschaft'.²⁶⁹ Dutch law holds anyone criminally responsible who causes an innocent person to commit a criminal offence.²⁷⁰

In German and Dutch law, concepts have been developed to escape the rigid condition of innocence of the agent in the concept of perpetration by means, which have affected the development and use of the latter concept. In German law, an alternative theory of indirect perpetration is the 'Tatherrschaftlehre' or, as Fletcher translates it, the doctrine of 'hegemony-over-the-act'.²⁷¹ The indirect perpetrator dominates through and within an organisation the acts of the subordinates, who as direct perpetrators, carry out the crimes conceived and ordered by the indirect perpetrators who can be referred to as commanders. The subordinates are criminally responsible together with the commanders who are in control and use the former as replaceable or fungible mediators of the act. As Ambos submits, 'the direct perpetrator loses transcendence as he plays a secondary role in the execution of the act. He who dominates the system dominates the anonymous will of all the men who constitute it'.²⁷² The domination of the indirect perpetrator over the direct perpetrator is total, in that even if the latter refused to comply, another would automatically replace him and the commission of the acts would take place anyhow.

In Dutch law, the development of the concept of 'functional perpetration' has rendered the statutory provision of 'perpetration by means' virtually superfluous. According to the concept of functional perpetration, a person may be held liable for an offence he did not physically commit, if he can be said to have acted through another person, irrespective of whether that other person is criminally responsible for that offence himself. An offence is considered to have been functionally perpetrated when the following requirements have been met: (i) the doctrine can be applied to the offence,²⁷³ (ii) the violated norm was addressed to the accused, and (iii) the physical acts of another person can be imputed to him.²⁷⁴ A person is held liable as the functional perpetrator of an offence because of his failure to prevent another person's act if he had control over those acts and he accepted, or usually accepted, such acts. Intent is inferred from the acceptance of the act(s). This is taken to indicate that the functional perpetrator consciously and voluntarily refrained from intervening (while he had the duty to do so).²⁷⁵

²⁶⁹ Fletcher (1978), pp. 639-640. See also M. Burgstaller in Eser *et al.* (1999), pp. 19-20.

²⁷⁰ Article 47(1) Dutch Penal Code. See A.M. van Woensel, *In de daderstand verheven*, Deventer (1993) with summary in English pp. 179-182.

²⁷¹ C. Roxin, *Täterschaft und Tatherrschaft*, Berlin (2000), pp. 242-252, 653-654 and G.P. Fletcher (1978), pp. 655-656.

²⁷² Ambos (2000), p. 19.

²⁷³ As 'innocent agency' and nonproxyable action in Anglo-American law, there are some crimes to which the doctrine of functional perpetration is inapplicable, for instance, rape and other crimes involving sexual intercourse. See Van Woensel (1993), pp. 87-88.

²⁷⁴ Dutch Supreme Court 23 February 1954, *NJ* 1954, 378.

²⁷⁵ Van Woensel (1993), p. 96.

(d) Observations

Article 25(3)(a) introduces to the international level a new form of perpetration: perpetration by means. As this perpetration by means concept includes both innocent and culpable agents, it is likely to cover a wider range of situations than does the classic concept of perpetration through innocent agents developed in national law. Bearing in mind the systematic and widespread nature of the crimes within the jurisdiction of the ICC, it makes sense to equate concepts such as hegemony-over-the-act and functional perpetration, which are well-equipped to deal with that type of crime, with perpetration by means.

It is interesting to see which cases eventually qualify as ‘classic’ perpetration by means cases. One might imagine that it is relied upon in situations in which the agent has a defence, for instance, because he is a minor or because he acted with a mental defect. In either case, he would be considered non-culpable.²⁷⁶ Moreover, the concept may be useful in instances in which the agent acted erroneously. This can be the case in situations where the agent/subordinate lacks valid information. Take the example of the bomber pilot who drops poisoned bombs, but who is unaware of their poisonous content. Employing poisoned weapons is a war crime under Article 8(2)(b)(xvii) of the ICC Statute. When it can be shown that the superior manipulated the pilot in that he knew that the weapons contained poison, but assured his subordinate that they were ‘clean’ and thus used his subordinate as an instrument in employing those weapons, the superior can be held responsible as an indirect perpetrator (a principal) for perpetration by means. The pilot has a defence under either Article 32 (mistake of fact or law) or Article 33 (superior orders) of the ICC Statute. If the pilot in our example is not ‘innocent’, because he was aware of the poisonous content of the weapons, his superior can still be qualified a perpetrator by means, culpable under Article 25(3)(a). This would be different, under Anglo-American complicity law; the pilot would be guilty as a principal/perpetrator. In that sense, the concept of ‘perpetration-by-means’ of Article 25(3)(a) is inherently different from the Anglo-American doctrine of innocent agency.

6. JOINT OR CO-PERPETRATION

Article 25 (3)(a): Commits such a crime (...) jointly with another (...) person

(a) Text and legal history

‘Commits such a crime’ in subparagraph 25(3)(a) extends to perpetration ‘jointly with another’ and introduces another new concept, joint perpetration as an autono-

²⁷⁶ These, however, are exceptions. As Ambos points out: ‘(...) especially in the field of “macro-criminality”, i.e. systematic or mass criminality organized, supported or tolerated by the state, the direct perpetrator or executor normally performs the act with the necessary mens rea and is fully aware of its illegality’, Ambos in Triffterer (1999), margin No. 9, p. 479.

mous head of perpetration. Joint or co-perpetration connotes two or more perpetrators who each contribute to the commission of the crime. Their co-operation must be close as their contributions are *mutually attributed*, holding each co-perpetrator responsible for the *whole* crime. Through the doctrine of common purpose developed in ICTY jurisprudence, co-perpetration has developed into a separate mode of *participation*. Joint perpetration in the context of Article 25 of the ICC Statute is a type of *perpetration*. Its position in subparagraph 3(a), alongside perpetration by means and separate from the other participation modes, warrants this conclusion.

(b) Jurisprudence

It suffices to state here that the Trial Chambers at the ICTY have adopted different views in granting co-perpetration a separate status alongside accomplice liability. The distinction is the same as that separating a dual participation model from a differentiated participation model.²⁷⁷ The Trial Chamber in *Kvočka* adopted the differentiated approach in that the Trial Chamber made a fundamental distinction between an aider and abettor, on the one hand, and a co-perpetrator, on the other hand.²⁷⁸ Dividing the level of participation into different categories not only seemed relevant for purposes of sentencing, but also for evidentiary reasons. The closer the level of participation, the safer it is to draw an inference that the accused shared the intent of the co-perpetrators involved in the joint criminal enterprise. As was decided in *Kvočka*,

In the Trial Chamber's view, a co-perpetrator of a joint criminal enterprise shares the intent to carry out the joint criminal enterprise and performs an act or omission in furtherance of the enterprise; an aider or abettor of the joint criminal enterprise need only be aware that his or her contribution is assisting or facilitating a crime committed by the joint criminal enterprise. An aider or abettor need not necessarily share the intent of the co-perpetrators. In the case of a continuing crime such as those alleged in this case, the shared intent of an accused participating in a criminal enterprise may be inferred from knowledge of the criminal enterprise and continued participation, if the participation is significant in position or effect. Eventually, an aider or abettor, one who assists or facilitates the criminal enterprise as an accomplice, may become a co-perpetrator, even without physically committing crimes, if their participation lasts for an extensive period or becomes more directly involved in maintaining the functioning of the enterprise. By sharing the intent of the joint criminal enterprise, the aider or abettor becomes a co-perpetrator. The Trial Chamber acknowledges that it may sometimes be difficult to draw distinctions between an aider or abettor and a co-perpetrator, particularly when mid-level accused are involved who do not physically perpetrate crimes. When, however, an accused participates in a crime that advances the goals of the criminal enterprise, it is often reasonable to hold that her form of involvement in the enterprise has graduated to that of a co-perpetrator (*italics added, EvS*).²⁷⁹

²⁷⁷ See para. 3 of this Chapter.

²⁷⁸ *Kvočka* Judgement, paras. 249 and 284. See also *Krstić* Judgement, paras. 642-643.

²⁷⁹ *Kvočka* Judgement, para. 284

The *Krstić* Trial Chamber adopted a similar approach by according the status of co-perpetrator to General Krstić as a member of joint genocidal enterprise.²⁸⁰ The Trial Chamber was of the view that the distinction between accomplice liability, denoting a secondary form of participation, and direct or principal perpetration, should be maintained and corresponds with that between ‘genocide’ in Article 4(2)(a), and ‘complicity in genocide’ in Article 4(3) of the ICTY Statute. As Krstić’s role in the Srebrenica massacre was ‘most accurately characterised as a direct or principal perpetrator’ as he ‘fulfilled a key co-ordinating role in the implementation of the killing campaign’ he was found guilty of genocide pursuant to Article 4(2)(a) of the ICTY Statute.²⁸¹

In *Tadić*, the Appeals Chamber took the common law stand and, although distinguishing it from aiding and abetting,²⁸² considered co-perpetratorship in the context of the doctrine of common purpose, a *form of* accomplice liability:

In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal.²⁸³

The Trial Chamber in *Krnojelac* endorsed this view and rejected the findings on this point in the *Kvočka* case:

This Trial Chamber does not hold the same view as Trial Chamber I as to the need to fit the facts of the particular case into specific categories for the purposes of sentencing. There are, for example, circumstances in which a participant in a joint criminal enterprise will deserve greater punishment than the principal offender deserves. The participant who plans a mass destruction of life, and who orders others to carry out that plan, could well receive a greater sentence than the many functionaries who between them carry out the actual killing. Categorising offenders may be of some assistance, but the particular category selected cannot affect the maximum sentence which may be imposed and it does not compel the length of sentences which will be appropriate in the particular case. This Trial Chamber, moreover, does not, with respect, accept the validity of the distinction which Trial Chamber I has sought to draw between a co-perpetrator and an accomplice. This Trial Chamber prefers to follow the opinion of the Appeals Chamber in *Tadić*, that the liability of the participant in a joint criminal enterprise who was not the principal offender is that of an accomplice. For convenience, however, the Trial Chamber will adopt the expression ‘co-perpetrator’ (as meaning a type of accomplice) when referring to a participant in a joint criminal enterprise who was not the principal offender.²⁸⁴

²⁸⁰ *Krstić* Judgement, paras. 636-645.

²⁸¹ *Ibidem*, paras. 643-645.

²⁸² *Tadić* Appeal Judgement, para. 221: ‘This Convention (the UN International Convention for the Suppression of Terrorist Bombing) would seem to be significant because it upholds the notion of “common criminal purpose” as distinct from that of aiding and abetting (couched in the terms of “participating as an accomplice [in] an offence”).’

²⁸³ *Ibidem*, para 220.

²⁸⁴ *Krnojelac* Judgement, para. 77.

The last sentence is noteworthy, a co-perpetrator in a joint criminal enterprise is considered 'a type of accomplice' and the term co-perpetrator will be adopted 'for convenience'. Unlike the fundamental distinction that was drawn by the *Krstić* and *Kvočka* Trial Chambers, between accomplice, aider and abettor, on the one hand, and co-perpetrator, on the other hand, both the *Tadić* and *Krnjelac* Trial Chambers wield a 'cosmetic' distinction between the two concepts.

The dual participation model is predominant in the context of the *ad hoc* Tribunals. The common purpose doctrine, instrumental in developing a type of co-perpetratorship, is ultimately considered a form of accomplice liability. In this, it accords with the Anglo-American concept of common purpose, as will be demonstrated below.

(c) National underpinnings

Co-perpetration as a form of individual responsibility has proved problematic from an Anglo-American doctrinal viewpoint since Anglo-American participation (complicity) is based on the basic structure of a perpetrator who most immediately or directly *causes* the *actus reus* and an accomplice whose responsibility derives from that of the principal.²⁸⁵ The question arises as to how to view the following cases in the light of the above principle: 1) Each participant makes a direct causal contribution to an element of the *actus reus*; or 2) only the act of one causes the *actus reus* while both participants share the *mens rea*. An example of the first situation is the case in which each of the joint principals stabs P, who dies of the combined effect of the wounds, and each is liable for his own act and, to the extent of his own *mens rea*, each can be considered a principal.²⁸⁶ An example of the second situation is A and B setting out to murder P, but it is A who actually carries out the plan. Both A and B can be considered joint *principals*.²⁸⁷ Smith and Hogan take the view that, although joint enterprise liability deviates from the basic principal-accomplice structure, the concept is governed by the ordinary principles of secondary participation.²⁸⁸ It still is *derivative* liability: where a person fulfils some of the *actus reus* elements himself. In other words, his liability for the crime must rest in part on the conduct of another.²⁸⁹ The distinction between a joint principal and an abettor may be sometimes

²⁸⁵ See for a discussion on the relationship between causation and complicity: Smith (1991), p. 69; Kadish (1985); Hart and Honoré (1984). Smith believes that the liability of accomplices is in fact liability on a causal basis, *i.e.* liability for their causal contribution to the crime'. Hart and Honoré distinguish between causation *stricto sensu*, relating to natural causes, and 'quasi causation' which relates to human behaviour and underlies complicity liability. Kadish draws on the insights of Hart and Honoré and states 'The doctrine of causation deals with fixing blame for natural events. The doctrine of complicity deals with fixing blame for the criminal action of another person', p. 333.

²⁸⁶ Smith & Hogan. (1996), p. 147.

²⁸⁷ It was held in *Rook* that the same principles apply to a party who is absent as to one who is present, [1993] 2 All ER 955, p. 130. After all, the absent party may well be the 'mastermind' and the most culpable party. Smith & Hogan. (1996), p. 147.

²⁸⁸ Smith & Hogan. (1996), p. 147.

²⁸⁹ See Kadish (1985), pp. 344-345, n. 36.

difficult to draw, however. This distinction is immaterial according to Smith and Hogan; it does not matter in which capacity one commits a crime, as perpetrators and secondary parties are *equally* liable.²⁹⁰

The strict principal-accomplice structure is not well suited to deal with situations in which A and B are joint principals where each make an essential causal contribution to an element of the *actus reus*.²⁹¹ The doctrine of common purpose or joint criminal enterprise compensates for this 'deficiency' in the Anglo-American complicity doctrine by not requiring an exact identification of the causal contributions that led to the offence(s), but rather leaving them under the cover of 'joint enterprise' or 'common purpose'.²⁹² Common purpose is based on the principles of accomplice liability where the responsibility of the one is (partly) derived from the causal contribution of the other and where joint 'principals' are each liable for their joint acts and are punished for the principal crime.

In most civil law systems, co- or joint perpetration is recognised as a separate ground of liability. In some systems, it qualifies as a participation mode; in other systems, as a type of (indirect) perpetration. In any event, joint perpetration, such as the German 'Mittäterschaft', or the Belgian *coaction* are distinguished from complicity as mere facilitation.²⁹³ Co-perpetration connotes full co-operation in the crime.²⁹⁴ In Dutch law, joint perpetration requires two or more persons who 'consciously collaborate and jointly execute an offence'. Conscious collaboration implies intent that may be inferred from previous as well as actual conduct. Co-perpetration does not necessarily require actual involvement, as long as the collaboration is 'close and complete'.²⁹⁵ The joint perpetration concept has developed into a very broad participation mode where attribution of responsibility seems primarily based on common planning. This explains why some have referred to it as a type of 'collective responsibility'.²⁹⁶

In Germany, co-perpetration covers situations in which two or more persons jointly commit a crime by co-operating in an 'equal and co-ordinated manner'.²⁹⁷ In

²⁹⁰ Smith & Hogan. (1996), pp. 127-129.

²⁹¹ Smith (1991), p. 80, footnote 101.

²⁹² Ibidem, pp. 209-234.

²⁹³ Mittäterschaft, Article 25(2) German Penal Code, Coaction, Article 66 Belgian Penal Code, Medeplegen, Article 47(1) 1° Dutch Penal Code. In French law, there is a statutory provision that encapsulates co-perpetration, but it is recognised as a form of participation in case law.

²⁹⁴ Legal doctrine on the status of co-perpetrators as participants or as principal offenders is divided. In Belgium, it seems that a co-perpetrator is considered a principal offender/perpetrator. In the Netherlands and Germany, on the other hand, the co-perpetrator is a participant and not a perpetrator. See P-L. Bodson, *Manuel de Droit Pénal*, Liège (1986); Van Toorenburg (1998); and P. Hünerfeld in Eser *et al.* (1999).

²⁹⁵ The Dutch Supreme Court ruled in a landmark decision that one person's planning an offence and another person carrying it out can be qualified as co-perpetration pursuant to Article 47 para. 1, Dutch Penal Code. Dutch Supreme Court 17 November 1981, *NJ* 1983, 84/197.

²⁹⁶ A. Beijer, 'Collectieve Verantwoordelijkheid bij groepsgeweld in recht en moraal' in M. Moerings *et al.* (eds.), *Morele kwesties in het strafrecht*, Deventer (1999), p. 146.

²⁹⁷ H. Burgstaller in Eser *et al.* (1999), p. 19.

Belgian law, co-perpetration is distinguished from secondary participation to the extent that joint perpetration requires a *necessary* contribution to the crime, *i.e.* the act is indispensable for the crime to occur. This contrasts secondary participation, which requires a *useful* contribution without which the crime might still take place.²⁹⁸ In those systems that recognise two types of accomplices (co-perpetrators and facilitators), it has proved difficult to distinguish between the two.²⁹⁹ Yet this is vital, since facilitators, who have a subsidiary status as helper, are punished less severely than co-perpetrators, who are considered full partners in the crime.³⁰⁰

French law, like Anglo-American law, has struggled to accommodate the notion of co-perpetrator or 'coauteur' because of the derivative nature of its complicity theory, based on the notion of 'emprunt de pénalité'.³⁰¹ Under the 1810 Code, the accomplice was punished *as a* principal, while under Article 121-7, the accomplice is now punished *as if he were* the principal. This has the advantage that aggravating circumstances can now be attributed to the instigator rather than to the direct perpetrator.³⁰² 'Coauteurs' are distinguished from accomplices in that they are liable in their own right. It is not necessary to establish the criminal liability of the other perpetrator. The difference between 'coauteurs' and accomplices is that the 'coauteur' is *considered to have* performed the acts, which constitute the offence, whereas the accomplice has performed mere ancillary acts with a view to assisting the offence.³⁰³ As in the common purpose doctrine in Anglo-American law, which will be discussed more in detail below, a joint perpetrator in French law is treated *as if he were* a principal. In essence he is a secondary party, just like any other accomplice.

(d) Observations

Article 25(3)(a) of the ICC Statute marks the 'emancipation' of the concept of co-perpetration from participation to perpetration, from a secondary party to a principal. It has developed into a separate head of responsibility and is no longer subsumed under complicity. This way, the ICC Statute seems to adopt the approach of some civil law systems while deviating from the Anglo-American dual participation model adopted at the *ad hoc* Tribunals. Co-perpetratorship is not recognised in the statutory provisions of the ICTY, but it provides for a *quasi* joint or co-perpetration in its case law through the concept of common purpose.

²⁹⁸ Article 66 of the Belgian Penal Code encapsulates joint principals, whereas Articles 67-69 of the Code relate to secondary participation. See Bodson (1986), pp. 318-323.

²⁹⁹ See Fletcher (1978), p. 640.

³⁰⁰ Fletcher (1978), p. 584.

³⁰¹ Desportes and Le Gunehec (2000), para. 566, p. 494.

³⁰² See para. 3 of this Chapter.

³⁰³ Bell *et al.* (1998), p. 238.

7. INSTIGATION

Article 25 (3)(b): Orders, solicits or induces the commission of such a crime

(a) Text and legal history

Although the Rome Statute does not speak of ‘instigation’ but rather uses the three participation modes, ordering, soliciting, and, inducing the commission of a crime, it appears appropriate to use ‘instigation’ as a common denominator in describing liability for prompting a person to commit a crime.³⁰⁴

To avoid any confusion regarding the nature of the participation mode encapsulated in Article 25(3)(b) of the ICC Statute, the latter provision explicitly presupposes a crime ‘which in fact occurs or is attempted’. Instigation in the context of Article 25(3)(b) of the ICC Statute should be distinguished from direct and public incitement to commit genocide in Article 25(3)(e) of the ICC Statute, *i.e.* incitement is punishable even if the principal crime (genocide) is not carried out.

Soliciting or inducing

Ordering, soliciting, and inducing relate to one another as *specimen* to *generalis*. Inducing seems to be an umbrella term for soliciting and ordering, and is defined in Black’s Law Dictionary as: ‘to bring on or about, to affect, cause, to influence an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on’.³⁰⁵ The French text of Article 25(3)(b) of the ICC Statute reads as follows: ‘ordonne, sollicite ou encourage’, thereby translating ‘induce’ as ‘encourage’, which suggests that a low standard of influence is required to prompt another to commit a crime. ‘Inducing’ in Article 25(3)(b) of the ICC Statute, seems to constitute the lowest grade of instigation and is broad enough to cover any type of influence causing another person to commit a crime.

Black’s Law Dictionary defines solicitation in rather neutral terms as ‘asking, enticing, urgent request’. In criminal law, it seems to have the added element of ‘provocation’. Soliciting, in the context of Article 25 of the ICC Statute, is a mode of criminal participation and not an inchoate crime as it normally is in national criminal law.³⁰⁶

Ordering

While soliciting and inducing do not feature as participation modes in the Statutes of the *ad hoc* Tribunals, or in the 1996 ILC Draft Code, ‘ordering’ does appear as a form of participation in crime in Article 2(3)(b) of the ILC Draft, and Article 6/7(1) of the ICTR/Y Statutes. ‘Ordering’ can be a specific type of ‘soliciting’. It requires a

³⁰⁴ See also A. Eser, ‘Individual Criminal Responsibility’, in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: a commentary*, Oxford (2002) (Eser in Cassese *et al.* (2002a)), p. 795.

³⁰⁵ Black’s Law Dictionary (1990), p. 775.

³⁰⁶ See para. 7(c) below.

superior-subordinate relationship, *de facto* or *de iure*, and an underlying (subordinate) crime. Though the word ‘superior’ does feature neither in Article 2(3)(b) of the ILC Draft Code nor in the *ad hoc* Statutes, nor in Article 25(3)(b) of the ICC Statute, ordering should be interpreted as implying issuance by a person ‘who is in a position of an authority and uses his authority to compel another individual to commit a crime’.³⁰⁷ A person who orders is not a secondary party or accomplice, but rather a perpetrator by means. It has, therefore, been suggested that ‘ordering’ can be subsumed under ‘committing’ in Article 25(3)(a).³⁰⁸ As Article 25(3)(a) does not require an *innocent* agent like in national law,³⁰⁹ ordering can be constructed as perpetration by means. After all, as it was said in the ILC Draft Commentary, ‘the 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’.³¹⁰

Double intent

Article 25(3)(b) does not contain any specific mental element. As a consequence, the general requirements of Article 30 of the ICC Statute apply. This means that, with regard to his *own* conduct, an instigator must exert influence with intent and knowledge. His intent must be directed at inducing the principal to commit the crime.³¹¹ Moreover, the instigator’s intent must be directed at the underlying crime. He must foresee that the principal will perform the crime. In that sense, the instigator must have a ‘double intent’, *i.e.* intent with regard to his own conduct and that of the principal. The intent does not include all aspects of the crime. The instigator must anticipate the essential element of the crime.³¹²

(b) Jurisprudence

The ICTY/R equivalent of the ICC clause ‘orders, solicits or induces’ is the provision ‘planned, instigated, ordered’ in Article 6/7(1) ICTR/Y Statutes. In the following it is useful to take a closer look at each of those participation modes.

Planning

As Morris and Scharf submit, the first type of criminal conduct formulated in Article 7/6(1) ‘represents the initial stage of a crime, namely the planning phase’.³¹³ The 1996 ILC Draft addresses this type of participation in Article 2 subparagraph 3(e) of the 1996 ILC Draft: ‘directly participates in planning or conspiring to commit such a

³⁰⁷ See ILC Commentary to 1996 ILC Draft Code, Article 2, para. 8, and para. 7(b) of this Chapter.

³⁰⁸ Ambos in Triffterer, margin No. 38, p. 491.

³⁰⁹ See para. 5 (c) of this Chapter.

³¹⁰ ILC Commentary to 1996 ILC Draft Code, Article 2, para. 8.

³¹¹ See Eser in Cassese *et al.* (2002a), p. 797.

³¹² Ibidem, p. 798. See para. 7(c) below.

³¹³ V. Morris and M.P. Scharf, *The International Criminal Tribunals for Rwanda*, New York (1998), p. 236.

crime, which in fact occurs'.³¹⁴ Two points can be made when comparing 'planning' as it is formulated in the 1996 ILC Draft and Commentary and as it has taken shape in the law at the *ad hoc* Tribunals.

First of all, attention should be drawn to the link between plan and execution. Planning is a type of complicity and requires the planned crime to be carried out. The clause in Article 2(3)(e) of the 1996 ILC Draft, 'which in fact occurs', rules out the inclusion of conspiracy as an inchoate crime.³¹⁵ In the words of the ILC, 'sub-paragraph (e) of article 2 sets forth a principle of individual responsibility with respect to a particular form of participation in a crime rather than creating a separate and distinct offence or crime'.³¹⁶ Although the 'subsequent crime requirement' does not appear in Article 7/6(1) of the *ad hoc* Statutes, it is adopted in case law. In *Akayesu*, the ICTR determined that

The first form of liability set forth in Article 6 (1) is planning of a crime. Such planning is similar to the notion of *complicity* in Civil law, or *conspiracy* under Common law, as stipulated in Article 2 (3) of the Statute. But the difference is that planning, unlike complicity or plotting, can be an act committed by one person. Planning can thus be defined as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.³¹⁷

In the same way, in *Blaškić*, the ICTY Trial Chamber held that 'a person other than the person who planned (...) must have acted in furtherance of a plan or order'.³¹⁸ Thus, the plan must have resulted in an act. This does not necessarily mean that the Trial Chamber required that there be a direct causal connection between the plan and the act. Consider the following reasoning:

The Trial Chamber holds that proof is required that whoever planned, instigated or ordered the commission of a crime possessed the criminal intent, that is, that he directly or indirectly intended that the crime in question be committed. However, in general, a person other than the person who planned, instigated or ordered is the one who perpetrated the *actus reus* of the offence. In so doing he must have acted in furtherance of a plan or order. In the case of instigating, as appears in the definition below, proof is required of a causal connection between the instigation and the fulfilment of the *actus reus* of the crime.³¹⁹

³¹⁴ As we have seen in paras. 3 and 7 of Chapter 1, the principle of individual criminal responsibility for formulating a plan or participating in a plan or conspiracy to commit crimes was recognised in Article 6 of the Nuremberg Charter in Article III(b) of the Genocide Convention, and in the Nuremberg Principles (Principle VI).

³¹⁵ As was submitted in the ILC Commentary: 'the criminal responsibility of an individual who, acting alone or with other individuals, participates in planning a crime (...) in which the criminal plan is actually carried out'. Commentary 1996 ILC Draft, Article 2, para. 13.

³¹⁶ Commentary 1996 ILC Draft Code, Article 2, para. 13.

³¹⁷ *Akayesu* Judgement, para. 480. This definition has been endorsed at the ICTY in: *Blaškić* Judgement, para. 279; *Kordić and Cerkez* Judgement, para. 386; and *Krstić* Judgement, para. 601.

³¹⁸ *Blaškić* Judgement, para. 278.

³¹⁹ *Ibidem*.

Reasoning *a contrario*, it can be taken that, unlike in the case of ‘instigating’ a crime, a direct causal link between ‘planning’ and the crime(s) does not have to be proved.

The second point relates to the concept of ‘planning’. The term ‘directly’ in Article 2(3)(e) of the 1996 ILC Draft, indicating that the ‘planner’ must participate in some meaningful way to the formulation of the criminal plan or policy, does not feature in Article 6/7(1) of the ICTR/Y Statutes. The *Blaškić* and *Akayesu* judgements, however, make it clear that planning implies criminal intent at the preparatory as well as the execution phases.³²⁰ The existence of a plan might be demonstrated through circumstantial evidence.³²¹ It was also held that ‘planning’ can be a solitary task. Referring to *Akayesu* and *Blaškić*, the Trial Chamber in *Kordić and Cerkez* ruled that ‘(p)lanning constitutes a discrete form of responsibility under Article 7(1) of the Statute, and thus agrees that an accused may be held criminally responsible for planning alone’,³²² as long as the person who committed the crime is not the same person as the one who planned it.

The participation mode ‘planning’ is likely to be applied to high-level government officials and military commanders of the highest ranks. In Nuremberg the ‘major war criminals’ were held criminally responsible for ‘planning’. It is against this background that the ILC’s commentary must be understood that

Subparagraph (e) is intended to ensure that high-level government officials or military commanders who formulate a criminal plan or policy, as individuals or as co-conspirators, are held accountable for the major role that they play which is often a *decisive factor* in the commission of the crimes covered by the Code’ (italics added, *EvS*).³²³

‘Planning’ will normally occur in the initial stages of the commission of a crime and to those who find themselves at the top of a hierarchy. The link between the actual perpetrator and the *auctor intellectualis* can be quite distant. It is likely to pass through mid-level positions in the governmental hierarchy or a military command structure, where the plans are elaborated and implemented. Therefore, a direct or *sine qua non* causal connection would be too ‘close’ or direct in describing the connection between the planner and the executor of a crime. A ‘decisive factor test’, such as that mentioned in the Commentary on the 1996 ILC Draft, cited above, seems more appropriate than a *sine qua non* causal link.

Instigating

The French version of Article 6/7(1) of the ICTR/Y Statutes translates the English word ‘instigated’ as ‘incité’. In *Akayesu*, the Rwanda Tribunal considered instigation and incitation to be synonymous when they qualify as criminal participation un-

³²⁰ Ibidem, para. 278 and *Akayesu* Judgement, para. 480.

³²¹ Ibidem, para. 279.

³²² *Kordić & Cerkez* Judgement, para. 386.

³²³ Commentary 1996 ILC Draft Code, Article 2, para. 14.

der Article 6(1) of its Statute. It held, however, that these terms have different meanings in the context of the inchoate crime of 'incitement to genocide' in Article 2(3)(c) of the ICTR Statute.³²⁴ The Trial Chamber refers to French and Rwandan criminal law, suggesting that instigation in Article 6 must include 'direct and public elements'.³²⁵ This is confusing and inaccurate since 'direct and public incitement' is part of the *inchoate crime* of incitement to genocide, which should be kept separate from complicity in genocide.³²⁶

Note the Trial Chamber's claim that there is a distinction between 'aiding and abetting' in Article 6(1) of the ICTR Statute on the one hand, and applicable to all crimes covered by the Statute, and complicity in genocide in Article 2(3)(e) of the ICTR Statute, on the other.³²⁷ This part of its judgement is not convincing. In particular, the recognition of two distinct *mens rea* standards for the two complicity concepts can be faulted.³²⁸ Two observations can be made in this respect.

Firstly, the Trial Chamber's attempt to uncover two mental standards might be explained by the somewhat uncomfortable combination of the 'reduced' *mens rea* standard of complicity (knowledge of the principal's intent) and the *dolus specialis* of genocide. Consider Schabas' observations on this point:

This assessment by the Rwanda Tribunal cannot be correct, and confuses the issue of knowledge of the principal offender's intent with the accomplice's intent. It also flies in the face of a consistent line of authority by which a specific intent is an essential element of the offence. In reality, genocide is more likely to be committed where the principal offender – the actual murderer – lacks genocidal intent, but is incited or directed to commit the crime by a superior – technically an accomplice – who possesses the genocidal intent. The principal offender is a subordinate who may possibly be ignorant of the genocidal plan. He or she follows an order to commit an act while unaware that the intent behind the order is to destroy a group in whole or in part. The superior orders the murder, but does not in fact commit it, and is therefore an accomplice or principal in the second degree. The better view, then, is that a person prosecuted for genocide as an accomplice must

³²⁴ Derived from Article III(c) of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

³²⁵ *Akayesu* Judgement, para. 481.

³²⁶ Consider the comments of Schabas in this respect: 'If the Tribunal means to suggest that instigation and abetting as set out in article 6, para. 1, must also be direct and public, it unnecessarily restricts the scope of the Statute. Alternatively, the Trial Chamber may be implying that the incitement-related forms of participation in article 6, para. 1 are inoperative because "direct and public incitement" is specifically covered by article 2, para. 3 (c) of the Statute, which is consequently a form of *lex specialis*'. Commentary by W.A. Schabas in A. Klip and G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals, Vol 2: The International Criminal Tribunal for Rwanda 1994-1999* (ALC-II), Antwerp-Groningen-Oxford (2001), p. 547.

³²⁷ Schabas in Klip/Sluiter, ALC-II-547 and Schabas (2000), p. 293 *et seq.*

³²⁸ In the case of complicity pursuant to Article 2(3)(e), the intent was thought to be 'knowledge of the genocidal plan, coupled with the *actus reus* of participation in the execution of such a plan'. In the case of complicity under Article 6(1), it ruled that 'it must be proven that such a person acted with a specific genocidal intent, *i.e.* the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, whereas, as stated above, there is no such requirement to establish accomplice liability in genocide'. *Akayesu* Judgement, paras. 544, 547 and 485.

have the special intent required by article II of the Convention, and is culpable even if the principal offender lacks such special intent.³²⁹

Secondly, and this touches upon the same problem, the Anglo-American complicity terminology, in which the physical perpetrator is referred to as the *principal* and his partner in crime as a *secondary* party, is 'inappropriate' with regard to instigation to commit genocide when these terms are taken to have a normative meaning. Again Schabas can be cited:

Complicity is sometimes described as secondary participation, but when applied to genocide, there is nothing 'secondary' about it. The 'accomplice' is often the real villain, and the 'principal offender' a small cog in the machine. Hitler did not, apparently, physically murder or brutalize anybody; technically, he was 'only' an accomplice to the crime of genocide.³³⁰

It appears from the above that instigation as a complicity mode has raised some problems in the context of the crime of genocide.

It suffices to say here that complicity, including the participation mode of instigation, is relevant to *all* crimes in the *same* way. This conclusion is warranted when we bear in mind that the drafters of the Genocide Convention intended 'complicity', as this is used in Article III(e) of the Convention, to connote the familiar (common law) concept of complicity.³³¹ With regard to the criticism on complicity liability in the context of genocide, we should bear in mind that understood in normative rather than in technical legal terms its 'shortcomings' are most apparent. In particular, with regard to system criminality like genocide, where the major criminals are *behind* the scene rather than *at* the scene of the crime, complicity liability may not be wholly satisfactory to 'describe' system responsibility. It seems that the dissatisfaction with the Anglo-American dual participation model not only stems from its lego-technical 'deficiencies', for which common purpose has a solution, but also originates from a normative defect. The differentiated participation model adopted in Article 25(3) of the ICC Statute is a move away from these problems.

The *Blaškić* Trial Chamber held that the definition of instigating, 'prompting another to commit an offence', is sufficiently broad to comprise both acts and omissions.³³² This, however, is a statement made *obiter* and is as such not supported by the facts of the case. It has further ruled that proof of a causal relationship between the instigation and the commission of the crime is required.³³³ This accords with the ordinary meaning of instigating as to 'bring about'.³³⁴ The causal link between insti-

³²⁹ Schabas (2000), p. 221.

³³⁰ *Ibidem*, p. 286.

³³¹ *Ibidem*, p. 293.

³³² The Trial Chamber in *Kordić and Cerkez* endorsed this ruling. See *Kordić and Cerkez* Judgement, para. 387.

³³³ *Blaškić* judgement, paras. 278 and 280 endorsed in ICTR, *Prosecutor v. Ignace Bagilishema*, Judgement, Case No. ICTR-95-1A-T, 7 June 2001 (*Bagilishema* Judgement), para. 30.

³³⁴ See also *Kordić and Cerkez* Judgement, para. 280.

gation and crime does not need to be one of 'but for' or *sine qua non*.³³⁵ Pressure resulting in a 'psychological change' may suffice.

The question arises as to whether instigation in Article 6/7(1) of the ICTR/Y Statutes covers cases of compound instigation, where person A instigates person B to instigate a crime. It seems that, until now, instigation in the context of the Tribunals has been limited to 'direct instigation'

[t]he ordinary meaning of instigating (...) corroborates the opinion that a causal relationship between the instigation and the *physical perpetration* of the crime is an element requiring proof.³³⁶

However, this does not mean that 'indirect instigation' could not generate criminal responsibility on the basis of Article 6/7(1) of the Statutes of the *ad hoc* Tribunals. As long as the instigator had the requisite *mens rea* and the crime in fact occurred, it should qualify as 'instigation' just the same. Indirect instigation would come close to the participation mode of 'planning'.

Compound participation through intent is one way of attributing liability in such a case. Another way to achieve this is to apply the ICC concept of perpetration by means, where the agent is not necessarily innocent. The advantage of the latter type of participation may be that, since it sets aside any intermediate link between instigation and perpetration, it might be easier to prove.

Ordering

The leading case in relation to 'ordering' is the *Blaškić* case at the ICTY. The Bosnian Croat, Tihomir Blaškić, was Colonel in the armed forces of the Croatian Defence Unit (HVO) and commander of their headquarters in central Bosnia when violence broke out between Croatian nationals and Bosnian Muslims in the Lasva Valley. Between May 1992 and January 1994, members of the HVO under Blaškić's control committed serious violations of international humanitarian law against the Bosnian Muslim civilian population.

In defining the *actus reus* of ordering, the Trial Chamber concurred with the relevant findings of the Trial Chamber in *Akayesu*:

By ordering the commission of one of the crimes referred to in Articles 2 to 4 of the Statute, a person also incurs individual criminal responsibility. Ordering implies a superior-subordinate relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince another to commit an offence. In certain legal systems, including that of Rwanda, ordering is a form of complicity through instructions given to the direct perpetrator of an offence. Regarding the position of authority, the Chamber considers that sometimes it can be just a question of fact.³³⁷

³³⁵ *Kordić and Cerkez* Judgement, para. 387.

³³⁶ *Blaškić* Judgement, para. 280, endorsed in *Kordić and Cerkez* Judgement, para. 387.

³³⁷ *Akayesu* Judgement, para. 483.

In *Blaškić*, the Trial Chamber ruled that ‘ordering’ implies a superior-subordinate relationship between the person giving the order and the person executing it.³³⁸ This was of particular interest with respect to orders issued by Blaškić to independent units (Vitezovi) and the Military Police not formally under his command. The Trial Chamber, however, held that such a relationship existed *de facto* as Blaškić exercised control over these units.³³⁹ As the Trial Chamber in *Kordić and Cerkez* held: ‘no formal superior-subordinate relationship is required for a finding of “ordering” so long as it is demonstrated that the accused possessed the authority to order [*italics, EvSJ*]’.³⁴⁰ As to the form of the order, the *Blaškić* Trial Chamber ruled that the order may be either explicit or implicit and does not need to be given directly by the superior to the subordinate. With regard to the mental element of ‘ordering’, it made clear that it is the commander’s *mens rea* that counts, not that of the subordinate.³⁴¹ Thus a commander who issues an unlawful order to a subordinate, who executes that order without being aware of its illegal character, is criminally responsible just the same. Even though the Trial Chamber does not mention it in so many words, when the subordinate lacks the requisite *mens rea* in executing an order to commit a crime, he may be regarded an innocent agent of the superior who would qualify as a perpetrator by means.

A *dolus eventualis* standard was established for ‘ordering crimes’. The criminal liability of the person who gave the order was said to extend even to those crimes, which had not been ordered, but had merely been accepted as likely consequences. It has been argued by the German scholar Roxin that when a statement cannot *objectively* be seen to provoke a certain event or act, it should not be considered an act of criminal participation by ‘Anstiftung’ (instigation).³⁴² In the light of this statement, the Trial Chamber’s interpretation of ‘ordering crimes’ in Article 7(1) of the ICTY Statute can be regarded as being broad. In the light of the facts, however, the result does not appear to be wholly unacceptable. By ordering an attack on villages to prevent a counter-attack in an atmosphere of ethnic tension, one increases the chance of a massacre. If a person accepts such a chance, imputing to the superior the consequences does not appear too far-fetched. In this case it seemed acceptable that, though the commander did not order the crimes, he could be held responsible for having knowingly *accepted the risk* that his order would result in the commission of crimes.

(c) National underpinnings

As Fletcher observes, there are two ways in which a person can participate in the crime of a perpetrator. One can aid or abet the criminal act, or one can instigate or

³³⁸ *Blaškić* Judgement, para. 281.

³³⁹ *Ibidem*, paras. 466 and 521.

³⁴⁰ *Kordić and Cerkez* Judgement, para. 388.

³⁴¹ *Blaškić* Judgement, para. 282.

³⁴² H.H. Jescheck and W. Ruß, *Strafgesetzbuch Leipziger Kommentar*, Berlin (1993), note 60, para. 26 StGB.

solicit the offence. In the former case, the actor often occupies a subsidiary status as helper or facilitator, while in the latter case, he is a full partner in the crime.³⁴³ While Dutch and German law recognise instigation as a separate participation mode, distinct from aiding and abetting and joint perpetration, French and Anglo-American law regard it as a belonging to the category of accomplices, together with aiding and abetting.³⁴⁴ The division runs again along the line dividing a dual from a differentiated participation model. The reason for recognising two types of 'accomplices' in Dutch and German law, as with the distinction between joint perpetration and aiding and abetting, is clear: aiders and accessories are punished less severely than instigators who face the same penalties as perpetrators. The English and French wait until the sentencing stage to qualify the degree and extent of the participation. In these legal systems, the difference between instigation and mere assistance is reflected in the sentence.

The participation modes in Article 25 3(b), 'orders, solicits or induces', have municipal origins. In English law, 'induce' features exclusively in the context of the 'Forgery and Counterfeiting Act' and has, therefore a limited range.³⁴⁵ The same is true for 'solicits', which is not a general complicity mode in English law but a statutory crime,³⁴⁶ albeit an inchoate crime, *i.e.* the crime solicited need not be committed.³⁴⁷ In that quality, it is analogous to incitement. Instigation seems best described in Anglo-American law in terms of 'ordinary' complicity. Instigating can be subsumed under 'abetting' or 'counselling' in Anglo-American law, as well as under 'procuring'.³⁴⁸ The latter form seems particularly appropriate since, unlike abetting and counselling, it requires a causal link, which seems to be a characteristic of instiga-

³⁴³ Fletcher (1978), p. 640.

³⁴⁴ Pradel (1995), pp. 282-283; Fletcher (1978), p. 640.

³⁴⁵ *Archbold* (2000), § 22-22: Forgery and Counterfeiting Act 1981, s. 3: 'It is an offence for a person to use an instrument which is, and which he knows or believes to be, false, with the intention of inducing somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice'.

³⁴⁶ In English law, solicitation is a crime in the Offences against the person Act 1861, s.4: Whosoever shall solicit, encourage, persuade or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to imprisonment for life. *Archbold* (2000), § 19-119. In American law 'solicitation' is an inchoate crime under the MPC, § 5.02: 'A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission'. LaFave (1988), p. 696.

³⁴⁷ *Archbold* (2000), § 33-70: 'To solicit or incite another to commit a crime is indictable at common law, even though the solicitation or incitement has no effect'.

³⁴⁸ The natural meaning of 'to abet' is to 'incite, instigate or encourage'. Smith & Hogan (1996), p. 130. 'The ordinary meaning of the word "counsel" is "advise" or "solicit"'. *Archbold* (2000), § 18-21. Defined as such 'abet' seems indistinguishable from 'counsel'. As was submitted: 'perhaps there is no difference except that at common law "abet" connoted incitement at the time of the offence and "counsel" incitement at an earlier time'. Smith & Hogan (1996), p. 130.

tion.³⁴⁹ This leads us to conclude that complicity is the Anglo-American equivalent of instigation as this is drawn up in the context of the ICC and the *ad hoc* Tribunals.

'Ordering' does not necessarily have an independent status as a complicity mode in municipal criminal law. In some civil law systems, *e.g.* those of Belgium, France, Germany, the Netherlands, and Rwanda, instigation as a complicity mode involves prompting another to commit an offence through gifts, promises, threats, abuse of authority or power, etc. Ordering is considered *a type of* instigation, namely, prompting another by abuse of authority or power.³⁵⁰ In German law, this is done by subsuming ordering under the German complicity mode 'Anstiftung'.³⁵¹

As to the mental element or *mens rea* of instigation, civil law jurisdictions apply a 'double test', which involves the instigator's own conduct (i) and the underlying crime (ii). Anglo-American complicity law uses a reduced *mens rea* standard that is based on knowledge; the instigator does not have to share the principal's intent with respect to the underlying crime. He does not need to know the crime in all its details; it suffices that he had it 'within his contemplation'. Some legal systems have accepted *dolus eventualis* as the requisite mental standard of instigation.³⁵² For instance when the instigator induces, or challenges, the principal to commit an offence, as he (the instigator) wants to demonstrate that the provoked person does not dare to commit that offence, but he takes and accepts the risk that he will. Suppose that A instigates B to commit a burglary and steal a certain item X. When it turns out that B has stolen item Y, A is still responsible for instigating burglary since he knowingly accepted the risk that B might steal an item.³⁵³

All the national equivalents of instigation require a close causal link although *conditio sine qua non* or 'but for' causation does generally not seem required. At least the showing of some 'mental change' brought about by the instigation should be proved. This has been referred to as 'psychological causation'.³⁵⁴

(d) Observations

The ICC participation mode of instigation is described in different terms than in the Statutes of the *ad hoc* Tribunals. This is a matter of 'outlook' rather than of substance. 'Inducing' in Article 25(3)(b) of the ICC Statute is a broad term and can be regarded as equating to 'instigation' in Article 6/7 of the ICTR/Y Statute, if not en-

³⁴⁹ See Archbold (2000), § 18-21.

³⁵⁰ See Fletcher (1978), pp. 644-645; Pradel (1995), pp. 274-278. For 'instigation' as a complicity mode in the context of the Tribunals see *Akayesu* Judgement, paras. 481-482 and paras. 534-537, and Commentary by Schabas in Klip/Sluiter, ALC-II- 547-548.

³⁵¹ In the case of Egon Krenz, relating to the killing of Eastern German people who tried to escape to the West and were shot by border guards. BVerfG, NJW 2000, 1480; *Streletz, Kessler and Krenz v. Germany*, ECtHR, Judgement of 22 March 2001, Az/34044/96

³⁵² For Germany, see the Egon Krenz case in the previous footnote. In the Netherlands this is an accepted practice. See H.G.M. Krabbe, 'Uitlokking', in J.L. van der Neut (ed.) *Daderschap en Deelneming*, Deventer (1999), pp 127-147. See also Dutch Supreme Court, NJ 1983, 799.

³⁵³ Dutch Supreme Court, 29 April 1997, NJ 1997, 654.

³⁵⁴ Krabbe in Van der Neut (1999), p. 133.

capsulating it. Moreover, the various forms of criminal participation listed in Article 25(3) of the ICC Statute leave no territory uncovered and are sufficiently broad to cover those types of instigation that are found in the Tribunals' Statutes, but not mentioned in Article 25(3)(b) of the ICC Statute. 'Planning', for instance, can come under 'perpetration by means' in Article 25(3)(a) or 'inducing' in 25(3)(b) of the ICC Statute. As far as the objective side of instigation is concerned, there seems to be no real difference between the ICC and the Tribunals.

On the subjective side, however, there seems a difference between the law of the ICC and that of the Tribunals. While instigation in the context of the *ad hoc* Tribunals allows for *dolus eventualis* as the requisite mental standard, Article 25(3)(b) of the ICC Statute requires intent. Article 25(3)(b) is subject to the general mental element provision of Article 30 of the ICC Statute, which does not include a *dolus eventualis* standard.³⁵⁵

As was observed earlier with regard to ordering and instigating genocide, 'mere complicity' seems insufficient to describe instigation where the 'secondary party' is often the principal in moral terms.³⁵⁶ An instigator of mass crime may better be held criminally responsible as a perpetrator by means pursuant to Article 25(3)(a), rather than as an instigator pursuant to Article 25(3)(b). A 'division of labour' could be that instigators on a macro-level, for instance the *auctor intellectualis*, could be held responsible under paragraph (3)(a) as a *perpetrator* by means, while the instigator on micro-level, for instance, a mid- or lower-level superior, could be held responsible under paragraph 3(b) as an instigator, a *participant*. Be that as it may, the participation model of the ICC seems better equipped in dealing with the instigator of international crimes than the *ad hoc* Tribunals. In all this we should, however, be mindful of the fact that in the end, complicity is a *theory* of criminal participation rather than a *normative description* of criminal responsibility.

8. AIDING, ABETTING, OR OTHERWISE ASSISTING

Article 25 (3)(c): Aids, abets or otherwise assists in its commission (...) including providing the means for its commission

(a) Text and legal history

This subparagraph covers criminal responsibility for complicity by assistance that falls short of instigation (subparagraph b). The wording 'or otherwise assists' seems to suggest that a lower degree of involvement than as required in subparagraph (3)(b) of Article 25 of the ICC Statute. In this way, Article 25 of the ICC Statute draws a distinction between secondary parties merely facilitating a crime and those

³⁵⁵ See para. 2(a) of this Chapter.

³⁵⁶ See also Eser in Cassese *et al.* (2002a), pp. 796-797; Ambos in Triffterer (1999), margin No. 38, p. 491.

fully taking part in the commission of a crime as instigators. Article 25(3)(b) contains a specific *mens rea* requirement, in that it requires the aider and abettor to act 'for the purpose of facilitating'. Like instigation, a double intent is required, and the general requirements of Article 30 of the ICC Statute also apply.

(b) Jurisprudence

The Tribunals for Rwanda and the Former Yugoslavia provide for 'aiding and abetting' as a participation mode in Article 6/7(1) of their respective Statutes. In case law the concept has been further developed. It closely resembles the Anglo-American complicity concept.

Aiding means 'giving assistance to someone', abetting involves 'facilitating the commission of a crime by being sympathetic thereto'.³⁵⁷ In interpreting complicity liability in international law, the Trial Chamber in *Tadić* relied upon case law produced by the post-Nuremberg war crimes trials. As was shown earlier, in connection with the implementation of Bernays' collective criminality theory, the subsequent Nuremberg proceedings provide us with a patchwork of decisions, and on some points, an inconsistent body of law.³⁵⁸ Each tribunal or court relied on concepts familiar to it, deriving from its own criminal law system.³⁵⁹ On the whole, however, the complicity concept was applied along Anglo-American lines. By 'picking and choosing' from these precedents the Trial Chamber developed its own theory of complicity liability.

The *Krnojelac* judgement,³⁶⁰ providing a short review of case law on aiding and abetting, and lists the following elements:

- (i) it must be demonstrated that the aider and abettor carried out an act which consisted of practical assistance, encouragement, or moral support to a principal offender;
- (ii) the act of assistance need not have directly caused the act of the principal offender but it must have had a substantial effect on the commission of the crime by the principal offender;
- (iii) presence alone at the scene of a crime is not conclusive of aiding and abetting unless it is demonstrated to have had a significant or legitimising or encouraging effect on the principal offender;
- (iv) the *mens rea* requires that the aider and abettor knew (in the sense that he or

³⁵⁷ *Akayesu* Judgement, para. 484.

³⁵⁸ As to participation and presence at the scene of the crime, this inconsistency was recognised by the Trial Chamber, 'Although the court in that case (Trial of *Franz Schonfeld and Nine Others*, Vol. XI Law Reports 69-70, *EvS*) neither accepted nor rejected the Judge-Advocate's statement (that to incur liability the principal in the second degree must participate in the act, *EvS*), other cases (Trial of *Adam Golkel and Thirteen Others*, Vol. V Law Reports, p. 53; Trial of *Max Wielen and Seventeen Others*, Vol. XI Law Reports, pp. 43-44, 46, *EvS*) show that direct contribution does not necessarily require the participation in the physical commission of the illegal act'. *Tadić* Judgement para. 679.

³⁵⁹ See para. 6 of Chapter 1.

³⁶⁰ *Krnojelac* Judgement, paras. 88-90.

- she was aware) that his or her own acts assisted in the commission of the specific crime in question by the principal offender;
- (v) the aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's *mens rea*;
 - (vi) however, the aider and abettor need not share the *mens rea* of the principal offender.³⁶¹

A few remarks can be made. First, the *mens rea* for aiding and abetting drawn up in ICTY case law is a 'reduced' *mens rea* standard. The aider and abettor need not share the *mens rea* of the principal offender. It suffices that he was aware of the principal offender's *mens rea* (v). Moreover, *mens rea* needs to relate to the act of assistance. The aider and abettor needs to know, or be aware, that his act assists in the commission of the crime (iv). A 'double intent' is thus required.

The second point relates to causation. While the *Tadić* Trial Chamber was of the view that the contribution needed to be 'direct and substantial', *i.e.* a straightforward *sine qua non* or 'but if' approach,³⁶² the Trial Chamber in *Furundžija* held that a 'substantial' contribution would suffice in expressing the causal link between assistance and principal crime.³⁶³ In the context of aiding and abetting, the requirement of 'directly' was found to be 'misleading':

[t]he Trial Chamber believes the use of the term 'direct' in qualifying the proximity of the assistance and the principal act to be misleading as it may imply that assistance needs to be tangible, or to have a causal effect on the crime. This may explain why the word 'direct' was not used in the Rome Statute's provision on aiding and abetting.³⁶⁴

The third point relates to the nature of the assistance. In the *Furundžija* Judgement, the Trial Chamber ruled that 'intangible assistance' could qualify as aiding and abetting. Intangible assistance can exist through moral support and encouragement. *Furundžija* is a case of a single incident of rape and torture where there was no evidence that the accused himself touched the victim or ordered the assault. *Furundžija* and another member of the Croatian Defence Council (HVO), of which the accused was the local commander, questioned a female Muslim civilian. During the questioning, *Furundžija*'s associate threatened her while *Furundžija* continued to interrogate her. His partner beat her and forced her to have oral and vaginal intercourse with him. The accused was present and did nothing to stop the assault.³⁶⁵ In deliberating on the nature of *Furundžija*'s participation in the crime, the Trial Chamber

³⁶¹ See R. Dixon *et al.*, *Archbold International Criminal Courts: practice, procedure and evidence*, London (2003), § 10-15.

³⁶² *Tadić* Judgement, paras. 678-680.

³⁶³ *Furundžija* Judgement, para. 232, endorsed in *Aleksovski* Appeal Judgement, para. 163.

³⁶⁴ *Furundžija* Judgement, para. 232.

³⁶⁵ See Commentary by William Schabas in A. Klip and G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals*, Vol 3, *The International Criminal Tribunal for the former Yugoslavia 1997-1999* (ALC-III), Antwerp-Groningen-Oxford (2001), p. 753.

found that actual physical presence at the scene of the crime is not required.³⁶⁶ It concluded a survey on customary international law relating to criminal participation with the following ruling:

[t]hat the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.³⁶⁷

It can be understood from post-Second World War jurisprudence that presence and authority can constitute a form of assistance. An approving spectator who is held in such esteem by the perpetrators that his presence encourages them to commit or continue to commit crime, may be guilty of complicity (by omission) in a crime against humanity.³⁶⁸ Mere presence as part of a crowd does not suffice; it needs to be coupled with a certain status before it can qualify as ‘aiding and abetting the commission of a crime’. Thus, attending as a spectator in civilian dress a parade in which two political opponents are publicly humiliated, falls short of silent approval as encouragement.³⁶⁹ Moreover, the failure to act must have a significant effect on the commission of the crimes to qualify as aiding and abetting by omission.³⁷⁰ In the *Akayesu* case, the ICTR argued along similar lines when it determined that the defendant, a *bourgomestre*, aided and abetted by merely being present at the scene of the crime. His inaction coupled with his status had an encouraging effect on the actual perpetrators.³⁷¹ The assumption underlying this reasoning is that the defendant’s status and presence has a legitimising effect on the actions of the principal.³⁷² In *Aleksovski*, the ICTY Trial Chamber found that the accused had contributed substantially to the mistreatment of detainees by his presence during their mistreatment and his lack of objection thereto notwithstanding the authority he had over the actual perpetrators. He

[w]as necessarily aware that such tacit approval would be construed as a sign of his support and encouragement. He thus contributed substantially to the mistreatment. Accordingly, the accused must be held responsible for aiding and abetting under Article 7(1) in the physical and mental abuse which detainees were subjected to during the body searches on 15 and 16 April 1993.³⁷³

³⁶⁶ *Tadić* Judgement, para. 691.

³⁶⁷ *Furundžija* Judgement, para. 235.

³⁶⁸ *Ibidem*, para. 207.

³⁶⁹ As was decided in the ‘Pig-cart parade case’ by the German Supreme Court in the British Occupied Zone, cited in the *Furundžija* Judgement, para. 208. The Trial Chamber concluded that the accused ‘[w]as found not guilty. He may have lacked *mens rea*. But in any event, his insignificant status brought the effect of his “silent approval” below the threshold necessary for the *actus reus*.’ *Furundžija* Judgement, para. 208.

³⁷⁰ *Blaškić* Judgement, para. 284; *Čelebići* Judgement, para. 842; *Tadić* Judgement, para. 686.

³⁷¹ *Akayesu* Judgement, para. 705.

³⁷² See *Kunarac* Judgement, para. 393; *Tadić* Judgement, para. 689; *Furundžija* Judgement, para. 232; *Aleksovski* Judgement, para. 64; *Kvočka* Judgement, para. 257.

³⁷³ *Aleksovski* Judgement, para. 87.

It appears from the above that aiding and abetting, or complicity by omission is supported in customary international law, and endorsed in the jurisprudence of the *ad hoc* Tribunals.

(c) National underpinnings

Much has already been said on Anglo-American complicity law and it is dealt with only briefly here. In common law, accessories are those who 'aid, abet, counsel or procure' the commission of an offence. 'Aiding and abetting' has often been taken to connote presence whereas 'counselling and procuring' traditionally refers to helping beforehand.³⁷⁴ However, the view prevails that these four words should be given their ordinary meaning.³⁷⁵ 'Aiding' means 'to give help, assistance or support'.³⁷⁶ 'Abetting' denotes 'to incite, instigate or encourage'.³⁷⁷ The ordinary meaning of 'counselling' is 'to advise' or 'solicit'³⁷⁸ whereas 'procuring' means 'to produce by endeavour'.³⁷⁹ In Anglo-American, complicity thus has its own distinctive *actus reus*: aiding, abetting, counselling or procuring.³⁸⁰ As to the *mens rea*, it was held in *D.P.P. for Northern Ireland v. Maxwell*³⁸¹ that it is not necessary that the aider and abettor know the precise crime that was intended and which in the event, was committed. It suffices that he knew the principle elements of the crime. The requirement is that the accomplice must have had the commission of the principal crime that was 'within his contemplation'. As Gardner points out,

This does not mean that he must intend or even expect crime X to be committed. It may merely cross his mind that crime X may be committed, and he may dismiss it as an unlikely scenario. Still it was within his contemplation. But even if it was not, where X was a crime committed in the course of carrying out the agreed plan, the accomplice shares the principal's liability for it.³⁸²

³⁷⁴ Smith & Hogan (1996), p. 130. The common law on felonies equated aiders and abettors with principals in the second degree and counsellors and procurers with accessories before the fact. See also *Archbold* (2000), § 18-9.

³⁷⁵ 'We approach s. 8 of the 1861 Act on the basis that the words should be given their ordinary meaning, if possible. We approach the section on the basis also that if four words are employed here "aid, abet, counsel or procure", the probability is that there is a difference between each of the four words and the other three, because, if there were no such difference, then Parliament would be wasting time in using four words where two or three would do'. *Att.-Gen's Reference* (No. 1 of 1975), [1975] 2 All ER 684, p. 686.

³⁷⁶ Smith & Hogan (1996), p. 129. 'Aiding and abetting' can also include acts before the perpetration of the offence. See *Archbold* (2000), § 18-9 and § 18-10.

³⁷⁷ Smith & Hogan (1996), p. 129.

³⁷⁸ *Archbold* (2000), § 18-20. According to Smith 'abet' seems indistinguishable from 'counsel': 'Perhaps there is no difference except that at common law "abet" connoted incitement at the time of the offence and "counsel" incitement at an earlier time'. Smith & Hogan (1996), p. 130.

³⁷⁹ Procuring requires a causal connection between what the (alleged) procurer did and the commission of the offence. *Archbold* (2000), § 18-22.

³⁸⁰ Gardner in Eser *et al.* (1998), p. 229. See Also Smith (1991), pp. 20-135.

³⁸¹ [1978] 3 All ER 1140, (1978) 1 WLR 1350.

³⁸² Gardner in. Eser *et al.* (1998), p. 229.

Here, 'reckless knowledge' is sufficient to constitute *mens rea*: the defendant had *knowledge of a risk* that a certain crime would be committed. This is a broad test, especially when bearing in mind that the defendant was *persuaded* to drive the principal offenders to the scene of the crime. He knew broadly what offences the principal offenders might commit, but not exactly which one or ones they would commit.

As was discussed earlier, some civil law systems recognise two categories of aiders and abettors: facilitation-type complicity and full co-operative complicity.³⁸³ The former generates a lower maximum sentence than the latter. As to its *mens rea*, a double intent is required and *dolus eventualis* can suffice as the requisite mental standard of instigation.³⁸⁴ Causality plays an important role in that the contribution must have facilitated or contributed to the principal offence, but a *sine qua non* link is not required. Aiding and abetting, as a form of accomplice liability, has an accessorial nature, *i.e.* culpability and/or punishability is based on the principal crime.³⁸⁵ This is not only expressed through the requirement of double intent, but also in sentencing. In Dutch law, for instance, the aider and abettor ('medeplechtige') can only be sentenced for the acts he intentionally facilitated or contributed to.³⁸⁶

Complicity by non-tangible (psychological) assistance is recognised in national law as well. A recent Dutch case comes to mind.³⁸⁷ Two tenants subjected the owner of a house to maltreatment over an extended period of time. When one of the tenants abused the man to such a degree that he collapsed and died of his wounds, the other tenant, having heard the man's groans and requests for help, remained passive and refrained from intervening. Both tenants were held criminally responsible for the death of the owner of the house, the former as the principal and the latter as accomplice. The Netherlands Supreme Court's reasoning in this case is of interest. In response to the defence argument that, as there was no legal duty on the part of the 'passive tenant' to act, he could not be held responsible for having *intentionally* participated (by omission) in the maltreatment, the Supreme Court held that passive complicity could be based on the knowledge that the victim was defenceless, a situation for which the passive tenant was responsible because of his previous behaviour. In the period preceding the fatal maltreatment, the 'passive tenant' had hit the owner of the house in such a way that he could no longer walk. The Court deemed that the tenant had a legal duty to protect the owner of the house since he had caused the latter to be in a helpless state.³⁸⁸ It was because of his previous behaviour that he had a legal *duty* to intervene.

³⁸³ See para. 3, 6 and 7 of this Chapter.

³⁸⁴ Jescheck (1996), pp. 691-696; G. Kok and S.F.C. Römer, 'Medeplechtigheid', in Van der Neut (1999), pp. 117-125.

³⁸⁵ See para. 3 of this Chapter.

³⁸⁶ Article 49(4) Dutch Penal Code: 'Only those actions that were intentionally facilitated or promoted by the accessory and the consequences of such actions are to be taken into consideration in sentencing'. (Translation: *The American Series of Foreign Penal Codes, The Netherlands*, Vol. 30 (1997)).

³⁸⁷ HR, 12 December 2000, *NJ* 2002, 526. See also HR, 27 November 2001, *NJ* 2002, 517.

³⁸⁸ That previous conduct can create duties of care is an accepted principle in Dutch legal doctrine and case law. See Remmelink/Hazewinkel-Suringa (1995), p. 168.

According to Smith, English law, considers passive presence at the scene of the crime complicity by omission to exercise control.³⁸⁹ This type of liability is found mainly in the area of offences relating to motor vehicle control or possession, where the accessory, the owner-passenger, can be convicted of abetting dangerous driving by failing to control the driver.³⁹⁰ Such a duty to control can be derived from ownership, but also from driving regulations.

The position of French law on complicity by omission seems more restricted, which is not surprising considering its general position on omission liability.³⁹¹ Passive acquiescence by a person with a certain status is not sufficient to amount to aiding and abetting. The president of a club can only be liable as an accomplice with regard to an illegal lottery organised among the club's members when he had the power to intervene but he *deliberately* failed to exercise it.³⁹²

(d) Observations

In the light of the above, a few comments can be made on aiding and abetting in the ICC Statute. Firstly, unlike the Statutes of the ICTY and ICTR, which seem to consider 'counselling' and 'procuring' as subsumed under aiding and abetting, the ICC Statute deals with aiding and abetting as a facilitation-type of complicity, which has a distinct status from the other participation modes listed in Article 25(3).

Secondly, the *mens rea* standard is higher than that established in the case law of the *ad hoc* Tribunals. Aiding and abetting 'for the purpose of facilitating' is a higher threshold than mere knowledge that the accomplice aids the commission of the offence. To use an example provided by Eser:

[i]f a civilian, asked by a soldier to disclose the hiding place of the later victim, is doing so out of fear and with the hope that the victim may have fled, he will not be criminally responsible, even if he is aware that the soldier might find and kill the victim.³⁹³

This standard also seems higher than some of the above-mentioned national concepts of aiding and abetting.

Finally, the question arises as to whether 'intangible support' or complicity by omission can qualify as aiding and abetting under Article 25(3)(c) of the ICC Statute. In other words, does the ICC concept of aiding and abetting extend to complicity by omission. As was pointed out above, some believe that omission liability is not part of Article 25 as Article 28 of the ICC Statute was understood to provide for it exclusively. This author, for the reasons set out above, does not share that view, and argues that this specific type of assistance should be included under Article 25(3)(c)

³⁸⁹ Smith (1991), pp. 39-47.

³⁹⁰ For example, *Du Cros v. Lambourne* (1907) 1 KB 40; *Rubie v. Faulkner* (1940) 1 KB 571, See Smith (1991), pp. 40-41.

³⁹¹ See subparagraph 2(b) of this Chapter.

³⁹² The case of *Coutant*, Crim. 29 Jan. 1936, DH 1936.134, cited in Bell *et al.* (1998), pp. 218 and 236.

³⁹³ Eser in Cassese *et al.* (2002a), p. 801.

as being part of customary international law.³⁹⁴ The *Furundžija* Trial Chamber convincingly demonstrated that there is a rule of customary international law that allows for such an interpretation of aiding and abetting.³⁹⁵ National (and general) criminal law on this point further supports this statement. Complicity by omission should therefore enter the ICC Statute through Article 21 as a rule of customary international law.

9. COMMON PURPOSE

Article 25 (3)(d): In any other way contributes to the 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*

(a) Text and legal history

The conspiracy concept and notion of group-member criminality is to be found at the *ad hoc* Tribunals in the notion of *common purpose*. Consider the following extract from the Nuremberg Judgement:

A criminal organisation is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the state for membership unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.³⁹⁶

Subparagraph (d) of Article 25 is the result of a compromise between earlier conspiracy provisions that remained controversial in the drafting process of the ICC Statute. The Anglo-American concept of conspiracy had been a divisive concept among civil law delegates in Nuremberg and proved again controversial ‘on the road to Rome’.³⁹⁷ The controversy in Nuremberg reduced the conspiracy concept to a complicity mode for crimes against humanity and war crimes, retaining its inchoate

³⁹⁴ See subparagraph 2(b) and para. 4 of this Chapter.

³⁹⁵ *Furundžija* Judgement, paras. 193-231.

³⁹⁶ Nuremberg Judgement in Friedman (1972), Vol. II, pp. 962-963.

³⁹⁷ Saland (1999), p. 199.

character only in relation to crimes against peace.³⁹⁸ Nuremberg's legacy influenced the work of the ILC in that Article 2(3) of the 1996 Draft Code of Crimes introduced a conspiracy-complicity concept generating liability only when a person 'directly participates in planning or conspiring to commit such a crime *which in fact occurs*' (italics added, *EvS*).³⁹⁹ This mixed conspiracy-complicity concept is reflected in Article 25 of the ICC Statute. There the term 'conspiracy' is not even used although it appeared in earlier drafts.⁴⁰⁰ The wording in paragraph 3(d) of Article 25 contains the English 'common purpose' concept. The provision is taken from a paragraph of an Anti-terrorism Convention.⁴⁰¹ Resort to the terminology of common purpose (also referred to as 'common design' or 'joint enterprise')⁴⁰² usually occurs where the criminal act is a result of a 'confederacy'. The notion of common purpose has developed into a separate participation mode in international criminal (case) law and, therefore, deserves attention. At the ICTY, it was first applied in the *Tadić* case.

(b) Jurisprudence

Tadić; Three categories of common purpose

In *Tadić*, the Trial Chamber found that the accused could not be sentenced for the killing of five men in the village of Jaskići. As part of an armed group, Tadić had participated in ethnic cleansing in the Prejidor region, during which operations he had removed non-Serb men from the villages of Sivci and Jaskići. In Jaskići, the armed group killed five men. There was no evidence that Tadić himself had taken part in these killings and the Trial Chamber concluded that he could not be sentenced for them.⁴⁰³ On cross-appeal by the Prosecution, the Appeals Chamber rejected this finding and, applying the concept of common purpose, ruled that Tadić could be held responsible for these five deaths, as members of his group committed them. In other words, despite the absence of evidence that he physically took part in the killings, Tadić was found responsible for and guilty of these five deaths.⁴⁰⁴ The Appeals Chamber reasoned as follows:

³⁹⁸ See Chapter 1 para. 3.

³⁹⁹ ILC Commentary to 1996 ILC Draft Code, Article 2, para. 13.

⁴⁰⁰ Conspiracy is initially mentioned as a ground of criminal liability in the *Report of the ad hoc Committee on the Establishment of an International Criminal Court*, (1995 *ad hoc* Committee Report) 6 September 1995, UN Doc. A/50/22, Annex II: Article 23(7) reads, '[a] person is criminally responsible and liable for punishment for a crime defined (in article 5) (in this Statute) if that person:

(i) (intentionally) (participates in planning) (plans) to commit such a crime which in fact occurs or is attempted; or (ii) agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifests their intent (and such a crime in fact occurs or is attempted)'. However, it does not feature in later documents, for instance, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 4 February 1998, UN Doc. A/AC.249/1998/L.13.

⁴⁰¹ Saland (1999), p. 199, referring to the International Convention for the Suppression of Terrorist Bombing, UN Doc. A/RES/52/164 (1998), annex (37 *ILM* 249 (1998)), Article 2, para. 3(c).

⁴⁰² *R. v. Williams and Davies*, 95 Cr App R 1, CA, *Archbold* (1999), § 18-7 and Smith & Hogan (1996), pp. 147-150.

⁴⁰³ *Tadić* Judgement, para. 373.

⁴⁰⁴ *Tadić* Appeal Judgement, paras. 232-233.

[t]he Appellant had the intention to further the criminal purpose to rid the Prejidor region of the non-Serb population, by committing inhumane acts against them. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, *foreseeable*. 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*.⁴⁰⁵ (italics added, *EvS*)

Article 7(1) of the ICTY Statute does not provide for the concept of common purpose. However, according to the Appeals Chamber, 'the commission of one of the crimes envisaged in Articles 2,3,4, or 5 of the Statute might also occur through participation in the realisation of a common design or purpose'.⁴⁰⁶ By pointing to the object and purpose of the Statute and the inherent characteristics of crimes committed in warlike situations it interprets 'committing' as embracing the doctrine of common purpose.⁴⁰⁷ According to the Appeals Chamber, relevant case law shows that the notion of common purpose in international criminal law encompasses three distinct categories of collective criminality.⁴⁰⁸

The first category relates to cases where all co-defendants possessing the same intent pursue a common criminal design, for instance, the killing of a certain person. As to the *mens rea* and *actus reus* of this category of common purpose cases, the Appeals Chamber ruled that

The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.⁴⁰⁹

The cases illustrating this first common purpose category are primarily of British origin in which conviction is based on the notion of being 'concerned in' a crime. They connote group criminality based on a common criminal plan and qualify as classic cases of joint or co-perpetration.

The second category concerns the so-called 'concentration camp' cases. As the *Dachau*⁴¹⁰ and *Belsen*⁴¹¹ cases show, being part of the functioning of a concentration camp was thought to constitute 'acting in pursuance of a common design to violate

⁴⁰⁵ *Ibidem*, para. 232.

⁴⁰⁶ *Ibidem*, para. 188.

⁴⁰⁷ See for the doctrine of common purpose at the ICTY and the principle of legality *Boot* (2002), pp. 288-302.

⁴⁰⁸ *Tadić* Appeal Judgement, para. 196.

⁴⁰⁹ *Ibidem*, para. 196.

⁴¹⁰ *Trial of Martin Gottfried Weiss & Thirty-Nine Others* (Dachau Concentration Camp case), UNWCC, Vol. XI, pp. 5-17.

⁴¹¹ *Trial of Josef Kramer and 44 Others* (Belsen Concentration Camp case), UNWCC, Vol. II, pp. 1-165.

the laws and usages of war'.⁴¹² Not all 'concentration camp criminality' was based on the doctrine of common purpose. In the *Auschwitz* case, the court relied on complicity rather than on the doctrine of common purpose.⁴¹³ The accused was considered an aider and abettor as he was not thought to have identified himself with the aims of the Nazi regime and, therefore, lacked the specific intent to 'want the offence as his own'.⁴¹⁴

The Appeals Chamber in *Tadić* submits that the second category of cases is merely a variant of the first category, although the accused's 'position of authority' plays an important role in attributing responsibility. The *mens rea* and *actus reus* for this type of common purpose liability is established as follows:

It would seem that in these cases the required *actus reus* was the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates.⁴¹⁵

The inference of *actus reus* from the position of authority within the camp or organisational hierarchy constitutes a broad test. It seems limited to the extent that proof is required of knowledge of the nature of the system, and the intent to further the common design. However, intent may *also* be inferred from the accused's position within the camp.⁴¹⁶ The *Tadić* Appeals Chamber held:

[p]ersonal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority).⁴¹⁷

This type of common purpose liability is inappropriate with regard to those occupying the lowest positions in a criminal organisation, such as the cleaner or the sentry. In their case it would be better to rely on 'aiding and abetting' to construct liability. The *Kvočka* Judgement, which will be discussed more in detail below, must be understood against that background.

The third category of common purpose responsibility is the category under which *Tadić* was found responsible for the Jaskíci murders. This type of collective criminality has proved to be controversial and has been the subject of debate.⁴¹⁸ It concerns cases where 'one of the perpetrators commits an act which, while outside the

⁴¹² *Dachau Concentration Camp* case, UNWCC, Vol. XI, p. 14.

⁴¹³ *Case against R. Melka et al.* (Auschwitz concentration camp), Bundesgerichtshof in Justiz und NS-Verbrechen, Vol. XX, pp. 838 *et seq.*, cited in *Tadić* Appeal Judgement.

⁴¹⁴ *Ibidem*.

⁴¹⁵ *Tadić* Appeal Judgement, para. 203.

⁴¹⁶ *Tadić* Appeal Judgement, para. 228.

⁴¹⁷ *Ibidem*.

⁴¹⁸ M. Sassòli and L.M. Olsen, 'The Judgement of the ICTY Appeals Chamber on the merits in the

common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose'.⁴¹⁹ Thus Tadić, in sharing the intention to remove people from Jaskici, was equally responsible for the five deaths as they were perpetrated in the course of the removal and constituted a predictable consequence of the removal.

Reviewing the case law constituting this category, the Appeals Chamber referred to the *Essen Lynching* and *Borkum Island* cases, representing situations of mob violence. In these situations, a plurality of persons acted with a common purpose; each committed offences against the victim, but it is unknown, or impossible to establish, who exactly did what. In other words, the causal link between each act and the harm done is indeterminate.⁴²⁰ In the *Essen Lynching* case, German civilians lynched three British prisoners of war after a German captain had said loudly that their escort should not interfere if German civilians should molest the prisoners, adding that they ought to be shot. The crowd started attacking the three and they were eventually killed and thrown from a bridge, those who were still alive were shot. Three civilians were found guilty (of murder) of having killed the prisoners of war, although it could not be proved that they had actually given the fatal blows.⁴²¹ The Appeals Chamber inferred from this case that although not all the accused intended the killings, intent could be imputed.⁴²² The fact that the accused had intended to participate in the common design of ill-treating the prisoners, and foresaw that others might kill, was enough to convict them for murder.

In the *Borkum Island* case, civilians beat seven American airmen who were forced to march through the streets of Borkum. The guards, instead of protecting them, participated in the assault. The airmen were shot and killed by German soldiers. The accused included a few senior officers, the mayor of Borkum, who had incited the mob to kill the airmen, some policemen, a civilian, and a leader of the Reich labour Corps. All were charged with war crimes. The prosecutor propounded the doctrine of common purpose by arguing that each played his part in the mob violence leading to the unlawful killings, and charged each of the accused with murder. The Court, holding all the accused responsible for pursuing a common criminal design, found some of them guilty of murder, even where there was no evidence that they had actually killed the prisoners.⁴²³ The *Tadić* Appeals Chamber inferred from this case that a 'foreseeable-risk test' was applied to construct liability. Intent to kill was imputed to the accused on the basis that they, by virtue of their status, role, or conduct, could have predicted the assault.⁴²⁴

Tadić case. New horizons for international humanitarian and criminal law?', 82 *IRRC* (2000) (Sassòli and Olsen (2001a)), pp. 733-769; M. Sassòli and L.M. Olsen, 'Prosecutor v. Tadić (Judgement)', 94 *AJIL* (2000) (Sassòli and Olsen (2001b)), p. 57.

⁴¹⁹ *Tadić* Appeal Judgement, para. 204

⁴²⁰ *Ibidem*, para. 205

⁴²¹ *Ibidem*, paras. 207-208.

⁴²² *Ibidem*, para. 209.

⁴²³ *Ibidem*, paras. 210-212.

⁴²⁴ *Ibidem*, para. 213.

The Appeals Chamber then embarked on an analysis of Italian war crimes cases in which the notion of group member responsibility was applied.⁴²⁵ It inferred from these cases that the *mens rea* required for criminal responsibility of a person for acts not envisaged but committed by other members of the group should be 'the notion of an attenuated form of intent (*dolus eventualis*) or (...) a high degree of carelessness (*culpa*)'.⁴²⁶ The Appeals Chamber concluded the case overview with the statement that the doctrine of common purpose is an established rule of customary international law. As for the subjective element, the Appeals Chamber adopted the following standard:

- (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.⁴²⁷

In the words of the Appeals Chamber, this is a standard of *dolus eventualis*, which can also be referred to as 'advertent recklessness'.⁴²⁸

Summarising the above, it seems that the *actus reus* for common purpose requires:

- (i) a plurality of persons, who are 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 one of the crimes provided for in the Statutes. This plan or design or joint criminal enterprise does not have to have been previously agreed upon. It may arise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise;
- (iii) Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (e.g. murder extermination, torture etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.⁴²⁹

The *mens rea* differs in that

- (i) with regard to the first category a shared intent on the part of all co-perpetrators is required to perpetrate a certain crime;
- (ii) with regard to the second category personal knowledge of the system of ill-treatment is required as well as the intent to further this common concerted system of ill-treatment;

⁴²⁵ 'In these cases, courts indisputably applied the notion that a person may be held criminally responsible for a crime committed by another member of the group and not envisaged in the criminal plan.' *Tadić* Appeal Judgement, para. 218.

⁴²⁶ *Tadić* Appeal Judgement, para. 219. Sassòli and Olsen doubt the correctness of this statement as the Italian cases, unlike the *Essen Lynching* and *Borkum Island* cases, represent the application of national rather than international law. See Sassòli and Olsen (2000a), pp. 751-752.

⁴²⁷ *Tadić* Appeal Judgement, para. 228.

⁴²⁸ *Ibidem*, para. 220. See also para. 2(b) of this Chapter.

⁴²⁹ *Ibidem*, para. 228 and *Archbold International Criminal Courts* (2003), § 10-24.

- (iii) with regard to the third category what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.⁴³⁰

In *Tadić*, the elaborate findings in law are not matched with its application to the facts of the case. The Appeals Chamber did not indicate how and if Tadić was aware that the actions of the group of which he was a member were likely to lead to the killings and that he nevertheless willingly took that risk. The *Tadić* Appeal Judgement can be criticised for being an academic study more than a legal judgement. Be that as it may, it provided the basis for a theory of complicity in group crime which has become a core concept of the substantive law of the ICTY.

Joint criminal enterprise

In the *Brdanin & Talić* case, the ICTY Trial Chamber preferred to use the term 'joint criminal enterprise' to refer to the third category of common purpose.⁴³¹ The reasoning behind this was that the third category of cases, regarding 'collateral liability', are distinct as to the requisite mental standard. While the first two categories require the state of mind to be the same for all perpetrators, thus warranting the term *common purpose*, the third category relates to cases where the common purpose is overshoot by a natural and foreseeable act of one of the co-perpetrators.

In *Krnjelac*, the Trial Chamber determined that the only basis for the distinction between the first and second categories of common purpose was the subject-matter with which the second category deals, namely, concentration camps during World War II. It was suggested that both categories should be treated as one and the same. Moreover, the Trial Chamber replaced the term of common purpose with that of joint criminal enterprise, maintaining a distinction between joint criminal enterprises that require proof of a shared intent and those in which participants share a common intent but 'where the principal offender commits an act which falls outside of the intended joint criminal enterprise but which was nevertheless a "natural and foreseeable consequence" of effecting the agreed joint criminal enterprise'.⁴³² This way joint criminal enterprise replaced the term of common purpose. In the following, the term joint criminal enterprise will be used to refer to 'collateral liability' while the terminology of 'first' and 'second category common purpose' will be maintained. Second category common purpose is a remainder of Bernays' collective criminality theory and thus warrants a clear distinction from first category common purpose, which relates to 'normal' co-perpetration.

⁴³⁰ Ibidem, para. 228.

⁴³¹ *Prosecutor v. Radoslav Brdanin & Momir Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, T. Ch. II, 26 June 2001, (*Brdanin & Talić* Decision) para. 29.

⁴³² *Krnjelac* Judgement, para. 78.

The joint criminal enterprise concept at the ICTY has become the concept *par excellence* to construct the criminal responsibility of senior military and political figures for crimes planned by them and carried out by others. The most conspicuous example of this is the Milošević case. But also the cases of General Krstić and Plavšić turn on the concept of participation in a joint criminal enterprise. The roles of these three may vary within the joint criminal enterprise, but their participation is considered in the same way, *viz.* as generating criminal responsibility for the underlying crime(s). Krstić did not conceive the plan to commit genocide in Srebrenica, but he participated in a joint criminal enterprise by fulfilling 'a key co-ordinating role in the implementation of the killing campaign' and was therefore found guilty of genocide.⁴³³ The participation of Plavšić in the collective and expanded Presidencies of the Serbian Republic of Bosnia and Herzegovina was characterised as participating in a joint criminal enterprise with the aim of persecuting Bosnian Muslims and Croats, but she was not regarded the *auctor intellectualis* behind this system criminality. In both the Kosovo and Croatia cases, Milošević is charged with participating in a joint criminal enterprise with the purpose of expelling and removing (a portion) of the Kosovo Albanians and the Croat and other non-Serb population, respectively, and other crimes that result from this common aim, upon the basis that such perpetration was foreseeable, and he willingly took that risk. Milošević seemed to have been the source from which the plans for ethnic separation originated. This distinguishes him as a 'participant' in a joint criminal enterprise from persons like Plavšić and Krstić. The fact that the latter did not plan crimes on the highest level does, however, not alter their responsibility as a participant in the joint criminal enterprise. A type of 'Führerprinzip reasoning', raised by defendants in Nuremberg, cannot be a valid defence in averting responsibility.⁴³⁴

Common purpose/joint criminal enterprise distinguished from aiding and abetting

In *Tadić*, the Appeals Chamber considered accessorial liability inadequate to hold the accused liable for the Jaskići deaths. Considering *Tadić* an aider or abettor 'might understate the degree of (his) criminal responsibility'.⁴³⁵ This reasoning raises the question as to how common purpose liability differs from complicity liability.⁴³⁶ The Appeals Chamber distinguished aiding and abetting from common purpose liability in that (i) an aider and abettor is always an accessory to a crime perpetrated by the principal, (ii) in the case of aiding and abetting, no proof is required of the existence of a common concerted plan, (iii) the aider and abettor carries out acts specifically directed to assisting, encouraging, or lending moral support to the perpetration of a specific crime while the support has a substantial effect upon the perpetration of the crime. By contrast, in the case of common purpose, it is sufficient

⁴³³ *Krstić* Judgement, para. 644.

⁴³⁴ See Chapter 1 para. 3.

⁴³⁵ *Tadić* Appeal Judgement, para. 192.

⁴³⁶ See also para. 6 of this Chapter.

for the co-perpetrator to perform acts that are in some way directed to furthering the common plan or purpose, (iv) the *mens rea* of aiding and abetting is knowledge that the acts performed assist the commission of a specific crime, while the *mens rea* of co-perpetrators in common purpose is either a shared intent or a *dolus eventualis*.⁴³⁷

In *Kvočka*, the Trial Chamber made an interesting finding on aiding and abetting and joint criminal enterprise. It held that one could aid and abet *in a* joint criminal enterprise. Although its ruling was *obiter* the facts of the case are essential in that they provide for the specific context in which aiding and abetting in a joint criminal enterprise can take place. The five defendants were charged with crimes committed against civilians in the Omarska, Keraterm, and Trnopleje camps. They did not occupy high-ranking or official positions in the prison camp organisation and administration. The Trial Chamber was of the view that when the level of participation in a joint criminal enterprise like a concentration camp does not amount to significant contribution but can rather be termed as 'facilitation', where at the same time the facilitator does not share the intent of the joint criminal enterprise, a person should be held responsible for aiding and abetting rather than participating in a joint criminal enterprise.⁴³⁸ The Trial Chamber, however, admitted that, 'eventually an aider or abettor, one who assists or facilitates the criminal enterprise as an accomplice, may become a co-perpetrator'.⁴³⁹ This is the case when his 'participation lasts for an extensive period or [he, *EvS*] becomes more directly involved in maintaining the functioning of the enterprise'.⁴⁴⁰ It gave the following example:

[a]n accused may play no role in establishing a joint criminal enterprise and arrive at the enterprise and participate in its functioning for a short period without knowledge of its criminal nature. Eventually, however, the criminal nature of the enterprise is learned, and thereafter participation in the enterprise is engaged in knowingly. Depending on the level and nature of participation, the accused is either an aider and abettor or a co-perpetrator of the criminal enterprise. Once the evidence indicates that a person who substantially assists the enterprise shares the goals of the enterprise, he becomes a co-perpetrator. For instance, an accountant hired to work for a film company that produces child pornography may initially manage accounts without awareness of the criminal nature of the company. Eventually, however, he comes to know that the company produces child pornography, which he knows to be illegal. If the accountant continues to work for the company despite this knowledge, he could be said to aid or abet the criminal enterprise. Even if it was also shown that the accountant detested child pornography, criminal liability would still attach.⁴⁴¹

In *Krnjelac*, the Trial Chamber did away with this plea for a differentiated approach to participation and endorsed the Anglo-American dual participation model. It held that there is 'no need to fit the facts of the particular case into specific cate-

⁴³⁷ *Tadić* Appeal Judgement, para. 229.

⁴³⁸ *Kvočka* Judgement, paras. 282-284.

⁴³⁹ *Ibidem*, para. 284.

⁴⁴⁰ *Ibidem*.

⁴⁴¹ *Ibidem*, para. 285.

gories for the purposes of sentencing'.⁴⁴² We should understand this statement in the light of the *Krnojelac* Trial Chamber's assumption that principles of accomplice liability apply to joint criminal enterprise.

The problem with the *Kvočka* Judgement lies not in its differentiated view, but in its understanding of joint criminal enterprise. The concept is perceived as a factual concept rather than a legal concept. This is a misconception, as joint criminal enterprise is nothing more than a special type of accomplice liability creating a basis for (*quasi*) co-perpetratorship. The Trial Chamber should have focused on aiding and abetting instead.

(c) National underpinnings

In *Tadić*, the Appeals Chamber relied on the common purpose doctrine in the same way as municipal courts: in cases providing a causality problem or where liability for a principal's acts falls outside the scope of complicity, usually relating to mob violence.

As already appeared when discussing joint perpetration, the common purpose doctrine offers a solution for complicated causation problems.⁴⁴³ Anglo-American complicity law, which was at the basis of the complicity concept at the *ad hoc* Tribunals, is based on the premise that the perpetrator is the one who most immediately or directly *causes* the *actus reus*. But what if each participant makes a direct causal contribution to an element of the *actus reus*? Consider the example of three persons shooting with a rifle at a target without taking proper precautions, and one of the shots kills a passer-by, and it cannot be established which one was the fatal shot, then all three can be found guilty of manslaughter. Here, the distinction between principal and abettor is difficult to make and the parties can be referred to as 'parties to a joint enterprise'.⁴⁴⁴

The doctrine of common purpose offers another solution. The basic form of *mens rea* for an accomplice is that the commission of the principal crime was within his 'contemplation'.⁴⁴⁵ The common purpose doctrine introduces a 'foreseeable risk' test and thus brings within the scope of complicity the acts committed by a principal who goes off on a frolic of his own. This is why the concept was relied upon in the *Tadić* case with regard to the Jaskići murders. This type of 'collateral liability' is based in English law on the rule that when A and B share the common purpose of committing an offence, B is also liable for a crime which he did not intend, assist, or encourage A to commit, if he knew that A might do the act while committing the 'agreed crime'.⁴⁴⁶ B is not liable for a crime perpetrated by A in the course of committing the agreed crime when B did not foresee that A might commit the act result-

⁴⁴² *Krnojelac* Judgement, para. 77, see also para. 6(b) of this Chapter.

⁴⁴³ See Chapter 1 para. 6.

⁴⁴⁴ *R. v. Salmon* (1880) 6 QBD 79; *R. v. Williams and Davies*, 95 Cr App R 1, CA, *Archbold* (2000), § 18-7 and § 18-16.

⁴⁴⁵ Gardner in Eser *et al.* (1998), referring to *D.P.P. v. Maxwell*, p. 229.

⁴⁴⁶ Smith (1991), p. 209.

ing in that crime.⁴⁴⁷ The criminal liability lies in participating with foresight. Ashworth points out that English law has changed on this point. The test used to be an objective test of foreseeability with a strong element of prior agreement or 'authorisation': could the crime perpetrated by the principal be regarded as a 'probable consequence' of the common design? Nowadays, the basis of liability has shifted to (subjective) foresight of a significant possibility.⁴⁴⁸

The discussion on the foresight test in *Tadić* seems to have run a similar course. The Appeals Chamber initially gave the impression that the doctrine of common purpose was a solution to causation problems in mob violence situations. In this, it seemed to apply a (objective) predictability-indifference test, amounting to negligence.⁴⁴⁹ However, in the summing-up, it applied a (subjective) accepted-risk test amounting to *dolus eventualis*.⁴⁵⁰ This test is similar to the reckless knowledge test of complicity liability in English law.⁴⁵¹ The same standard was considered sufficient with regard to aiding and abetting.⁴⁵² In that sense, the common purpose doctrine does not differ fundamentally from complicity law. This accounts for the view that common purpose/joint criminal enterprise is a form of accomplice liability to which the principles of secondary participation apply.⁴⁵³

In American law, a similar type of common purpose collateral liability exists; the so-called 'Pinkerton conspiracy'. In *Tadić*, the Appeals Chamber referred to this concept when discussing national legislation and case law incorporating notions of common purpose.⁴⁵⁴ According to the Supreme Court in *Pinkerton v. United*

⁴⁴⁷ Smith & Hogan (1996), p. 148, referring to the decision of the Privy Council in *Chan Wing-Sing v. R.* (1985) 80 Cr App R 117: '(The principle) turns on contemplation...It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight'.

⁴⁴⁸ Ashworth (1999), p. 448. Ashworth observes the following in respect of the 'subjective' test: '[i]n practice this test may be wider than the old objective one: indeed, it bases the accomplice's liability on a restricted form of recklessness, and is therefore similar in spirit to the *Maxwell* decision'. Smith is of the view that agreement is the basis of common purpose liability. Indeed, it is the agency test that limits a possible unrestrained extension of liability for collateral offences based on the foresight test. He relies in this on e.g. *Anderson and Morris* (1966) 2 QB 110, where it was decided that, '[i]f one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act (and) it is for the jury in every case to decide what was done in part of a joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise'. Smith (1991), p. 219.

⁴⁴⁹ *Tadić* Appeal Judgement, paras. 220 and 228.

⁴⁵⁰ According to Sassòli and Olsen, the foreseeability-risk test is a lower standard than *dolus eventualis*, where the result and not only the risk is accepted. Sassòli and Olsen (2002a), p. 750.

⁴⁵¹ In *D.P.P. for Northern Ireland v. Maxwell* ([1978] 3 All ER 1140), a reckless knowledge test was introduced for complicity. As to the mental element of the accomplice, it suffices that he '[k]nows that one or more of a group of offences is virtually certain to be committed, which means that in relation to the one(s) actually committed there was knowledge only of a risk that it would be actually committed – and that amounts to recklessness'. Ashworth (1999) p. 442.

⁴⁵² *Furundžija* Judgement, para. 246.

⁴⁵³ See para. 8 (c) of this Chapter.

⁴⁵⁴ *Tadić* Appeal Judgement, para. 224, footnote 289.

States,⁴⁵⁵ each member of a conspiracy can be liable for substantive offences carried out by co-conspirators in furtherance of the conspiracy, even when there is no evidence of their direct participation in, or knowledge of such offences. Liability extends to offences that are 'reasonably foreseen as a necessary or natural consequence of the unlawful agreement'.⁴⁵⁶ This reasoning is similar to the foresight-test in common purpose cases, though the *Pinkerton* test puts more emphasis on the agreement. The foresight-test in *Pinkerton* is, therefore, less subjective than the collateral common purpose test. In *Pinkerton*, the conspirator was a party to an offence, which was committed in furtherance of the collective criminal objective by a co-conspirator. This is conspiracy as complicity or, in the words of Smith, 'conspiracy's auxiliary status'.⁴⁵⁷ It appears that the *Pinkerton* interpretation of conspiracy has blurred the distinction between conspiracy and complicity, and that in the common purpose/joint criminal enterprise notion the two concepts meet.

In civil law legal systems, common purpose/joint enterprise responsibility can be referred to as 'co-perpetration'.⁴⁵⁸ Moreover, specific concepts of complicity in group crime and membership responsibility exist that serve as a means to prosecute and convict those engaged in jointly committing a crime where it is not clear who actually 'gave the final blow'.

French law penalises 'participation in a group formed or an understanding reached for the perpetration of one of the felonies specified in Articles 211-1, 212-1, and 212-2 (genocide, crimes against humanity, and war crimes, *EvS*), when evidenced by one or more overt acts'.⁴⁵⁹ Moreover, the French concept of 'association de malfaiteurs', mentioned earlier as the inspiration in devising the concept of criminal organisations at Nuremberg,⁴⁶⁰ can also be referred to as a type of common purpose concept.⁴⁶¹

Dutch law provides for an analogous concept in Article 140 of the Dutch Penal Code. This provision penalises the 'participation in an organization that has as its object the commission of serious offenses'.⁴⁶² A participant in a criminal organisation needs to be part of the organisation and needs to participate or support acts that lead to, or directly relate to the realisation of the common purpose. The participant's intent does not have to extend to all the elements of the underlying crimes. It suffices that he knew the aim and intention of the organisation.⁴⁶³ This resembles the *mens rea* of the 'second category common purpose' cases, where intent to further the aim of the organisation suffices rather than intent in respect of the underlying crime con-

⁴⁵⁵ 328 US 640 (1946).

⁴⁵⁶ *Ibidem*, see dictum.

⁴⁵⁷ Smith (1991), p. 48.

⁴⁵⁸ See further para. 6(c) of this Chapter.

⁴⁵⁹ Article 212-3, para. 1 Code Pénal (Translation: *The American Series of Foreign Penal Codes, France*, Vol. 31 (1999)). See also Desportes and Le Gunehec (2000), p. 461.

⁴⁶⁰ Chapter 2 para. 4.

⁴⁶¹ Regulated in Articles 450-1 to 450-4 of the Code Pénal.

⁴⁶² Translation: *The American Series of Foreign Penal Codes. The Netherlands*, Vol. 30 (1997).

⁴⁶³ De Hullu (2000), pp. 420-442. See Dutch Supreme Court, 18 November 1997, *NJ* 1998, 225.

stitutes the requisite *mens rea*. The common purpose concept differs from Article 140 of the Dutch Penal Code in that in the latter case a person is convicted of *involvement* in a criminal organisation while in the former case the participant is to culpable for the *crime itself*.

(d) Observations

At the ICTY, as in national – Anglo-American – law, the common purpose doctrine has been useful in tackling causality problems generated by mob violence. It further enabled the recognition of (*quasi*) co-perpetratorship in the context of the *ad hoc* Tribunals. Moreover, it served as the basis for the participation mode of joint criminal enterprise. The latter has evolved into a concept that on the one hand is applied to high government and military officials in planning system criminality, and on the other hand provides the basis for constructing liability of those participating in a system of criminality, such as a detention camp. In the latter form it can also be referred to as second category common purpose liability.

Collective criminality theory revisited?

The joint criminal enterprise concept brings back memories of the past. Elements of Bernays' collective criminality theory and the two pillars supporting it: criminal organisations and conspiracy, can be detected when reading the ICTY judgements on, and bearing in mind the nature of the concept of common purpose/joint criminal enterprise. This is not surprising as the bulk of case law which the *Tadić* Appeals Chamber relied upon in drawing up the common purpose concept, was the output of Bernays' collective criminality theory. In fact, the mix of conspiracy and complicity – that is typical for the common purpose concept – was one of the features of the conspiracy concept at Nuremberg. This analogy is even more compelling when we bear in mind the IMT's definition of a criminal organisation as '[a]nalogous to a criminal conspiracy in that the essence of both (conspiracy and criminal organisation) is co-operation for criminal purposes. There must be a group bound together and organized for a *common purpose*' [*italic added, EvS*].⁴⁶⁴

At the ICTY, the concept of joint criminal enterprise, when applied to persons who participate in system criminality at policy level, qualifies as conspiracy-complicity. It is, however, important to recognise the differences between conspiracy and common purpose liability. In ancestry, nature, and scope, the former is very different from the latter. Common purpose is a form of complicity, thus, requiring a subsequent crime linking the participant (or joint principal) to that crime by the requirement of double intent.⁴⁶⁵ In doctrine, it has been conceded that it is dangerous to recognise conspiracy as a special basis of complicity. In this way, complicity's reach extends to remotely associated parties of whose existence co-conspirators may not even know.⁴⁶⁶ A warning is appropriate here. Applying the joint criminal enter-

⁴⁶⁴ See further Chapter 1 para. 4.

⁴⁶⁵ See Smith (1991), p. 53.

⁴⁶⁶ Smith (1991), p. 49.

prise concept as conspiracy-complicity may amount to violating the personal fault requirement underlying individual criminal responsibility.

Second category common purpose liability reminds of the other pillar under the collective criminality theory: criminal organisations. The test applied in this case is unfortunate. Inferring *actus reus* and *mens rea* from a position of authority within a system is potentially harmful to criminal law principles. Criminal responsibility should not be merely based on a person's position. This would bring us back to Bernays' collective criminality theory, which proved so contentious in Nuremberg, and which flies in the face of the fundamental principles of criminal law, such as personal fault. Mere membership cannot generate criminal responsibility, and holding a superior position within a 'system of ill-treatment' cannot automatically indicate intent to further the common purpose. We should be cautious in applying the position-based test of second category common purpose liability, as it can result in a transgression of the limits set by what I earlier called the 'parameters of culpability'.⁴⁶⁷

ICC Statute

At this point we should return to the common purpose provision in the ICC Statute. Article 25(3)(d) stipulates that a person shall be criminally responsible if he 'contributes to the commission of a crime by a group of persons acting with a common purpose'. Such contribution is intentional and shall either '(i) be made with the aim of furthering the criminal activity or criminal purpose of the group, or (ii) be made in the knowledge of the intention of the group to commit the crime'. Paragraph 25(3)(d) does not specify the *actus reus* of criminal participation in this paragraph. On the contrary, it sets the lowest possible objective standard since it penalises 'any other way' one contributes to the commission of a crime. The only objective limit it sets is that it must concern the 'commission of such a crime by a group'. Like in the concept of common purpose discussed above, the focus is on the *mens rea* or mental element.

The mental element of common purpose liability in Article 25(3)(d) of the ICC Statute constitutes 'acting with a *common purpose*'. Like the previously discussed participation modes of instigation and aiding and abetting, common purpose liability requires a twofold mental standard: one relating to the contribution and one relating to the subsequent crime. As to the first mental standard, Article 25(3)(d) stipulates that such contribution shall be 'intentional'. Intentional includes knowledge and volition. As to the second mental element, alternatives (i) and (ii) provide two different mental standards relating to the underlying crime. The mental standard in subparagraph (i) is captured in the following wording: the 'aim of furthering the criminal activity or criminal purpose of the group'. This is a specific subjective requirement, which, in the words of Ambos, amounts to 'the specific intention to promote the practical acts and ideological objectives of the group'. In other words, a shared intent is required.

Bearing in mind the three types of common purpose cases distinguished by the

⁴⁶⁷ See the Introduction to this study, para. 1.

ICTY Appeals Chamber in *Tadić* it seems that the first category of common purpose cases can be brought under subparagraph (i). The first category also requires a 'shared intent on the part of all co-perpetrators'.⁴⁶⁸ The second type of cases, the so-called 'concentration camp' cases, can also be brought under this provision, provided it concerns those participants who identified themselves with the aims and policies of the system of ill-treatment, most likely those in superior positions. As far as the type of criminality is concerned, it seems that the clause 'furthering the criminal activity' relates to an ongoing activity, like the functioning of a concentration camp or criminal organisation.

Alternative (ii) seems to constitute a lower mental threshold than alternative (i). The clause 'knowledge of the intention' suggests that the co-perpetrator does not have to share the *mens rea* of the actual perpetrator. This alternative seems to cover situations in which the participation in the common design takes the form of assistance in, or contribution to, the execution of the common plan or purpose; in other words, situations in which the co-perpetrator was not involved in all the aspects of the carrying out of the common design or did not identify himself with it, but was aware of the intention of his co-perpetrators. For instance, the soldier who contributes to the commission of a crime by keeping a lookout for his mates who carry out the commonly planned crime. Ambos wonders how specific the knowledge of the participant in such a situation must be. Does it require the 'lookout-soldier' to have positive knowledge of a specific crime, or is 'reckless knowledge' sufficient? The latter would mean that the soldier knew that one or more of a group of offences was virtually certain to be perpetrated, which means that in relation to the offence actually committed there was knowledge only of the risk that the crime would be perpetrated.⁴⁶⁹ It would, however, not suffice under alternative (ii). It follows from the wording of this provision that the participant must be aware of the specific crime intended by the group, as it requires 'knowledge of the intention to commit the crime'.⁴⁷⁰

Other cases that can be brought under alternative (ii) are the 'concentration camp cases' involving those who cannot be identified as the ideologists behind it but had knowledge of the system and intended to further it. It is most likely that those in mid-level positions would qualify for this standard.

The *dolus eventualis* standard, which is based on the foreseeability-risk test of third category common purpose liability, does not 'fit' the ICC common purpose concept. Article 25(3)(d) of the ICC Statute does not cover the 'collateral liability' as alternative (ii) requires knowledge of the intention of the group.⁴⁷¹ With regard to the third category of cases, the accused did not *know* of the intention of the group member who committed the additional crime. Thus, membership responsibility in the context

⁴⁶⁸ *Tadić* Appeal Judgement, para. 228.

⁴⁶⁹ See for the reckless knowledge test and complicity para. 8(c) of this Chapter.

⁴⁷⁰ Ambos in Triffterer (1999), margin No. 25, p. 486.

⁴⁷¹ See also Sassòli and Olsen (2000a), p. 753.

of what has now become known as joint criminal enterprise, falls outside the ambit of the ICC regime.

The common purpose doctrine in the framework of the ICC Statute has a different role and scope than in the context of the *ad hoc* Tribunals. It does not repair the shortcomings of the 'all or nothing nature of complicity'.⁴⁷² The drafters of the ICC Statute have already done the 'repair-job' by providing for various participation modes and recognising co-perpetration as a separate head of criminal responsibility. Moreover, its scope is more limited; it does not include 'collateral liability'. This may be problematic when we bear in mind that the latter type of liability proved useful in cases of mob violence. It accounts for the adoption of the common purpose doctrine in Article 7(1) of the ICTY Statute by the *Tadić* Appeals Chamber in:

The above interpretation (including the doctrine of common purpose under Article 7(1) of the ICTY Statute, added *EvS*) is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the times 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.

Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrators physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.⁴⁷³

It will be interesting to see whether the more limited scope of Article 25(3)(d) of the ICC Statute will affect the ICC's effectiveness in bringing to trial those involved in system criminality. With regard to the conspiracy-complicity, the defined scope of Article 25(3)(d) does not seem to pose problems. After all, perpetration by means provides the right tools for constructing liability of those at the policy level. With regard to the 'executive machinery',⁴⁷⁴ however, it might leave a gap when criminality amounts to mob violence.

⁴⁷² The typification is from T.B. Robinson, 'A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under § 924(c)', 96 *Mich. LR* (1997), p. 783.

⁴⁷³ *Tadić* Appeal Judgement, paras. 190-192.

⁴⁷⁴ Trainin (1944), p. 79.

10. INCITEMENT TO COMMIT GENOCIDE

Article 25 (3)(e): In respect of the crime of genocide, directly and publicly incites others to commit genocide

As incitement to commit genocide is an inchoate crime and, strictly speaking, not a mode of criminal participation, I will limit myself here to a few remarks.

The provision in Article 25(3)(e) of the ICC Statute is largely identical with Article III(c) of the Genocide Convention of 1948 and the genocide provisions of the Statutes of the Rwanda and Yugoslavia Tribunals.⁴⁷⁵ As it does not require that the incited genocide is in fact committed, it can be distinguished from perpetration by means and soliciting and inducing under subparagraph 3(a) and 3(b), respectively, of Article 25 of the ICC Statute. The *actus reus* of the offence consists in:

[d]irectly provoking the perpetrators(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.⁴⁷⁶

The *mens rea*

[l]ies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is engaging.⁴⁷⁷

Incitement to commit genocide requires a double intent: the act of incitement must be intentional and the inciter must have the *dolus specialis* required by Article 6 of the ICC Statute on genocide.⁴⁷⁸ This not only accords with the above jurisprudence but, more importantly, with the qualification of being an ‘other act’ of genocide as codified in Article III of the Genocide Convention.

‘Directly and publicly’ specify the incitement, this way restricting the concept that would otherwise be very broad, particularly bearing in mind that it does not require the genocide to actually take place. ‘Publicly’ is a straightforward requirement and its interpretation in the *Akayesu* Judgement cited above does not provide any difficulties. ‘Directly’, on the other hand, raises questions. If ‘direct’ is understood in the definition of the 1996 ILC Draft Code as: ‘specifically urging *another individual* to take immediate criminal action rather than making a vague or indirect sugges-

⁴⁷⁵ Para. 3(b) of Article 4 of the ICTY Statute and para. 3(b) of Article 2 of the ICTR Statute.

⁴⁷⁶ *Akayesu* Judgement, para. 559.

⁴⁷⁷ *Ibidem*, para. 560.

⁴⁷⁸ Ambos in Triffterer (1999) margin No. 30, p. 488. For a different view: Eser in Cassese *et al.* (2002a), p. 806. He asserts that the inciter does not necessarily have to possess the genocidal intent. It is sufficient that ‘the inciter (...) must merely know and want the incited persons to commit the crime with genocidal intent while he himself might have completely different motives’.

tion [*italics added, EvS*]', incitement becomes 'instigation', as encapsulated in paragraph 25(3)(b) of the ICC Statute. In this way it would lose much of its own significance. A better view would be to understand 'directly' as a requirement that warrants the exclusion of vague and indirect public statements and expressions that are not themselves used for provoking genocidal activities.⁴⁷⁹

11. COMPLICITY AFTER THE FACT

Article 25 of the ICC Statute does not contain references to complicity after the fact. Earlier drafts did provide for this type of complicity. The ILC drafted a proposal in which contributions after the fact would qualify as complicity if they were based on a commonly agreed plan. In the absence of such a plan the person would only be liable for a distinct offence ('harbouring a criminal').⁴⁸⁰ This proposal, however, never made it to the final text.

Contrary to the Rome Statute, the ICTY did accept the possibility of complicity after the fact. In drawing up its participation theory in *Tadić*, the ICTY Appeals Chamber held that

In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or *after the incident*. He will also be responsible for all that naturally results from the commission of the act in question (*italics added, EvS*).⁴⁸¹

Complicity after the fact played a role in the ICTY case of *Hadžihasanović* where one of the accused was held responsible as a superior for subordinate crimes committed before he assumed command.⁴⁸² This responsibility was based on superior responsibility pursuant to Article 7(3) of the ICTY Statute, which as will be shown below, was an ill-founded decision and should be faulted.⁴⁸³ The question arises as to whether the superior could be held responsible for these crimes on the basis of Article 7(1) of the ICTY Statute.

In national law, complicity after the fact is recognised as a form of criminal participation or as a separate offence. The accessory after the fact is one of the degrees of criminal participation in the common law on felonies. Smith describes the accessory after the fact as a person 'harbouring or assisting a felon' and one who 'knowing a

⁴⁷⁹ See Eser in Cassese *et al.* (2002a), p. 805.

⁴⁸⁰ Report of the ILC, *YILC* (1991), Vol. II/2, p. 98. See Eser in Cassese *et al.* (2002a), pp. 806-807; Ambos in Triffterer (1999), margin No. 40, pp. 491-492.

⁴⁸¹ *Tadić* Appeal Judgement, para. 692.

⁴⁸² ICTY, *Prosecutor v. Hadžihasanović et al.*, Decision on Joint Challenge to Jurisdiction, T.Ch. Case No. IT-01-47-PT, 12 November 2002, (*Hadžihasanović et al.* Decision).

⁴⁸³ See Chapter 4 subparagraph (3)(iii)(b).

felony to have been committed by another, receives, relieves, comforts or assists the felon'.⁴⁸⁴ In common law, anyone who gives to any party to a felony any assistance enabling him to evade arrest, trial, or punishment is guilty of the felony as accessory after the fact.⁴⁸⁵

While most civil law systems establish culpability after the fact as a separate crime rather than as complicity, complicity after the fact exists as a form of participation in a crime. The post-crime act of participation must have a causal link with the accomplishment of the crime and there must have been the intent to this effect.⁴⁸⁶ Thus, the agreement to help the principal escape *after* the commission of the murder, which was made *during* the commission of the crime, can qualify as complicity, the rationale being that the principal acted in the knowledge that he could escape later, which encouraged him to commit the crime.⁴⁸⁷

Crimes such as harbouring a criminal or concealing a crime as separate offences can be found in most national criminal laws.⁴⁸⁸ The same approach, that is, penalising post-crime aid in separate offences, can be found in current English law as well.⁴⁸⁹ Most American states have penalised post-crime aid as separate offences rather than relying on complicity.⁴⁹⁰ Statutes have created offences such as 'hindering prosecution', 'obstructing justice', 'concealing or aiding a fugitive', and 'aiding escape'.⁴⁹¹ In general, it is required that the person 'harbouring' a criminal knows the underlying offence and intends to hinder or the arrest or its prosecution.⁴⁹²

⁴⁸⁴ Smith (1991), p. 7, referring to J.W.C. Turner, *Russell on Crime*, London (1964), p. 163.

⁴⁸⁵ Smith & Hogan (1996), p. 165.

⁴⁸⁶ Eser in Cassese *et al.* (2002a), p. 807; Ambos in Triffterer (1999), margin No. 40, pp. 491-492.

⁴⁸⁷ Dutch Supreme Court, 15 December 1987, *NJ* 1988, 835. De Hullu (2000), pp. 417-418. See Smith & Hogan (1996), pp. 165-170.

⁴⁸⁸ Pradel (1995), pp. 276-278. An example of the latter is Article 189 of the Dutch Penal Code: A term of not more than six months or a fine of the third category shall be imposed upon: (1) A person who *intentionally* harbors a person who has committed any serious offense or is being prosecuted for any serious offense, or who intentionally assists such person in evading detection or arrest by judicial officers or police officers; (2) a person who, after any serious offense had been committed, *with the object* of concealing that fact or of rendering investigation or prosecution thereof impossible or difficult, destroys, causes to disappear, conceals or withholds from the investigation of judicial officers or police officers objects with regard to which or by means of which the serious offense has been committed or other evidence of the commission of the serious offense (...) [italics added, *EvS*]. (Translation: *The American Series of Foreign Penal Codes, The Netherlands*, Vol. 30 (1997)).

⁴⁸⁹ The whole of the law relating to accessories after the fact was repealed and replaced by s. 4 of the Criminal Law Act 1967. The latter section created the offence of 'impeding the apprehension or prosecution of an arrestable offence' which in effect encapsulates four variations of a 'basic crime' carrying different punishments. Paragraph (1) contains the definition of the basic offence: 'Where a person has committed an arrestable offence, any other person who, *knowing or believing* him to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence [italics added, *EvS*]'.⁴⁹⁰

⁴⁹⁰ This is also the approach laid down in the Model Penal Code. For instance, § 242.3: 'Hindering Apprehension or Prosecution' and § 242.5: 'Compounding'.

⁴⁹¹ LaFare (1988), p. 800.

⁴⁹² With regard to 'impeding the apprehension or prosecution of an arrestable offence', the *actus reus*, or objective element exists of two ingredients: (i) an arrestable offence must have been committed by person X whose apprehension or prosecution D is charged with impeding; and (ii) D must have done

Considering the above, and bearing in mind the law of the *ad hoc* Tribunals on aiding and abetting, the superior in the *Hadžihasanović* case could only be held responsible under Article 7(1) of the ICTY Statute as an accomplice after the fact if the following could be proved: 1) that he knew of the subordinate crimes, 2) that he had the intent to hinder the prosecution, and 3) that his intent known to the subordinate(s) in that it had an encouraging effect on them, and thus substantially contributed to the commission of the crimes. When we come to discuss the case in more detail, it will be clear that the superior could not have been held responsible as an accomplice after the fact. On the fact of it there seems to be no reason why complicity after the fact would not be part of Article 25(3)(d) of the ICC Statute. It could constitute a type of facilitation or assistance which would be causally linked to the principal crime.

12. CONCLUSION

The ICC Statute provides for three types of perpetrators: the direct or physical perpetrator, the perpetrator by means also referred to as indirect perpetrators, and the joint perpetrator. It recognises two types of participants: instigators and facilitators, and it contains a specific concept of 'group-complicity'.⁴⁹³ Article 25 of the ICC Statute represents a true example of a differentiated participation model. This way it does not have the 'all or nothing' problem of accomplice liability, which has caused some misunderstanding and resulted in creative law-making at the *ad hoc* Tribunals. This way Article 25 'repairs' the technical defaults of complicity liability and it awards the joint perpetrator or co-principal with a real rather than with a *quasi* status. Moreover, it ends the dissatisfaction with the failing terminology of complicity liability where instigators are referred to as 'secondary' parties. Already Trainin pointed out when writing about 'Hitlerite responsibility' that complicity liability does not go well together with war criminals who can be regarded as the ones pulling the strings behind the scene.⁴⁹⁴ Recognising concepts such as perpetration by means and instigation does away with this criticism. Altogether, these arguments make a strong case for the adoption of a differentiated rather than a dual participation model in international criminal law, as the ICC has now done.

Comparing Article 25 of the ICC Statute with, on the one hand, criminal participation at the *ad hoc* Tribunals, and, on the other hand, with national underpinnings, we see that the ICC participation modes establish a relatively high threshold in attributing criminal responsibility. This is mainly due to the strict *mens rea* requirement of Article 30 of the ICC Statute excluding *dolus eventualis*. However, the new

'any act' with intent. The *mens rea* or subjective element equally provides for two points: (i) D must know or believe the offender to be guilty of the arrestable offence, which he had actually committed; and (ii) D must intend to impede the apprehension or prosecution of the offender. Negligent impediment of apprehension or prosecution does not suffice.

⁴⁹³ Term from Eser in Cassese *et al.* (2002a), pp. 802-807.

⁴⁹⁴ Trainin (1944), p. 79. See also Chapter 1, para. 1.

concept of perpetration by means, which does not require an innocent agent, seems to compensate for this to a certain extent.

One could criticise Article 25 of the ICC Statute for ‘overdoing’ it by providing for overlapping modes of participation. Indeed, ordering, soliciting, and inducing can all be regarded as perpetration by means.⁴⁹⁵ However, when subparagraph 3(b) is considered as the *participation* counterpart of the *perpetration* modes in subparagraph 3(a) there is a difference, making this critique less valid. The distinction between perpetration and participation corresponds with the distinction between crime committed on macro-level and crime committed on micro-level. The division is then 3(a) for perpetrators, physical, joint or by means. For instance, the *auctor intellectualis*, (b) for mid-level and lower level participants c) for mere facilitators and assistants, d) those involved in group crime.

It is submitted here that Article 25 of the ICC Statute should include liability by omission. The ICC should interpret the various modes of participation listed in paragraph 3(a)-(d) as extending to omission. None of the commentators in the field have yet expressed a definite view on this point.⁴⁹⁶ It remains to be seen whether or not the Court will allow this extension of criminal responsibility.

Of interest is the ICTY case law with regard to complicity in group crime. The common purpose doctrine and the joint criminal enterprise concept can be seen as modern – but still very broad- versions of the conspiracy-complicity and criminal organisation concepts of Nuremberg. The fact that the ICTY relies on these concepts in its case law might warrant the conclusion that they fill a gap left by the participation modes listed in the ICTY Statute. It is doubtful whether Article 25 (3)(d) can fill this gap as it does not extend to the collateral type of common purpose liability, which has proved useful in dealing with mob violence.

The differences that exist between the ICC participation concept and the participation concept drawn up in the context of the *ad hoc* Tribunals, brought to the surface in this Chapter do not cause concern when we bear in mind that the ICC may apply the jurisprudence of the *ad hoc* Tribunals in interpreting the concepts listed in Article 25 of the ICC Statute. After all, the participation concepts drawn up in the context of the *ad hoc* Tribunals and based on Second World War case law, while generally supported by national underpinnings, can be regarded as customary international law and/or general principles of law. The ICC should apply the law of the *ad hoc* Tribunals on criminal participation as much as possible, and not develop its own participation concept. The Court should apply the participation modes listed in Article 25 of its Statute in the light of the jurisprudence emanating from the ICTR and ICTY. Such an approach warrants not only because the Court has to apply customary international law and general principles pursuant to Article 21 of its Statute, but also in order to develop a coherent and uniform concept of perpetration and participation in international criminal law.

⁴⁹⁵ Ambos in Triffterer (1999), margin Nos. 38-39, p. 491.

⁴⁹⁶ Ambos in Triffterer (1999), margin No. 42, p. 492; A. Eser in Cassese *et al.* (2002a), p. 820; O. Triffterer, ‘Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?’, 15 *LJIL* (2002), p. 187.

EVALUATION PART I

The development of the modes of individual criminal responsibility in international law is a process of evolution. This is particularly clear from the development of criminal participation. While Second World War case law provided for a broad and factual concept of criminal participation, the jurisprudence of the *ad hoc* Tribunals have refined criminal responsibility in various modes of criminal participation. Article 25 of the ICC Statute offers an even broader range of participation modes, covering almost any type of contribution to a crime and marking the transition from a dual participation model to a differentiated participation model. This should be welcomed, as it allows for recognising various contributions to a crime already at the stage of attributing responsibility. This is particularly relevant with regard to system criminality where contributions to the crime cover a wide scale: from mere facilitation to instigation as an *auctor intellectualis*.

Compared to its predecessors the ICC Statute left lacunae in dealing with group crime, in particular with regard to mob violence. The joint criminal enterprise and common purpose concepts are not easily fitted into Article 25 of the ICC Statute. Moreover, the unclear status of commission by omission may render it difficult to prosecute and convict perpetrators who have stood by and watched approvingly.

The ICTY and the ICTR have processed Second World War case law on criminal responsibility to make it meet acceptable standards of criminal law. This is especially true with regard to the common purpose doctrine. Relying on Bernays' collective criminality theory by way of post-Nuremberg case law, the ICTY developed a theory of criminal organisations and complicity-conspiracy in case law, which adds to the participation modes listed in its Statute. Like Bernays' theory, the joint criminal enterprise concept is used to construct liability of, on the one hand, war criminals at policy level, and on the other hand, war criminals on the lower, execution level.

The comparison between national underpinnings and international jurisprudence produced by the *ad hoc* Tribunals demonstrates that, although very broad, the common purpose and joint criminal enterprise concepts do not constitute unprecedented law. Nevertheless, they border on *collective* responsibility and should be closely examined to ensure they do not violate the principle of *individual* criminal responsibility.

On balance and compared with the jurisprudence of the *ad hoc* Tribunals and national underpinnings, the text, context and legal history of Article 25 of the ICC Statute enable the Court to establish a real *individual* threshold in attributing criminal responsibility. In this it honours principles of criminal law and makes an important contribution to the development of international criminal law. Whether it is an effective system of criminal law is another matter. In any event, for the future of international criminal law it is important that the ICC incorporates the jurisprudence of the *ad hoc* Tribunals as much as possible, particularly when it qualifies as customary international law. This to prevent a development of two diverging bodies of international criminal law: ICC criminal law and ICTY/ICTR criminal law.

PART II

SUPERIOR RESPONSIBILITY

The lieutenant said, 'Have you seen enough?' speaking savagely. Almost as though I had been responsible for these deaths. Perhaps to the soldier the civilian is the man who employs him to kill, who includes the guilt of murder in the pay-envelope and escapes responsibility.

GRAHAM GREEN, THE QUIET AMERICAN

INTRODUCTION TO PART II

Superior responsibility is probably the most well known example of individual responsibility in international criminal law. It has been at the core of many legal and non-legal debates and occupies a prominent place in that law. A study on the criminal responsibility of individuals in international criminal law is therefore not complete without an analysis of such responsibility.

The first Chapter of part II, Chapter three, describes a few leading cases on superior responsibility. Some of these cases, for instance the *Yamashita* and *Hirota* cases, have a contentious status in war crimes law. The cases discussed in this Chapter present a differentiated body of law. It is nevertheless possible to distill from this case law three principles that underlie the concept of superior responsibility. This 'skeleton concept' of superior responsibility leads into Chapter four, where superior responsibility at the *ad hoc* Tribunals and the ICC is discussed.

The *ad hoc* Tribunals for the Former Yugoslavia and Rwanda have developed the concept of superior responsibility into a modern concept of individual criminal responsibility, enabling it to move away from the *Yamashita* and *Hirota* legacy. The comparison in Chapter four between the superior responsibility concept as it applies in the context of the *ad hoc* Tribunals, and as it is formulated in the ICC Statute, is instructive in that it shows that although based on the same principles, superior responsibility can take different forms. The question then arises as to what really is the nature of superior responsibility?

In Chapter five a survey of concepts analogous to superior responsibility, such as the responsibility of employers for crimes committed by their employees, serves to uncover the nature of superior responsibility. The second half of this Chapter lists superior responsibility concepts encapsulated in national (war crimes) law and military manuals. From this overview it can be seen how the concept has been 'interpreted' in national terms, which gives a clearer idea of the nature of superior responsibility.

CHAPTER 3

HISTORICAL SURVEY: A FEW LEADING CASES

1. INTRODUCTION

Superior or command responsibility¹ is the primary mechanism through which superiors can be held criminally responsible for crimes perpetrated by their subordinates. The concept is an important tool in punishing persons in superior positions for lack of control and/or supervision over those under their command or authority. The concept extends to political, military, and civilian superiors. In essence, it joins together two contrasting types of responsibility: collective and individual responsibility. As Sunga puts it,

In the Nuremberg Charter, the dilemma between the unfairness of collective responsibility, and the unfairness for direct perpetrators only, finds resolution in the doctrines of criminal conspiracy and superior responsibility, both of which provide the normative means to enforce individual criminal responsibility beyond the direct perpetrator and to sweep in those who planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the crime or crimes.²

The question of a person's passivity, his not interfering in offences committed by others, entailing his criminal liability for those offences, is not new. Hugo Grotius already described it:

We must accept the principle that he who knows of a crime, and is able and bound to prevent it but fails to do so, himself commits a crime.³

In one sentence Grotius summarised the scope and substance of superior responsibility.

Prior to the Second World War, superior responsibility was an articulation of military practice.⁴ This accounts for the term *command* responsibility. A position of command has always imposed responsibility,⁵ yet in a few instances, it entailed

¹ Command responsibility and superior responsibility are used here as interchangeable concepts.

² L.S. Sunga, 'The Čelebići Case: a Comment on the Main Legal Issue's in the ICTY's Trial Chamber Judgement', in 13 *LJIL* (2000), p. 122.

³ Grotius (1615/1964), p. 523.

⁴ For a historical overview, see W.H. Parks, 'Command Responsibility for War Crimes', 62 *MLR* (1973), pp. 1-20; L.C. Green, 'Command Responsibility in International Humanitarian law', 5 *Trans. L & Contemp. Probs.* (1995), pp. 320-327; Bantekas (2002), pp. 67-70.

⁵ Some trace it back to what they refer to as 'the oldest military treatise in the world', written in 500 B.C. by Sun Tzu: 'When troops flee, are insubordinate, distressed, collapse in disorder or are routed, it is

criminal and even *international* responsibility. According to Parks, international recognition of superior responsibility occurred as long ago as 1474 with the trial of Peter Hagenbach who was brought to trial by the Archduke of Austria for murder, rape, perjury and other crimes.⁶ Hagenbach was tried by an international tribunal composed of judges from the allied states of the Holy Roman Empire. He was convicted of crimes which he, as a knight, should have prevented as he had had the duty to do so.⁷

International adjudication in the twentieth century, in particular after the Second World War, has developed superior responsibility into a concept of criminal responsibility, adding it to the other two variants of individual criminal responsibility in international law: perpetration and participation. While the Leipzig court that tried the architects of the First World War applied the concept in at least one of its (few) cases,⁸ it was really the Second World War and its aftermath that generated the leading cases on superior responsibility.

2. THE YAMASHITA CASE

The most illustrative post-Second World War case on superior responsibility is the trial of the Japanese general Tomoyuki Yamashita who was charged, convicted, and sentenced to death by a United States war crimes commission. The verdict was upheld in appeal by the American Army command and the United States Supreme Court.

Yamashita was the commanding general of the Fourteenth Army Group of the Imperial Japanese Army in the Philippines and was charged by the United States with having:

[u]nlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the laws of war.⁹

According to the indictment, which contained 123 counts, when American troops invaded the Philippines, Yamashita's troops had fled in retreat and committed numer-

the fault of the general. None of these disorders can be attributed to natural causes', S. Tzu, *The Art of War* (ed. S.B. Griffith, Oxford 1963), p. 125.

⁶ See Parks (1973), pp. 4-5

⁷ *Ibidem*.

⁸ In the trial of Emil Muller. Muller, a captain in the army reserves and the commander of a prison camp, had witnessed a prisoner being maltreated by a soldier. Muller was held to have 'at least tolerated and approved of this brutal treatment, even if it was not done on his orders'. Judgement in the Case of Emil Muller, 30 May 1921, 16 *AJIL* 684 (1922) cited in M.R. Lippman, 'Humanitarian Law: The Uncertain Contours of Command Responsibility', *The Tulsa J of Comp. & Int. L* (2001) (Lippman (2001a), p. 8.

⁹ *U.S. v. Tomoyuki Yamashita*, TWC, Vol. IV, pp. 3-4.

ous war crimes. The greatest number of civilians was killed in the Batangas Province, an area under the control of Yamashita's (indirect) subordinate Fujishige. The total was estimated at 25,000 dead.¹⁰ Fujishige had been far removed from his direct superior (General Yokoyama) who only gave general directions, leaving the details to Fujishige. The latter, on own authority, decided to meet Filipino guerrilla resistance by declaring war on the civilian population. He reportedly told his men that 'all civilians have now turned into guerrilla and therefore kill all of them'.¹¹ Yamashita was also held responsible for atrocities committed in Manila, where, during a two-week period thousands of men, women, and children were killed and maltreated.¹² A further 8,000 people were murdered in the Laguna Province, which was also within the area of General Yamashita's command.

Yamashita surrendered on 3 September 1945. His trial commenced on 29 October 1945 and was concluded on 7 December 1945. The prosecutor did not allege that Yamashita had ordered the crimes or that he knew of them. At trial, Defence Counsel argued that, as the general had not known about the crimes, he should not be punished for them just because of his position as commander:

[n]either the Laws of War nor the conscience of the world upon which they were founded would countenance any such charge. It was the basic premise of all civilised criminal justice that it punished not according to status but according to fault, and that one man was not held to answer for the crime of another.¹³

The prosecution argued that the atrocities were so widespread and numerous that Yamashita *must have known* about them:

[t]hose atrocities were spread from the northern region of the Philippine Islands to the southern portion; that they continued, as I say, repeatedly throughout the period of Yamashita's command; that they were so notorious and so flagrant and so enormous, both as to scope of their operation and as to its inhumanity, the bestiality involved, that they must have been known to the accused if he were making any effort whatever to meet the responsibilities of his command or his position; and that if he did not know of those acts, notorious, widespread, repeated, constant as they were, it was simply because he took affirmative action not to know.¹⁴

The prosecutor presumed knowledge, but made it clear that even if Yamashita had not known of the crimes, he 'should have known' of them because of his duty as a commander and because the crimes were so notorious and widespread. He should have been more active in informing himself of his subordinate's acts. Criminal negligence was construed as a safety net.

¹⁰ Ibidem, p. 5.

¹¹ B.D. Landrum, 'The Yamashita War Crimes Trial: Command Responsibility Then and Now', 149 *MLR* (1995), p. 294.

¹² Parks (1973), p. 25.

¹³ *Yamashita* case, TWC, Vol. IV, p. 12.

¹⁴ Ibidem, p. 17.

The Defence rebutted by pointing out that Yamashita had had no control over his troops. There was a low morale in the army over which he had assumed command just eleven days before the American invasion. The preparation for a defensive operation was inadequate, not in the least because Yamashita had not received a briefing from his predecessor, who had left him with a number of new and untrained soldiers.

The Defence arguments were of no avail; the Commission convicted and sentenced Yamashita to hang. The five general officers constituting the Commission held that:

Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.¹⁵

The military commission did not find that Yamashita actually knew of any of the atrocities. It followed the prosecutor's line of reasoning in that he 'must have known' of them.

Habeus corpus relief was sought by the Defence from the US Supreme Court, but denied in a majority decision with Judge Murphy and Judge Rutledge dissenting. The authority of, and proceedings before, the military commission were upheld. Moreover, the majority concluded that: a) military commanders have an affirmative duty to control their subordinates, ensuring their compliance with the laws of war, and b) that where such a duty exists, a charge alleging less than personal participation in, or ordering of, an act in violation of the law of war *is* a violation of the law of war.¹⁶ In other words, superior responsibility incurs criminal responsibility for a violation of the laws of war. The judgement effectively adopted a 'must have known' standard and culpability was based on Yamashita's breach of duty. In the words of the Supreme Court:

[t]he gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by 'permitting them to commit' the extensive and widespread atrocities specified.¹⁷

In his dissenting opinion, Justice Murphy pointed at the incompatibility of Yamashita's superior responsibility and the principle of personal guilt:

He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as a commander to control the operations of the members of his command, permitting

¹⁵ Ibidem, p. 35.

¹⁶ Ibidem, pp. 43-44 and Parks (1973), p. 35.

¹⁷ 327 US, pp. 14-15.

them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed dependant upon its biased view as to the petitioner's duties and his disregard thereof, a practice reminiscent of that pursued in certain less respected nations in recent years.¹⁸

Justice Murphy further pointed out that the American army had tried everything to disrupt Yamashita's command, control, and communications. It was unfair to now charge him with having committed war crimes for not having effectively controlled his troops.¹⁹ Judge Rutledge criticised the technical-legal flaws of the trial before the Military Commission and its prejudice.²⁰

There were many critics of the judgement. In legal practice and academic circles, the trial and the judgement received strong disapproval.²¹ Parks, however, in his much cited article on superior responsibility, points out that evidence showed that Yamashita had participated personally in the crimes by ordering or at least authorising at least 2000 summary executions.²² He disagrees with the view of some who believe that the Military Commission in *Yamashita* applied a standard of strict liability.²³ In an interesting essay on the *Yamashita* case and superior responsibility as applied in US court-martials, Smidt points out that the US superior responsibility concept requires *actual* knowledge and *active* participation. He therefore submits that the military commission convicting Yamashita must have had evidence before it of actual knowledge and participation and that it cannot merely have based its conviction on Yamashita's failure to act.²⁴ However that may be, the *Yamashita* precedent remains contentious. As Landrum observes 'even in the United States courts, Yamashita has lost its favor'.²⁵ The case, however, should not be dismissed completely. Its value lies in the recognition that failure of duty can generate criminal responsibility. As will be shown later, Article 28 of the ICC Statute encapsulates a similar standard.²⁶

¹⁸ Ibidem, p. 28.

¹⁹ Ibidem, pp. 34-35.

²⁰ Ibidem, p. 41 *et seq.* Justice Rutledge was of the opinion that the military commission lacked jurisdiction. He further objected to the range and type of evidence that had been admitted by the military commission.

²¹ W.V. O'Brien, 'The Law of War, Command Responsibility and Vietnam', 60 *Georgetown LJ* (1972), p. 637 *et seq.*; A.M. Prévost 'Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita', 14 *HRQ* (1992), p. 309; R.L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility*, Wilmington (1982); Lippman (2001a), pp. 1-93; M.R. Lippman, 'The Evolution and Scope of Command Responsibility', 13 *LJIL* (2000), pp. 139-170; W.A. Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute, Part III', *Eur. J of Crime, Crim. L & Crim. Justice*, 1998-4.

²² Parks (1973), p. 27, n. 92.

²³ As expressed, for instance, by Lael (1982), pp. 123 and 127.

²⁴ M.L. Smidt, 'Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations', 164 *MLR* (2000), pp. 155-234.

²⁵ Landrum (1995), p. 300.

²⁶ See further Chapter 4 para. 5.

3. THE NUREMBERG TRIBUNAL

The Nuremberg Statute did not provide for a special regulation on superior responsibility. Nor does the Judgement specifically mention it. In finding the defendants guilty, the Tribunal relied on participatory rather than superior responsibility. Any form of (factual) participation in a crime could establish criminal responsibility as long as the defendants had had knowledge of the crimes and the crimes were committed under their authority.²⁷ In this way, in the words of Lippman, 'the tribunal implicitly invoked the doctrine of superior responsibility'.²⁸ With respect to political leaders such as Göring and Von Ribbentrop, this meant that the evidence of their presence at meetings where policies of slave labour, persecution, or extermination were agreed upon, sufficed as a basis for conviction. No specific superior-subordinate relationship was required; these were the men at the top who were held to have the means and the duty to intervene and stop mass crime as soon as information of it reached their ears. Rather than superior responsibility, they were held responsible on the basis of, what we would now call, participation in a joint criminal enterprise, as a type of conspiracy-complicity concept.

On some of the counts in the case of certain senior military commanders or administrators of occupied territories, the Tribunal applied the *active* form of superior responsibility, *i.e.* for ordering crimes. In the case against Kaltenbrunner, the Tribunal ruled:

During the period in which Kaltenbrunner was head of the RSHA ('Reichssicherheitshauptamt', *i.e.* Reich Central Security Office, *EvS*), the Gestapo and SD ('Sicherheitsdienst', SS Security Service, *EvS*) in occupied territories continued the murder and ill-treatment of the population, using methods which included torture and confinement in concentration camps, usually under orders to which Kaltenbrunner's name was signed.²⁹

In the case of Rosenberg, who was the Reichs Minister for the Occupied Eastern Territories, the Tribunal determined:

Rosenberg had knowledge of the brutal treatment and terror to which the Eastern people were subjected. He directed that the Hague Rules of Land warfare were not applicable in the Occupied Eastern territories. He had knowledge of and took an active part in stripping the Eastern territories of raw materials and foodstuffs, which were sent to Germany. He stated that feeding the German people was first on the list of claims on the East, and that the Soviet people would suffer thereby. His directives provided for the segregation of Jews, ultimately in ghettos (...). He gave his civil administrators quotas of laborers to be sent to the Reich (...). His signature of approval appears on the order of 14 June 1944 (...) Upon occasion Rosenberg objected to the excesses and atrocities committed by his subordinates (...) but these excesses continued and he stayed in office until the end.³⁰

Rosenburg was held liable for ordering, and actively participating in crimes. This

²⁷ See also Lippman (2001a), pp. 14-17 and Ambos (2000), pp. 8-9; Green (1995), pp. 327-333.

²⁸ Lippman (2000), p. 144.

²⁹ Nuremberg Judgement in Friedman (1972), Vol. II, p. 979.

³⁰ *Ibidem*, p. 982.

type of superior responsibility can be termed *active* superior responsibility and should be distinguished from *passive* superior responsibility, which can be referred to as the true form of superior responsibility.³¹ In the case against Frick, who was first the Minister of Interior and later Reichs Protector of Bohemia and Moravia, a true instance of superior responsibility can be seen:

During the war nursing homes, hospitals, and asylums in which euthanasia was practiced as described elsewhere in this Judgement, came under Frick's jurisdiction. He had knowledge that insane, sick, and aged people, 'useless eaters', were being systematically put to death. Complaints of these murders reached him, *but he did nothing to stop them* (italics added, *EvS*).³²

It is clear from these excerpts that the IMT's findings were mainly concerned with participatory liability and the active form of superior responsibility. The former was applied to government representatives, the latter to high-ranking military commanders and civil administrators.

4. SUBSEQUENT NUREMBERG PROCEEDINGS

The US military tribunals at Nuremberg delivering judgement under CCL 10, provided for interesting jurisprudence on superior responsibility. In the *Hostages*³³ and *High Command*³⁴ cases, the tribunals endorsed the *Yamashita* precedent by adopting the 'dereliction of duty' argument, yet they applied more limited knowledge standards. In the *Hostages* case, the German General Wilhelm List was held criminally responsible for the killing of a great number of hostages by subordinates under his command. The tribunal ruled that a command position entails certain duties of control with regard to the area of competence. As to the cognitive aspect, the tribunal held that;

The defendant List also asserts that he had no knowledge of many of the unlawful killings of innocent inhabitants which took place because he was absent from his headquarters where the reports came in and that he gained no knowledge of the acts. A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area of his command. (...) If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense (...). His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal liability.³⁵

³¹ See further Chapter 5 para. 5.

³² Nuremberg Judgement in Friedman (1972), Vol. II, p. 987.

³³ *U.S. v. Wilhelm List et al. (Hostages case)* in Friedman (1972), Vol. II, pp. 1303-1343; TWC, Vol. XI, pp. 1230-1319.

³⁴ *U.S. v. Von Leeb (High Command case)* in Friedman (1972), Vol. II, pp. 1421-1470; TWC, Vol. XI, pp. 462-697.

³⁵ Friedman (1972), Vol. II, pp. 1323-1324.

The tribunal determined that List failed to acquire information on the atrocities, which had been available to him through reports. Without explicitly using the formula, the judges seemed to have applied a 'should have known standard', but, unlike the military commission in the *Yamashita* case, it attributed responsibility on the basis of the availability of concrete information rather than the widespread nature of the atrocities.

In the *High Command* case, the *Yamashita* decision was considered not applicable. The German General Von Leeb was acquitted of charges relating to atrocities committed by subordinates under his command. The latter had killed Russian prisoners of war during an expedition against Russia. Von Leeb argued that, while criminal acts may have occurred in the territory under his command, the crimes were committed by agencies of the state over which he exercised no supervision or control. The Tribunal accepted Von Leeb's defence of lack of knowledge and distinguished between commanders of occupied territories and field commanders. The *Yamashita* case was recognised as an important precedent but regarded irrelevant to Von Leeb's case,

[f]or the reason that the authority of Yamashita in the field of his operations did not appear to have been restricted by either his military superiors or the state (as was the case with Von Leeb, *EvS*).³⁶

The Tribunal continued:

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 when the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes 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 (...) We are of the opinion (...) that the occupying commander must have knowledge of these offenses and acquiesce or participate or criminally neglect to interfere in their commission and that the offense committed must be patently criminal.³⁷

A distinction was made in the superior responsibility of field commanders and the superior responsibility of commanders of occupied territories. The U.S. military tribunal in the *High Command* case seemed to have been of the view that with regard to the latter type of commander it is not a matter of course that there is actual *control* over subordinates, and an ability to intervene. 'Occupation commanders' might have a formal position of command but not possess the actual powers of command. Legal authority to direct the actions of subordinates was not considered an absolute requirement for the imposition of superior responsibility.

Control was also relevant in attributing responsibility to *non-military* superiors in the *Pohl* and *Medical* cases. The defendant Mummenthey in the *Pohl* trial was an

³⁶ Friedman (1972), Vol. II, p. 1451.

³⁷ Ibidem.

officer of the Waffen SS and a manager running businesses in which he employed concentration camp labour. He was held criminally liable for the maltreatment of prisoners by concentration camp guards over whom he was deemed to have had control. The tribunal held that 'as an SS officer', he 'wielded military power of command'.³⁸ Moreover, the military tribunal declared that he must have known of the mistreatment:

If excesses occurred in the industries under his control he was in a position not only to know about them, but to do something. From time to time he attended meeting of the concentration camp commanders where all items pertaining to concentration camp routine such as labour assignment, rations, clothing, quarters, treatment of prisoners, punishment etc., were discussed.³⁹

In the *Medical* case, military officials and doctors were prosecuted for having conducted medical experiments on concentration camp inmates in Dachau, Buchenwald, and Ravensbrueck. Although not referred to as such, the tribunal seemed to have assigned liability on the basis of superior responsibility. The duty to investigate the medical experiments, and the concomitant responsibility for failing to intervene, was imposed on the defendant Brandt, a doctor. The Tribunal judged:

In the medical field Karl Brandt held a position of the highest rank directly under Hitler. He was in a position to intervene with authority on all medical matters; indeed, it appears that such was his positive duty (...) Occupying the position he did and being a physician of ability and experience, the duty rested upon him to make some adequate investigation concerning the medical experiments which he knew had been, were being and doubtless continue to be, conducted in the concentration camps.⁴⁰

With regard to the military officials standing trial in this case, the tribunal imposed an affirmative duty to prevent or intervene. With regard to the defendant Schröder, the tribunal stated:

As has been pointed out in this judgment, the law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war (...) With all this knowledge, or means of knowledge, before him as a commanding officer, he blindly approved a continuation of typhus research by Haagen, supported by the program, and was furnished reports of its progress, without so much as taking one steps to determine the circumstances under which the research had been or was being carried on, to lay down rules for the conduct of present or future research by his subordinates, or to prescribe the conditions under which the concentration camp inmates could be used as experimental subjects.⁴¹

³⁸ TWC, Vol. V, pp. 1052-1053.

³⁹ Ibidem.

⁴⁰ TWC, Vol. II, p. 193-194.

⁴¹ Ibidem, pp. 212-213.

It appears from the above, that although the military tribunals at Nuremberg recognised the *Yamashita* ruling as an important precedent,⁴² they refrained from applying its knowledge standard. In *Hostages*, the tribunal based a 'should have known' test on concrete information received by the superior rather than on the widespread nature of atrocities.⁴³ In the *High Command* case, the American Military Commission explicitly declared the *Yamashita* knowledge standard as being inapplicable. On the other hand, both judgements endorsed *Yamashita* in that they recognised 'an affirmative duty on the part of the commander to take such measures as are within his power and appropriate in the circumstances to wage war within the limitations of the laws of war'.⁴⁴ Other subsequent Nuremberg proceedings on superior responsibility extended the concept to apply to non-military superiors as well. Thus, the Nuremberg trials developed *Yamashita* as to: 1) the cognitive aspect and, 2) the *scope* of the concept.

5. THE TOKYO TRIBUNAL

In 1948 the Tokyo Tribunal delivered its judgement.⁴⁵ Twenty-eight of the former leaders of Japan stood trial before the Tokyo Tribunal. The Japanese Cabinet, superior military officers, and administrative officials were charged with crimes against peace, murder and conspiracy to commit murder, war crimes, and crimes against humanity.⁴⁶ In discussing superior responsibility, the charges of war crimes against prisoners are of interest here.

The Tokyo Tribunal continued the line set out in the subsequent Nuremberg trials by applying superior responsibility to non-military personnel. Unlike *Yamashita* and the Nuremberg jurisprudence, accentuating the *cognitive aspect* in attributing superior responsibility, the Tokyo Tribunal was mainly concerned with the *operational aspect* of superior responsibility, the failure to act, anticipate, or react, and the *functional aspect*, the person's function which entails a duty to act. With regard to the Japanese Cabinet, this had far-reaching consequences:

A member of a Cabinet which collectively, as one of the principle organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet

⁴² Not in the least because it was a US Supreme Court ruling.

⁴³ See also Ambos in Cassese *et al.* (2002a), p. 830.

⁴⁴ Parks (1973), p. 37.

⁴⁵ International Military Tribunal for the Far East (IMTFE), 29 April 1946-12 November 1948, The Tokyo War Crimes Trial (Tokyo Judgement), in Friedman (1972), Vol. II, pp. 1029-1183.

⁴⁶ Parks (1973), pp. 64-65.

thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill-treatment in the future.⁴⁷

The Tribunal applied a type of *collective* responsibility. It seemed to have equalled political (cabinet) responsibility to criminal responsibility. Take, for instance, the *Koiso* case. Koiso, who after having served in two cabinets as a minister, was appointed Prime Minister in 1944. The Tribunal found that he knew of war crimes being committed in 'every theatre of the war' through information brought to him by the Supreme Council for the Direction of War, which Koiso attended.⁴⁸ He had even requested the issuance of a directive to the competent authorities to prohibit the mistreatment of prisoners of war. However, the fact that Koiso remained in office for another six months, during which the treatment of POWs and internees showed no improvement, was deemed to amount to a 'deliberate disregard of duty'.⁴⁹

Another example of this broad interpretation of superior responsibility was the *Hirota* case. Superior responsibility was attributed to Hirota for his reliance on assurances that crimes committed by Japanese troops in Nanking would be halted. As Foreign Minister, he had received reports of the atrocities known as the 'the Rape of Nanking'. He had taken the matter up with the War Ministry, which assured him that the crimes would be stopped. After these assurances, however, atrocities continued for at least a month. The Tribunal found Hirota responsible for dereliction of duty. He should have acted more vigorously in insisting that the Cabinet take action. Instead, he was content to rely on assurances. The judges of the Tokyo Tribunal held that his action amounted to criminal negligence.⁵⁰ It seems the Tribunal imposed upon Hirota a duty to be *pro-active*. In this the Tribunal did not take into account that the crimes were committed by subordinates of *another* ministry over whom Hirota had no control. Röling persuasively criticised the decision in *Hirota* in his dissent:

Evidence (...) shows that it was far from easy for a Foreign Minister to deal with the military... The peculiar structure in Japan, where the armed forces possessed an independent position, made it the more difficult for the government to intervene in Army affairs.⁵¹

The Tribunal failed to give weight to the degree of control as a requirement in attributing superior responsibility.⁵² Emphasis on his *function* as Foreign Minister entailed the disregard of the reality of his actual power.

Tojo, successively Head of the War Ministry, Prime Minister, and Head of the Home Ministry until Koiso took over, was held responsible for the mistreatment of civilian internees and prisoners of war by Japanese soldiers. The Tribunal found him

⁴⁷ Tokyo Judgement in Friedman (1972), Vol. II, p. 1039.

⁴⁸ Ibidem, p. 1141.

⁴⁹ Ibidem.

⁵⁰ Ibidem, p. 1134.

⁵¹ *The Tokyo Judgement: The International Military Tribunal for the Far East (IMTFE)*, Vol. I (B.V.A. Röling and C.F. Rüter (eds.) Amsterdam (1977)), p. 1126.

⁵² See also G.R. Vetter, 'Command Responsibility of Non-Military Superiors in the ICC', 25 *YJIL* (2000), pp. 125-127.

criminally liable, as he had been aware of atrocities while taking no effective action to stop them. The fact that he had brought a company commander to trial for this maltreatment was not considered sufficient. The Tribunal imposed upon him, because of his position as Prime Minister, a 'continuing responsibility for the care of prisoners and civilian internees'.⁵³

As to the cognitive element, the Tribunal coupled a 'should have known' standard to the duty to act. It held that those superiors who had a duty to secure proper treatment of prisoners⁵⁴ could not be excused when they failed to acquire knowledge of crimes that they should have.⁵⁵ In most cases, however, there was evidence that defendants had *actual* knowledge of atrocities.⁵⁶ For instance the case of Shigetaro, who was acquitted on the grounds that he had neither ordered, authorised nor permitted crimes. Moreover, he had not known of the murders of prisoners in the Pacific.⁵⁷

The Tokyo Judgement is important in that it confirms and endorses the application of superior responsibility to non-military superiors, such as civilian officials and political superiors. Moreover, in relying on the position and duty of the defendants before them, the Tokyo Tribunal stressed the *functional* and *operational* aspect of superior responsibility as constitutive elements of superior responsibility besides the *cognitive* aspect. The one-sided reliance on these two aspects is at the same time the judgement's weak point and has led to some harsh decisions. At times the Tribunal lost sight of reality by ignoring the lack of actual control on the part of some of the defendants. This is regrettable as it is exactly that element that is important in attributing superior responsibility to non-military persons. After all, in the words of Judge Röling,:

Generally speaking, a Tribunal should be very careful in holding civil government officials responsible for the behaviour of the Army in the field.⁵⁸

As we will see later, this statement and the contentious status of the *Hirota* judgement have influenced the present-day debate on non-military/civilian superior responsibility.

⁵³ Tokyo Judgement in Friedman (1972), Vol. II, p. 1154.

⁵⁴ 1) members of the government, 2) military or naval officers in command of formations having prisoners in their possession, 3) Officials in those departments which were concerned with the well-being of prisoners, 4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners. Tokyo Judgement in Friedman (1972), Vol. II, p. 1038.

⁵⁵ Ibidem, p. 1039.

⁵⁶ See also Lippman (2000), pp. 145-147.

⁵⁷ Tokyo Judgement in Friedman (1972), Vol. II, pp. 1149-1150. See Lippman (2000), p. 146.

⁵⁸ Ibidem, p. 1127.

6. THE UNITED NATIONS WAR CRIMES COMMISSION

In addition to Nuremberg and Tokyo, the Allied military courts before which lower level superiors stood trial, and whose judgements are documented by the United Nations War Crimes Commission (UNWCC), based convictions on superior responsibility. A British military court referred to it in the case of *Franz Schonfeld et al.* With regard to the defendant Harders, who together with Schonfeld, was charged with the killing of American, Canadian and Royal Air Force personnel in Tilburg, The Netherlands, the Judge Advocate stated that

In English law, a person can be held responsible for the commission of criminal offences committed by others, if he employs them or orders them to act contrary to law. He would, in such circumstances, be criminally responsible for the crimes of his employees whether he was present or not at their commission. Criminal responsibility might also arise, in the case of a person occupying a position of authority, through culpable negligence, for example, if Harders had reasonable grounds for supposing that his men were going to indulge in committing a war crime against their opponents (...) and in fact they did so, and he failed to take all reasonable steps to prevent such an occurrence.⁵⁹

This excerpt demonstrates the search for concepts in domestic law, analogous to superior responsibility. The British court identified the functional and operational element, yet did not identify what cognitive element it required.

In the *Abbaye Ardenne* case before a Canadian military court, the accused, Kurt Meyer was convicted of the killing of prisoners of war by his subordinates on the proposition that he knew of the crimes as they occurred within one hundred meters of his headquarters. Meyer, however, claimed to have been unaware of the killings, yet the proximity of the killings persuaded the panel that he had known of them. The Judge Advocate pointed out that,

Whether the accused (...) tacitly acquiesced in the killing of prisoners, or wilfully failed in his duty as a military commander to prevent, or to take such action as the circumstances required to endeavour to prevent the killing of prisoners, were matters affecting the question of the accused's responsibility.⁶⁰

In the case against *Takashi Sakai* before a Chinese court, the defendant, a commander of the Japanese forces, was convicted of inciting and/or permitting his troops to engage in atrocities. Sakai's argument that he had not known of the acts of his subordinates was rejected with the argument that it 'is an accepted principle' that 'a field commander must hold himself responsible for the discipline of his subordinates'.⁶¹

In the *Masao* case, the *Yamashita* precedent was followed. Masao, a Japanese commander in Borneo, was held responsible for the ill-treatment and killing of

⁵⁹ UNWCC, Vol. XI, pp. 70-71.

⁶⁰ UNWCC, Vol. IV, p. 108.

⁶¹ UNWCC, Vol. XIV, p. 7.

American and British prisoners who were evacuated by his subordinates in an awful state, and made to march sixty-five miles. Many perished and those who survived were shot. Masao claimed ignorance of the killings as the allied invasions had cut him off from his subordinates. The military panel barred Masao's claim of unawareness by pointing to his affirmative duty to do everything within his power to protect the prisoners.⁶²

The above demonstrates that superior responsibility was a ground for conviction in the cases compiled by the UNWCC.⁶³ Allied Courts were willing to hold individuals responsible for the failure to act while they had an active duty to intervene. Superior responsibility was based on jurisprudence emanating from other war crimes courts, or from non-military municipal law.

7. THE MEDINA CASE

The Vietnam War produced interesting jurisprudence on superior responsibility.⁶⁴ The trials that ensued from the enquiries into the *My Lai* massacre are of particular interest. In 1973, First Lieutenant William Calley was convicted of the premeditated murder of Vietnamese civilians in 1968.⁶⁵ The US Court of Military Appeal determined that Calley had directed and had personally participated in the killing of men, women, and children who were in the custody of armed soldiers under Calley's command. Captain Ernest Medina, Calley's company commander, was prosecuted for involuntary manslaughter of one hundred human beings.⁶⁶ With regard to the question whether he, as a commander, was personally responsible for the massacre, the *Yamashita* standard was ignored and a more limited test was applied. Judge Kenneth Howard instructed the jury as follows:

Furthermore, a commander is also responsible if he has *actual* knowledge that troops or other persons subject to his control are in the process of committing or are about to commit war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war.⁶⁷

The Judge made it clear that mere presence at the scene would not suffice if the defendant had no knowledge of the crimes. He further instructed the jury that

While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities.⁶⁸

⁶² UNWCC, Vol. XI, p. 59.

⁶³ For an overview, see Ambos (2002), pp. 147-150.

⁶⁴ See further: W.G. Eckhardt, 'Command Criminal Responsibility: A plea for a workable standard', 97 *MLR* (1982), p. 11 *et seq.*; Lippman (2000), pp. 152-155; J.J. Paust, 'My Lai and Vietnam: Myths and Leader Responsibility', 59 *MLR* (1972), p. 99 *et seq.*

⁶⁵ *United States v. William Calley*, 46 CMR 1131 (1971), affirmed 48 CMR 19 (1973).

⁶⁶ See also Lippman (2000), p. 154.

⁶⁷ *Medina Case* in Friedman (1972), Vol. II, p. 1732.

⁶⁸ *Ibidem*.

Medina was acquitted because of lack of knowledge. Bearing in mind the *Yamashita* ruling, the outcome of the *Medina* case is surprising, especially when we take a closer look at the facts of the two cases: Medina was present at the scene of the crimes, while Yamashita had been cut off from communication with his troops. With that in mind, one can understand Professor Clark's observation, that it was 'hard to avoid the feeling that there is a certain amount of hypocrisy lurking somewhere'.⁶⁹ According to Crowe Judge Howard's interpretation of superior responsibility was inconsistent with the U.S. Army manual that applied a 'should have knowledge' test.⁷⁰ The strict interpretation of the knowledge standard in *Medina* has been interpreted as an expression of sympathy for American combatants.⁷¹ The protective attitude of the American military with regard to those subjected to the My Lai inquiries is confirmed by the fact that no high-profile superiors have been charged and brought to trial for having failed to supervise the operation. Court-martial charges against General Koster, commanding officer of the unit that launched the My Lai operation, were replaced by administrative penalties.⁷²

8. THE KAHAN COMMISSION

The concept of superior responsibility played a role in the investigations into the massacres at the Palestinian refugee camps Sabra and Shatila in Lebanon in 1982. To prevent an escalation of violence after the assassination of the Lebanese Christian Phalangist leader Bashir Jemayal, the Israelis, rather than risk their own troops, authorised Phalangist forces to enter the Sabra and Shatila refugee camps in order to discover and detain Palestinian guerrillas. The leaders of Israel were aware of the Phalangist desire for revenge and cautioned the Phalangist Christians to respect the civilian inhabitants. It was to no avail. The Phalangist groups led a barbaric slaughter and killed between seven and eight hundred Muslims.⁷³

A government commission, headed by the President of the Israeli Supreme Court Kahan had the task of enquiring into the matter and finding out who amongst the political and military leadership was responsible for this tragic error of judgement and failure to put an end to the massacre.⁷⁴ The Commission blamed Prime Minister Begin for having relied on calming reports and for not continuing to monitor.⁷⁵ The findings with regard to Defence Minister Ariel Sharon are of interest in that the Commission held him liable for not having *anticipated* the slaughter:

⁶⁹ Lippman (2000), pp. 153-154.

⁷⁰ C.N. Crowe, 'Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution', 29 *Univ. of Richmond LR* (1994), pp. 223-224.

⁷¹ Crowe (1994), p. 224; Lippman (2000), p. 154.

⁷² Lippman, (2000), p. 154.

⁷³ Lippman (2000), p. 156; Green (1995), p. 361 *et seq.*

⁷⁴ *Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut* (7 February 1983), 22 *ILM* 473 (1983).

⁷⁵ *Ibidem*, p. 501.

It is true that no clear warning was provided by military intelligence or the Mossad about what might happen if the Phalangist forces entered the camps (...) But...even without such warning, it is impossible to justify the Minister of Defense's disregard of the danger of the massacre (...) [There was] the widespread knowledge regarding the Phalangists' combat ethics, their feelings of hatred toward the Palestinians, and their leaders' plans for the future of the Palestinians when said leaders would assume power (...) In the circumstances that prevailed after [the] assassination, no prophetic powers were required to know that concrete danger of acts of slaughter existed.⁷⁶

The Commission further held that it had been Sharon's duty to *prevent* the entry of the Phalangist forces.⁷⁷ The Chief of Staff in the Defence Ministry was held responsible for having *approved* the entry of Phalangist troops without taking precautionary measures with regard to the Palestinian inhabitants.⁷⁸ Foreign Minister Shamir was held responsible for having ignored a statement from a fellow minister on the danger posed by the Phalangist forces. He was found 'guilty' because of his inaction.⁷⁹

The Kahan commission was not a criminal court, but its findings can be regarded a further affirmation of the doctrine of superior responsibility. Of interest are its findings on the superior responsibility of government ministers. Responsibility was attributed to both military and government officials in an equal manner. The Commission's reliance on a failure to anticipate coupled with an affirmative duty to monitor and to control established a gross negligence standard for superior responsibility. Actual knowledge of the crimes was not required to generate superior responsibility. This was particularly clear in respect of Begin. There was no evidence that he knew of the slaughter or that he had deliberately disregarded information.

The findings of the Kahan Commission remind us of the broad interpretation of 'ordering' adopted by the ICTY Trial Chamber in the *Blaškić* case.⁸⁰ General Blaškić was held criminally responsible for crimes committed by his subordinates upon his orders, while he had not explicitly ordered these crimes. The Trial Chamber ruled that he must have foreseen and accepted the crimes as likely consequences of his order because of ethnic tension in the field of operation. A *dolus eventualis* standard was applied as the requisite mental element of 'ordering'. The difference between the findings of the Kahan Commission and the *Blaškić* judgement lies in their point of departure. The Kahan Commission departed from the premise that the 'accused' were responsible for their *failure to act*, while the ICTY Trial Chamber held that Blaškić was responsible for his positive *act of ordering*.

⁷⁶ Ibidem, pp. 501-502.

⁷⁷ Ibidem, p. 502.

⁷⁸ Ibidem, pp. 505-507.

⁷⁹ Ibidem, p. 519.

⁸⁰ See Chapter 2, para. 7(b).

9. CONCLUSION

In Second World War case law the first contours were drawn of a modern concept of superior responsibility. In the trials that were conducted in the aftermath of the war, the concept was broadened to apply to non-military superiors as well. In the *Pohl* and *Medical* cases the concept was relied upon in attributing criminal responsibility thus developing it into 'superior' rather than 'command' responsibility. The Tokyo Tribunal and the Kahan Commission endorsed this extension of superior responsibility to non-military superiors by applying it to senior government officials such as ministers. The extension of superior responsibility to non-military superiors has not resulted in a narrower standard for non-military superiors. If anything, the above survey gives examples of instances where military superiors profited from a more lenient standard than non-military superiors.

The skeleton concept of superior responsibility that arises from the disparate digest of Second World War consists of three aspects: i) a *functional* aspect; a superior's position must entail a duty to act, ii) a *cognitive* aspect; a superior must have known, or should have known of the crimes, and iii) an *operational* aspect; a superior must have failed to act. The disparity amongst the above-discussed cases stems from a differing interpretation of the three aspects, and from an imbalance in weighing these aspects when attributing responsibility. This is, for instance, the case with the knowledge standard, which ranges from a 'should have known' standard in the *Hostages* case to a narrow actual knowledge requirement in the *Medina* case. Moreover, a one-sided reliance on the functional and operational elements resulted in wide variations in the scope of superior responsibility. Consider, for instance, the differing approach in the *Hirota* case and the *Medina* judgement.

It is submitted that, in order to make the concept of superior responsibility a solid, sophisticated and coherent concept of criminal responsibility in international law, the above-mentioned three elements should be seen as *cumulative* in application and *equal* in weight. This way, an unrealistic attribution of criminal responsibility through superior responsibility, can be avoided.

CHAPTER 4

SUPERIOR RESPONSIBILITY AT THE TRIBUNALS AND THE ICC

1. INTRODUCTION

The concept of superior responsibility has been developed and critically assessed since the Second World War.⁸¹ It owes much of its recent development to the *ad hoc* Tribunals that have used the concept to try military, and political leaders alleged to have directed and orchestrated criminal acts. The ICC has drawn from this jurisprudence and developed it further, as evidenced by Article 28 of its Statute. As will be made clear below, this development is generally an improvement. Before embarking on a comparison between the jurisprudence of the *ad hoc* Tribunals on superior responsibility with the superior responsibility concept of the ICC Statute, we should analyse its development in treaty law.

2. CODIFICATION

(a) Prior to the ICC Statute

The first treaty to explicitly address the doctrine of superior responsibility was the First 1977 Additional Protocol to the Geneva Conventions (AP I). By incriminating a failure to act, the Protocol complements the four Conventions that merely penalise 'active superior responsibility', *i.e.* responsibility for ordering crimes. The grave breaches system applies only to persons 'committing or ordering to be committed'.⁸²

⁸¹ Ambos in Cassese *et al.* (2002a), pp. 823-872; Bantekas (2002) pp. 67-124; I. Bantekas (1999), pp. 573-595; Eckhardt (1982), pp. 1-34; W.J. Fenrick, 'Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia', 6 *Duke J of Comp. & Int. L* (1995), pp. 103-125; M.F. Tinta, 'Commanders on Trial: The Blaškić Case and the Doctrine of Command Responsibility under International Law', *NILR* (2000), pp. 293-322; Green, (1995), pp. 319-371; L.C. Green, 'Superior Orders and Command Responsibility', 27 *Can.YIL* (1989); B.B. Jia, 'The Doctrine of Command Responsibility: Current Problems', 3 *YIHL* (2000), pp. 131-165; K.M.F. Keith, 'The Mens Rea of Superior Responsibility as Developed by ICTY Jurisprudence', 14 *LJIL* (2001), pp. 617-634; Lippman (2001a), pp. 1-93; Lippman (2000), pp. 139-170; Parks (1973), pp. 1-104; Vetter (2000), pp. 89-143; H.G. van der Wilt, 'The Duty to Know: Enkele beschouwingen over het leerstuk van command responsibility', in G.J.M. Corstens and M.S. Groenhuijsen (eds.), *Rede en Recht*, Deventer, (2000), pp. 123-135; T. Wu & Y. Kang, 'Criminal Liability for the Actions of Subordinates – the Doctrine of Command Responsibility and its Analogues in United States Law', *Harvard ILJ* (1997), pp. 272-297; A. Zahar, 'Command Responsibility of Civilian Superiors for Genocide', 14 *LJIL* (2001) pp. 591-616.

The only other treaty provision that *prohibits* (but does not necessarily penalise) a failure to act and qualifies as a serious breach is Article 13 of the Third Geneva Convention, on Prisoners of War:

Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the present Convention.

In drawing up Article 86 of the AP I, the Diplomatic Conference attempted to codify existing customary international law on superior responsibility. This was a difficult task because of the lack of uniformity in doctrine and case law on superior responsibility. Be that as it may, the provision can be merited for having incorporated the fundamental principles of superior responsibility.

Article 86 of the AP I is entitled ‘failure to act’ and provides

Article 86 of Additional Protocol I (Failure to Act):

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Paragraph (2) encapsulates the concept of superior responsibility. The Commentary on the provision stipulates that three conditions must be fulfilled for a superior to be held responsible for an omission to prevent or repress subordinates’ crimes:

- a) the superior concerned must be the superior of that subordinate (‘his superiors’);
- b) he knew, or had information which should have enabled him to conclude that a breach was being committed or was going to be committed;
- c) he did not take the measures within his power to prevent it.⁸³

These provisions were termed earlier as the functional element (a); the cognitive element (b), and the operational element (c). The superior responsibility provisions in the Statutes of the ICTY and ICTR clearly bear the signs of Article 86(2) of the AP I. The three conditions, which have been extracted from post-World War II case law on superior responsibility, have been identified and applied by the *ad hoc* Tribunals as well. What should be underlined at this point is that Article 86(2) of the AP I relates to *subordinate* responsibility as well. The clause ‘committed by a subordinate’

⁸² See Article 50 GC I and II, Article 129 GC III, and Article 146 GC IV.

⁸³ Pilloud *et al.* (1987), para. 3538, pp. 1012-1013.

shows that Article 86(2) of the AP I explicitly refers to a breach of the Conventions or the AP I by a subordinate.⁸⁴

Responsibility for a breach consisting of a 'failure to act' can only be established if the person had a duty to act.⁸⁵ Article 86(2) of the AP I should, therefore, be read in conjunction with Article 87 of the AP I on the duty of a commander to prevent the commission of crimes by his subordinates:

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Subsequent (draft) provisions on superior responsibility have been drawn up in the context of the ILC, the 'Association International de Droit Pénal' (AIDP), and the ICTY/ICTR Statutes. These provisions were all based on Article 86(2) of the AP I and feature the three conditions and the format of parallel responsibility of the subordinate. To illustrate the differences between the various articles and compare them with their source: Article 86(2) of the AP I, the subsequent provisions are listed below in chronological order. The italicised parts refer to the parts where the provisions differ.

Article 12 of the ILC Draft Code 1991:

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or *had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime* and if they did not take all *feasible* measures within their power to prevent or repress the crime.⁸⁶

Article 6/7(3) of the ICTR/ICTY Statute:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he *knew or had reason to know* that the subordinate *was about to commit such acts or had done so*

⁸⁴ See also Ambos in Cassese *et al.* (2002a), p. 838.

⁸⁵ Pilloud *et al.* (1987), para. 3537, p. 1010.

⁸⁶ Article 12 of the ILC Draft Code 1991, in *YILC* (1991), Vol. II, Part 2, pp. 94-97.

and the superior failed to take the *necessary and reasonable* measures to prevent such acts or to punish the perpetrators thereof.

The unofficial (updated) 1994 Siracusa Draft:

The fact that a crime under this Statute was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or *had reason to know*, under the *circumstances at the time*, that the subordinate *was committing or was going to commit such a crime* and if they did not take all *necessary* measures within their power to prevent or repress the crime.⁸⁷

Article 6 of 1996 ILC Draft Code:

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or *had reason to know*, in the *circumstances at the time*, that the subordinate *was committing or was going to commit* such a crime and if they did not take all *necessary* measures within their power to prevent or repress the crime.⁸⁸

The different *cognitive*, or ‘knowledge’ formulas of the above superior responsibility provisions do not create different standards in substance. The ICTY, which features ‘had reason to know’ in its Statute, incorporates the 1991 ILC knowledge standard (‘had information enabling him to conclude’), which derives from Article 86(2) of the AP I, in its jurisprudence. It is noteworthy that the 1991 ILC clause leaves out the ‘should have’ part of Article 86(2) of the AP I and adopts a more neutral wording. Be that as it may, both standards are now incorporated in ‘had reason to know’ through judicial interpretation. In *Čelebići*, the Trial Chamber interpreted ‘had reason to know’ as requiring that a superior had ‘information...available to him which would provide notice of offences committed by his subordinates’.⁸⁹ The ILC itself stated that the changes did not imply substantive differences:

The phrase ‘had reason to know’ is taken from the statutes of the *ad hoc* tribunals and should be understood as having the same meaning as the phrase ‘had information enabling them to conclude’ which is used in Additional Protocol I.⁹⁰

As to the *operational* aspect, while the ‘feasible measures’ of Article 86(2) of the AP I are mentioned in the 1991 ILC Draft provision, the ICTY/R clause requires ‘necessary and reasonable measures’. The latter does not seem to be inherently different from ‘feasible’.⁹¹ This is because ‘feasible’ in Article 86(2) needs to be read

⁸⁷ AIDP/MPI (Max Planck Institute), *1994 ILC Draft Statute for an International Criminal Court with suggested modifications*, Siracusa/Freiburg/Chicago, 15 March 1996 (Updated Siracusa Draft/Siracusa Draft II), in Ambos (2002), p. 943 (Annex C). See also <<http://www.iuscrim.mpg.de>>

⁸⁸ Article 6 of the 1996 ILC Draft Code.

⁸⁹ *Čelebići* Judgement, para. 393.

⁹⁰ ILC Commentary to 1996 ILC Draft Code, Article 2, para. 5.

in conjunction with 'to initiate such steps as are necessary to prevent such violations' in Article 87(3) on the duty of commanders.⁹² It can be taken to limit a superior's duty to take measures that are realistic in the circumstances of the time.⁹³ The clause 'necessary measures' in the Siracusa Draft and the 1996 ILC provision was interpreted by the ILC as '[t]he *legal* competence to take measures to prevent or repress the crime and the material possibility to take such measures' (italics added, *EvS*). The Trial Chamber in *Čelebići* did away with this interpretation:

The Trial Chamber does not adopt the position taken by the ILC on this point, and finds that the lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior.⁹⁴

Finally, attention should be drawn to the *temporal* aspect of the above provisions. It is noteworthy that the ICTR/Y superior responsibility provision lacks the clause 'in the circumstances at the time'. This formula is part of the two ILC Draft provisions and the Siracusa Draft. Its added value lies in creating an 'individualising' standard, thus requiring more than a mere abstract evaluation of the context in which the crimes were committed. The lack of this 'temporal clause', however, is not a shortcoming at the Tribunals, as the 'circumstances at the time' clause has been accepted at the ICTY in its jurisprudence. The Trial Chamber in *Čelebići* held that

It is the view of the Trial Chamber that any evaluation of the action taken by a superior to determine whether this duty has been met is inextricably linked to the facts of each particular situation that any attempt to formulate a general standard *in abstracto* would not be meaningful.⁹⁵

The emphasis that is put in ICTY and ICTR jurisprudence on 'effective control' and 'the material ability' to prevent or punish further requires an inquiry *in concreto*.

A second temporal aspect relates to the crimes committed by the subordinates. In Article 6/7(3) ICTR/Y Statutes, a superior has a duty to intervene when the 'subordinate was about to commit such acts *or had done so*'. Article 86(2) of the AP I is reiterated in the ILC and Siracusa Draft provisions; a superior has to intervene when the subordinate 'was committing or was going to commit such a breach'. Unlike the other provisions, which refer to the situation preceding and during the commission of the crimes, the ICTY/R Statute extends a superior's duty to intervening in the post-crime situation. In *Ambos*' words,

⁹¹ This was also the view of the prosecution at the ICTY. See ICTY, *Prosecutor v. Kordić and Cerkez*, Prosecution Final Brief, Annex 4, Case No.IT-95-14-PT/2-T, 26, paras. 109-110.

⁹² Pilloud *et al.* (1987), para. 3548.

⁹³ *Ibidem*, para. 3562.

⁹⁴ *Čelebići* Judgement, para. 395.

⁹⁵ *Ibidem*, para. 394.

[t]his change affects the *actus reus* of the offence since the way the superior is supposed to react to a crime depends on the time of its commission; once the crime is committed the issue becomes one of failure to punish.⁹⁶

As will appear below when discussing the operational element in the case law of the *ad hoc* Tribunals, this temporal extension can have the undesirable result that a superior can be held liable for crimes committed before he assumed command.

Article 86(2) of the AP I, taken together with Article 87 of the AP I, constitutes the basis of the modern concept of superior responsibility. Its substance and scope is uncontested, although the cognitive aspect leaves room for differing interpretations. It is, therefore, not surprising that subsequent provisions encapsulating superior responsibility have drawn heavily on Article 86(2) of the AP I. The above comparison demonstrates that the difference between the formulas relating to the *cognitive* and *operational* aspects of superior responsibility do not concern its substance. Moreover, the differences have been 'straightened out' by judicial interpretation by the *ad hoc* Tribunals. The only remaining difference involves the *temporal* aspect. The *ad hoc* Tribunals wield a superior responsibility concept that extends liability to the situation *post-crime* by penalising a failure to punish.

(b) Article 28 of the ICC Statute

The most recent superior responsibility provision is Article 28 of the ICC Statute. Comparing Article 28 ICC Statute with earlier codifications of superior responsibility shows the 'novelties' of this provision and reveals some conspicuous points, for example, the distinction between the responsibility of (*de facto*) military commanders in paragraph (a) and non-military superiors in paragraph (b). This is new and will be discussed in its different aspects below.

It is noteworthy that the 'should have known' standard, which is not part of the law of the *ad hoc* Tribunals, now features in paragraph 28(a)(i) of the ICC Statute. This effectively means that negligence can generate military and *quasi* military superior responsibility. The high threshold for non-military superiors, 'knew or consciously disregarded information which clearly indicated', contrasts with the negligence standard that applies to (*quasi*) military superiors. Delegations in Rome were divided in adopting two distinct mental standards for military and non-military superiors. The delegates from Argentina, Canada, and Germany argued in favour of a standard of negligence for both military and non-military superiors. The United States delegation, on the other hand, opposed a uniform cognitive standard and argued in favour of two distinct standards. The opposing positions agreed upon a compromise formula replacing the proposed negligence standard for non-military superiors to: 'consciously disregarded information which should have (clearly) enabled him or her to conclude that in the circumstances of the time that the subordinates

⁹⁶ Ambos in Cassese *et al.* (2002a), p. 841.

were committing or about to commit a crime'.⁹⁷ In a later version, this standard was changed to the current clause.

As far as the objective element or *actus reus* is concerned, Article 28 contains a few new elements compared to earlier codification.⁹⁸

- (1) With respect to 'superior', this term is specified in paragraph (a) as a 'military commander or person effectively acting' and not specified in paragraph (b). The latter paragraph provides for a 'negative' definition of superior by stipulating that it applies to 'superior and subordinate relationships not described in paragraph (a)' thus making it a 'residual' concept of superior.
- (2) While earlier provisions described the superior-subordinate link by referring to *his* superior, Article 28 refers to forces or subordinates under *his or her* effective command, or authority and control. This seems to be better suited to cover situations of indirect subordination.
- (3) Command and control, or authority and control, must be 'effective'. This requirement stems from the jurisprudence of the *ad hoc* Tribunals and constitutes the basis of any superior-subordinate relationship that goes beyond *de iure* standards.
- (4) The crimes committed by subordinates are *a result of* the superior's failure to exercise proper control over them. This element denotes a causal requirement
- (5) The countermeasures are threefold: prevent, repress, or submit to the proper authorities. 'Repress' is used instead of 'punish' at the *ad hoc* Tribunals and stems from Article 86 of the AP I while the 'submit-alternative' was not part of earlier codifications. Like the ICTY and ICTR, superior responsibility is extended post-crime.
- (6) Paragraph 28(b)(ii) seems to create an additional requirement for non-military superior responsibility: 'The crimes concerned activities that were within the effective responsibility and control of the superior'. Its status and scope will be discussed in more detail below.

Since Article 28 ICC Statute needs to be understood in the light of the jurisprudence of the *ad hoc* Tribunals, we will now turn to an analysis of superior responsibility in the jurisprudence of the *ad hoc* Tribunals.

3. AD HOC TRIBUNALS

The case against *Delalić et al.*, also referred to as the *Čelebići* case, resulted in the first solid decision on superior responsibility by an international tribunal after Nuremberg and Tokyo.⁹⁹ It was also the first superior responsibility case before the

⁹⁷ Ambos in Cassese *et al.* (2002a), p. 849.

⁹⁸ Ibidem, pp. 849-850.

⁹⁹ For comments on the *Čelebići* case see, Bantekas, (1999), p. 573 *et seq.*; Tinta (2000), p. 293 *et seq.*; Lippman (2000), p. 139 *et seq.*; Sunga (2000), p. 105 *et seq.*; Commentary on the *Čelebići* Judgment by Harmen van der Wilt in Klip/Sluiter, ALC-III-669-683.

ICTY. Until then the accused were charged and convicted for direct participation under Article 7(1) of the Statute. The Trial Chamber in *Čelebići* formulated the three criteria as follows:

- (i) the existence of a superior-subordinate relationship (functional aspect);
- (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed (cognitive aspect); and
- (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof (operational aspect).¹⁰⁰

These criteria reflect the three aspects of the concept of superior responsibility established in post-Second World War case law.

Below, each criterion will be discussed as it was interpreted in the case law of both *ad hoc* Tribunals. The same format is utilised in paragraph with regard to Article 28 of the ICC Statute.

(i) FUNCTIONAL ELEMENT: SUPERIOR-SUBORDINATE RELATIONSHIP

(a) **Superior**

In the *Čelebići* case the Trial Chamber held that from the text of Article 7(3) of its Statute it could be taken that the concept of 'superior' is not restricted to military superiors. The use of the term 'superior' and the affirmation of individual criminal responsibility for Heads of States or responsible Government officials in Article 7(2) ICTY Statute, was found to indicate that superior responsibility extends beyond military commanders to political leaders and other non-military superiors in positions of authority.¹⁰¹ This reasoning can already be found in *Prosecutor v. Milan Martić*, where an ICTY Trial Chamber held that

[t]he Tribunal has particularly valid grounds for exercising its jurisdiction over persons who, through their position of political or military authority, are able to order the commission of crimes falling within its competence *ratione materiae* or who knowingly refrain from preventing or punishing the perpetrators of such crimes.¹⁰²

In *Karadžić and Mladić*, the Trial Chamber contended that criminal responsibility should 'converge upon a political responsibility in the highest sense of the term'.¹⁰³

¹⁰⁰ *Čelebići* Judgement, para. 346, confirmed in appeal; ICTY, *Prosecutor v. Delalić et al.*, Judgement, Case No. IT-96-21-A, A.Ch., 20 February 2001 ('*Čelebići* Appeal Judgement'), paras. 189-198, 225-226, 238-239, 256, 263;. The principles developed in *Čelebići* were reiterated and endorsed in the *Aleksovski* judgement, and confirmed in the *Aleksovski* Appeal Judgement, ICTY, *Prosecutor v. Zlatko Aleksovski*, Judgement, Case No. IT-95-14/1-A, 24 March 2000, para. 72.

¹⁰¹ *Čelebići* Judgement, para. 356; *Aleksovski* Appeal Judgement, para. 76.

¹⁰² ICTY, *Prosecutor v. Milan Martić*, Rule 61 Decision, 8 March 1996, IT-95-11-R61 (*Martić* Decision).

In supporting the argument that the concept of superiors encompasses non-military superiors as well, the Judges in *Čelebići* pointed to the 'customary law doctrine' of command responsibility. Referring to post-World War II cases, such as *Hirota* and *Pohl*, the Trial Chamber concluded that the applicability of superior responsibility extends to individuals in non-military positions of authority.¹⁰⁴

The reports of the atrocities committed in Rwanda indicate that high-level officials of the former government of Rwanda, local politicians like 'prefets' and 'bourgmestres', and even influential businessman were involved in the genocide and contributed to the atrocities.¹⁰⁵ Any such individual can be called to account before the Rwanda Tribunal notwithstanding his or her official position. Article 6(2) of the ICTR Statute reproduces the corresponding provision contained in Article 7(2) of the ICTY Statute rejecting the immunity from criminal liability of people in official positions. The Trial Chamber in the case of the bourgmestre *Akayesu*, however, held that in the case of civilian superiors, the principle of command responsibility as laid down in 6(3) ICTR Statute remains 'contentious'.¹⁰⁶ This statement was based on the dissenting opinion of Judge Röling in the *Hirota* decision of the Tokyo Tribunal. Bearing in mind the particulars of the *Hirota* trial discussed above, the Trial Chamber's observation is understandable.

The initial hesitance at the ICTR to rely on superior responsibility for non-military superiors disappeared in subsequent trials. The *Kayishema and Ruzindana* judgment, in which a prefect and a businessman stood trial, was delivered a year after *Akayesu* and incorporated the *Čelebići* decision. The ICTR Trial Chamber was of the view that 'superior' encompasses political leaders and other civilian superiors, as long as a civilian/non-military superior holds a position of authority.¹⁰⁷ Unlike the Trial Chamber in *Akayesu*, it held that 'the application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one'.¹⁰⁸ It further emphasised that the crucial question was not the civilian status of the accused, but the degree of authority exercised by the accused over his subordinates. In *Musema*, the case of a director of a tea factory, who was held responsible for the genocidal acts of his employees, the Trial Chamber subscribed to this position, but asserted that authority should be assessed on a case-by-case basis.¹⁰⁹

¹⁰³ ICTY, *Prosecutor v. Karadžić and Mladić*, Review of Indictment Pursuant to Rule 61, Case No. IT-95-5-R61, IT-95-18-R61, T.Ch. I, 11 July 1996, para. 41.

¹⁰⁴ *Čelebići* Judgement, paras. 364-378.

¹⁰⁵ Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), U.N. Doc. S/1994/1405 (9 December 1994), in V. Morris and M.P. Scharf, *The International Criminal Tribunal for Rwanda*, New York (1998), Vol. II. pp. 150-175.

¹⁰⁶ *Akayesu* Judgement, para. 490.

¹⁰⁷ *Kayishema and Ruzindana* Judgment, para. 16.

¹⁰⁸ It points to the guilty pleas of the former Rwandan Prime Minister, Jean Kambanda, and a prominent local civilian, Serushago, in which both acknowledged responsibility under Article 6(3) of the ICTR Statute, *Kambanda* Judgement, ICTR, *Prosecutor v. Omar Serushago*, Judgement and Sentence, Case No. ICTR 98-39-S, T. Ch. I, 14 December 1998 (Serushago Judgement); *Kayishema and Ruzindana*, Judgment, para. 213.

¹⁰⁹ *Musema* Judgement, para. 135. See also *Akayesu* Judgement, para. 491: '[i]t is appropriate to as-

As the Appeals Chamber in *Čelebići* endorsed the Trial Chamber's ruling on the application of command responsibility to civilian superiors, it is clear that the principle of superior responsibility under the Statutes of the two *ad hoc* Tribunals extends to military and non-military superiors.¹¹⁰

(b) Command

According to an important military source, command is 'the authority vested in an individual of the armed forces for the direction, co-ordination, and control of military forces'.¹¹¹ Such authority can be acquired *de iure* or *de facto*. This was held by the Trial Chamber in *Čelebići*:

[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. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's *de facto*, as well as *de iure*, position as a commander.¹¹²

The responsibility of authorities not endowed with *de iure* command positions can be established *de facto*. *De facto* superiors may incur responsibility on the basis of their *de facto* positions, not because of a formal appointment. In the former Yugoslavia, where previously existing formal structures were absent and where, during an interim period, structures of *de iure* control and command did not exist and were improvised, *de facto* command was the rule rather than the exception. To map the power structures and the responsibilities associated with *de facto* command requires an analysis of the actual situation: the distribution of tasks, powers of influence, and the capacity to issue orders.

De facto and *de iure* command can be combined in one and the same person. In the case of *Akayesu*, the ICTR held that the latter had *de facto* power exceeding his *de iure* power. As bourgmestre, Akayesu was the most powerful figure in the commune. His actual authority in the area went beyond which was conferred upon him by law.¹¹³

sess on a case by case basis the power of authority actually devolved upon the accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof'.

¹¹⁰ *Čelebići* Appeal Judgement, para. 195. See also *Aleksovski* Appeal Judgement, para. 76.

¹¹¹ *NATO Glossary of Terms and Organisations*, AAP-6(U), 1995.

¹¹² *Čelebići*, para. 370 endorsed in appeal, *Čelebići* Appeal Judgement, paras. 205-206.

¹¹³ *Akayesu* Judgement, para. 76.

(c) Types of command

The U.S. military tribunal in the *High Command* case suggested that there is a difference between field command and occupation command.¹¹⁴ This distinction corresponds with the distinction Bantekas makes between operational command and executive or 'occupation command'. He submits that while an operational commander is usually in charge of large-scale military operations, an executive commander is 'vested by the occupying state with supreme governing authority in the occupied territory'.¹¹⁵ He exercises absolute civilian and military command over the occupied territory. This expands his scope of responsibility far beyond that of an operational commander, who is 'only' responsible for the people under his command and control. Subordination or rank difference is not relevant in generating superior responsibility of executive commanders. While an operational commander is normally only able to exercise authority over those under his direct command and control, an occupation commander has a duty to prevent or punish crimes that involve any individual and armed force within his area of command.¹¹⁶

Yamashita was an operational commander who was held responsible for the acts of troops under his command but beyond his control. The fact that he was isolated from his troops and that there was a lack of adequate communication between him and his men made his conviction contentious. More recent examples of operational commanders charged with crimes committed by their subordinates are the *Blaškić* and *Krstić* cases before the ICTY. The *High Command* case is an example of an occupation executive commander. Von List was held responsible for having failed to prevent atrocities committed within his area of command as he had failed to take notice of available information on the crimes. Occupation command requires an effective reporting system that ensures a constant delivery of up-to-date information to the commander. In general, occupation commanders are not vested with operational tasks. This was not the case, however, with General Von Leeb in the *High Command* case.¹¹⁷ He exercised both operational and executive functions. This dual function made implementing a reporting system even more pertinent.

A third type of 'command', which is really a variance of occupation command, has been developed in international treaties and case law and concerns the care of prisoners and internees.¹¹⁸ It is established military practice that POWs and civilian internees should be taken care of and should be protected from ill treatment by the Detaining Powers.¹¹⁹ This duty involves both government and military officials. Case law, in particular the Tokyo Judgement, has shown that, apart from government officials entrusted with prisoner issues, cabinet members who were not directly

¹¹⁴ See Chapter 3 para. 4.

¹¹⁵ Bantekas, (2002), p. 102

¹¹⁶ Ibidem, p. 103.

¹¹⁷ TWC, Vol. XI, p. 544.

¹¹⁸ Bantekas (2002), pp. 105-108.

¹¹⁹ See GC III, Articles 12-16.

responsible for prisoner welfare have also been held accountable for ill-treatment of POWs.¹²⁰ A similar reasoning was applied by the ICTR in the *Kambanda* case, in which he was held responsible as Prime Minister for inaction to repress massacres although he had been informed about them.¹²¹ To avoid unreasonable attribution of responsibility on the basis of ‘overhead responsibility’, actual capacity to act and knowledge should be taken into account.

The authority of POW camp commanders extends over the institution and its personnel in their duty to, on the one hand, ‘run the camp’ and, on the other hand, safeguard the prisoners or internees’ well-being according to international standards. With Bantekas this author agrees that the ICTY erred in the *Aleksovski* case where it held that a POW camp commander was not responsible for ill treatment of internees by auxiliary HVO troops as they were not subordinate to the camp commander.¹²² After all,

For the purposes of superior responsibility, it is irrelevant whether individuals committing abuses against prisoners are not directly subordinate to the camp commander. POW camp commanders are responsible for infringements of prisoner rights, whether this takes place within the camp or outside of it.¹²³

Examples of this type of occupation or ‘executive’ command can further be found in the *Čelebići*, *Kvočka*, and *Krnojelac* cases. As with government officials, the actual capacity to intervene, and the knowledge of crimes, play an important role in establishing whether camp commanders can be held accountable for crimes committed by their subordinates. Camp commanders have a duty of care and are, therefore, under an obligation to do everything within their power to acquire knowledge and oppose any situation of maltreatment.¹²⁴

It is important at this stage to realise that different types of command do not incur different types of superior responsibility at the *ad hoc* Tribunals, and to a certain extent, this is also true for the ICC.¹²⁵ Whether it is direct or indirect subordination that characterises the relationship between subordinates and superiors, occupation or operational level of command, there is only one type of *criminal* superior responsibility. This is due to an element which already played a role in some of the earlier described Second World War cases and has now become a constituent part of superior responsibility, *i.e.* control. Control is instrumental in establishing a superior’s actual authority over a subordinate and enables the attribution of superior responsi-

¹²⁰ For instance Tojo, Shigemitsu and Hirota See Chapter 5 para. 5 and Tokyo Judgement in Friedman (1972), Vol. II, p. 1029 *et seq.*

¹²¹ *Kambanda* Judgement, para. 39.

¹²² *Aleksovski* Judgement, paras. 106-111, 119.

¹²³ Bantekas (2002), p. 107.

¹²⁴ See Bantekas (2002), pp. 107-108.

¹²⁵ As we will see below in para. 6, this is somewhat different with the ICC.

bility on the basis of one uniform standard. As such, it 'pierces the veil of formalism' and establishes *de facto* relationships incurring responsibility.¹²⁶

(d) Control

Control is defined in the NATO glossary as 'authority exercised by a commander over part of the activities of subordinate organisations, or other organisations not normally under his command, which encompasses the responsibility for implementing orders or directives. All or part of this authority may be transferred or delegated'.¹²⁷ Having control means having *effective* authority over subordinates.¹²⁸ This accords with the ICTY understanding of the concept of control, as shaping the relationships of both direct and indirect subordination that can generate superior responsibility. Control 'requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders'. It governs relationships beyond rank and formal authority.

Firstly, control is particularly relevant in establishing the superior responsibility of those who hold occupation or executive command. In the words of Parks:

It is particularly though not exclusively in occupied territory that this concept of indirect subordination may arise, in contrast with the link of direct subordination which relates the tactical commander to his troops.¹²⁹

And,

[w]here a commander exercises executive power over occupied territory, he is responsible for the acts committed within that area of responsibility regardless of whether a unit is subordinated to his command or not. As the commander bearing executive power, he is charged with responsibility for maintaining peace and order within the area over which his executive authority extends, and the duty of crime prevention rests upon him.¹³⁰

Secondly, control is instrumental in assessing a commander's responsibility for units or organisations not normally under his command. The ICTY confirmed this in the *Blaškić* case.¹³¹ In this case, the defendant was held responsible for the acts of the Military Police as he exercised effective control over them. These troops were put under *Blaškić*' authority, and as he was in the position to impose disciplinary measures on them, he was believed to have had the material power, *i.e.* control, to prevent the Military Police from perpetrating crimes. He was, therefore, considered their superior in the wording of Article 7(3) ICTY Statute.¹³²

¹²⁶ *Čelebići* Judgement, para. 377.

¹²⁷ *NATO Glossary*.

¹²⁸ *Čelebići* Judgement, para. 378, endorsed in *Čelebići* Appeal Judgement, paras. 256 and 265-266.

¹²⁹ *ICRC Commentary* to Article 87 of the AP I.

¹³⁰ See Parks, (1973), p. 82.

¹³¹ *Blaškić*, Judgement, paras. 445, 451, 464.

¹³² *Blaškić*, Judgement, para. 722-725. See also Bantekas (2002), p. 102.

Thirdly, control is the key concept in establishing the scope of *de facto* superior responsibility of non-military superiors. This already appeared in the *Pohl* case, against defendant Mummenthey, a business manager of industries employing concentration camp labour. In *Čelebići*, the Trial Chamber ruled that, in order for the principle of superior responsibility to be applicable to non-military superiors, an element of control is vital:

[t]he doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.¹³³

In the cases of *Kayishema and Ruzindana*,¹³⁴ and *Musema*,¹³⁵ the Trial Chamber adopted the *Čelebići* reasoning that a superior's actual or formal power of control over his subordinates is a determining factor in charging civilians with superior responsibility.

Both Trial Chambers interpreted control as to include 'powers of influence'. In *Kayishema and Ruzindana*, the Trial Chamber held that with regard to non-military superiors – a 'prefet' and a businessman – 'influence' would 'provide a sufficient basis for the imposition of command responsibility'.¹³⁶ This interpretation was applied by the Trial Chamber in the *Musema* case, in which a non-military superior stood trial. The Trial Chamber stated that

The influence at issue in a superior-subordinate command relationship often appears in the form of psychological pressure. This is particularly relevant to the case at bar, insofar as Alfred Musema was a socially and politically prominent person in Gisoivu Commune.¹³⁷

This approach was rejected by the ICTY Appeals Chamber in *Čelebići*. The Appeals Chamber established a threshold point below which persons with authority cease to have actual power of control and as such cannot be qualified superior. Having examined customary law on superior responsibility, the Appeals Chamber ruled that 'sufficient influence' is not an element of command responsibility, and that where influence plays a role in prompting subordinates to commit crimes, for instance, influencing criminal policies by writing them into orders, direct liability through aiding and abetting is more appropriate.¹³⁸ The Appeal Chamber explicitly rejected the statement of the ICTR in *Kayishema and Ruzindana* and with it (implicitly) the *Musema* ruling on this point.¹³⁹

¹³³ *Čelebići* Judgement, paras. 378.

¹³⁴ *Kayishema and Ruzindana* Judgement, para. 217.

¹³⁵ *Musema*, Judgement, para. 135.

¹³⁶ *Kayishema and Ruzindana* Judgement, para 220; *Čelebići* Appeal Judgement, para. 265.

¹³⁷ *Musema* Judgement, para. 140.

¹³⁸ *Čelebići* Appeal Judgement, paras. 258-264, *Kayishema and Ruzindana* Judgement, para. 220.

¹³⁹ *Čelebići* Appeal Judgement, para. 265.

The author fully agrees with the Appeals Chamber's ruling in *Čelebići* that 'substantial influence' is not an element in constructing a person's superior responsibility, not merely because the customary law concept of command responsibility supports this interpretation, as was convincingly demonstrated by the Appeals Chamber, but also for a reason of principle.¹⁴⁰ The nature of the concept of superior responsibility concerns the relationship between superiors and their subordinates. That relationship should be marked by a hierarchy built on elements such as command and control and not by influence. After all, it is this relationship, governed by authority and obedience, which justifies holding a superior liable for subordinate behaviour. Relationships that fall short of the latter type should be construed as participatory responsibility or accomplice liability.

For the same reason, I would argue that control is more than being feared by others or putting psychological pressure on somebody. The *Čelebići* Trial Chamber ruled that fear is not an indication of influence and evidence of control. While the defendant Delić's influence over the prison-camp guards was attributable to their fear of him, it was not regarded as a sign of superior authority, establishing a superior-subordinate relationship. Bantekas, criticised the findings in the *Čelebići* case on this point. To his mind, Delić's influence over the *Čelebići* guards was 'the culmination of his intimidating and overwhelming personality, which enabled him to issue and enforce his own orders, despite his being only second in command'.¹⁴¹ However, in accepting that fear can create a superior-subordinate relationship, Bantekas seems to overlook an essential element of superior responsibility. There needs to be a *duty* to act on the part of the superior when those under his *de facto* or *de iure* command and control commit or are about to commit crimes. In that sense, a superior-subordinate relationship is a two-sided, *i.e.* reciprocal relationship rather than a one-sided relationship based on, for instance, fear. Relationships characterised by psychological pressure can better be dealt with in the context of criminal participation.

In *Čelebići*, the ICTY determined that control is the key element in establishing superior responsibility. By doing this, it continued a line set out already in early post Second World War case law. It gave the element of control the place it deserves in the law on superior responsibility:

The doctrine of command responsibility is ultimately predicated upon the power of a superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. It follows that there is a

¹⁴⁰ In an overview of post-Second World War case law the Appeals Chamber demonstrates that the *Muto* case, which was referred to by the Prosecutor in arguing that substantial influence can generate superior responsibility, is 'outweighed by other authorities that suggested that a position of command in the sense of effective control was necessary' (*Čelebići* Appeal Judgement, para. 265). 'Other authorities' are the *Hostages*, *High Command*, *Roechling* (*U.S. v. Friedrich Flick et al.*, Vol. IX, p. 54 *et seq.*) and *Pohl* cases.

¹⁴¹ Bantekas (2002), p. 88.

threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and accordingly, cannot properly be considered their 'superiors' within the meaning of Article 7(3) of the Statute.¹⁴²

(e) Command and control

Command and control are inseparable. To hold a person liable on the basis of superior responsibility there needs to be proof of both command *and* control. This applies to both *de facto* and *de iure* superiors. As we saw earlier when defining control, command needs to be *exercised* through control. This is illustrated in the following.

Delalić was a 'co-ordinator of operations' and as such liaised between the War Presidency and the military forces. The ICTY Trial Chamber in *Čelebići*, when reacting to the prosecution argument, rejected that there was no evidence of a superior-subordinate relationship and, therefore, found him not responsible under Article 7(3) of the ICTY Statute. Providing logistic support, being involved in weapons delivery, exercising administrative functions, and signing orders were not regarded sufficient evidence of authority pertaining to a superior status. Moreover, The Trial Chamber noted that

Mr Delalić did not take part in combat activities and was not in a position of superior authority during this period. He was without command functions and could not issue any orders. Midhat Cerovac also testified that Mr. Delalić had no military command. Since he was not within the structure of command and control.¹⁴³

And,

Analysis of the relevant evidence further demonstrates conclusively the failure of the Prosecution to show that Mr. Delalić was in a position of command authority or superiority in relation to the *Čelebići* prison-camp and in a superior-subordinate relationship with those who have been alleged to have committed offences therein. The Trial Chamber does not consider the acts of Delalić, as relied upon by the Prosecution, as an unequivocal exercise of superior authority.¹⁴⁴

From this reasoning it appears that the Trial Chamber in *Čelebići* requires a superior, or even a highly influential individual, to have effective control over subordinates before he can be held liable for their conduct. This seems a perfectly reasonable ruling and therefore the author disagrees with Bantekas, who is of the view that the Trial Chamber failed to recognise that Delalić,

[d]espite his indisputable authority, his function was to operate beyond any chain of command. His primary duty was to provide logistical support. Therefore, only if one exerts

¹⁴² *Čelebići* Judgement, para. 377.

¹⁴³ *Čelebići* Judgement, para. 668.

¹⁴⁴ *Čelebići* Judgement, para. 669.

influence over others, upon whom effective control is also exercised, should that individual be held responsible for their criminal actions where he or she fails to act.¹⁴⁵

This was exactly the point the Trial Chamber seemed to make when it rejected Delalić's alleged superior responsibility. His position of command was not accompanied by control over subordinates and for that reason he was not responsible under Article 7(3) of the Statute.

The case against Delalić provides a useful analogy to the superior responsibility of staff officers. The latter usually occupy positions of authority but lack the requisite control to incur superior responsibility. This does not mean that they cannot be held criminally responsible for planning or participating in crimes.¹⁴⁶

Command and control have no independent existence under the doctrine of superior responsibility. Control can, therefore, not be equated with *de facto* command, as Fischer seems to suggest:

So the Tribunal makes a distinction between control on the one hand, and formal authority, on the other hand. Indeed, looking into the cases of the Nuremberg Tribunal and of the Tokyo Tribunal, the CCL 10 cases, and also some cases in national courts, it often appear that a commander who has no formal authority, but has actual control of a group, is responsible for the actions of this group. Control, according to my understanding, has always been conceived as an alternative to formal authority.¹⁴⁷

Command is a prerequisite for criminal responsibility and control determines the extent of that responsibility. From the premise that command needs to be exercised through control before a person can be held liable under the doctrine of superior responsibility, one could conclude that the superior-subordinate relationship needs to be established before a superior can be held criminally liable for the acts of subordinates. This begs the question whether a commander who has just assumed command can be held liable for acts committed by subordinates before such a superior-subordinate relationship is established, for instance, on the first day of his appointment. From a military point of view, there can be no 'gap' between two command positions. Subordinates' acts need to be 'covered' by a responsible commander at all times.¹⁴⁸ One should assume, therefore, that command and control are vested in a commander as from the time of appointment and that a superior-subordinate relationship existed. At this point, however, military and criminal law diverge. When there is no personal fault on the part of the superior, there can be no criminal liability. In other words, when it cannot be established that the new superior had anything to do with the subordinate acts and he would only be held responsible in the capacity

¹⁴⁵ Bantekas (2002), p. 88.

¹⁴⁶ See further *High Command* case Vol XI, pp. 513-514.

¹⁴⁷ H. Fischer, 'Command Responsibility under the ICC Statute,' in P. Duyx *et al.* (eds.), 'War Crimes Law and the Statute of Rome: Some Afterthoughts?', Report of the Seminar of Rijswijk' in *Revue de Droit Militaire et de Droit de la Guerre*, XXXIX-1-2-3-4, p. 81.

¹⁴⁸ Article 23(g) 1907 Hague Rules of Landwarfare.

of superior, he cannot incur *criminal* liability. This does not rule out the imposition of any military disciplinary measures.

In the *Hadžihasanović* case before the ICTY, the Prosecutor argued that a commander who assumes command *after* subordinate have committed crimes, knows that such crimes were committed, and fails to punish the subordinate(s), can be held criminally liable under Article 7(3) of the ICTY Statute.¹⁴⁹ Defence counsel of the accused commander contested this proposition and pointed out that a superior-subordinate relationship and effective control should have existed *at the time* of the offences. The (pre-)Trial Chamber accepted the Prosecutor's point, albeit with some restraint:

The Trial Chamber finds that in principle a commander can be liable under the doctrine of command responsibility for crimes committed prior to the moment that the commander assumed command. The Trial Chamber finds, however, that the question of whether the principle may also apply to the present case depends on whether the elements of command responsibility are met, which is a factual issue to be determined at trial.¹⁵⁰

The problem with this statement is that the Trial Chamber accepts that the functional element of superior responsibility can be measured in the post-crime period and as such trigger criminal liability. The *Hadžihasanović* Decision will be discussed more extensively in connection with the operational element of superior responsibility.¹⁵¹

Command and control cannot incur liability independently from each other. The mere occupation of a position in the chain of command cannot generate criminal responsibility. On the other hand, control alone cannot entail command responsibility. In situations of traditional WW II warfare, between regular armies and with the legal infrastructure in place, there is less need to distinguish between these concepts. Conflicts nowadays, however, are mostly internal and characterised by the breakdown of legal structures. The conflicts in the Former Yugoslavia and Rwanda have shown that command structures are not what they appear to be at first sight. This prompts us to consider *de facto* rather than *de iure* structures. The notion of control is instrumental in that.

(f) Evidence of *de facto* command and control

It appears from case law emanating from the *ad hoc* Tribunals that establishing *de facto* command structures in the absence of *de iure* command requires an analysis of the distribution of tasks within a specific combat unit or prisoner camp.¹⁵² This is how the ICTY Trial Chamber found in the *Nikolić* case that the latter was the commander of Susica Prisoner Camp. All the decisions were initiated or channelled

¹⁴⁹ *Hadžihasanović* Decision, para. 191.

¹⁵⁰ *Ibidem*, para. 202.

¹⁵¹ See para. 3(iii)(b) of this Chapter.

¹⁵² See also Bantekas (2002), p. 87.

through him before being implemented.¹⁵³ In the case of prison-camp commanders, the testimony of detainees is relied upon to establish who was the actual commander. The testimony of detainees in *Čelebići* demonstrated that Mucić introduced himself as commander and that he behaved as a commander towards the guards. In *Furundžija*, detainees testified that the accused was a commander of a Croatian Defence Council Unit because he was in charge of interrogations and was called 'boss' by members of his unit.¹⁵⁴ Being called 'commander' in itself is not sufficient to infer subordination; there must be exercise of superior authority over the institution and its personnel.¹⁵⁵ In the case of operational commanders, the testimony of monitoring personnel and observers is often relied upon. In the *Vukovar* case against Mrksić *et al.*, international and humanitarian personnel testified that Major Sljivancanin 'behaved like a commander and took the decisions', surpassing his superior Colonel Mrksić.¹⁵⁶ In the *Radić* case, international observers testified that the accused regarded himself as the acknowledged commander of HVO forces.¹⁵⁷

As to the capacity to issue orders, a person's signature can indicate authority and can, therefore, be considered as evidence of *de facto* command. However, the signature in itself is not enough. To establish the command status of a signatory, the authority and executive capacity of the latter need to be put forward as supporting evidence. In *Čelebići*, the Trial Chamber rejected the Prosecutor's contention that Delalić was in command because he could issue orders. The judges held that Delalić 'had no power or authority to issue binding orders'.¹⁵⁸ Moreover, the release orders he signed were equally valid without his signature, which was taken as another sign that he exercised no command in the prison camp. Mucić's signature on a release document, on the other hand, was taken as evidence of his command authority. Unlike Delalić, Mucić was held to also *have* the authority to release detainees.¹⁵⁹

(g) Parallel chains of command and delegation

Peacekeeping operations and other multinational forces often operate under parallel chains of command, a national and an international, or even a multinational one. This often pertains to a distinction between operational command and administrative command. A parallel chain of command should not decrease a commander's vigi-

¹⁵³ ICTY, *Prosecutor v. Nikolic*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, Case No. IT-94-2-R61, para. 24.

¹⁵⁴ *Furundžija* Judgement, paras. 65 and 130. See also Bantekas (1999), p. 583.

¹⁵⁵ *Čelebići* Judgement, para. 763.

¹⁵⁶ ICTY, *Prosecutor v. Mrksic, Radic, and Sljivancanin*, review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996, No. IT-95-13-R61, para. 16. See Bantekas (1999), p. 584.

¹⁵⁷ ICTY, *Prosecutor v. Radic*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 13 September 1996, IT-95-12-R61, paras. 58-59. See also Bantekas (1999), p. 584.

¹⁵⁸ *Čelebići* Judgement, para. 673.

¹⁵⁹ *Čelebići* Judgement, para. 764.

lance. Consider Parks' observation based on the Supreme Court's ruling on Yamashita's co-defendant, Toyoda:

[w]here a tactical commander has only operational control of a subordinate unit and not the authority to relieve or punish the subordinate commander, he will be expected to take such measures as are within his physical power under the circumstances to prevent or stop war crimes by that subordinate commander. It is the commander's responsibility to take all measures possible to prevent the commission of war crimes by subordinates; lack of administrative control and hence normal administrative remedies does not foreclose or preclude use of other measures.¹⁶⁰

According to Parks, lack of command and control is not an excuse to not take 'all measures possible' to prevent subordinates from committing war crimes, even if it concerns crimes committed by another superior's subordinates. The ICTY endorses this view in its jurisprudence and wields the concept of 'effective control' in compelling a superior to remain active in his supervision. On the basis of 'effective control', a superior can be held liable for those not directly under his command. As was recognised by the ICTY in *Aleksovski* and *Blaškić*,

[t]he test of effective control exercised by the commander implies that more than one person may be held responsible for the same crime committed by a subordinate.¹⁶¹

The Defence in the *Krstić* case pointed to the parallel chain of command in rebutting the Prosecution's claim that General Krstić exercised command over his men, the Drina Corps Command. After the take-over of Srebrenica, the Drina Corps Command received orders from both Mladić and Krstić. It was Mladić, however, who had ordered the Corps to carry out mass-executions. Concerning Krstić's responsibility for these executions, the Trial Chamber held that

The Corps' ordinary chain of command was not suspended as a result of the direct involvement of the Main Staff or the security organs in certain aspects of the Srebrenica follow up operation. The Trial Chamber has further held that General Krstić became the *de facto* Corps Commander from the evening of 13 July onwards and *de jure* Corps Commander from 15 July onwards.¹⁶²

Neither the fact that Mladić was Krstić's superior nor the fact that he did not have *de iure* command throughout the whole period exempted him from criminal responsibility for the executions.

A related issue is delegation. At least within NATO, there seems to be a trend towards a diffusion of tasks and decision-making processes to lower echelons of com-

¹⁶⁰ Parks (1973), p. 84 referring to the *Yamashita* case, 327 U.S. 1, p. 15.

¹⁶¹ *Blaškić* Judgement, para. 303 referring to the *Aleksovski* Judgement, para. 106.

¹⁶² *Krstić* Judgement, para. 625.

mand through delegation.¹⁶³ How does this affect superior responsibility? The short answer to this question is that the delegation of tasks does not affect the unity of command.¹⁶⁴ A commander who delegates the task of preventing the commission of war crimes to a subordinate officer remains responsible, in both military and criminal terms. On the other hand, when the 'delegating commander' can be shown to have fulfilled his duty by delegating his task and, at the same time, doing everything that under the circumstances could reasonably be expected of him, he should not be held criminally liable for subordinates' acts.

Again, the *Yamashita* case is relevant. General Yamashita inherited a disorganised army of untrained and unmotivated soldiers. In carrying out his mission, he deemed it appropriate to split the (remainder of the) 14th Area Army into three separate fighting units, handing over command of one unit to General Tsukada and one to General Yokoyama.¹⁶⁵ However, against his orders, the units did not evacuate but remained in the area and started to engage in mass killing. At the same time, Yamashita seemed to have lacked effective control over the units as communications had broken down

Delegation of command does not entail delegation of responsibility. Yet, to attach criminal responsibility to a delegating superior makes pertinent an examination of the actual powers of control and the circumstances under which he decided to delegate his powers. The *Yamashita* precedent is instructive in this, firstly, because his decision to delegate his command powers seemed appropriate in the circumstances at the time and reliance on his two generals was not unreasonable. There is no proof that Yamashita was *mala fide* in delegating command, *i.e.* that he did so for the purpose of evading responsibility.¹⁶⁶ Moreover, he lacked effective control to direct his troops to halt committing crimes. These two points: (i) bona fide delegation, and (ii) effective control, must constitute the test a court would apply when faced with a situation of delegated command.¹⁶⁷

(ii) COGNITIVE ELEMENT: STANDARDS OF KNOWLEDGE

The cognitive standard of superior responsibility has been the subject of extensive legal debate at the *ad hoc* Tribunals, particularly at the Yugoslavia Tribunal. Post-Second World War case law and ICRC documents have been consulted in order to interpret the 'knew or had reason to know' standard of Article 6(3) and Article 7(3) of the ICTR and the ICTY Statutes, respectively, according to customary interna-

¹⁶³ 'Mission command', see NATO, *Allied Joint Publications I (A), Allied Joint Operations Doctrine* Brussels, (1996).

¹⁶⁴ M.L. van Creveld, *Command in War*, Cambridge (Mass.) (1985), p. 274

¹⁶⁵ Crowe (1994), pp. 201-202; Bantekas (2002), p. 100.

¹⁶⁶ This is the approach taken in US law in the Responsible Corporate Officer (RCO) doctrine for instance, in the landmark case of, *U.S. v. Park*, 421 U.S. 658, p. 678 (1975). See Wu and Kang (1997), p. 295

¹⁶⁷ See also Wu and Kang, (1997), pp. 293-295; Ambos (2002), p. 681.

tional law. The patchwork of norms constituting the post-Second World War law on command responsibility has given rise to different interpretations. At the ICTY, this resulted in a divergence between two Trial Chambers: the Trial Chamber in the *Čelebići* and in the Trial Chamber in *Blaškić*. The disagreement evolved around the in- or exclusion of the clause 'should have known' into the knowledge standard of Article 7(3) of the ICTY Statute. This amounted to diverging views on the scope of criminal responsibility of superiors. The *Čelebići* Trial Chamber rejected the 'should have known' clause introducing a negligence standard. This was confirmed on appeal. The *Blaškić* Trial Chamber, however, pleaded for an inclusion of such a standard, which has now been codified in Article 28(i)(a) of the ICC Statute. Before taking a closer look at their divergence on the knowledge standard, we will examine the concurrence between the Trial Chambers on the first part of the 'knew or had reason to know' test.

(a) **Knew**

There seems to be general agreement amongst the Trial Chambers that 'knew' can be proved through direct evidence and by circumstantial evidence.¹⁶⁸ In the former case, evidence such as written reports informing a commander of crimes and that bear his signature, or testimony establishing that the accused made oral statements proving that he knew of the crimes, can establish such knowledge.¹⁶⁹ In the latter case, it can be derived from circumstantial evidence and establish 'must have known'. We already saw that the military commission in the *Yamashita* case found recourse to a constructive knowledge standard.¹⁷⁰ The Prosecutor's contention in *Čelebići* that knowledge may be presumed when the crimes are a matter of public notoriety, are numerous, and occurred over a prolonged period, or over a wide geographical area, was not accepted. The Trial Chamber was of the view that no such general presumption could be made. The Trial Chamber took from the Commission of Experts the list of indicia that serves to establish by way of circumstantial evidence if a superior knew of offences committed by his subordinates.¹⁷¹ It is not clear whether in the Trial Chamber's view the indicia themselves can establish knowledge

¹⁶⁸ *Čelebići* Trial Chamber Judgement, para. 386; *Čelebići* Appeal Judgement, para. 241; *Blaškić* Judgement; para. 307; *Kordić and Čerkez* Judgement, para. 427; *Aleksovski* Judgement, para. 80.

¹⁶⁹ Keith (2001), p. 620.

¹⁷⁰ It is not clear from the Judgement which *mens rea* standard was applied. Different interpretations have been advanced by scholars on this point, amongst which 'must have known' and no *mens rea*, i.e. strict liability. See Landrum (1995), pp. 204-208.

¹⁷¹ *Čelebići*, para 386: Commission of Experts in its Final Report:

- (a) The number of illegal acts;
- (b) The type of illegal acts;
- (c) The scope of illegal acts;
- (d) The time during which the illegal acts occurred;
- (e) The number and type of troops involved;
- (f) The logistics involved, if any;
- (g) The geographical location of the acts;
- (h) The widespread occurrence of the acts;

or whether they need to be supported by other evidence. In *Aleksovski* the Trial Chamber expressed the view that a superior's position may be an indication of knowledge. It needs, however, to be coupled with other indicia such as the geographical and temporal circumstances:

This means that the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them.¹⁷²

In the *Blaškić* case, the defendant had his headquarters three kilometres from the village where over ninety civilians were killed. The Trial Chamber stated that

Apart from the fact that it is difficult to believe that the accused had no foreknowledge of an attack planned in an area coming within his area of responsibility only a few kilometres from his headquarters, several pieces of evidence disproved the accused's assertions.¹⁷³

(b) **Had reason to know**

The second part of the knowledge element of Article 6/7(3) of the ICTR/Y Statutes contains the clause 'had reason to know'. This clause is based on Articles 86 and 87 of the AP I. These Articles are the only codified predecessors of the superior responsibility provision of the *ad hoc* Tribunals. The Trial Chamber in *Čelebići*, therefore, attached much weight to the fact that the drafters of the AP I rejected the proposed inclusion of a 'should have known' clause in Article 86 put forward by the ICRC and the United States.¹⁷⁴ Reading the terms of Article 86 in the ordinary meaning, confirmed by the *travaux préparatoires*, the *Čelebići* Trial Chamber interpreted 'had reason to know', as follows:

[t]hat a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.¹⁷⁵

- (i) The tactical tempo of operations;
- (j) The *modus operandi* of similar illegal acts;
- (k) The officers and staff involved;
- (l) The location of the commander at the time.

¹⁷² *Aleksovski* Judgement, para. 80.

¹⁷³ *Blaškić* Judgement, para. 478.

¹⁷⁴ *Čelebići* Judgement, para. 392, referring to CCDH/I/SR.61, in Official Records, Vol. IX, p. 278, paras. 56-57. See for a critical appraisal of the interpretation of the Trial Chamber of the *travaux préparatoires* Keith (2001), pp. 624-626.

¹⁷⁵ *Čelebići* Judgement, para. 393, p. 146

While it adopted the reasoning of the *Čelebići* Trial Chamber on the other two criteria of superior responsibility (the functional and operational aspects), the Trial Chamber in *Blaškić* departed from the *Čelebići* Judgement on the cognitive aspect.¹⁷⁶ In *Blaškić*, the mental element of Article 7(3) ICTY Statute was interpreted as incorporating the 'should have known' test. Although relying on the same inconsistent body of post Second World War case law as the *Čelebići* Trial Chamber, the Trial Chamber in *Blaškić* concluded that

[a]fter World War II, a standard was established according to which a commander may be liable for crimes 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 and such failure to know constitutes criminal dereliction'.¹⁷⁷

The *Blaškić* Trial Chamber found that a customary law 'should have known' standard emerged from post-Second World War case law. This led the trial Chamber to interpret Article 86(2) of the AP I, the precursor of Article 7(3) of the ICTY Statute, to include a 'should have known' standard.¹⁷⁸ The Trial Chamber based its position on the premise that a commander cannot claim to be ignorant and has a duty to remain informed. Reading Article 86 in the light of Article 87 of the AP I on the duty of commanders, the *Blaškić* Trial Chamber held that the cognitive standard or *mens rea* of Article 7(3) of the ICTY Statute is one of criminal negligence, based on a dereliction of duty.

In *Blaškić*, the Trial Chamber did not apply its findings to the facts of the case before it. Its observations in this respect can therefore be regarded as *obiter dicta*. In *Čelebići*, the Appeals Chamber implicitly rejected the *Blaškić* test by endorsing the *Čelebići* Trial Chamber interpretation of 'had reason to know'.

(c) Different interpretations

Three observations can be made on the divergence between the *Blaškić* and *Čelebići* judgements. First of all, the AP I did not intend to change custom regarding the concept of command responsibility. This was observed by *Čelebići* Trial Chamber:

[a] survey of the *travaux préparatoires* of these provisions reveals that, while their inclusion was not uncontested during the drafting of the Protocol, a number of delegations clearly expressed the view that the principles expressed therein were in conformity with pre-existing law.¹⁷⁹

The delegations to the Diplomatic Conference purported to codify the customary law principles of command responsibility. That these principles constitute a 'should

¹⁷⁶ See N. Keijzer and E. van Sliedregt, Commentary to *Blaškić* Judgement, Klip/Sluiter, ALC-IV-300; Keith (2001), pp. 617-634.

¹⁷⁷ *Blaškić* Judgement, para. 322.

¹⁷⁸ *Blaškić* Judgement, para. 328.

¹⁷⁹ *Čelebići* Judgement, para 340.

have known' standard is, to this author's mind, at the very least contestable.

As noted earlier, post-Second World War case law is heterogeneous and susceptible to different interpretations. Lippman accurately observes this in his analysis of the evolution and scope of command responsibility.¹⁸⁰ He describes the evolution of the cognitive aspect from an almost strict liability crime in *Yamashita*, to an actual knowledge test by the Tokyo Tribunal, to the use of an intent standard by American courts in Vietnam-related case law.¹⁸¹ To his mind, a 'should have known' test, introducing a negligence standard for superior responsibility, was introduced by the findings of the Kahan Commission (1983).¹⁸² It is not surprising, therefore, that the *Blaškić* Judgement relied on the findings of the Kahan commission to illustrate a customary law 'should have known' standard. Such a standard, however, does not *unequivocally* arise from pre-existing law on which Article 86(2) of the AP I codified. This is also apparent from the lack of uniformity on the 'should have known' standard amongst the Government Experts at the ICRC Diplomatic Conference drawing up the AP I.¹⁸³ As Article 6/7(3) of the ICTR/Y Statute is based on Article 86 of the AP I, the *Čelebići* interpretation, giving weight to the contentious nature of 'should have known' at the negotiating table, is a cautious but warranted interpretation of 'had reason to know'. Bearing in mind the foregoing, Tinta's suggestion that in *Čelebići* it was, 'erroneously concluded that the applicable *mens rea* standard for command responsibility under customary international law had changed with the adoption of Additional Protocol I'¹⁸⁴ seems, therefore, difficult to maintain.

This, does not mean that a 'should have known' standard is not part of *current* customary international law. Such was acknowledged by the *Čelebići* Trial Chamber in reference to the 'should have known' clause in Article 28 of the ICC Statute. The findings of the Kahan Commission can be regarded as support for such a rule. Moreover, the ICC Statute is further removed from the negotiating table of the Government Experts drafting the AP I than the *ad hoc* Tribunals. This enables a progressive interpretation of 'had reason to know', as 'should have known'.

The second observation relates to the duty aspect of command responsibility. Taking a closer look at the divergence between the *Čelebići* and *Blaškić* judgements on the duty-aspect of superior responsibility, the material difference between the two is that the former does not penalise the neglect of the duty to *acquire* knowledge whereas the latter does. The *Blaškić* judgement aimed at preventing the occurrence of a situation in which a superior lacked knowledge as a result of dereliction of his duty to obtain information, for instance by being absent from his Headquarters.

¹⁸⁰ Lippman (2000), pp. 139-170.

¹⁸¹ Ibidem, pp. 152-155, and 168. He refers to American courts and their findings in *My Lai*, *Medina*, and *Rockwood*.

¹⁸² Lippman (2000), p. 157.

¹⁸³ In fact, there was 7:5 support for the US proposal of 'should have known'. Strong objections from the Syrian delegation relating to the formula's lack of clarity, and the fear of Latin-American delegates for a possible reverse of the burden of proof, eventually led to its rejection. Keith (2001), pp. 624-625.

¹⁸⁴ Tinta (2000), p. 319.

(...) taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.¹⁸⁵

In *Čelebići*, the prosecutor argued along similar lines in applying the Trial Chamber judgement. The Appeals Chamber in *Čelebići*, however, argued that

Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish. The Appeals Chamber takes it that the Prosecution seeks a finding that 'reason to know' exists on the part of a commander if the latter is seriously negligent in his duty to obtain the relevant information. The point here should not be that knowledge may be presumed if a person fails in his duty to obtain the relevant information of a crime, but that it may be presumed if he had the means to obtain the knowledge but deliberately refrained from doing so. The Prosecution's argument that a breach of the duty of a superior to remain constantly informed of his subordinates actions will necessarily result in *criminal* liability comes close to the imposition of criminal liability on a strict or negligence basis. It is however noted that although a commander's failure to remain apprised of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability.¹⁸⁶

The Appeals Chamber went on to determine that, from post-Second World War case law, Article 86 of the AP I, and the 1996 ILC Draft Code of Crimes, a customary rule imposing upon commanders a *general* duty to know cannot be derived.¹⁸⁷ It then concluded:

Thus, as correctly held by the Trial Chamber, as the element of knowledge has to be proved in this type of cases, command responsibility is not a form of strict liability. A superior may only be held liable for the acts of his subordinates if it is shown that he 'knew or had reason to know' about them. The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, in so far as vicarious liability may suggest a form of *strict* imputed liability.¹⁸⁸

While rejecting the *Blaškić* 'should have known standard' as imposing upon a commander a general duty to know, the Appeals Chamber also minimised the difference between Article 86(2) of the AP I and the 'should have known standard':

¹⁸⁵ *Blaškić* Judgement, para. 332.

¹⁸⁶ *Čelebići* Appeal Judgement, para. 226.

¹⁸⁷ *Ibidem*, para. 227.

¹⁸⁸ *Ibidem*, para. 239.

If 'had reason to know' is interpreted to mean that a commander has a duty to inquire further, on the basis of information of a general nature he has in hand, there is no material difference between the standard of Article 86(2) of Additional Protocol I and the standard of 'should have known' as upheld by certain cases decided after the Second World War.¹⁸⁹

The third observation relates to the evidentiary aspect of the difference between the *Čelebići* and the *Blaškić* tests. When faced with a commander who claims to be ignorant, the *Čelebići* test requires the Prosecutor to demonstrate that he actually knew or must have known of the subordinates' crimes, or that he had reason to know. In any event, knowledge must be established. The Tribunal seems to apply in this a predominantly subjective or internal test, taking into account the actual state of mind of the defendant under the circumstances at the time. The *Blaškić* test is different in that it is irrelevant whether the superior actually knew about the crimes if at least he 'should have known' about them. Here, a predominantly objective or external test is likely to be applied. The fact that the *Blaškić* Trial Chamber was willing to apply subjective criteria, such as the particular level of command, could make this test less objective and less distinct from the subjective *Čelebići* test. Both tests have the same tools at their disposal. The indicia listed by the Commission of Experts in its Final Report, and used by the *Čelebići* and *Blaškić* Trial Chambers¹⁹⁰ in establishing proof of actual knowledge by circumstantial evidence, can also be relevant to 'should have known'.¹⁹¹ This might warrant the conclusion that the way in which evidence is presented to meet either the *Čelebići* or '*Blaškić*' tests is not inherently different. The real distinction lies in their points of departure: the degree of negligence that is based on dereliction of a duty that differs in scope.

A last point relates to the nature of information that is available to a superior and that can generate superior responsibility. In *Čelebići*, the Appeals Chamber endorsed the Trial Chamber's definition that 'had reason to know' means that 'a superior will be criminally responsible through the principles of superior responsibility only if the information was available to him, which would have put him on notice of offences committed by subordinates'.¹⁹² 'Available information' was defined as general information that could put a superior on notice, for instance, information on: 1) the tactical situation, 2) the level of training and instruction of subordinate officers and their

¹⁸⁹ Ibidem, para. 235.

¹⁹⁰ *Čelebići* Judgement, para. 386; *Blaškić* Judgement, para. 307.

¹⁹¹ Fenrick's commentary on the 'should have known' clause of Article 28 of the ICC Statute is instructive in this context: 'A commander is not automatically held liable for the acts of all of his subordinates. He or she may, however, be liable in certain circumstances because he or she "should have known" that forces were committing or about to commit offences even if it is believed that the commander did not know at the appropriate time. The commander has a duty to have relevant information gathered and to evaluate it. If he or she failed to obtain or wantonly disregards information of a general nature within his or her reasonable access indicating the likelihood of actual or prospective criminal conduct on the part of subordinates, he or she meets the "should have known" standard. The indicia for proof of actual knowledge by circumstantial means (...) are also relevant for should have known'. Fenrick in Triffterer (1999), Article 28, margin Nos. 10-11.

¹⁹² *Čelebići* Appeal Judgement, para. 241, referring to *Čelebići* Judgement, para. 383.

troops, and 3) their character traits.¹⁹³ As to the nature of the information, it does not necessarily have to relate to unlawful subordinate behaviour.

A military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having required knowledge.¹⁹⁴

A presumption of knowledge was established for these particular situations. This presumption effectively imposes a duty to *anticipate* criminal subordinate behaviour.¹⁹⁵ A similar duty was established by the *Blaškić* Trial Chamber in the context of Article 7(1) of the ICTY Statute. Blaškić was held criminally liable under Article 7(1) ICTY Statute for ordering crimes, despite the fact that it could not be established that he had ordered these crimes with *intent*.¹⁹⁶ The Trial Chamber ruled that when he ordered his men to attack he should have anticipated the crimes that his subordinates had previously been guilty of. He was held responsible for these crimes on the basis of a *dolus eventualis* standard.

(d) One uniform knowledge standard at both Tribunals

In the *Akayesu* case the ICTR dealt with superior responsibility for the first time. In rejecting strict liability, the Trial Chamber observed that 'it is certainly proper to ensure that there has been malicious intent, or, at least ensure the negligence was so serious as to be tantamount to acquiescence or even malicious intent'.¹⁹⁷ This formula, which can be traced back to the ICRC Commentary on Article 86 of the AP I,¹⁹⁸ was reiterated in the *Musema* judgement but has had no support at the ICTY.¹⁹⁹

In *Kayishema and Ruzindana*, the Trial Chamber noted the rejection by the *Čelebići* Trial Chamber of the 'should have known' standard. As it did not protest against this interpretation, it may be assumed that – reasoning *a contrario* – it adopted the *Čelebići* reasoning on this point. However, it, adopted a different knowledge standard for civilian superiors:

¹⁹³ Ibidem, para. 238.

¹⁹⁴ Ibidem.

¹⁹⁵ *Blaškić* Judgement, para. 474.

¹⁹⁶ See also Chapter 2 para. 7(b).

¹⁹⁷ *Akayesu* Judgement, para. 489.

¹⁹⁸ '[o]ne delegate referring to the concept expressly reflected in the English version (which was not included in the French text, curiously enough(...)), namely information which "should have" enabled them to conclude that a subordinate was committing or was going to commit a breach, remarked that this was undoubtedly a case of responsibility incurred by negligence, and that it was important to make this clear. However, this does not mean that every case of negligence may be criminal. For this to be so, the *negligence* must be so serious that it is *tantamount to malicious intent*, apart from any link between the conduct in question and the damage that took place' (italics added, *EvS*). ICRC Commentary, para. 3545..

¹⁹⁹ *Musema* Judgement, para. 131.

On this issue, the Chamber finds the distinction between military commander and other superiors embodied in the Rome Statute an instructive one...The Trial Chamber agrees with this view insofar that it does not demand a *prima facie* duty upon a non-military commander to be seized of very activity of all persons under his or her control. In light of the objective of Article 6(3) which is to ascertain the individual criminal responsibility for crimes as serious as genocide, crimes against humanity and violations of Common Article 3 to (of, *EvS*) the Geneva Conventions and Additional Protocol II thereto; the Chamber finds that the Prosecution must prove that the accused in this case either knew, or consciously disregarded information which clearly indicated or put him on notice that his subordinates had committed, or were about to commit acts in breach of Articles 2 to 4 of this Tribunal's Statute.²⁰⁰

A different knowledge standard for non-military superiors was justified by a difference in scope of duty. The Trial Chamber used the ICC standard for non-military superiors laid down in Article 28(b)(i) of the ICC Statute and incorporated it into the law of the Rwanda Tribunal.

The above begs the question of whether the *Čelebići* Appeal Judgement on the cognitive element of superior responsibility, which was issued *after* the ICTR Judgements, altered the law of the Rwanda Tribunal. It is true that the *Čelebići* Appeals Chamber judgements have authoritative status at both *ad hoc* Tribunals.²⁰¹ However, the *Čelebići* Judgements deal with military and quasi-military superiors and not civilian superiors.

It is submitted, that irrespective of its 'military starting-point', the *Čelebići* Trial Chamber and Appeals Chamber touch upon *principles* of superior responsibility, and as such their findings on the matter go beyond the boundaries of the case, and beyond that of the ICTY. Moreover, the parameters of superior responsibility as set out in *Čelebići* leave room for variation. *De facto* and *de iure* command, the element of 'control', the broad superior concept, and the 'material ability' to halt crimes, are all designed to accommodate differing circumstances and persons. This way the Trial Chamber and Appeals Chamber in *Čelebići* devised *one* uniform superior responsibility concept. This stems from the provision and its legal history. Having regard to Article 28 of the ICC Statute and the differentiation to military and non-military superiors, with their respective cognitive standards of 'should have known' and 'consciously disregarded', we can position the cognitive standard of the *Čelebići* case between those of Article 28 of the ICC Statute. As such it may apply to both military and non-military superiors.²⁰² For these reasons, the *Kayishema* and

²⁰⁰ *Kayishema and Ruzindana* Judgement, paras. 227-228.

²⁰¹ This does not mean that it has *binding* effect. See for the doctrine of binding precedent and *stare decisis* in the context of the *ad hoc* Tribunals: Boot, (2002), paras. 233-237, pp. 251-257 and the *Aleksovski* Appeals Chamber Judgement, paras. 92-111.

²⁰² The 'should have known' standard for military commanders is a considerably lower standard than the 'knew or consciously disregarded information' standard for civilian superiors. For non-military superiors, it is necessary to establish – that information clearly indicating a significant risk that subordinates were committing or were about to commit offences existed; – that this information was available to the superior, and; – that the superior while aware that such a category of information existed, declined to refer to the category of information'. Fenrick in Triffterer (1999), margin Nos. 20-21.

Ruzindana finding on the cognitive aspect should be regarded as erroneous.

In a critical evaluation of the law on superior responsibility at the ICTR, Zahar observes that, in assessing superior-subordinate relationships, the Tribunal applies a standard differing from that of the *Čelebići* Appeal judgement.²⁰³ He expresses the view that the ICTR should rely on the *Čelebići* Appeal judgement when it uses superior responsibility to attribute criminal responsibility.²⁰⁴ His main argument is that, although the accused in the cases at issue were non-military superiors,²⁰⁵ the *Čelebići* standard reflects the customary law concept of superior responsibility that provides for one uniform doctrine. Moreover, the *Čelebići* standard of 'effective control' warrants that the doctrine of superior responsibility is only operative in cases in which the superior's control over subordinates strongly resembles that of military superiors, and thus prevents unreasonable attribution of liability.²⁰⁶ Zahar's reasoning confirms the plea for a uniform approach to superior responsibility set out above. Superior responsibility at the Tribunals is one unifying doctrine in all three of its underlying pillars, the functional, cognitive, and operational elements.

(iii) OPERATIONAL ELEMENT: FAILURE TO PREVENT OR PUNISH

(a) Duty to anticipate

The third requirement establishing superior responsibility concerns the operational element and relates to a superior's failure 'to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof'.²⁰⁷ In interpreting 'necessary and reasonable measures', both the *Blaškić* and the *Čelebići* Trial Chambers found that such measures do not depend on the *formal* legal ability to take them. They determined in both judgements that superior responsibility turns on a superior's *material* possibility to prevent or punish.²⁰⁸ As was found in *Čelebići*,

[t]he lack of formal legal competence to take the necessary measures to prevent or punish the crime in question does not necessarily preclude the criminal responsibility of the superior.²⁰⁹

As to the extent of the duty to prevent, in some of the World War II cases on superior responsibility, a duty to 'anticipate' was imposed. This was the case with high government and military superiors who were prosecuted before the Tokyo Tribunal. A similar duty was imposed on those when held responsible by the Kahan Commis-

²⁰³ Zahar (2001), pp. 591-616.

²⁰⁴ Zahar (2001), pp. 613-616.

²⁰⁵ The following cases were discussed by Zahar: *Akayesu*, *Kayishema and Ruzindana*, and *Mu-sema*. These trials involved a bourgmestre, a prefet and a commercial trader, and the director of a tea company, respectively.

²⁰⁶ Zahar (2001), pp. 606-613.

²⁰⁷ *Čelebići* Judgement, para. 346.

²⁰⁸ *Blaškić* Judgement, para. 335; *Čelebići* Judgement, para. 395.

²⁰⁹ *Čelebići* Judgement, para. 395.

sion. The *Čelebići* Appeals Chamber seems to have imposed an anticipatory duty as well.

(b) Prevent or punish: two scenario's, one superior

In *Kordić and Cerkez*, the Trial Chamber held (*obiter*) that the duty to prevent

[s]hould be understood as resting on a superior at any stage before the commission of a subordinate crime if he acquires knowledge that such a crime is being prepared or planned, or when he has reasonable grounds to suspect subordinates' crimes.²¹⁰

On the duty to punish, the same Trial Chamber stated that

The duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish. This duty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself. Civilian superiors would be under similar obligations, depending upon the effective powers exercised and whether they include an ability to require the competent authorities to take action.²¹¹

Extending a superior's responsibility under Article 7(3) of the ICTY Statute to *after* the commission of crimes by imposing a duty to punish leaves open the possibility that a superior may be held responsible under the doctrine of superior responsibility for crimes committed *before* he assumed command. It appeared earlier, with regard to *Hadžihasanović* that the prosecutor put the above-cited suggestion of the *Kordić and Cerkez* Trial Chamber into practice. In *Hadžihasanović*, commander Kubura was charged with crimes committed by a group of subordinates in January 1992 although he took up his position as commander on 1 April 1992. The Trial Chamber found that, in principle, Kubura could be held criminally liable for not having punished his subordinates for crimes committed in the period before he took over command.²¹² As long as there is evidence that demonstrates that Kubura exercised effective control over the subordinates, he can be held responsible under Article 7(3) of the ICTY Statute.²¹³ In this the Trial Chamber seems to adopt the position of the Prosecutor that

[t]he material issue for command responsibility is the existence of a superior-subordinate relationship *when* the commander became aware of the crimes allegedly committed by subordinates and failed to take reasonable and necessary measures to punish.²¹⁴

²¹⁰ *Kordić and Cerkez* Judgement, para. 445.

²¹¹ *Ibidem*, para. 446.

²¹² At the time of writing, the Trial is still in the pre-trial phase and factual issues still need to be determined at trial.

²¹³ *Hadžihasanović* Decision, para. 201.

²¹⁴ *Ibidem*, para. 193.

However, this author submits that the superior-subordinate relationship, and the effective control exercised over the subordinates, should have been present *at the time of the commission of the crimes*. Superior responsibility is a basis for criminal liability of the superior who was in a position to *prevent* the commission of offences. On the other hand, the failure to punish may constitute a separate offence of a dereliction of duty to supervise. In the words of the Trial Chamber in *Hadžihasanović*,

Article 7(3) posits two scenarios for the attachment of individual criminal responsibility to a superior (a) if he knew or had reason to know that a subordinate was about to commit such acts (...) referred to in Articles 2 to 5 of the Statute and the superior failed to take the necessary and reasonable measures to prevent such acts, *or* (b) if he knew or had reason to know that a subordinate had committed such acts (...) referred to in Articles 2 to 5 of the Statute and failed to punish the perpetrators thereof. Thus, the Trial Chamber finds Article 7(3) to mean that (a) when a superior knew or had reason to know that a subordinate was about to commit such acts as those in Article 2 to 5 of the Statute AND the superior failed to take the necessary and reasonable measures to prevent such acts, the commander is individually criminal(ly, *EvS*) responsible; OR (b) when a superior knew, or had reason to know, that a subordinate had committed such acts as those in Article 2 to 5 of the Statute AND the superior failed to take the necessary and reasonable measures to punish the perpetrators thereof, the commander is individually criminal(ly, *EvS*) liable.²¹⁵

However, both ‘scenarios’ can only apply to one and the same superior and should be based on one and the same superior-subordinate relationship. Only when a superior fails to prevent crimes, and it can be shown he *no* had reason to know of the crimes at the time of their commission, does the ‘punish scenario’ apply to him when he becomes aware of the crimes after their commission. It is not in line with ICTY jurisprudence that the ‘prevent scenario’ applies to the former superior and the ‘punish scenario’ to the new superior. Moreover, it is undesirable that a superior, who would have been responsible had he remained in command, escapes liability when his successor takes over and the subordinates’ crimes become public knowledge. This reasoning seems to be in line with the ruling in the *Blaskić* case and was reiterated in subsequent trials.²¹⁶

[t]he obligation to ‘prevent or punish’ does not provide the accused with two alternatives and equally satisfying options. Obviously, where the accused knew or had reason to know that subordinates were about to commit crimes and failed to prevent them, he cannot make up for the failure to act by punishing the subordinates afterwards.²¹⁷

The Prosecutor’s statement that the superior-subordinate relationship should exist at the time when a superior becomes aware of the subordinates’ crimes, includes the unwelcome possibility that the ‘prevent and punish scenarios’ become alternative scenarios. This position would fault the superior responsibility doctrine as it has

²¹⁵ *Hadžihasanović* Decision, para. 198.

²¹⁶ *Kordić and Cerkez* Judgement, para. 444.

²¹⁷ *Blaskić* Judgement, para. 336.

been developed at the *ad hoc* Tribunals. It would also thwart the jurisprudence of the Tribunals on the functional and cognitive elements of superior responsibility. After all, in the *Čelebići* case, the Trial Chamber interpreted Article 86 of the AP I as to meaning

[t]hat a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were *being committed or about to be committed* by his subordinates (italics added, *EvS*).²¹⁸

In further support of the contention that the doctrine of superior responsibility is based upon a superior-subordinate relationship that existed *at the time of the offence*, one can refer to the *Čelebići* judgement, which emphasises that superior responsibility evolves around effective control:

[i]t is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons *committing* the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of the offences.²¹⁹ (italics added, *EvS*)

Moreover, it was held in *Kunarac*:

Both those permanently under an individual's command and those who are so only temporarily or on an *ad hoc* basis can be regarded as being under the effective control of that particular individual. The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination between the members of a unit and its commander. To be held liable for the acts of men who operated under him on an *ad hoc* or temporary basis, it must be shown that, *at the time when the acts charged in the Indictment were committed*, these persons were under the effective control of that particular individual.²²⁰

The Trial Chamber in *Kunarac* italicised these words, emphasising their importance. It based its finding on the ICRC Commentary on Article 86 of the AP I, the provision on which Article 6/7(3) ICTR/Y Statutes is based, and is discussed below. The above statements demonstrate that the doctrine of superior responsibility depends on the superior-subordinate relationship at the time of the commission of the offences. That point in time 'frames' superior responsibility.

²¹⁸ *Čelebići* Judgement, para. 393, endorsed in the *Čelebići* Appeal Judgement, para. 241. Cited by Defence counsel of Kumura, *Hadžihasanović* Decision, para. 184.

²¹⁹ *Čelebići* Judgement, para. 378, endorsed in *Čelebići* Appeal Judgement, paras. 256, and 265-266 cited by Defence counsel of Kumura, *Hadžihasanović* Decision, para. 185.

²²⁰ *Kunarac* Judgement, para. 399.

A last point in rejecting the interpretation of superior responsibility by the Trial Chamber in *Hadžihasanović* relates to the most recent international provision on superior responsibility, Article 28 of the ICC Statute. While it is probably too early to rely upon the ICC Statute as a source of customary international law, its value as the most recent internationally-agreed-upon codification of superior responsibility must not be underestimated. Defence counsel in *Hadžihasanović* pointed to Article 28 of the ICC Statute in support of their argument that the latter provision limits the scope of superior responsibility to the time when the offences were committed ('circumstances at the time'), and that it does not relate to past crimes ('were committing or about to commit such crimes').²²¹ The text of Article 28 provides another argument supporting this contention. Both Article 28(a) on military superiors, and Article 28(b) on non-military superiors require subordinates' crimes to be '*a result of his or her failure to exercise control properly over such forces [italics, EvS]*'. The causal element rules out liability under the doctrine of command responsibility for crimes committed prior to the time when the commander assumed command. In all this we must be reminded of the fact that superiors are guilty of the crimes *as* the subordinates, who committed them. Criminal law principles, such as *personal* fault, could be violated when we accept the responsibility of the successor-superior the way the Trial Chamber in *Hadžihasanović* has done.

All things considered, it can be said that extending the concept of superior responsibility to successor-superiors who fail to punish the subordinates' crimes, while they had no effective control at the time of the commission of the offences, is an undesirable broadening of the scope of the concept of superior responsibility. It appears from the above that this approach must be faulted for its inconsistency with the modern doctrine of superior responsibility developed in the context of the *ad hoc* Tribunals and the ICC.

Rather than imputing a previous superior's failure to prevent or punish subordinates' crimes to his successor by penalising the possible failure to punish of the latter by way of superior responsibility, criminal responsibility should 'follow' the superior who was in a position of command at the time of the commission of the crimes. In the event that the former superior is not held responsible for having failed to prevent the crimes, as he did not know of them, he remains under a duty to punish if he later becomes aware of them, provided he still has 'effective control'. He is under a duty to inform the competent or judicial authorities who will be able to take measures to punish the persons concerned. This means that 'effective control', *i.e.* the material ability to 'punish' should be taken to include the submission of the matter to the competent authorities, a clause which is now part of the superior responsibility provision in the ICC Statute. In all this, the length of time elapsed between the actual commission of the crimes and the time that the superior ceded his command, should be taken into account in assessing an ex-superior's command responsibility. This reasoning is the exact opposite of what was held by the Trial Chamber in *Hadžihasanović*, where the time factor was held to be relevant with regard to the

²²¹ *Hadžihasanović* Decision, para. 187.

‘new’ superior. The length of time elapsed between the commission of the crimes and the time of taking over of command was regarded as a factor in assessing the superior responsibility of the new superior.²²² It seems that three situations of ‘failure to punish’ of former superiors can occur:

(i)	(ii)	(iii)
A did not know he had no reason to know	A did not know, he had reason to know	A did not know he had no reason to know,
he now knows he fails to punish	he fails to punish	he fails to punish

The dividing line denotes the change of command from A, the former superior, to B, the successor-superior. In situation (i) A can be held responsible under the doctrine of superior responsibility even after he has ceded command, as long as he has the ‘material ability to punish’, *i.e.* effective control. The scope of his superior responsibility is thus limited in time. There is no time limit on A’s superior responsibility in situation (ii). A was already criminally responsible before command was taken over and remains criminally responsible throughout the period following the taking-over of command by B. In situation (iii), A cannot be held liable under the doctrine of superior responsibility.

Two remarks need to be made here. Firstly, when it can be shown that successor-superior B had *de facto* authority and control at the time of the commission of the crimes, he is as responsible for the subordinates’ crimes as the *de iure* commander A. As we saw earlier in connection with parallel chains of command, in *Krstić*, the Trial Chamber accepted that, although the latter was a *de facto* superior at the time of the offences and it was Mladić who had *de iure* command throughout the whole period, Krstić was not exempt from criminal responsibility for the executions committed by the subordinates over whom he would later assume *de iure* command.²²³ This means that, in situations (i) and (ii) above, two superiors can be held criminally responsible under the doctrine of superior responsibility: the *de iure* commander A and the *de facto* commander B. Secondly, when superior B cannot be shown to have had knowledge, nor *de facto* command (authority), *no superior* can be held responsible in situation (iii) for the subordinates’ crimes, at least not under the doctrine of superior responsibility. This does of course not rule out the possibility of military (disciplinary) punishment.

The above shows that the Prosecutor in *Hadžihasanović* was partly right in stating that the existence of a superior-subordinate relationship *when* the commander became aware of the crimes is important in establishing superior responsibility. This is, however, only half of the picture. The other half relates to the prior situation. When the moment of awareness occurs *after* the commission of the crimes, the superior-subordinate relationship must exist at both the moment of awareness *and* the

²²² *Hadžihasanović* Decision, paras. 200-201.

²²³ See *Krstić* Judgement, para. 625.

time of the commission of the crimes. To establish superior responsibility when the cognitive and operational elements are post-crime, the functional element must exist *both* post-crime and during the commission of the crimes. This is because a superior-subordinate relationship needs to be established before a superior can be held criminally liable for the acts of subordinates.²²⁴ The superior-subordinate relationship justifies holding a superior *criminally* liable for the acts of subordinates. The nature of superior responsibility as a *derivative* of subordinates' crimes and depending on a superior-subordinate relationship requires as its point of measurement the time of the commission of the crimes.²²⁵ Any other way of attributing superior responsibility would conflict with the doctrine of superior responsibility and principles of criminal law.

(c) Failure to punish entailing individual criminal responsibility?

When the successor-superior becomes aware of the subordinates' crimes, he cannot let this information pass unnoticed. If only to discipline his men and instruct them on the rules of war, he is under the obligation to punish the culprits for the crimes committed prior to the time when he assumed command.²²⁶ Can a failure to punish trigger individual responsibility? Non-punishment of crimes may be interpreted as instigating new crimes within the context of Article 7(1) of the ICTY Statute. The *Blaskić* Trial Chamber considered that

[t]he failure to punish past crimes, which entails the commander's responsibility under Article 7(3), may, pursuant to Article 7(1) and subject to this fulfilment of the respective *mens rea* and *actus reus* requirements, also be the basis for his liability for either aiding and abetting or instigating the commission of *further* crimes.²²⁷

In the *Kordić and Čerkez* case, the Trial Chamber was of the same view:

Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under Article 7(1).²²⁸

The above, however, relates to *future* crimes, how about *past* crimes? Prosecuting a successor-superior for past crimes before he assumed command would be tantamount to prosecuting complicity after the fact where the successor-superior would qualify as an accessory after the fact. As appeared earlier, this type of liability can

²²⁴ See para. 1 of this Chapter para. 3 (i)(e).

²²⁵ See Chapter 5 para. 4(b).

²²⁶ See Article 87 of the AP I.

²²⁷ *Blaskić* Judgement, para. 337. The Trial Chamber refers in this respect to the regulations of the SFRY armed forces, which provide that 'A military commander is responsible as a *participant or an instigator* if, by not taking measures against subordinates who violate the law of war, he allows his subordinate units to continue to commit acts'.

²²⁸ *Kordić and Čerkez* Judgement, para. 371.

be applied as complicity liability.²²⁹ This means that a causal link with the past crime is required, for instance, an agreement made *before* or *during* the commission of the crime not to repress the crime or submit it to the competent authorities. Moreover, it must be shown that a superior's intent was known to the subordinate(s) in that it had an encouraging effect on them, and thus substantially contributed to the commission of the crimes.

Therefore, a superior who fails to punish subordinates' crimes committed prior to the time when he assumed command (and who had no knowledge or effective control to prevent or punish the crimes before he assumed command) cannot be held criminally responsible under the doctrine of superior responsibility for those crimes, nor under a type of complicity after the fact, entailing individual criminal responsibility. Only in two instances can a successor-superior incur individual criminal responsibility for failing to punish the crimes of subordinates: 1) when his failure to punish dates back to an agreement made before or during the commission of the crime(s), or 2) when his failure to punish can be seen to contribute to *future* crimes. The latter situation will be discussed more extensively in paragraph 7 below.

(d) Dereliction of duty to supervise

It must not be forgotten that military disciplinary measures can still be imposed to punish a successor-superior's failure to punish the prior crimes committed by subordinates. Under military law, subordinate conduct needs to be covered by a commander's responsibility at all times.²³⁰ This could be regarded as a separate crime, such as, dereliction of duty to supervise. Punishment and responsibility would, however, be separated from the underlying crimes. An overview of national provisions and concepts shows examples of this type of superior responsibility, which in fact is a crime of omission.²³¹ The ICTY in *Hadžihasanović* seemed to accept a 'crime of omission' type of superior responsibility. The reason for opposing such an interpretation in the above is that it does not 'fit' the doctrine of superior responsibility and Article 6/7(3) of the ICTR/Y Statutes. Consider the text of the relevant provision:

[t]he fact that any of the facts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate *does not relieve his superior of criminal responsibility* if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The close connection between a culpable subordinate and a culpable superior as a result of the same crime, suggests that the superior is responsible for the crime and should be punished for it. Indeed, practice at the Tribunals shows that superiors are

²²⁹ See Chapter 2 para. 11.

²³⁰ See also para. 3 (i)(g) of this Chapter.

²³¹ See Chapter 5 para. 4.

punished for the underlying crimes and not for a dereliction of duty. In *Hadžihasanović*, the Trial Chamber deviated from consistent ICTY jurisprudence when it allowed for a ‘dereliction of duty version’ of superior responsibility under Article 7(3) of the ICTY Statute. In *Čelebići*, the Appeals Chamber already abandoned the ‘dereliction of duty version’ of superior responsibility:

Article 7(3) of the Statute is concerned with superior responsibility arising from failure to act in spite of knowledge. *Neglect of duty to acquire such knowledge, however, does not feature in the provision as a separate offence*, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish. (...) It is however noted that although a commander’s failure to remain apprised of his subordinates’ action, or to set up a monitoring system may constitute a neglect of duty which results in *liability within the military disciplinary framework*, it will not necessarily result in criminal liability.²³²

(e) Causality

At the ICTY, causality was denied the status of a separate element of the doctrine of superior responsibility.

Notwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formulation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject.²³³

This does not mean that it is not an element of Article 6/7(3) of the ICTR/Y Statutes. The Trial Chamber in *Čelebići* worded it as follows:

In fact, a recognition of a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior’s failure to take the measures within his powers to prevent them. In this situation, the superior may be considered to be causally linked to the offences, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed.²³⁴

Causality is part of ‘prevent’. The wording of Article 6/7(3) ICTR/Y Statutes implies that, if the superior had used his power, he would or could have prevented the attempted or completed crime. A causal link between the second alternative, ‘punish’, and the underlying crime can only be established when the completion of the crime is not final, for instance, if a repetition of the completed crime is about to oc-

²³² *Čelebići* Appeal Judgement, para. 226.

²³³ *Čelebići* Judgement, para. 398.

²³⁴ *Ibidem*, para. 399.

cur or there is a continuance of the harm.²³⁵ The ‘punish alternative’ is linked to the underlying crime through the superior-subordinate and the knowledge element, as well as through the causal element of the ‘prevent alternative’: had he (the superior) known his subordinates were about to commit crimes, he would have acted and could have prevented the crimes, as he now knows he can punish the perpetrators of the underlying crimes. In other words, ‘punish’ as a post-crime alternative can never have a causal link apart from through ‘prevent’, *i.e.* a ‘second-hand’ causal link. This is why the *Čelebeći* Trial Chamber held that causality is not a separate element of command/superior responsibility:

In contrast, while a causal connection between the failure of a commander to punish past crimes committed by subordinates and the commission of any such future crimes is not only possible but likely, the Prosecution correctly notes that no such casual link can possibly exist between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence. The very existence of the principle of superior responsibility for failure to punish, therefore, recognised under Article 7(3) and customary law, demonstrates the absence of a requirement of causality as a separate element of the doctrine of superior responsibility.²³⁶

Causality, rather than being a means to establishing the exact chain of events leading to the subordinates’ crimes and the superior’s responsibility, is an issue of ‘reasonable attribution’ of criminal responsibility.

The concept of superior responsibility enshrined in Article 28 of the ICC Statute, on the other hand, does provide for causality as an element of the provision. That is dealt with in more detail in paragraph 5 below.

4. CONFLICT CLASSIFICATION

Before taking a closer look at Article 28 of the ICC Statute and analysing the provision in the light of the above-described case law of the *ad hoc* Tribunals, the problem of conflict classification needs to be addressed. In *Hadžihasanović*, the Tribunal was asked to consider the nature of the armed conflict as relevant for the application of superior responsibility. The Defence in this case claimed that the doctrine of command responsibility was not applicable in non-international armed conflicts at the time of the commission of the alleged crimes. This issue had never been elaborately dealt with by either of the *ad hoc* Tribunals, and, the Trial Chamber aimed at doing just that.

In the early stages of its existence the ICTY was called to establish jurisdiction over crimes committed in internal or non-international armed conflicts. Through a dynamic interpretation of international humanitarian law, the ICTY Appeals Chamber

²³⁵ Triffterer (2002), pp. 185-186.

²³⁶ *Čelebići* Judgement, para. 400.

dealt with these challenges.²³⁷ The Tribunal, by relying on customary international law, expanded the scope of criminal responsibility by ruling that it attaches to *any* violation of international humanitarian law; not just violations of rules applicable during international armed conflicts. Current treaty law confirms this progressive jurisprudence. The Rome Statute provides for a catalogue of crimes committed in non-international armed conflicts, and as such offers a treaty basis for the concept of criminal liability relating to offences committed during internal armed conflicts.²³⁸

The issue of individual responsibility for crimes committed in non-international armed conflicts being settled, the question arises how this pertains to superior responsibility. Does this mean that superior responsibility can generate criminal responsibility in non-international armed conflicts as well? After all, as *specialis* of the *generalis* individual responsibility, it seems logical to assume that it equally extends to non-international armed conflicts. In the *Furundžija* case, the ICTY applied that line of reasoning with regard to aiding and abetting.²³⁹ Furundžija was a commander of the special unit of the HVO (Croatian Defence Council) military police, involved in an armed conflict with the army of Bosnia Herzegovina. The HVO was established by the self-proclaimed political entity of the Bosnian Croats inside the Republic of Bosnia Herzegovina.²⁴⁰ In its judgement the Trial Chamber established that all those who participate in the crime (for instance by ordering it) are equally liable.²⁴¹ It did not pronounce on the nature of the conflict in which the offences were committed. It sufficed to determine that the threshold-test established in the '*Tadić* Jurisdiction Decision' had been met:

[A]n armed conflict exists whenever there is 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.²⁴²

The ICTY was asked to pronounce on the matter for the first time in the *Aleksovski* case. The Defence argued that early precedents cited by the prosecutor as establishing a general doctrine of superior responsibility in international law, did not apply in the case at hand as the precedents all related to the Second World War, *i.e.* an international armed conflict while the present conflict was of an internal nature.²⁴³ The Trial Chamber rejected the Defence argument by holding that it 'does not share this view'.²⁴⁴ It did not address the point in detail and instead emphasised that 'any person acting *de facto* as a superior may be held responsible under Article 7(3)'.²⁴⁵ The Trial Chamber seemed to consider the nature of the conflict – internal or interna-

²³⁷ See further Chapter 1 para. 8.

²³⁸ Article 8(c) and (e) of the ICC Statute.

²³⁹ See also Zegveld (2002), pp. 112-113.

²⁴⁰ *Furundžija* Judgement, para. 51.

²⁴¹ *Ibidem*, paras. 253-254.

²⁴² *Tadić* Jurisdiction Decision, para. 70.

²⁴³ *Aleksovski* Judgement, para. 74.

²⁴⁴ *Ibidem*, para. 75.

²⁴⁵ *Ibidem*, para. 76.

tional – irrelevant for the question of superior responsibility. In the *Krnjelac* case, the defendant was held criminally liable on the basis of Article 7(3) of the ICTY Statute for crimes committed during a non-international armed conflict. The Trial Chamber did not explicitly find that these crimes were committed against the background of an internal armed conflict – it was not a point of dispute between the parties – but it implicitly accepted it by finding the accused guilty of cruel treatment, a violation of Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions.²⁴⁶ A similar approach can be found in the *Krstić* case.²⁴⁷

In *Hadžihasanović*, the ICTY pronounced on the matter more clearly. The Defence in this case argued that at the time of the establishment of the ICTY in 1993 there was no basis in customary or conventional law for the doctrine of command responsibility in internal armed conflicts and that therefore Article 7(3) of the ICTY Statute violates the principle of *nullum crimen sine lege*.²⁴⁸ The Defence referred to case law from international and national judicial organs, military manuals, and national legislation in supporting their argument that ‘there is little to no evidence in any source of a consistent, extensive and representative State practice to apply the doctrine of command responsibility as applied by the International Tribunal in internal armed conflicts’.²⁴⁹ The Trial Chamber, in ruling on the issue, gave an overview of the development and history of command responsibility, from its roots in the Lieber Code to the ICC Statute.²⁵⁰ It held that the doctrine of superior responsibility was part of customary law prior to the foundation of the Tribunal, and that it applied in situations of peace, as well as in international and non-international armed conflicts. In response to the Defence argument that international and national case law on superior responsibility all relate to international armed conflicts, it held that,

[a]s the conflicts in relation to which the various international judicial bodies had been established were of an international character, obviously the principle of command responsibility was only used against persons who had acted in such international armed conflicts. (...) The elements elaborated in the case law focused on the duty of commanders, the relationship to the subordinates, and the commanders failure to prevent or punish – none of which include expressly or implicitly any kind of jurisdictional requirement, let alone relevance to the nature of the conflict – and thus, to apply the doctrine developed in relation to international armed conflict to an internal conflict does not disrupt in any way the integrity of the maxime of command responsibility.²⁵¹

The author agrees with the Trial Chamber that the principle of superior responsibility is firmly rooted in customary international law. Its context is not a pre-requisite

²⁴⁶ *Krnjelac* Judgement, paras. 174, 316, and 534.

²⁴⁷ In the *Krstić* case. Although the latter was found to meet the requirements under Article 7(3) of the ICTY Statute, he was found guilty under Article 7(1) of the ICTY Statute, which was thought to ‘consume’ superior responsibility pursuant to Article 7(3) of the ICTY Statute. *Krstić* Judgement, paras. 480–483, and 605.

²⁴⁸ *Hadžihasanović* Decision, paras. 9 and 16.

²⁴⁹ *Ibidem*, para. 23.

²⁵⁰ *Ibidem*, paras. 68–149.

²⁵¹ *Ibidem*, paras. 151–152.

for its application. Conflict classification may be relevant for the underlying crimes, but it does not impinge upon the principles of individual or superior responsibility. Furthermore, the fact that treaty law does not provide for superior responsibility in internal armed conflicts does not mean, reasoning *a contrario*, that it does not apply in internal armed conflicts. The AP II differs from the AP I in that it contains *minimum* rules. In *Hadžihasanović*, the Trial Chamber made this same point by referring to the ICRC Commentary to the AP II and the preamble of the Protocol, which contains the Martens clause. Common Article 3, and the AP II leave intact the right of authorities to prosecute, try, and convict members of the armed forces in internal armed conflicts.²⁵² The Trial Chamber also rebutted the Defence argument on the point of conflict classification and national legislation and military manuals. The Defence argued that 'there is practically no national legislation or military manual touching upon command responsibility in the context of internal armed conflicts'²⁵³ Moreover, the Defence stated that the national concepts reflect different types of superior responsibility, as accomplice liability, and a separate offence of omission, distinguishing it from Article 7(3).²⁵⁴ The Trial Chamber agreed that there is practically no national provision encapsulating superior responsibility in internal armed conflict, but this does not alter its position that,

[c]ertainly by and since 1991 command responsibility as a theory of individual criminal responsibility clearly formed part of customary international law.²⁵⁵

The ICTR has largely followed the ICTY rulings on superior responsibility, and has applied it in the context of the Rwanda situation. This means that the principle of superior responsibility has been applied to substantive norms applicable during an internal armed conflict as well. Various convictions have been based on superior responsibility but the Rwanda Tribunal has never explicitly ruled on conflict classification and the concept of superior responsibility.²⁵⁶

The argument that the legality principle is violated by attaching superior responsibility to crimes committed during non-international armed conflicts, is the most convincing objection against application of superior responsibility in non-international armed conflicts. After all, Article 86 and Article 87 of the AP I, the first treaty provisions establishing superior responsibility, are part of the body of law that regulates international armed conflicts. Superior responsibility has no counterpart in common Article 3 or in the AP II. Moreover, Second World War-related case law, such as the much-cited *High Command*, *Hostages*, and *Yamashita* cases all relate to crimes committed in connection with an international armed conflict. At second glance, however, the argument is flawed. The world has moved on, and the law has

²⁵² Ibidem, paras. 160-161.

²⁵³ Ibidem, para. 165.

²⁵⁴ Ibidem, paras. 22-30.

²⁵⁵ Ibidem, para. 167.

²⁵⁶ *Kayishema and Ruzindana* Judgement; *Musema* Judgement; *Kambanda* Judgement; ICTR, *Prosecutor v. Omar Serushago*, Sentence, Case No. ICTR-98-39-S, Sentence, 5 February 1999.

developed since the adoption of the additional protocols to the Geneva Conventions in 1977. Customary law provides for a doctrine of superior responsibility that applies in *any* type of armed conflict. One could even argue that the concept exists outside armed conflict, as a general principle of law that has counterparts in *general* criminal law, or even in other fields of law.²⁵⁷ Be that as it may, the *Tadić* Appeals Chamber's findings on the principle of individual criminal responsibility in non-international armed conflicts is the most straightforward argument why we should accept that superior responsibility, as its *specialis*, applies in non-international armed conflicts.

In *Hadžihasanović*, the Trial Chamber, in pronouncing on the issue of the application of superior responsibility in non-international armed conflicts, was asked to make the implicit explicit and state the obvious. Conflict classification is not relevant as a jurisdictional prerequisite in triggering the application of superior responsibility. This might explain why, as the Defence in *Hadžihasanović* observed 'no leading or highly qualified publicists have addressed this question in detail'.²⁵⁸

5. ARTICLE 28 ICC STATUTE

Article 28 of the ICC Statute: Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her

²⁵⁷ See Chapter 5 paras. 2 and 4.

²⁵⁸ As reproduced by the Trial Chamber: *Hadžihasanović* Decision, para. 35.

power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 28 of the ICC Statute is a more detailed formulation of superior responsibility than Article 6/7(3) of the *ad hoc* Statutes and any other formulation of superior responsibility prior to that. The common *chapeau* for the alternatives enumerated in Article 28 stipulates that superior responsibility adds 'to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court'. It supplements the various participation modes listed in Article 25(3) sub a-f.

(i) FUNCTIONAL ELEMENT: SUPERIOR-SUBORDINATE RELATIONSHIP

(a) Superior

From negotiations leading to the formulation of Article 28 of the ICC Statute, we learn that the distinction between military and non-military superiors stems from a proposal put forward by the United States. The latter made the point that it was not obvious that a civilian superior has the same degree of control as a military superior. After lengthy debates, the current text was adopted, distinguishing between military and non-military superior responsibility.

Fenrick, in a commentary to this provision, submits that military superior responsibility, or command responsibility, is firmly established in post-Second World War case law.²⁵⁹ With respect to non-military superiors, he is more hesitant, observing that there are 'indications' in post-Second World War establishing such liability. However, the Tokyo trial and some of the subsequent trials, in which non-military superiors were held criminally liable for failure to act, seem to constitute more than mere 'indications'.²⁶⁰ In any event, military superior always had a stronger *treaty* basis than non-military superior responsibility. While Article 86 of the AP I established responsibility for *all* types of superiors in respect of failure to act, the *duty* to act laid down in Article 87 of the AP I was only imposed on 'commanders'.²⁶¹ The duty of non-military superiors was based on international customary law and general principles of law derived from national laws and legal systems. Recent jurisprudence, especially at the ICTY, has developed the concept of non-military superior responsibility even further, giving it a strong basis in customary international law. This basis has now been codified in Article 28 of the ICC Statute.

Having established the 'horizontal scope' of superior responsibility by unequivocally stipulating that it extends to non-military superiors as well, the question arises as to which hierarchical level relates to superior responsibility. In other

²⁵⁹ Fenrick in Triffterer (1999), margin No. 3, p. 517.

²⁶⁰ Ibidem.

²⁶¹ Ibidem, margin No. 2, p. 517

words, what is its 'vertical scope'? This issue has never been clearly addressed in international case law.²⁶² The Tokyo Tribunal, and to a certain extent the Nuremberg Tribunal relied on a conspiracy-complicity concept in holding those responsible at policy level for crimes committed by subordinates. In the subsequent Nuremberg and UNWCC proceedings, superiors at various levels were held accountable for subordinates' crimes on the basis of superior responsibility.

The *ad hoc* Tribunals provide a mixture of 'superiors', ranging from cabinet ministers to generals, to low-level commanders. While prosecutorial focus nowadays is on those at higher levels, leaving those at lower levels to national prosecution and adjudication, in the early days of the Tribunals' existence, superiors at all levels were tried. The 'effective control' mechanism allows for this broad scope. 'A position of authority' or 'hierarchical power' coupled with 'effective control' over a subordinate can trigger superior responsibility under Article 6/7(3) of the ICTR/Y Statutes.²⁶³

It is interesting, that in more recent cases, the prosecutor at the *ad hoc* Tribunals has found recourse to the concept of 'joint criminal enterprise' rather than superior responsibility in charging high-level defendants with crimes committed by their subordinates.²⁶⁴ One can only guess what the motive behind this is, but a reason could be that the knowledge requirement of Article 6/7(3) of the ICTR/Y Statutes provides the prosecutor with evidentiary problems and poses a risk in prosecuting a superior for superior responsibility. In particular with high-profile defendants, such as Milošević, the prosecutor cannot afford to make mistakes. After all: 'the further away a superior is from the actual "smoking gun" the more difficult he is to prosecute'.²⁶⁵

In *theory*, the 'vertical scope' of superior responsibility is not limited to a certain level of command or authority. As long as certain requirements are met, any superior can be held responsible under the doctrine of superior authority. It is another matter if that happens; prosecutorial policy might put *practical* limits on the application of superior responsibility.

(b) A military commander or person effectively acting as a military commander

Article 28(a) of the ICC Statute relates to a military commander or a person 'effectively acting as a military commander'. The provision encompasses both *de iure* and *de facto* superiors. The delegates in Rome expressed the view that it would be unacceptable to have less stringent requirements for *de facto* commanders than for *de iure* military commanders in regular armed forces.²⁶⁶

²⁶² See also Ambos in Cassese *et al.* (2002a), p. 855.

²⁶³ *Čelebići* Appeal Judgement, para. 354; *Blaškić* Judgement, para. 300, *Aleksovski* Judgement, para. 78.

²⁶⁴ For an analysis of joint criminal enterprise, see Chapter 2 para. 9(b).

²⁶⁵ Wu and Kang (1997), p. 272.

²⁶⁶ Saland (1999), p. 203.

De facto commanders can include police officers in command of armed police units, persons responsible for paramilitary units not incorporated in the armed forces, and persons who have assumed *de facto* control over the armed forces, armed police or paramilitary units.²⁶⁷ The element of 'effective' is inserted to ensure that whichever way control is exercised, through *de facto* authority or *de iure* command, it meets a certain threshold in establishing a superior-subordinate relationship. This is in line with the ICTY Appeals Chamber Judgement in the *Čelebići* case, superior responsibility evolves around the element of 'effective control', *i.e.* 'having the material ability to prevent or punish criminal conduct, however that control is exercised'.²⁶⁸ The 'effective control' element makes superior responsibility 'pierce veils of formalism'²⁶⁹ and cut right through strict hierarchical structures. It can apply to staff officers, when they act having command powers, or commanders from a parallel chain of command. The ICC endorses this approach and accepts that what really triggers a superior's liability for another person's act is his effective control over that person.²⁷⁰

A question that arises in this context is whether political superiors should be regarded as 'persons effectively acting as a military commander' under paragraph (a), or as 'other superiors', under the less stringent regime of paragraph (b). History has shown that political leaders are often the most blameworthy as the masterminds behind a policy of mass crime. The 'Führerprinzip', which was raised as a defence by the accused in Nuremberg, is an illustration of this. The defendants, persons of high ranks belonging to the military and the administrative Nazi 'apparatus', argued that it could not be proved that they were guilty of common planning to prepare and wage war since there was complete dictatorship under Hitler.²⁷¹

Be that as it may, it is clear from legislative history that 'effectively acting as a military commander' was meant to encompass warlords and leaders of non-regular armed forces rather than political leaders.²⁷² Fenrick indicates that paragraph 28(a) can be seen to extend to Heads of State and other political figures, as long as they *exercise command*.²⁷³ I agree with Fenrick that, although it might not have been on the minds of those drafting Article 28, a political leader can qualify as a person 'effectively acting a military commander' under paragraph (a).²⁷⁴ It would be unsatisfactory to classify those 'pulling the strings' under paragraph 28(b) and the 'puppets' under the more stringent regime of paragraph (a).

²⁶⁷ See W. J. Fenrick in Triffterer (1999), margin No. 5, para 5, pp. 517-518.

²⁶⁸ *Čelebići* Judgement, para. 378; *Čelebići* Appeal Judgement, para. 256.

²⁶⁹ *Čelebići* Judgement, para. 377.

²⁷⁰ *Čelebići* Judgement, para. 377: 'The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates'.

²⁷¹ See Nuremberg Judgement in Friedman (1972), Vol. II, p. 942.

²⁷² Saland (1999), pp. 202-204.

²⁷³ Fenrick in Triffterer (1999), margin No. 4, p. 517.

²⁷⁴ See also Vetter (2000), pp. 138-141.

As was said earlier, evidentiary difficulties seemed to have made the prosecutor at the ICTY rely on joint criminal enterprise rather than superior responsibility in charging superiors with crimes committed by others.²⁷⁵ This may be seen as an indication that the concept of superior responsibility is ‘unfit’ to provide the basis for holding responsible those in the highest positions, in particular those who can be regarded as the planners and/or *auctor intellectualis*. The concept of superior responsibility provides a basis for attributing criminal responsibility for a failure to act, *i.e.* passive conduct. The liability of an *auctor intellectualis* is more likely to connote active conduct, such as the planning and instigating of crimes. At this point, we can reiterate what the ICTY Trial Chamber stated in *Kordić and Cerkez* in considering the distinct features of Articles 7(1) and 7(3) of the ICTY Statute:

Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under Article 7(1).²⁷⁶

It appears that, besides the earlier-noted practical (evidentiary) motive, there is a more substantive reason why superior responsibility might not be the most appropriate basis for holding a political figure responsible for crimes committed by subordinates.

Lower political superiors and civilian superiors such as businessmen would qualify as non-military superiors and would be covered by Article 28 (b) of the ICC Statute.

(c) **Effective command and control, or effective authority and control**

The ICC reiterates the conjunctive notions of command and control, an established pair in military law and the jurisprudence of the ICTY. The clause ‘effective command and control, or effective authority and control’ in paragraph 28(a) of the ICC Statute was inserted to make sure that any *de facto* superior who effectively acts as a military commander falls under this paragraph.²⁷⁷ Paragraph (b) also features the clause ‘authority and control’. Moreover, it repeats a similar requirement in subparagraph (ii): ‘the effective responsibility and control’. This way the drafters emphasised that the requirement of effective control is particularly important with regard to non-military superiors.

The above begs the questions whether there is a difference between ‘command and control’ and ‘authority and control’, especially since paragraph 28(a) mentions both as an element of military superior responsibility. It is submitted that there is no substantive difference between the two concepts, provided that ‘command’ relates to *de iure* commanders and ‘authority’ to *de facto* commanders. This can be taken from the *Čelebići* Judgement, in which the Trial Chamber ruled that

²⁷⁵ See Chapter 2 para. 9 (b).

²⁷⁶ *Kordić and Cerkez* Judgement, para. 371.

²⁷⁷ See Saland (1999), p. 203.

[t]he term superior is sufficiently broad to encompass a *position of authority* based on the existence of *de facto* powers of control (italics added, *EvS*).²⁷⁸

Fenrick has a different understanding of 'effective authority and control', which stems from a different understanding of command. To his mind, commanders who exercise control over forces, which are not directly subordinate to him, have 'effective authority and control'. In other words, *de iure* commanders who stand in a relationship of indirect subordination to their subordinates exercise authority rather than command:

In certain circumstances, commanders may exercise control over forces which are not placed under them in a direct chain of command. Commanders who, in addition to their operational responsibility, have authority as occupation zone commanders, may give orders to all forces within their occupation zone. Such forces would be within the effective authority of the commander in matters related to public order and safety in the zone.²⁷⁹

For the sake of clarity, and in line with ICTY jurisprudence, I would prefer to reserve the term 'authority' for *de facto* commanders as the equivalent of the term 'command' for *de iure* commanders. Thus the *de iure* commander in my view always has command, even in situations of indirect subordination. The only difference between command based on a direct, and command based on an indirect line to the subordinate, is that in the latter case, the element of 'effective control' is pivotal in attributing liability for subordinates' crimes.

As was explained in paragraph 1 of this chapter, command or 'a position of authority' is exercised *through* control. Control is the concept that allows powers of command to be exerted; as such, it cannot be regarded as 'a kind of umbrella term encompassing command and authority', as was submitted elsewhere.²⁸⁰

In general, control in a non-military context is more limited than that in a military context. This is because military superiors operate within a structure of hierarchy and a system of obedience.²⁸¹ A non-military superior does not have control over activities of subordinates outside working hours, whereas a military commander is responsible for subordinates' activities 24 hours a day, during operations. Moreover, a military commander has recourse to a military code or a disciplinary system (in addition to general criminal law) in exercising control over his subordinates. These differences stem from the fact that a military commander can order his subordinates into danger. This is something a civilian superior usually does not do.²⁸² The latter difference might account for the insertion of subparagraph (ii) in Article 28(b) of the

²⁷⁸ *Čelebići* Judgement, para. 370.

²⁷⁹ Fenrick in Triffterer (1999), margin No. 8, p. 519.

²⁸⁰ Ambos in Cassese *et al.* (2002a), p. 857.

²⁸¹ *Ibidem*, p. 858.

²⁸² Fenrick in P. Duyx *et al.* (eds.), 'War Crimes Law and the Statute of Rome: Some Afterthoughts? Report of the Seminar of Rijswijk', in *Revue de Droit Militaire et de Droit de la Guerre*, XXXIX-1-2-3-4, pp. 68-122, p. 87. Wu and Kang (1997), p. 295.

ICC Statute. The clause 'the crimes concerned activities that were within the effective responsibility and control of the superior' seems to underline the difference between civilian control and military control. Since this is already part of the superior-subordinate relationship as this is articulated in both Articles 28(a) and 28(b) ICC Statute, subparagraph (ii) seems to have no added value. De Vetter, however, disagrees with this rather unsatisfactory reading of Article 28(b)(ii) of the ICC Statute. He argues that the meaning of Article 28(b)(ii) of the ICC Statute is not clear, but that it is more than just 'a mere statement of the differences between civilian control and military control'.²⁸³

To the author's mind, paragraph 28(b)(ii) does have added value. Concentrating on the word 'responsibility' rather than on the clause 'effective responsibility and control', 'control' in paragraph (ii) can be interpreted in such a way as to constitute the absolute minimum or 'bottom-line' of superior responsibility. Only activities within a civilian superior's responsibility and control can generate criminal responsibility under Article 28(b). As was discussed earlier, to have control over a person is more than being feared.²⁸⁴ The concept of superior responsibility is based on a relationship of hierarchy through obedience and superior authority coupled with responsibility. Unlike fear, which connotes a one-way relationship, a superior-subordinate relationship is reciprocal. Subordinates obey the superior who in turn is *responsible* for their behaviour. Article 28(b) (ii) should, therefore, be read as excluding the possibility of a relationship of fear qualifying as a superior-subordinate relationship generating superior responsibility. This accords with the findings of the Appeals Chamber in *Čelebići* on this point, which should be endorsed in the context of Article 28:

It follows that there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and accordingly, cannot properly be considered their 'superiors' within the meaning of Article 7(3) of the Statute.²⁸⁵

(ii) COGNITIVE ELEMENT: STANDARDS OF KNOWLEDGE

The 'unless otherwise' clause in Article 30 of the ICC Statute implies that mental standards other than intent and knowledge are allowed in the context of the ICC Statute.²⁸⁶ Article 28 encompasses another such standard in paragraph (a)(i) namely, negligence enshrined in the knowledge standard 'should have known'. Article 28 of the ICC Statute provides two other knowledge standards: actual knowledge and wilful blindness.

²⁸³ Vetter (2000), p. 120.

²⁸⁴ See para. 3 (i)(d) of this Chapter.

²⁸⁵ *Čelebići* Appeal Judgement, para. 377.

²⁸⁶ See further Chapter 2 para. 2 (a).

(a) **Knew**

The definition of knowledge in Article 30(3) of the ICC Statute may be usefully applied in the context of Article 28 of the ICC Statute: 'knowledge means awareness that a circumstance exists or a consequence will occur'. If actual knowledge cannot be proved with direct evidence, it may be established by way of circumstantial evidence. The list of indicia drawn up by the Commission of Experts and applied by the *ad hoc* Tribunals can prove useful in the context of the ICC as well.²⁸⁷

(b) **Should have known**

Article 28(a) of the ICC Statute reintroduces the 'should have known' standard unsuccessfully proposed by the ICRC during the drafting process of Article 86 of the AP I, and by the ICTY Trial Chamber in *Blaškić* in interpreting 'had reason to know'. The discussion at the ICTY on the 'should have known' and 'had reason to know' standards was described earlier.²⁸⁸ It was concluded that the interpretation of 'had reason to know' by the Appeals Chamber in *Čelebići* brought this standard close to a 'should have known' requirement and thus left little room for disagreement. Ambos agrees and submits that the two standards 'do not really have a different meaning'.²⁸⁹ They are rather two versions of the same thing.²⁹⁰

However, they do differ slightly. In the context of the *ad hoc* Tribunals, the prosecutor, when faced with an ignorant commander, needs to demonstrate that, bearing in mind the reporting system and the nature of the information, that the commander 'had reason to know' about the subordinates' crimes. The prosecutor has to show that the commander had information of a general nature that would have enabled him to conclude that crimes were ongoing or were committed. Information is the key element here. When he had information available and still did not know, he is nevertheless responsible as he 'had reason to know'.

The 'should have known' test equally assumes that the superior did not know, but that the reporting system or the nature of the information should have caused him to inquire. This test is likely to be an *objective* test as it departs from the assumption that the defendant did not have knowledge. The superior is tested against the standard of a commander of a similar position and training.²⁹¹ Taking into account 'the circumstances at the time', however, might 'individualise' this objective test.

Negligence

The question arises as to what exactly the *mens rea* of superior responsibility is. The law of the *ad hoc* Tribunals seems to require intent or at least recklessness: although

²⁸⁷ *Čelebići* Judgement, para. 386.

²⁸⁸ Para. 1 of this Chapter.

²⁸⁹ Ambos in Cassese *et al.* (2002a), p. 864.

²⁹⁰ This view is shared by Landrum (1995), p. 300. Vetter disagrees and regards them as two different standards. Vetter (2000), pp. 122-123.

²⁹¹ *Blaškić* Judgement, para. 332.

the commander did not desire a particular result, in not taking notice of the information available to him, he knowingly took a risk.

Article 30, the general provision on the mental standard in the ICC Statute, requires that crimes be committed with intent and knowledge, 'unless otherwise provided'. Article 28 qualifies as 'otherwise provided' as it establishes negligence through the clause 'should have known'. In search of the *mens rea* standard of superior responsibility, Ambos proposes interpreting 'should have known' in the light of Article 86 of the AP I. Indeed, that seems the safest way to proceed and develop the superior responsibility concept that is rooted in customary law, but developed from treaty law in the AP I. After all, 'should have known' was part of the debates in drafting Article 86 of the AP I and as appeared from the ICTY jurisprudence on the matter, may be seen to be part of current international customary law. Wu and Kang, propose four possible interpretations of the formula in Article 86 of the AP I:²⁹²

- 1) A superior has an obligation to monitor the actions of his subordinates and will be held responsible for the knowledge that a reasonable agent in his position would have possessed;
- 2) The superior is guilty of wilful blindness to the extent that knowledge should be assumed because deliberate ignorance and positive knowledge are equally culpable;
- 3) Knowledge must be constructively imputed based on a superior's position if there is no way he could have known;
- 4) Actual knowledge must be proved, but may be inferred from circumstances.

Alternative 3) and 4) can be ignored as possible interpretations of 'should have known'. The third alternative seems to establish vicarious liability by basing a superior's responsibility on his position. As this type of liability violates the parameters of culpability set out earlier in this study, and as it does away with the principle of personal fault, the third option should be faulted.²⁹³ The fourth alternative is an evidentiary matter of how to construct knowledge, and, as such, belongs to the alternative cognitive standard that the superior 'knew' of the crimes committed by subordinates. That leaves options 1) and 2). The first is a negligence, the second, a recklessness standard. The negligence standard is the interpretation of 'should have known' in the context of Article 28(a) ICC Statute. This finds support in comments and statements according to which the doctrine of superior responsibility creates liability for criminal negligence.²⁹⁴ But more importantly, it accords with general criminal law on negligence, where negligence is a fault degree connoting the mental state one *ought* to have had, rather than the mental state one actually had, or, in terms of superior responsibility, the knowledge one should have had. According to § 2.02(2)(d) of the MPC:

²⁹² Wu and Kang (1997), pp. 284-285. See also Ambos in Cassese *et al.* (2002a), pp. 866-867.

²⁹³ See on vicarious liability paras. 2 and 5 (a) of Chapter 5.

²⁹⁴ For instance: Commentary to Article 86 of the AP I requiring a gross negligence standard 'tantamount to malicious intent', Pilloud *et al.* (1987), para. 3541; Schabas (1998), p. 417: 'liability for negligence'; Bantekas (1999), p. 590: 'gross negligence for failure to act'; Keith (2001), p. 632: 'a should have known standard based on negligence'.

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.

In common law the test applied to negligence is an objective one. A person is judged by the standards of a reasonable man. Again § 2.0.2(d) MPC is instructive:

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.

Gross negligence manslaughter, on the other hand has produced a test that covers both, objective and subjective criteria.²⁹⁵ It remains to be seen how the ICC will establish negligence, by applying an objective, or a mixed test. The *Blaškić* ruling may be of guidance. The Trial Chamber in the latter case held that in establishing whether a superior has exercised due diligence in the fulfilment of his duties, one should consider 'his particular position of command and the circumstances at the time'. Given the clause 'owing to the circumstances at the time' is part of Article 28(a)(i) of the ICC Statute, it is unlikely that the ICC will establish guilt on a pure objective basis.

As we saw earlier, negligence or inadvertent recklessness corresponds to non-conscious 'Schuld' in (some) civil law systems and equally connotes the absence of awareness.²⁹⁶ This is different with conscious 'Schuld', which corresponds to advertent recklessness and where the accused *was* aware of the risk, but calculated that it would not occur. In the latter form it is part of the 'consciously disregarded information' standard of Article 28 (b) of the ICC Statute.

(c) Wilful blindness

The cognitive standard for non-military superiors in Article 28(b) of the ICC Statute essentially establishes a 'wilful blindness' standard. As such it corresponds to alternative 2) put forward by Wu and Kang as an interpretation of Article 86 of the AP I. 'Wilful blindness' is a standard of advertent recklessness. Indeed, Section § 2.0.2(c) of the MPC defines recklessness as 'consciously disregarding a risk'. It is a higher fault degree than the negligence standard for (quasi) military superiors in Article 28(a) of the ICC Statute and, as a result, it will be more difficult to prosecute non-military superiors than military superiors for a 'failure to exercise control properly'. Fenrick lists the following indicia that can be used to establish actual knowledge and that can be helpful in establishing 'wilful blindness':²⁹⁷

²⁹⁵ J.C. Smith, 'R v. Adomako', *Crim.LR* (1996), p. 515. Because of the subjective criteria in considering the definition of gross negligence, the concept would appear to resemble recklessness as it was defined in English common law in Caldwell, covering both subjective and objective states of mind.

²⁹⁶ See Chapter 2, para. 2 (b).

²⁹⁷ Fenrick in Triffterer (1999), margin No. 21.

- that information clearly indicating a significant risk that subordinates were committing or were about to commit offences existed
- that this information was available to the superior and
- that this superior, while aware that such a category of information existed, declined to refer to the category of information.

(iii) OPERATIONAL ELEMENT: FAILURE TO PREVENT, REPRESS OR SUBMIT TO AUTHORITIES

The superior must have the legal competence and the material ability to make his forces comply with international humanitarian law. According to Fenrick, the commander must

- ensure his forces are adequately trained in international humanitarian law
- ensure that due regard is paid to international humanitarian law in operational decision making
- ensure an effective reporting system is established so that he or she is informed of incidents when violating of international humanitarian law might have occurred (or is occurring, *EvS*)
- monitor the reporting system to ensure it is effective, and
- take corrective sanction when he or she becomes aware that violations are about to occur or have occurred.²⁹⁸

In all this, the Court will take into account what could reasonably have been expected of the commander under the circumstances at the time.

The drafters of Article 28 of the ICC Statute were aware of the differences that exist with regard to a military or non-military superior's power to prevent or repress the commission of crimes. Saland reports that the negotiators in Rome indicated that civilian superiors are not always in a position to prosecute.²⁹⁹ In some systems, the same would be true of military superiors, who have to submit the matter to the civilian system of police, prosecutors, and courts. These considerations account for the incorporation in paragraphs (a)(ii) and (b)(iii) of a second post-crime 'scenario': 'the superior failed to (...) submit the matter to the competent authorities for investigation and prosecution'.

(a) **Causality**

The text of Article 28 contains an express causal element: a superior shall be responsible for crimes committed by forces under his or her effective command/authority and control 'as a result of his or her failure to exercise control properly over such forces', where the superior 'failed to take all necessary and reasonable measures

²⁹⁸ Ibidem, margin No. 9, pp. 518-519. Also referred to by Ambos in Cassese *et al.* (2002a), pp. 861-862.

²⁹⁹ Saland (1999), p. 204.

within his or her power to prevent or repress their commission or to submit the matter to the competent authorities [*italics, EvS*]. An explicit causal connection is required between the underlying crimes and the superior's failure to exercise proper control over his subordinates. The failure to control is specified in subparagraph (a)(ii) and (b) (iii) as a failure to 'take necessary and reasonable measures to prevent or repress their commission or to submit the matter to the competent authorities'.

The first alternative, 'prevent', connotes a direct causal link between a superior's omission and the subordinates' crimes. The two other alternatives, 'repress' and 'submit the matter to authorities', are generally post-crime and imply that the crime cannot be prevented anymore.³⁰⁰ Unlike 'prevent', they lack a direct causal link with the underlying crimes. As was shown earlier, it was for this reason that the *Čelebići* Trial Chamber declined to award the causality element a separate status.³⁰¹ Causality plays an *indirect* role with regard to the post-crime alternatives, constituting the operational element of superior responsibility. When a superior fails to take action to prevent the crime, the next step that can free him from superior responsibility, is to repress the commission of the crime.³⁰² If that cannot be done (and he cannot be blamed for it), he can submit the matter to the authorities. The post-crime alternatives are causally linked and, as was mentioned above in connection with causality in the context of the *ad hoc* Tribunals, they have a 'second-hand' or even 'third-hand' causal link through 'prevent'. The alternatives cannot be considered separately from each other because they are not 'alternative and equally satisfying options'.³⁰³ A superior who failed to prevent when he could have prevented cannot escape liability by reporting the crime to the military police *ex post facto*.

It is submitted here that causation has the same status in Article 28 of the ICC Statute as in the context of the *ad hoc* Tribunals. The fact that it is spelt out as a definitional element of the provision rather than an implicit element of 'prevent' does not change the fact that superior responsibility generates liability beyond *direct* causation. To the author's mind, this is a feature of the concept of superior responsibility. In the end, superior responsibility is about a dereliction of duty. This is clear in the structure of Article 28, in which the cognitive and operational elements are formulated as conditions of a superior's failure to control. Even if a superior has failed to control properly and his failure has resulted in the commission of a crime, he cannot be punished unless these two conditions are met.

(b) Dereliction of duty to supervise

Article 28 of the ICTY Statute qualifies, more clearly than any of its codified predecessors, as a genuine offence, or separate crime of omission. Article 28 makes the superior liable for 'the failure to exercise control properly over such forces' or 'sub-

³⁰⁰ 'Repress', unlike 'punish', which is used in Article 6/7(3) of the ICTR/Y Statutes, can comprise a causal element when it is interpreted as suppressing further crimes. See also Triffterer (2002), p. 184.

³⁰¹ See para. 3 (iii)(d) of this Chapter.

³⁰² See Triffterer (2002), p. 201

³⁰³ See *Blaškić* Judgement, para 336. See further para. 3 (iii) (b) of this Chapter.

ordinates'. The previous superior responsibility provisions, which are based on Article 86 of the AP I, are formulated as extensions of subordinate liability where the superior is punished for both his own failure to intervene and for the crimes of others. In this way, the concept of superior responsibility 'seems to create, on the one hand, *direct* liability for the lack of supervision, and, on the other, *indirect* liability for the criminal acts of others'.³⁰⁴ Article 28, on the other hand, generates *direct* criminal responsibility of a superior because for *his* failure to act. A superior's criminal responsibility is linked to the subordinates' crimes in that they 'trigger' his liability.³⁰⁵ It is, however, not for these crimes themselves that the superior is criminally responsible. The structure of Article 28 of the ICC Statute as a separate crime of omission, narrowed down by the conditions (i) and (ii) in the respective subparagraphs (a) and (b), means that it can be termed a 'conditional crime of omission'.

6. DIFFERENT STANDARDS FOR MILITARY AND NON-MILITARY SUPERIORS

As was submitted earlier when rejecting the ICTR ruling in *Kayishema and Ruzindana*, in which a separate knowledge standard for civilian superiors was applied, the concept of superior responsibility should be considered a uniform concept, broad enough to apply to military and non-military superiors. Any attempt to distinguish the concept along military and non-military lines should, therefore, be faulted. The reasons supporting this statement have been set out earlier and equally apply with regard to the distinction made in Article 28 of the ICC Statute.³⁰⁶

Article 28 of the ICC Statute evidences an approach to superior responsibility that contradicts the nature of the concept as it has been developed in international law. Based on three equal and cumulative basic principles, evolving around effective control, enabling the inclusion of both *de facto* and *de iure* superiors, the concept leaves room for variation. Moreover, what can be understood from the discussion on 'should have known' at the ICTY is, that in the end, a knowledge standard varies with the scope of the underlying *duty*, not with the formula in which it is caught. A closer look at the most conspicuous difference between military and non-military superiors in Article 28 ICC Statute, the cognitive standard, is instructive in this respect.

If the ICTY/R knowledge formula 'had reason to know' would have been interpreted as 'should have known', it would have shifted from a 'duty to act when you know' to a 'duty to know'. As was shown by the Appeals Chamber in *Čelebići*, there is no essential difference between these two knowledge standards. They do constitute a difference in *extent* and *scope* of the duty to know, but merely in its point of departure. Bearing this in mind, and returning to Article 28(b) ICC Statute

³⁰⁴ Ambos in Cassese *et al.* (2002a), p. 824.

³⁰⁵ Ambos refers to subordinates' crimes as a 'point of reference of the superior's failure of supervision'. Ambos in Cassese *et al.* (2002a), p. 851.

³⁰⁶ See subpara. 3(ii)(d) of this Chapter.

where a 'duty to act when you know' is codified in the formula 'knew, or consciously disregarded information which clearly indicated (...)', and a 'duty to know' can be found in 'knew, or...should have known' in Article 28(a) ICC Statute, one wonders why the drafters sought to express the differences between military and non-military superiors in the cognitive aspect of superior responsibility. After all, the difference does not lie in the different knowledge formulas but in the *scope* of the superior's duty to know. A non-military superior's duty to know can vary within the 'should have known' standard, for instance by accepting that a civilian or military superior does not need to know about subordinate activities outside work. However, for those subordinate activities that fall within the scope of his duty of supervision, he 'should have known'. In all this a judge should have regard for the superior's effective control over the subordinates.

Considering the above arguments, it is unfortunate that we now have two standards of superior responsibility encapsulated in the ICC Statute. It is a pity that the drafters in Rome thought in terms of 'situations' rather than in principles. Categorising the concept in non-military and military concepts, leaving less room for judicial 'law-making' on this point, may even be taken as a lack of faith in the capability of the ICC judges to apply the concept of superior responsibility according to its underlying principles.

7. CONCURRENCE AND FUSION OF INDIVIDUAL RESPONSIBILITY AND SUPERIOR RESPONSIBILITY

In the *Blaškić* case, it was held that 'although one and the same individual may be prosecuted on the basis of both theories [individual and superior responsibility, *EvS*], this can be done only for distinct acts'.³⁰⁷ It would be illogical to hold a superior responsible for not having prevented or punished a crime in which he participated actively in an earlier stage, for instance, by ordering. It was found in *Kayishema and Ruzindana* that

If the Chamber is satisfied beyond a reasonable doubt that the accused ordered the alleged atrocities then it becomes unnecessary to consider whether he tried to prevent; and irrelevant whether he tried to punish.³⁰⁸

Individual responsibility should prevail over superior responsibility when it connotes *active* involvement in the crimes committed by subordinates. Thus, when it can be shown that atrocities were committed pursuant to the superior's orders, it is not necessary to establish the cognitive and operational elements of superior responsibility. The capacity of the 'superior' can then be an aggravating factor. However, in situations in which a superior can be prosecuted for *inaction* on the basis of individual responsibility, individual responsibility and superior responsibility concur.

³⁰⁷ *Blaškić* Decision, para. 31.

³⁰⁸ *Kayishema and Ruzindana* Judgement, para. 223.

Complicity by omission has been discussed in the context of 'aiding and abetting' in the jurisprudence of the *ad hoc* Tribunals.³⁰⁹ In the *Furundžija* case, the Trial Chamber held that mere presence at the scene of the crime constitutes assistance in the form of moral support, provided a person has a position of authority and the assistance through moral support substantially contributed to the commission of the crime.³¹⁰ This type of complicity by omission has common traits with superior responsibility in that it requires a status of *authority*, a failure to act, and an underlying crime committed by another person. The latter, however, does not necessarily have to be his subordinate. A superior-subordinate relationship governed by effective control is not a constitutive element of complicity by omission. Yet, when this position of authority qualifies as a superior-subordinate relationship, there is no substantial difference between complicity by omission and superior responsibility. The accused can then be charged under both heads of responsibility. It is under those circumstances that a 'fusion' of superior and individual responsibility can take place.

Superior responsibility is subsumed under individual responsibility. A superior's failure to take action can be seen to substantially contribute to the commission of the underlying crime(s), (i) where the superior was aware of the intent of the perpetrators, or when (ii) the accused superior can incur individual responsibility. These two requirements make up individual responsibility for aiding and abetting as established by the Tribunal.³¹¹ This type of complicity by omission is likely to overlap with superior responsibility with regard to 'continuing crimes', and crimes that consist of a multiplicity of wrongful acts, *i.e.* mass crime. The superior, by his failure to prevent or punish, not only 'creates' the danger that a new crime will be committed by his subordinate, but his inaction may have an encouraging effect upon his subordinates.³¹² 'Continuing crimes' often connote the maintenance of a wrongful situation, for instance, cruel treatment in a concentration camp. These types of crimes are not committed at one point in time but rather during a certain period of time. The same is true for mass crime. This consists of a set of wrongful acts that taken together qualify as a crime. Mass crime is also committed at several points in time (and several places). Examples of each type of crime, can be taken from the case law of the ICTY.

In the *Krstić* case, the attack against the Bosnian Muslims at Srebrenica, which involved the commission of a number of crimes qualifying as genocide, crimes against humanity, and war crimes, gave rise to the accused's individual responsibility as well as his superior responsibility. The Trial Chamber held that, with regard to crimes against humanity,

The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7(1) and Article 7(3) are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime through his subordinates, by 'planning', 'instigating', or 'ordering' the

³⁰⁹ Chapter 2 para. 8 (b).

³¹⁰ *Furundžija* Judgement, para. 209.

³¹¹ See Chapter 2 para. 8.

³¹² See Triffterer (2002), p. 187.

commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1).³¹³

The Trial Chamber established that there was a superior-subordinate relationship between Krstić and the perpetrators, that Krstić knew or had reason to know of the crimes, and that he failed to take the necessary and reasonable measures to prevent or punish the perpetrators. Nevertheless, it chose to base responsibility on Article 7(1). This seems to accord with the prosecutorial policy of primarily establishing liability on the basis of individual responsibility and, alternatively (secondly), on the basis of superior responsibility. In this way, the nature of superior responsibility as the *specialis* of the *generalis* individual responsibility is expressed.

In the *Krnjelac* case, the accused was held responsible for inhumane acts and cruel treatment of detained persons committed by his subordinates. The maintenance of a system of ill-treatment with his knowledge entailed individual responsibility. The relevant part of the Trial Chamber's judgement reads:

The Prosecution also alleges that the Accused incurred criminal responsibility for aiding and abetting the imposition of the inhumane conditions constituting inhumane acts and cruel treatment of the non-Serb detainees at the KP Dom pursuant to Article 7(1) of the Statute. To establish the Accused's responsibility on this basis, the Prosecution must establish that he was aware of the intent of the principal offenders, guards and military authorities, and that he carried out acts which rendered a substantial contribution to the commission of the intended crime by the principal offenders. The Trial Chamber is satisfied that the Accused was aware of the intent of the principal offenders and that he was aware that his failure to take any action as warden in relation to this knowledge contributed in a substantial way to the continued maintenance of these conditions constituting inhumane acts and cruel treatment by the principal offenders by giving encouragement to the principal offenders to maintain these living conditions. The Trial Chamber thus finds that the Accused incurred individual criminal responsibility pursuant to Article 7(1) of the Tribunal's Statute by aiding and abetting the maintenance of living conditions at the KP Dom constituting inhumane acts and cruel treatment during the period in which he was a warden.³¹⁴

The Trial Chamber went on to determine that the accused met the three elements making up superior responsibility and chose Article 7(1) as the basis of a conviction;

In the circumstances before it, the Trial Chamber considers that the criminality of the Accused is better characterised as that of an aider and abettor to the principal offenders who imposed and maintained the inhumane living conditions constituting inhumane acts and cruel treatment of the non-Serb detainees at the KP Dom.³¹⁵

³¹³ *Krstić* Judgement, para. 605.

³¹⁴ *Krnjelac* Judgement, para. 171.

³¹⁵ *Ibidem*, para. 173.

Accordingly, the Trial Chamber entered a conviction under Article 7(1) and considered the accused's position as superior an aggravating factor.

The same Trial Chamber came to an opposite finding with regard to the beatings of non-Serb detainees by guards of the KP Dom. Again, it found that the accused's liability could be established on the basis of both Article 7(1) and Article 7(3). This time, however, it held that,

[i]n view of the nature of the Accused's participation, the more appropriate basis of liability in relation to the beatings is his responsibility as a superior pursuant to Article 7(3) of the Statute. As the Trial Chamber is of the view that it is inappropriate to convict under both heads of responsibility based on the same acts, it will enter a conviction under Article 7(3) only.³¹⁶

The reason for this decision seems to lie in the evidence, which on this occasion seemed to point more in the direction of superior responsibility:

In respect of the actions of the guards of the KP Dom, the Accused is responsible as their superior under Article 7(3) of the Statute. As warden of the KP Dom, the Accused was de jure superior of the guards, and he knew, for the reasons given above, that they were involved in the beating of non-Serb detainees. Not only did the Accused personally see one of his subordinates beat a detainee, he also heard about such incidents, and it must have been clear that, considering that the guards were in direct contact with and controlled the detainees, some of them were involved.³¹⁷

The Trial Chambers in *Krstić* and *Krnjelac* do not make clear why they chose one ground of responsibility over the other. It seems that the closer the superior is involved with the subordinates' crimes (by physical presence and through active support, implying intent) the more likely he is to incur liability under Article 7(1), rather Article 7(3) of the ICTY Statute. This would be a proper way of attributing liability and accords with criminal law principles where fault and guilt should be premised first of all on *positive* conduct. This because it is more difficult to circumscribe omissive criminal behaviour, which means that liability by omission has an inherent danger of expanding beyond personal fault.³¹⁸

In sum, the ICTY has held that there can be a concurrent application of individual responsibility under Article 7(1), and superior responsibility under 7(3) of its Statute, except when *active* participation in the crime of the subordinate concurs with the failure to prevent this crime. Individual responsibility (complicity by omission) overlaps with superior responsibility under the following three conditions, when (i) the underlying crime(s) constitute a 'forbidden situation' or qualify as mass crime implying a plurality of wrongful acts (ii) the three elements of superior responsibil-

³¹⁶ Ibidem, para. 316.

³¹⁷ Ibidem, para. 318.

³¹⁸ See also A.J. Machielse, AIDP, 'Infractions d'Omission et Responsabilité Pénale pour Omission', Actes du Colloque Préparatoire au XIIIème Congrès International tenu à Urbino (Italie), 7-10 Octobre, 55 *Revue Internationale de Droit Pénal* (1984), pp. 790-792.

ity are fulfilled, (iii) the omission contributed substantially to the ‘continuing crime’ while the superior was aware of the intent of the perpetrators. It is noteworthy that by subsuming superior responsibility under aiding and abetting the causal element is explicit and the knowledge element more defined. In general, superior responsibility as aiding and abetting will connote a closer connection with the underlying crimes, something that superior responsibility does not necessarily suggest. The choice between the two heads of responsibility depends on the evidence available.

In theory, this same concurrence could also take place in the context of the ICC Statute. Article 25(3)(c) and Article 28 of the ICC Statute could be relied upon as alternatives if the above three conditions are met. However, there is some uncertainty as to whether complicity by omission can be part of Article 25(3)(c).³¹⁹ When we interpret the silence of lawmakers as not prohibiting the inclusion of complicity by omission, the ICC could rely on customary international law, applicable through Article 21 of the ICC Statute, to enter a conviction on the basis of complicity by omission.

8. SUPERIOR RESPONSIBILITY AND JOINT CRIMINAL ENTERPRISE

It is noteworthy that the concept of joint criminal enterprise has become instrumental in prosecuting high government officials at the ICTY. In the *Plavsić* and *Milosević* cases, joint criminal enterprise pursuant to Article 7(1), and superior responsibility pursuant to Article 7(3) of the ICTY Statute appear as cumulative heads of responsibility on the indictment.³²⁰ The joint criminal enterprise concept has appeal because it captures an array of criminal conduct for those who knowingly participate in the criminal endeavour. Moreover, with regard to Milosević’s responsibility under Article 7(3) of the Statute, the Prosecutor will have to prove beyond reasonable doubt that Milosević had effective control over his subordinates, that he had information within his possession that would have put him on notice of the crimes allegedly committed by his subordinates, and that he failed to prevent or punish the crimes.³²¹ These requirements might constitute evidentiary problems. Especially, since the hierarchical structure or chain of command between Milosevic and the actual perpetrators (local war lords and paramilitary units) seemed to have been interrupted, or at least very weak, and knowledge of every single crime difficult to establish.³²²

³¹⁹ See Chapter 2, para. 8 (b).

³²⁰ ICTY, *Prosecutor v. Momcilo Krajisnik and Biljana Plavsić*, Amended Consolidated Indictment, Case No. IT-0039& 40-PT, paras. 3-14; *Prosecutor v. Slobodan Milosević*, Indictment (‘Bosnia Herzegovina’), Case No. IT-01-51-I, paras. 5-31; *Prosecutor v. Slobodan Milosević*, First Amended Indictment (‘Croatia’), Case No. IT-02-54-T, paras. 5-33; *Prosecutor v. Slobodan Milosević, Milan Milutinović, Sainović, Dragoljub Ojdanić, Vlatko Stojiljković*, Second Amended Indictment, Case No./ IT-99-37-PT, paras. 16-29.

³²¹ As was made clear earlier, ‘prevent’ and ‘punish’ are not alternative ‘scenario’s’. See para. 3(iii)(b).

³²² See also E. van Sliedregt, ‘Milosević en “Command Responsibility”’ [Milosević and Command Responsibility], 50 *Ars Aequi* (2001), pp. 635-641.

The advantage of joint criminal enterprise over superior responsibility is the absence of the strict cognitive and functional requirements and a *dolus eventualis* standard creating 'collateral liability'. Milosević can be found criminally responsible for crimes committed by others when these crimes can be regarded a natural or foreseeable consequence of the joint criminal enterprise he participates in. Moreover, joint criminal enterprise fits the picture of Milosević as the *auctor intellectualis* much better than as the reluctant superior who should have intervened in halting mass-crime.

9. CONCLUSION

The jurisprudence of the *ad hoc* Tribunals on superior responsibility has 'put flesh' on the three constituent skeleton elements, identified in early case law on superior responsibility. The most valuable contribution to the development of the concept of superior responsibility is the identification of 'effective control' as a requisite element of superior responsibility. This element the concept of superior responsibility to apply to *de iure* and *de facto* superiors, but only for those crimes that one materially could have prevented, or punished. Effective control broadens the scope of superior responsibility beyond formal command relationships.

The ICC superior responsibility concept has built on the ICTY/R legacy, in that it expressly recognises the 'effective control element' in Article 28 of the ICC Statute. The latter provision also refers to *de facto* superiors by equating a military commander to a 'person effectively acting as a military commander'. The provision deviates from the superior responsibility concept as developed by the *ad hoc* Tribunals in that it provides for two distinct standards, one for military and quasi-military superiors, and one for non-military superiors. This distinction is unnecessary and inconsistent with the nature of superior responsibility; a concept that is defined in its three cumulative principles, but broad in allowing for variance.

The ICC superior responsibility concept is also a step forward. Its wording allows it to be a separate crime of omission. This way, superior responsibility at the ICC has fewer difficulties in identifying itself as a separate type of liability than at the ICTY/R, where it has been closed in by, on one hand, the concept of joint criminal enterprise, and, on the other hand, by complicity by omission.

CHAPTER 5

THE CONCEPT OF SUPERIOR RESPONSIBILITY

1. INTRODUCTION

The concept of superior responsibility applies to a wide range of superiors including ministers and directors of enterprises, and as such adjoins other types of liability, for instance, ministerial responsibility, vicarious liability, and/or employer's responsibility. These types of liability will be examined below in an attempt to define and delineate the concept of superior responsibility. A next step in this attempt is to look into national criminal law and military manuals to see how the concept has been interpreted and incorporated in national law. The aim is to eventually uncover the nature of superior responsibility. The following overview is limited to a few national legal systems, the provisions of which merely serve as illustrations of rules encapsulating concepts analogous to that of superior responsibility.

2. ANALOGOUS CONCEPTS

(a) **Responsibility of corporate officers and employers**

Section 2.06(3)(a)(iii) of the American MPC states

Section 2.06. Liability for Conduct of Another; Complicity

(3) A person is an accomplice of another person in the commission of an offence if:

- (a) with the purpose of promoting or facilitating the commission of the offense, he
 - (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.

From this provision it can be taken that U.S. complicity law encapsulates a type of liability that resembles superior responsibility.

Comparisons can further be drawn with economic criminal law where, in particular, the Responsible Corporate Officer (RCO) doctrine of vicarious liability shows similarities with superior responsibility. The doctrine of vicarious liability charges a supervisory party with responsibility for the conduct of a subordinate or associate because of the relationship between the two parties. In Anglo-American law, the doctrine of vicarious liability provides the theoretical groundwork for an employer's responsibility for crimes committed by employees during the course of employment.³²³

³²³ Alan O. Sykes, 'The Economics of Vicarious Liability', 93 *Yale LJ* (1984), p. 1231 *et seq.*

With regard to 'public welfare offenses', the US Supreme Court developed a strict rule. The leading case in this area is *United States v. Dotterweich*.³²⁴ Dotterweich, president and general manager of a pharmaceutical company, was convicted of shipping adulterated and misbranded drugs in interstate commerce.³²⁵ In finding Dotterweich culpable, the Supreme Court did not take into account 'awareness of any wrongdoing'.³²⁶ It stated that 'in the interest of the larger good it put the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger'.³²⁷ Central to the Court's decision was the accused's position and duty of care. In *United States v. Parks*,³²⁸ the Supreme Court continued this line of reasoning, stressing that a position of authority entailed a certain 'responsible relationship' and 'does not require a finding of guilt'.³²⁹ The Dotterweich case has had an important impact on environmental statutes and has resulted in an 'inference doctrine'. The key decision here is that of *Johnson & Towers*,³³⁰ in which a Federal Court held that for a violation of the Resource Conservation and Recovery Act (RCRA) it is required that knowledge 'be inferred by the jury as to those individuals who hold the requisite responsible position with the corporate defendant'.³³¹ In reality, this meant that criminal responsibility was inferred from the accused's job description.³³² This comes uncomfortably close to strict liability.

The responsibility of corporate officers in US law has been termed *derivative*: 'the guilt of the superior/accomplice is premised on the commission of a crime by a subordinate/principal'.³³³ It appears from the above that this type of liability entails concessions regarding the mental element; no *mens rea* is required.

The Dutch doctrine of 'functional liability', already mentioned in the context of perpetration by means, plays a key role in holding employers responsible for acts committed by their employees.³³⁴ The employer qualifies as the 'functional perpetrator' and he can be held liable for his employee's acts when he (the employer) (i) had control over his employee's acts and (ii) he accepted or usually accepted such acts.³³⁵ Exact knowledge of crimes committed by others need not be shown, as 'general knowledge' – being more than a vague awareness – is sufficient. It seems that, at minimum, '*dolus eventualis*' is required. These two criteria also apply to the

³²⁴ 320 U.S. 277 (1943).

³²⁵ See Wu and Kang (1997), p. 281.

³²⁶ 320 U.S. 277, p. 281. See LaFave (1988), p. 787.

³²⁷ *Ibidem*.

³²⁸ 421 U.S. 658 (1975).

³²⁹ *Ibidem*, p. 674.

³³⁰ 741 F.2d 662 (1984). See also I.M. Koopmans, 'Is schuld nog van belang? Een analyse van schuld in het Amerikaanse milieustrafrecht', in M.J. Borgers *et al.* (eds.), *Verwijtbare uitholling van Schuld?*, Nijmegen (1998), pp. 38-42; Wu and Kang (1997), p. 284.

³³¹ 741 F.2d 662, 669.

³³² Koopmans (1998), p. 39.

³³³ Wu and Kang (1997), p. 279.

³³⁴ See subpara. 5(c) of Chapter 2.

³³⁵ Dutch Supreme Court, 23 February 1953, *NJ* 1954, 378.

criminal responsibility of legal entities and their presidents.³³⁶ The latter may be responsible for an offence committed by a corporation when (i) no preventive measures were taken, while he or she was competent and could reasonably be expected to prevent the offences, and (ii) the considerable risk of the prescribed acts occurring was accepted.³³⁷ Exact knowledge of the crime is not required, but mere awareness of a certain 'policy' is insufficient. In that sense, the Dutch doctrine of functional liability differs from the 'Dotterweich doctrine' in US law, which does not require knowledge to be shown. Compared with criminal responsibility for physical perpetration it has a lower or 'reduced' knowledge standard. Legal entities can be held criminally responsible by imputing individual conduct, performed in a certain capacity (as a manager or employee, not as a private person), to the entity.³³⁸ Doctrine and practice in the Netherlands are divided on the issue whether legal entities can be held responsible for crimes of negligence. It has been argued that, since certain functionaries within an organisation have special duties of care, neglect of these duties can constitute a company's negligence.³³⁹

Other European countries, such as France and England, also provide for the criminal liability of employers for their employees, and of heads of businesses and corporations.³⁴⁰ French courts have held 'dirigeants' and 'chefs d'entreprise' responsible for offences committed by their employees since the middle of the nineteenth century. This doctrine, developed in case law, is now reflected in Article 121-2 of the Nouveau Code Pénal.³⁴¹ In English law, a corporation can incur criminal responsibility by 1) holding that it is vicariously liable for the acts of its employees and agents, and 2) through the 'doctrine of controlling officers'. The latter are regarded as the directing mind and will of a corporation and, as such, the embodiment of the company.³⁴²

³³⁶ This type of responsibility is sometimes referred to as 'corporate criminal responsibility'. However, this is too narrow here, as it suggests that only corporations can be found criminally responsible under Article 51 Dutch Penal Code. In Dutch criminal law other legal entities like associations can also be held criminally responsible.

³³⁷ Dutch Supreme Court, 16 December 1986, *NJ* 1987, 321/322, and 21 January 1992, *NJ* 1992, 414.

³³⁸ See generally R.A. Torringa, *Strafbaarheid van rechtspersonen*, Arnhem (1984).

³³⁹ N.D. Jörg, *Strafbare rechtspersonen in Amerika*, Arnhem (1990); Torringa (1984), pp. 102-108, referring to Dutch Supreme Court, 6 May 1969, *NJ* 1970, 32.

³⁴⁰ See Pradel (1995), pp. 271-274.

³⁴¹ See Bell *et al.* (1998), pp. 238-241; Desportes and Le Gunehec (2000), pp. 463-473, and 499 *et seq.*

³⁴² See Smith & Hogan (1996), pp. 174-193; Williams (1983), p. 969 *et seq.* Vicarious liability is also the legal theory upon which employers have been held responsible for offences committed by their employees. Elements of knowledge and direct control are relevant in attributing responsibility to the employer. Employer's responsibility has been constructed as criminal participation when personal characteristics are a definitional element of a crime, and as such only apply to the employee. See Smith & Hogan (1996), pp. 179-182.

(b) Parental responsibility

Grotius used the analogy of parental responsibility to describe superior responsibility:

Thus parents are responsible for the misdeeds of their children, but only the misdeeds of those who are still under their parental authority. On the other hand, even if parents have children under their authority and otherwise could have restrained them, they will not be held responsible unless they also had knowledge. For that one person may be held responsible for the act of another, these two elements, knowledge and the failure to prevent, should be present in like degree.³⁴³

The general requirements of knowledge and failure to prevent, coupled with the duty of care that every parent has, makes the analogy between parental responsibility and superior responsibility an obvious one.

Most modern legal systems provide for exemption from criminal responsibility for children under a certain age. After that age has been reached, responsibility begins.³⁴⁴ Recent American cases of 'schoolyard tragedies'³⁴⁵ have not only resulted in attempts to construct liability of gun manufacturers, but have also led to renewed interest for the concept of parental responsibility.³⁴⁶ In American law, imposing criminal liability on parents for their children's acts is a principle that can be found in the statutory laws of many States.³⁴⁷ An example is the California Street Terrorism Enforcement and Prevention Act, the purpose of the act being to 'rid the streets of hoodlums that are terrorising and killing our citizens' and to,

[a]llow parents to be arrested if their child becomes a suspect in a crime and they have knowingly failed to control or supervise him (...)³⁴⁸

The penalty for convictions under this act includes a maximum of one year in prison and a \$ 2500 fine.³⁴⁹

Parental liability has also been developed in American tort law. Parental liability for failure to discipline or supervise has been accepted as an exception to the com-

³⁴³ Grotius (1615/1964), p. 524.

³⁴⁴ Pradel (1995), pp. 289-290.

³⁴⁵ Consider the Columbine High school drama of 20 April 1999 where a seventeen year old boy armed with a handgun, two shotguns and a rifle killed twelve fellow students and one teacher, and wounded twenty-three others. J. Cloud, 'Just a Routine School Shooting', *TIME*, 31 May 1999, pp. 36-37.

³⁴⁶ V.D. Barton, 'Reconciling the Burden: Parental liability for the Tortuous Acts of Minors', 51 *Emory LJ* (2002), pp. 877-928; L. Lockwood, 'Where are the Parents? Parental Criminal Responsibility for the acts of Children', *Golden Gate Univ. LJ* (2000), pp. 497-557; D.A. Nicholas, 'Parental Liability for Youth Violence: the Contrast between Moral Responsibilities and Legal Obligations', *Rutgers Univ. LJ* (2000), pp. 215-245.

³⁴⁷ See Nicholas (2000), p. 230 *et seq.*

³⁴⁸ Cal. Penal Code § 186.2-186.27.

³⁴⁹ Nicholas (2000), p. 234.

mon-law rule of parental non-liability for the torts of their children. In *Gissen v. Goodwill*, an eight-year-old girl slammed a door on the plaintiff's hand with sufficient force to sever a part of the middle finger of the left hand. The plaintiff attributed the girl's wilful, deliberate, and malicious actions against him to a 'lack of parental discipline and neglect in the exercise of needful paternal influence and authority'.³⁵⁰ The Supreme Court of Florida, in considering the fourth exception to the common law rule, 'where he (the parent, *EvS*) fails to exercise parental control over his minor child, although he knows or in the exercise of due care should have known that injury to another is a probable consequence', held that the duty of control only arises when the parent knows or should know of the need to control and has the ability and opportunity to do so.³⁵¹ Failure to supervise, which is based on the duty to control, incurs *civil* liability when the parent knows or should have known that he had the ability, necessity, and opportunity to exercise control. The Court of Appeal of California confirmed this ruling. In *Ellis v. Angelo*,³⁵² where a baby-sitter suffered injuries caused by a minor child, the Court recognised that where a parent with knowledge of a child's destructive tendencies or acts fails to exercise reasonable care to control him, he or she is liable for the child's intentional acts of violence to persons or property. This was regarded as negligence on the part of the parents.

(c) Responsibility of members of government

Ministerial responsibility means two utterly different things. It means in ordinary parlance the responsibility of Ministers to Parliament, or, the liability of ministers to lose their offices if they cannot retain the confidence of the House of Commons. This is a matter depending on the conventions of the constitution with which law has no direct concern. It means, when used in its strict sense, the legal responsibility of every Minister for every act of the Crown in which he takes part.³⁵³

Dicey refers here to the responsibility (task) of minister's and/or members of government, and to the accountability (liability) of ministers. These two sides of a cabinet member's responsibility constitute the principle of responsibility of government to parliament, which is a principle that lies at the basis of most parliamentary democracies, regulating the government-parliament relationship, as one between the executive and the sovereign will of the people.³⁵⁴ The latter controls the former through a system of ministerial accountability.

³⁵⁰ 80 So. 2d 701 (Fla.1955)

³⁵¹ Ibidem, p. 708.

³⁵² 253 P.2d, 676.

³⁵³ A.V. Dicey, *Introduction the Study of the Law of the Constitutions*, London (1885/1959), p. 325.

³⁵⁴ V. Herman and F. Mendel (eds.), *Parliaments of the World. A reference compendium*, London (1976), p. 823.

Cabinet responsibility

Ministerial accountability is usually a collective matter.³⁵⁵ Each member of cabinet is responsible for a cabinet decision, even when opposed to that decision. Some constitutions, including those of France, India, and Israel understand ministerial responsibility exclusively in this form.³⁵⁶ This is also the case in countries that have adopted the British model of cabinet government. If parliament expresses a lack of confidence in one of the members of cabinet, the Prime Minister has to decide whether the entire cabinet steps down on the principles of ministerial solidarity and collective responsibility, or whether the resignation of the Minister or member of cabinet in question suffices to solve the conflict between parliament and cabinet.

Individual responsibility

Ministerial responsibility as individual responsibility covers (at least) three types of responsibility: financial, criminal, and political responsibility.³⁵⁷ Financial responsibility relates to a minister's responsibility not to exceed his budget and cause financial harm to the taxpayer. A minister's criminal responsibility usually relates to special crimes, such as treason, misappropriation, extortion, corruption, and encroachments upon the freedom of the individual.³⁵⁸ A minister's political responsibility is not based on an objective definition of criminal or civil offences but rather on a (codified) relationship between parliament and government, and the conventions that have ensued from that relationship as parliamentary practice. The scope of political responsibility is vast; it may attach to any act performed by a minister or his subordinates in the exercise of his duties, or the carrying out of policies. A minister's conduct is 'not regarded in the light of its legality but simply of its political wisdom in the face of views expressed by parliament'.³⁵⁹ Below, political and criminal ministerial responsibility will be examined more closely. Examples of political and criminal ministerial responsibility in Dutch and French law illustrate how political and criminal ministerial responsibility differ.

In the Netherlands, history has shown that a minister's political accountability renders criminal prosecution superfluous.³⁶⁰ In the words of two well-known Dutch constitutional lawyers: 'as far criminal responsibility is concerned, this is completely eclipsed by political responsibility'.³⁶¹

³⁵⁵ Ibidem, Table 62, pp. 829-840.

³⁵⁶ Ibidem, p. 825.

³⁵⁷ Ibidem.

³⁵⁸ Ibidem, p. 823.

³⁵⁹ Ibidem, p. 824.

³⁶⁰ Criminal ministerial responsibility was introduced in 1840 and coupled with the power and duty of ministers to sign all Royal Decrees, the countersignature. The countersignature made the minister responsible for orders of the government. Criminal responsibility as such proved of little significance. The Act of Ministerial Accountability ('Wet op de Ministeriële verantwoordelijkheid') of 1855 introduced criminal responsibility for ministers who fail to fulfil the Constitution or the Acts of Parliament. The Act of Ministerial responsibility is, nevertheless, of little practical value; it has never been applied.

³⁶¹ C.A.J.M. Kortmann and P.P.T. Bovend'Eert, *The Kingdom of the Netherlands. An Introduction*

Political ministerial responsibility is founded on Article 42(2) of the Constitution: 'the King is immune the ministers are responsible', and Article 68 of the Constitution, which requiring a minister to inform parliament.³⁶² It concerns the minister-parliament relationship. Parliament can sanction a minister's failure to inform it properly by deciding that it no longer has confidence in him or her (the confidence rule), which then obliges the minister to tender his resignation to the King/Queen.

A minister's responsibility for exercising authority over his subordinates is based on Article 44(1) of the Constitution.³⁶³ On the basis of this provision, a minister is vested with the power to issue orders to subordinates. The provision also grants a minister the supreme authority over his ministry, making him responsible for everything that happens inside it. On several occasions in the past, and often within the framework of parliamentary enquiries, most recently with Dutch peacekeepers in Srebrenica, ministers have been called to account for serious shortcomings in departmental organisation. The central question then always is can the minister be held responsible? This is particularly pertinent when it appears that the minister was mis- or uninformed about the conduct of his subordinates? Political ministerial responsibility goes beyond the personal culpability of the minister. A minister can be held *politically* responsible for acts of subordinates of which he could not even have had knowledge. It is important for the proper functioning of democratic control that the parliament can call someone to account for policy (not) being implemented, even if he had no knowledge of it.³⁶⁴

The Srebrenica tragedy has left its traces in Dutch politics and society. In April 2002, seven years after the event, a report of the Netherlands Institute for War Documentation led to the stepping down of the entire Dutch cabinet and the resignation of the head of the Dutch armed forces.³⁶⁵ Although the 'fall of Srebrenica' occurred during the term of a prior cabinet, the cabinet that was confronted with the failures of its predecessors, established through research and thorough investigation, took on the political consequence of the dismissal.³⁶⁶ Criminal prosecutions of high military

to *Dutch Constitutional Law*, Deventer (1993), para. 270, p. 100. See also C.A.J.M. Kortmann and P.P.T. Bovend'Eert, *Inleidende Constitutioneel Recht*, Deventer (2002), p. 64.

³⁶² Article 42 of the Dutch Constitution:

1. The Government shall comprise the King and the Ministers
2. The King is immune; the Ministers are responsible.

Article 68 of the Dutch Constitution:

Ministers and Under-Secretaries of State shall provide orally or in writing the Chambers either separately or in joint session, with any information requested by one or more members, provided that the provision of such information does not conflict with the interests of the State. English text of the Constitution: Appendix to Kortmann and Bovend'Eert, (1993), pp. 171-191.

³⁶³ Article 44 of the Dutch Constitution:

1. Ministries shall be established by royal decree. They shall be headed by a Minister;
2. Non-departmental Ministries may also be appointed.

³⁶⁴ Kortmann and Bovend'Eert, (2002), p. 66; Kortmann and Bovend'Eert, (1993), para. 276, pp. 101-102.

³⁶⁵ NIOD (Netherlands Institute for War Documentation), *Srebrenica a 'safe' area. Reconstruction, background, consequences and analysis of the fall of a safe area*, The Hague, 10 April 2001.

³⁶⁶ We are reminded here that the Prime Minister of the resigning cabinet also headed the prior cabinet.

and/or political superiors have not followed from the Srebrenica affair. The most recent Srebrenica report is the result of the Dutch parliamentary enquiry into the 'fall of Srebrenica'.³⁶⁷ Two conclusions stand out and can be found in both reports: firstly, that there was an 'information-gap' between the military and the politicians. The military should have supplied the minister of Defence with better and more information, while the latter should have been more active in seeking that information. Secondly, Dutch peacekeepers (Dutchbat) were dispatched on an unclear mandate and upon the basis of inadequate intelligence and ill-conceived decision-making. A point that was made by the parliamentary enquiry committee, relates to the culprits of the mass crime committed in Srebrenica. The committee determined that neither Dutchbat, nor any other Dutch military or political superior, could be held responsible for the crimes committed by the Serbs. *Criminal* responsibility lies with the Serbs, in particular with Mladić and Karadžić. The Dutch government should therefore insist on the arrest of the latter two in order for them to appear before the ICTY.

Article 20 of the 1958 French Constitution establishes collective ministerial responsibility to parliament.³⁶⁸ The Constitution refers to ministerial responsibility exclusively in this form. The individual responsibility of ministers for their own mistakes or for those made by others in their departments is based on convention, *i.e.* 'rules of constitutional morality that establish the rights and duties of political actors'.³⁶⁹ These rules operate as interpretations or even modifications of constitutional texts.³⁷⁰ In 1993, the French Constitution was changed to provide for the criminal responsibility of individual members of government. Article 68-1 of the Constitution stipulates that members of government are criminally responsible for the acts they perform in carrying out their functions. They are tried by the 'Cour de justice de la République' especially established to deal with government crime.³⁷¹

³⁶⁷ Parlementaire Enquête Commissie, *Een missie zonder vrede-Eindrapport*, The Hague, 27 January 2003.

³⁶⁸ Article 20: The Government shall determine and conduct national policy.

It shall have the administration and the army at its disposal.

It shall answer to Parliament under the terms of, and following the procedures set out in, articles 49 and 50.

English text of the 1958 Constitution: Annex to J.S. Bell, *French Constitutional Law*, Oxford (1992), pp. 245-259.

³⁶⁹ Bell (1992), p. 58.

³⁷⁰ Ibidem, p. 59.

³⁷¹ Article 68-1 of the 1993 Constitution:

Les membres du gouvernement sont pénalement responsables des actes accomplis dans l'exercice de leurs fonctions et qualifiés crimes ou délits au moment où ils ont été commis.

Ils sont jugés par la Cour de justice de la République

La Cour de justice de la République est liée par la définition des crimes et délits ainsi que par la détermination des peines telles qu'elles résultent de la loi.

(Members of government are criminally responsible for acts committed in the exercise of their function that qualify as felony or misdemeanour at the moment of their commission. They are judged by the 'Cour de la justice de la République'. The 'Cour de la République' is bound by the definition of felonies and misdemeanours, in the sense that punishments ensue from the law. (Transl. EvS)).

The 'sang contaminé' or tainted blood case that dates back to 1985 and concerns the contamination of haemophilia patients with blood containing the HIV virus led to administrative and criminal proceedings in France; the former against the State, the latter against three members of government.³⁷² The State 'stood trial' in 1993 before the 'Conseil d'État' in proceedings initiated by the victims.³⁷³ The negligent conduct of government members was imputed to the State. It was held liable by the 'Conseil d'État' for failing to enact regulations to require heat treatment of blood used in blood transfusions while there had been ample medical evidence demonstrating this was a necessary and effective way in preventing the transmission of HIV in contaminated blood.³⁷⁴

Criminal proceedings were initiated by seven victims against Fabius, Prime Minister at the time of the scandal, Dufoix, minister of social affairs and national solidarity at the time, and Hervé, ex-secretary of State of Health. They were brought before the newly created 'Cour de Justice de la République'.³⁷⁵ After a five-year trial and a fourteen-year legal battle only Hervé was found guilty. He was held criminally responsible for a crime of negligence and failure in the duty of care imposed on him by the Public Health Act.³⁷⁶ Only with regard to two of the seven victims was he held criminally responsible. It was only in their cases that a causal link between his negligence and their contamination could be established. The 'Cour de Justice de la République', however, decided not to impose any punishment. The Court seemed to have thought he had been punished sufficiently already by the protracted legal battle. The fact that fifteen years had passed since the actual contamination, which turned into a political scandal against which he could not properly defend himself, were reasons for the Court to let Hervé go unpunished.

The Court's reasoning in the case deserves a closer examination. With regard to Fabius, the Court established that as soon as he knew of the risks of contaminated blood transfusions, he acted in speeding up the decision-making processes implementing blood tests. If anything, he contributed to speeding up rather than delaying the implementation of blood tests. As to Dufoix, the Court found that she was not to blame, as it had not been her duty to take legislative initiatives in this regard. It was Hervé who should have acted swiftly and enacted regulations guaranteeing reliable blood tests. The Court determined that, although Hervé had not been fully informed by his services and advisors on the scale and the seriousness of the contamination, it was his task to enact regulations and ensure high quality blood. In other words, and this was not stated specifically, he *should have known* of the seriousness of the contamination.

³⁷² See for a critical evaluation of the case: O. Beaud, *Le Sang Contaminé: essai critique sur la criminalisation de la responsabilité des gouvernants*, Paris (1999).

³⁷³ CE Ass. Plen. 9 Mar. 1993, M.G., RFDA 1993.583.

³⁷⁴ Bell *et al.* (1998), p. 193. Further: <<http://www.france2.fr/evenement/cjr/page5.htm>>

³⁷⁵ Cour de Justice de la République, 9 Mars 1999, n° 99-001,

<http://www.rajf.org/imprimer.php3?id_article=660>.

³⁷⁶ He was guilty of a crime of negligence (Article 121-3 of the Code Pénal), causing death by imprudence (Article 221-6 of the Code Pénal), and causing to another by imprudence a total incapacity to work for more than three months (Article 222-19 of the Code Pénal).

The interesting point in this judgement lies in the weight that is put on the function and duties of Hervé as the then secretary of State of Health. The issue of contaminated blood had been discussed at ministerial meetings, and evidence showed that Fabius and Dufoix were aware of the problems at an early stage, only the secretary of State of Health was found culpable for the mistakes made, because it fell under his department to solve these problems. It seems that, although all three were responsible as cabinet members, only the one who had the legal duty to act was *criminally* liable. This clearly marks the difference between the criminal responsibility and the political responsibility of members of government. It also accounts for Dufoix's famous comment when asked about her role in the blood scandal: 'responsible, yes, but not culpable'.

3. EVALUATION

The above analysis, in particular with regard to parental responsibility, might seem far-fetched in the context of a study on superior responsibility. It serves, however, a two-fold purpose; it pertains to demonstrate that, firstly, *any* type of superior responsibility is in the end based on a *duty* (of care), which is essentially the justification for attributing to a person another person's criminal conduct, and, secondly, that superior responsibility as *criminal* responsibility should be premised on *all three* of its constitutive elements. As to the second point, a closer look at ministerial responsibility is warranted.

For a sound comparison between ministerial and superior responsibility one should first distinguish between cabinet responsibility and individual ministerial responsibility. Cabinet responsibility differs from ministerial responsibility in that the former is based on a horizontal relationship of collective solidarity rather than a vertical relationship based on functional hierarchy. Returning to the jurisprudence of the ICTY one could say that individual ministerial responsibility stands to cabinet responsibility as superior responsibility stands to joint criminal enterprise. Indeed, as we saw earlier, at the ICTY political leaders are charged on the basis of joint criminal enterprise rather than on the basis of superior responsibility.³⁷⁷ The participants can be held liable for the crimes planned at policy-level but carried out by an 'executive machinery'. This is a different type of responsibility than superior responsibility where a person is responsible for the crimes committed by a subordinate under his effective control.

In this context we should mention the practice of joint trials at the ICTR. At the Rwanda Tribunal, for instance, cabinet ministers are tried together on a number of charges including conspiracy to commit genocide and superior responsibility for not having prevented genocide.³⁷⁸ This prosecutorial policy bears two dangers in it, firstly, that once the Trial Chamber has found that the government itself was involved in

³⁷⁷ See Chapter 4 para. 8.

³⁷⁸ ICTR, *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-1 (Government case).

a conspiracy to commit genocide the accused could face a presumption of guilt with regard to the individual genocide charges. With Jørgensen I agree that 'there is a risk that the conspiracy idea combined with the holding of joint trials could be used to bring the concept of criminal organisations in via the back door without any of its inherent safeguards'.³⁷⁹ This danger was noticed earlier in this study, when analysing the doctrine of common purpose in ICTY jurisprudence.³⁸⁰ There is, however, a second danger. The superior responsibility concept in the context of a joint trial of cabinet ministers could be interpreted in political terms, as was done in the *Hirota* trial by the Tokyo tribunal. For reasons set out earlier, caution is warranted when applying superior responsibility to political leaders; it can lead to the expansion of superior responsibility beyond the boundaries of *individual* criminal responsibility.³⁸¹

Returning to the three elements of superior responsibility, it is clear that when superior responsibility is replaced by, or understood as political responsibility, it entails an emphasis on the functional element. A person's function as a minister or member of cabinet, is more important than his knowledge of the offences and the means he had to his disposal to prevent, or repress them. The Srebrenica affair illustrates this. It goes to show that political liability is completely different from criminal responsibility, and should be kept separate from it.

The French 'tainted blood case' provides us with a 'true case' of criminal ministerial responsibility. Hervé's failure to properly discharge the *duties* he had as secretary of State of Health under the Public Health Act was the basis for finding him responsible for the mistakes made by the (medical) services under his control. More than in the Srebrenica case there was a reliance on the duty aspect of his responsibility. This distinguished Hervé from his co-accused. Attributing criminal responsibility to a minister's failure to properly supervise is less likely to expand beyond criminal law boundaries when such a duty is not understood in political terms. This is exactly what prevented 'la Cour Justice de la République' from finding Fabius and Dufoix guilty.

In sum, the concept of superior responsibility can only be usefully equated with concepts of ministerial, employer's, and parental responsibility when its three underlying parameters receive equal weight in attributing responsibility *and* the duty to act is not expanded to an 'unrealistic' scope.

4. NATIONAL LAW AND MILITARY MANUALS

In military circles, it is not unusual to impute a subordinate's behaviour to his superior.

³⁷⁹ N.H.B. Jørgensen, 'A Reappraisal of the Abandoned Nuremberg Concept of Criminal Organisations in the Context of Justice in Rwanda', 12 *Criminal Law Forum* (2001), p. 401.

³⁸⁰ See Chapter 2 para. 9(d).

³⁸¹ See Chapter 3 para. 5.

The United States Articles of War, enacted 30 June 1775, express this approach:

Every Officer commanding (...) shall keep good order, and to the utmost of his power, redress all such abuses or disorders which may be committed by any Officer or Soldier under his command; if upon complaint made to him of Officers or Soldiers beating or otherwise ill-treating any person, (...) he, the said commander, who shall refuse or omit to see Justice done to this offender or offenders (...), be punished, as ordered by General Court-Martial, in such a manner as if he himself had committed the crimes or disorders complained of.³⁸²

The most cited national provision on superior responsibility is the Field-Manual 27-10 (FM 27-10) of the US Army Manual, which reads:

The commander is (...) responsible if he has actual knowledge or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.³⁸³

Another US provision is relevant in the context of superior responsibility: Article 77 of the Uniform Code of Military Justice (UCMJ). This provision provided the basis of the *Medina* conviction ensuing from the My Lai massacre:

Any person punishable under this chapter who:

- (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands or procures its commission; or
 - (2) causes an act to be done which if directly performed by him, would be punishable by this chapter;
- is a principal.³⁸⁴

Comparing paragraph 5-1 of FM 27-10 with Article 77 UCMJ, it is immediately clear that the latter requires positive personal participation, which implies actual knowledge of the crimes committed by subordinates. In fact, the Manual for Courts-Martial, which reads as a Commentary to the UCMJ, explains that a 'mere failure to prevent the commission of an offense' is not enough to create culpability; 'there must be an intent to aid or encourage the persons who commit the crime'.³⁸⁵ Criminal responsibility under Article 77(2) UCMJ penalises encouragement through inaction and qualifies it as complicity where a superior is the principal and his subordinate the accomplice.³⁸⁶

³⁸² Cited in Bassiouni (1999), p. 424.

³⁸³ US Department of the Army, *Field Manual 27-10: The Law of Land Warfare* (1956) (FM 27-10), para. 501, cited in Crowe (1994), pp. 223-224.

³⁸⁴ The relevant edition of the UCMJ during the Medina court-martial was the 1969 U.S. Manual for Courts-Martial, app.2 (1969). Article 77 has not changed since then. See Smidt (2000), p. 195.

³⁸⁵ 1969 U.S. Manual for Courts-Martial, R.C.M. 307(2) (1969), paras. 28-4 and 28-5.

³⁸⁶ Medina, for instance, was prosecuted as a principal. See Eckhardt (1982), pp. 18-22.

FM 27-10, on the other hand, is more in line with the international concept of superior responsibility that penalises passivity, namely a failure to act in the absence of knowledge, establishing a standard of criminal negligence or recklessness. Which provision applies to whom? According to FM 27-10, this provision applies to war crimes committed by enemy nationals or by persons 'serving the interest of the enemy state'. Violations of the law of war committed by persons subject to the military law of the United States are usually charged under the UCMJ.³⁸⁷

The British Manual of Military law employs exactly the same wording as FM 27-10, with a slight variation at the end: 'and he failed to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof'.³⁸⁸ The UK International Criminal Court Act 2001 incorporates Article 28 of the ICC Statute almost literally in Article 65 on 'responsibility of commanders and other superiors' and adds the following in paragraph 4:

A person responsible under this section for an offence is regarded as aiding, abetting, counselling or procuring the commission of the offence.³⁸⁹

This is a clear deviation from the provision in the Draft ICC Bill that provided in Article 48(4) that

A person responsible under this section for an offence is liable to be proceeded against and punished as a principal offender.³⁹⁰

In effect, the Act converted the superior from principal to accessory. This can be taken as an indication that the concept of superior responsibility was not readily recognisable as accomplice liability or participation.³⁹¹

The French provision dealing with military superior responsibility is Article 4 of the French Ordinance of 28 August 1944. It does not provide for exact rules, but it recognises the principle:

Lorsqu'un subordonné est poursuivi comme auteur principal d'un crime de guerre et que ses supérieures hiérarchiques ne peuvent être recherchés comme coauteurs, ils sont considérés comme complices dans la mesure où ils ont organisé ou toléré les assignements criminels de leurs subordonnés.³⁹²

³⁸⁷ FM 27-10, para. 507, cited in Smidt (2000), footnote 165.

³⁸⁸ Great Britain War Office, *The Law of War on Land: Being Part 3 of the Manual of Military Law* (1958) (British Manual of Military law (1958)), para. 631 cited in Green (1995), p. 343.

³⁸⁹ <<http://www.legislation.hmso.gov.uk/acts/acts2001/20010017.htm>>

³⁹⁰ <<http://www.parliament.uk>>

³⁹¹ See also R. May and S. Powles, 'Command responsibility: a new basis of criminal liability in English law?', *Crim. LR* (2002), pp. 363-378.

³⁹² English version: Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates. UNWCC, Vol. III, p. 94.

The German provision on command responsibility is Article 41 of the German Military Criminal Code (MCC). Under this provision, a commander is punished for failing to supervise or properly delegating supervision over his subordinates, which results in grave consequences, such as 'unlawful subordinate behaviour'.³⁹³ The provision creates a 'genuine' offence of omission.³⁹⁴ The material element consists mainly of two elements: the failure to supervise and the causing of grave consequences. The causal connection should be understood to be one of *sine qua non* or 'but if'. In other words, the grave consequence would not have occurred had the superior carried out his duty of supervision.³⁹⁵ As to the mental element, § 41 GMCC requires at least gross negligence.

The new German Code of Crimes against International Law (CCAIL)³⁹⁶ contains three provisions relating to superior criminal responsibility:

Article 1, § 4: Responsibility of military commanders and other superiors

- (1) A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the same way as a perpetrator of the offence committed by that subordinate. Section 13 subsection (2) of the Criminal Code shall not apply in this case.
- (...)

Article 1 § 13: Violation of the duty of supervision

- (1) A military commander who intentionally or negligently omits properly to supervise a subordinate under his or her command or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the commander and he or she could have prevented it.
- (2) A civilian superior who intentionally or negligently omits properly to supervise a subordinate under his or her authority or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the superior without more and he or she could have prevented it.
- (3) (...)
- (4) Intentional violation of the duty of supervision shall be punished with imprisonment for not more than five years, and negligent violation of the duty of supervision with imprisonment for not more than three year.

³⁹³ J. Schölz, *Wehstrafgesetz*, München, (1975), § 41, Margin 8.

³⁹⁴ Ambos in Cassese *et al.* (2002a), p. 842, and Schölz (1975), § 41, Margin 16.

³⁹⁵ Schölz (1975), § 41, Margin 11.

³⁹⁶ 'Gesetz zur Einführung des Völkerstrafgesetzbuches', 26 June 2002, *Bundesgesetzblatt Jahrgang 2002 Teil II*, Nr. 42, 2254. Available in all UN languages at <http://www.iuscrim.mpg.de/forsch/online_pu.html>.

Article 1 § 14: Omission to report a crime

- (1) A military commander or a civilian superior who omits immediately to draw the attention of the agency responsible for the investigation or prosecution of any offence pursuant to this Act, to such an offence committed by a subordinate, shall be punished with imprisonment for not more than five years.
- (...)

The CCAIL implements Article 28 of the ICC Statute in a twofold way: a superior who intentionally omits to prevent the commission of crimes by subordinates shall be punished *as* a direct perpetrator or principal and deserves the same punishment as the subordinate (Article 1 § 4(1)), whereas the failure to properly supervise the subordinate (Article 1 § 13) and/or report crimes (Article 1 § 14), which are both crimes of omission, are punished more leniently and as such remind us of the German concept of 'Beihilfe' (facilitation).³⁹⁷ It is noteworthy that none of these provisions provide for the differentiation into military and non-military superiors as to the mental standard, like Article 28(b)(i) of the ICC Statute. However, different formulas are used to describe a superior's power. A military superior is deemed to have 'command', while the civilian superior has 'authority'. Moreover, the operational element of § 13 shows a slight differentiation. This method of chopping up of Article 28 into segments of criminal responsibility – also referred to by Triffterer as the 'splitting solution' – may be welcomed for reasons of clarity and coherence.³⁹⁸ A 'splitting solution' can also be found in the Canadian and Dutch laws implementing the ICC Statute.

In meeting the requirements of the Rome Statute, Canada drew up new legislation and adopted the 'Crimes Against Humanity and War Crimes Act' that came into force on 23 October 2000.³⁹⁹ The Canadian legislator understands superior responsibility as a distinct offence rather than a form of committing one of the three core crimes. Consider Section 5 of the Act:

- (1) A military commander commits an indictable offence if
- (a) the military commander
- (i) fails to exercise control properly over a person under their effective command and con-

³⁹⁷ See Chapter 2 para. 8(c).

³⁹⁸ Triffterer (2002), p. 190. See also M. Neuner, 'General Principles of International Criminal Law in Germany', in M. Neuner (ed.), *National Legislation Incorporating International Crimes*, Berlin (2003), pp. 126-135.

³⁹⁹ Full title: 'An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts'. The Act received Royal Assent on 29 June 2000 < http://www.dfait-maeci.gc.ca/foreign_policy/icc/crimes-en.asp>. See W.A. Schabas, 'Canadian Implementing Legislation for the Rome Statute', in 3 *YIHL* (2000) (Schabas (2000a)), pp. 338 and 441-444; W.A. Schabas, 'Canadian implementing Legislation for the Rome Statute: Jurisdiction and Defences', in Neuner (2003), pp. 35-43; D. Robinson, 'Implementing International Crimes in National Law: The Canadian Approach', in Neuner (2003), pp. 45-54.

- trol or effective authority and control, and as a result the person commits an offence under section 4 (genocide, crimes against humanity, war crimes within Canada, *EvS*), or
- (ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 6 (genocide, a crime against humanity, war crime outside Canada, *EvS*);
 - (b) the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and
 - (c) the military commander subsequently
 - (i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
 - (ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.
- (2) A superior commits an indictable offence if
- (a) the superior
 - (i) fails to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 4, or
 - (ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 6;
 - (b) the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or is being committed by the person;
 - (c) the offence relates to activities for which the superior has effective authority and control; and
 - (d) the superior subsequently
 - (i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
 - (ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution

Schabas point out that besides, reasons of theoretical coherence, this approach was prompted by constitutional difficulties:

In effect, Canadian constitutional jurisprudence considers it contrary to principles of fundamental justice to stigmatise a person with a conviction for a serious crime like murder or rape where the mental element is one of negligence. A military commander may be convicted under the Rome Statute if he or she 'should have known' that subordinates were committing genocide. Canada's courts would be almost sure to consider genocide as a crime of terrible social stigma, and could be expected to resist any attempt to convict a commander who was merely negligent for the crime or its cognates, although such a commander would certainly be subject to prosecution for lesser crimes.⁴⁰⁰

⁴⁰⁰ Schabas (2000a), p. 342, referring to: *R. v. Vaillancourt* (1987) 2 SCR 636, pp. 653-654; *R. v. Martineau* (1990) 2 SCR 633, p. 645; *R. v. Logan* (1990) 2 SCR 731; *R. v. Creighton* (1993) 3 SCR 3.

Under Dutch law, various statutory provisions provide for superior responsibility. Article 9 of the War Crimes Act (WCA) is one example.⁴⁰¹ This provision has a limited scope of application and will be replaced in the near future by Section 9 of the new International Crimes Act (ICA). Article 9 of the WCA applies only in armed conflicts (international and non-international) and to certain categories of crimes: crimes against the state, crimes laid down in the Dutch Military Penal Code, torture, war crimes, and genocide. It applies to military and non-military persons. Article 9 of the WCA makes punishable the superior who *intentionally allows* a subordinate under his command to commit a crime mentioned in Article 8 of the Act.

The Dutch Military Penal Code (DMPC) provides for a superior responsibility provision in Article 148. Unlike the WCA, it also applies to crimes committed in times of peace and, apart from military superiors, to non-military persons performing 'vital functions' in the armed forces. Article 148 of the DMPC makes punishable the military superior who *intentionally allows* a subordinate to commit a crime or, when witnessing a crime being committed by a subordinate, *intentionally omits* to take the necessary measures that can reasonably be asked of him.⁴⁰² To be punished, he must have known, either directly or through other sources.

Article 149 of the DMPC makes punishable (with a maximum penalty of 6 months imprisonment) a military superior who *intentionally omits* to take action to prevent the commission of crimes by a subordinate under his command, if, owing to the circumstances, he *should have realised* that these crimes were being committed or were about to be committed. As to the knowledge requirement, negligence suffices.⁴⁰³ Article 149 of the DMPC is currently the only superior responsibility provision that provides for a 'should have known' standard. However, the provision has a limited scope: it only applies to superior-subordinate relationships within the chain of command.

The new Dutch International Crimes Act (ICA)⁴⁰⁴ provides for superior responsibility in Section 9:

⁴⁰¹ Act of 10 July 1952, Stb. (Staatsblad: Bulletin of Acts, Orders and Decrees) 1952, 408. Article 9 WCA: 'The punishment prescribed for the offences mentioned in the previous Article equally applies to a person who intentionally allows his subordinate to commit such an offence' (Transl., *EvS*)

⁴⁰² Standards of proportionality and subsidiarity apply; Article 148 of the DMPC: The superior who intentionally allows a subordinate to commit a crime or who, as a witness to a crime a subordinate has committed, intentionally omits to take measures which are necessary and may be required of him, is liable to punishment as an accessory'. (Transl., *EvS*)

⁴⁰³ Article 149 of the DMPC: The superior who should reasonably suspect a subordinate is committing or intends to commit a crime is liable to punishment of not more than six months imprisonment or a fine of the third category, if he intentionally neglects to take measures which are necessary and may be required of him.

⁴⁰⁴ Act of 9 June 2003, Stb 2003, 270.

English translation: <<http://www.iccnw.org/resourcestools/ratimptoolkit/nationalregionaltools/legislationdebates/NL.IntCrAct.doc>>. For a more elaborate analysis of the ICA: H. Bevers *et al.*, 'The Dutch International Crimes Act', in Neuner (2003), pp. 179-197.

Section 9

1. A superior shall be liable to the penalties prescribed for the offences referred to in § 2 if he:
 - (a) intentionally permits the commission of such an offence by a subordinate;
 - (b) intentionally fails to take measures, in so far as these are necessary and can be expected of him, if one of his subordinates has committed or intends to commit such an offence.
2. Anyone who culpably neglects to take measures, in so far as these are necessary and can be expected of him, where he has reasonable grounds for suspecting that a subordinate has committed or intends to commit such an offence, shall be liable to no more than two-thirds of the maximum of the principal sentences prescribed for the offences referred to in § 2.
3. If, in the circumstances referred to in subsection 2, the maximum sentence prescribed for the offence is life imprisonment, the term of imprisonment imposed shall not exceed fifteen years.

Section 9 of the ICA features the 'splitting solution' and provides for criminal liability of superiors who either intend the commission of international crimes by their subordinates, or who neglect to take adequate measures to prevent or punish such crimes. In Section 9(1)(a), the wording of Article 9 of the WCA can be recognised and, in Section 9(1)(b), traces of Article 148 of the DMPC are visible.

Like the Canadian superior responsibility provision cited above, Section 9(2) of the ICA introduces a separate crime of negligence. In this way, the ICA broadens the criminal liability of superiors under Dutch law, which currently requires recklessness or positive knowledge (intent). According to the Explanatory Memorandum, this is justified by the great damage and suffering modern means of warfare may cause. The distinction between intent and negligence is reflected in the applicable penalties. Like German criminal law, Dutch law adopts a differentiated participation concept where facilitation is a less direct form of criminal participation, such as instigation, and therefore receives a lesser sentence.

In sum, the above provisions derived from national war crimes law and military manuals, provide an array and variety of the forms superior responsibility may take. Three types stand out: superior responsibility (i) as criminal participation/complicity requiring actual knowledge and intent (Article 77 UCMJ), (ii) as criminal participation, including a negligence standard (FM 27-10, UK Manual of Military Law, and UK ICC Act 2001), and (iii) as a separate crime of omission through negligence (German, Dutch and Canadian legislation). Of interest are the 'splitting solutions' mentioned above, laws that provide for both: intentional and negligent failures to supervise/take measures or exercise control. The Dutch and German provisions provide for lesser penalties in cases of negligent failures to act and this way express the lower moral responsibility that attaches to the fault degree of negligence.

⁴⁰⁵ See L.H. Leigh, *Strict and Vicarious Liability*, London (1982).

⁴⁰⁶ Lippman (2000), p. 144.

5. NATURE OF THE CONCEPT

(a) Strict or vicarious liability

Superior responsibility has been characterised by some scholars as a type of vicarious or strict liability offence, particularly in the context of the *Yamashita* case.⁴⁰⁵ Lippmann submits that Yamashita was held 'vicariously liable for the widespread commission of war crimes by troops under his command'.⁴⁰⁶ Strict liability and vicarious liability, both of Anglo-American origin, are different types of liability. While strict liability generates liability for lesser offences, those that commit crimes that do not require intention, recklessness, or even negligence; vicarious liability follows solely from a relationship between two parties. Wu and Kang submit that superior responsibility can be characterised as a strict liability offence only when the underlying crime is a strict liability offence.⁴⁰⁷ They use the analogy of the 'Dotterweich doctrine' relating to strict liability public welfare offences.⁴⁰⁸ This is not the case with the underlying crimes that incur superior responsibility in international humanitarian law. War crimes, crimes against humanity, and genocide are not strict liability crimes and all require a form of intent.⁴⁰⁹ Therefore, any comparison between superior responsibility and strict liability is 'moot'.⁴¹⁰ Moreover, the doctrine of superior responsibility requires *mens rea* by way of proof of knowledge. Even though the knowledge standard of superior responsibility has given rise to confusion in the context of the *ad hoc* Tribunals, it is clear that

[t]he element of knowledge has to be proved in this type of cases, command responsibility is not a form of strict liability (...) The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, in so far as vicarious liability may suggest a form of *strict* imputed liability.⁴¹¹

(b) Participation/Complicity

A superior's failure to act can generate participatory or accomplice liability. This can be taken from the above-mentioned national provisions encapsulating superior responsibility. The question arises whether superior responsibility, as it has developed in the jurisprudence of the *ad hoc* Tribunals and is codified in the ICC Statute, can be classified as participation/complicity. In doing this, the following types of superior responsibility can be distinguished: 1) active superior responsibility, qualifying as a complicity mode by ordering crimes, 2) passive superior responsibility qualifying as complicity by omission, and 3) passive superior responsibility, qualifying as a *sui generis* form of criminal participation.

⁴⁰⁷ Wu and Kang (1997), pp. 279-282.

⁴⁰⁸ See para. 2 (a) of this Chapter.

⁴⁰⁹ See Chapter 2 para. 2 (a).

⁴¹⁰ Wu and Kang (1997), pp. 281-282. See also Jia (2001), pp 161-162.

⁴¹¹ *Čelebići* Appeal Judgement, para. 239.

Active and passive superior responsibility

Where the relationship between a subordinate and his superior is characterised by discipline and obedience, it is not unusual to *impute* the behaviour of a subordinate to the superior. The above mentioned United States Articles of War illustrate this. This is particularly the case when a subordinate has committed a wrongful act upon order from the superior.

When one equates superior responsibility with participation, one particular mode of participation stands out: ordering. That is how superior responsibility featured in the Nuremberg Statute and Judgement. This form of superior responsibility may be viewed as *active* superior responsibility, distinguishing it from passive superior responsibility, *i.e.* the responsibility for failure to act. Both concepts relate to a superior's responsibility. Furthermore, they are likely to flow from the same factual situation. A superior's failure to act can be accompanied by his orders to commit certain acts. That was certainly so in some of the cases discussed earlier.⁴¹² If such orders cannot be attributed to the superior, (passive) superior responsibility then serves as a subsidiary form of criminal responsibility.⁴¹³ This is illustrated by practice at the *ad hoc* Tribunals, where a superior is often charged on the basis of Article 6/7(1) ICTR/Y Statutes as the primary ground of responsibility and on the basis of Article 6/7(3) ICTR/Y Statutes as the subsidiary ground of responsibility.

Ordering crimes and failing to prevent them are, however, conceptually distinct.⁴¹⁴ Active superior responsibility and passive superior responsibility have been said to be different sides of the same coin.⁴¹⁵ In current national and international law, passive superior responsibility has been separated from its active opposite and has become a separate type of responsibility. In the context of the *ad hoc* Tribunals, Article 6/7 ICTR/Y Statutes can be mentioned, where ordering a crime is penalised as individual responsibility in paragraph (1) and failure to act as superior responsibility in paragraph (3). The 1996 ILC Draft Code also distinguishes between active superior responsibility as individual responsibility for ordering crimes in Article 2(3) of the 1996 ILC Draft Code, and passive superior responsibility as superior responsibility in Article 6 of the ILC Draft Code. The ICC Statute also provides for different concepts, referring to active superior responsibility in Article 25(3)(b) and passive superior responsibility in Article 28 of the Statute. It is now generally accepted that superior responsibility for failing to act should be distinguished from superior responsibility for ordering a crime. They connote two different types of liability, one requires a positive act whereas the other denotes a failure to act.

Complicity by omission

At the *ad hoc* Tribunals, passive superior responsibility can exist as complicity by omission (aiding and abetting) and superior responsibility. Two types of complicity by omission have been devised, one that falls short of superior responsibility, and

⁴¹² The *Yamashita* case provides for an example of this. See Parks (1973), and Smidt (2000).

⁴¹³ Ambos in Cassese *et al.* (2002a) p. 854; Bantekas (1999), p. 595; Wu and Kang (1997), p. 274.

⁴¹⁴ See also Ambos in Cassese *et al.* (2002a), p. 853.

⁴¹⁵ See Green (1989), p. 167 *et seq.*; Eckhardt (1983), pp. 4-5.

one that can coincide with superior responsibility. In the latter case superior responsibility was subsumed under Article 7(1) of the ICTY Statute as complicity. This was done in the *Krnjelac* and *Krstić* cases.⁴¹⁶

Differences between superior responsibility and complicity by omission may occur when *sentencing*. In Dutch law, for instance, the accomplice as facilitator is punished to a lesser degree than the principal.⁴¹⁷ English law, on the other hand, applies the principle of equality to accomplice liability/complicity in sentencing.⁴¹⁸ Either of these solutions would be satisfactory where a person of authority such as Akayesu, who was held responsible on the basis of complicity by omission, is concerned. Indeed, the superior position is regarded as an aggravating factor by the Tribunals, resulting in a more severe sentence.⁴¹⁹ The net result would thus be the same.

Superior responsibility: sui generis participation

The superior responsibility concept encapsulated in Article 6/7(3) of the ICTR/Y Statutes is a curious concept. It is formulated as an extension of a subordinate's liability, where the superior is held responsible both for his own failure to intervene and for the crimes committed by his subordinates. As such, it has features of accomplice liability/complicity. It is therefore not surprising that national superior responsibility concepts are formulated and treated as accomplice liability.

Superior responsibility has been termed 'imputed liability'.⁴²⁰ This is, however, misleading. The 'imputed' terminology has an air of vicarious liability, a type of liability, which – as seen earlier – was considered irrelevant in the context of superior responsibility.⁴²¹ Under the modern doctrine of superior responsibility, the superior is criminally responsible for his failure to properly supervise. His responsibility is merely 'triggered' by subordinates' crimes. Therefore Eckhardt's observation that: 'it (superior responsibility, *EvS*) is not personal criminal activity but criminal responsibility for the actions of subordinates' should be faulted.⁴²²

Instead of *imputed* liability, one could refer to superior responsibility as *derivative* liability.⁴²³ A superior's responsibility is derivative in that it is linked to the acts of subordinates. The commander is held responsible as principal offender for his failure to halt subordinates' crimes. The underlying crimes are not an element of the offence, but 'constitute the point of reference of the superior's failure of supervision'.⁴²⁴ The 'Dotterweich doctrine' is an example of derivative liability.

Qualifying superior responsibility as a form of participation would, however, distract from a superior's *own* liability for failure to act. After all, superior responsibility

⁴¹⁶ *Krnjelac* Judgement, para. 173; *Krstić* Judgement, para. 605. See further Chapter 4 para. 7.

⁴¹⁷ See Chapter 2 para. 8 (c).

⁴¹⁸ Smith (1991), pp. 73-74.

⁴¹⁹ See *Aleksovski*, Appeal Judgement, para 187; *Kambanda* Judgement, para 44.

⁴²⁰ Bantekas, on the other hand, qualifies superior responsibility as imputed liability. Bantekas (1999), p. 577.

⁴²¹ Wu and Kang subscribe to this, Wu and Kang (1997), p. 282, as does Eckhardt (1982), p. 5.

⁴²² Eckhardt (1982), p. 4.

⁴²³ Wu and Kang (1997), p. 279.

⁴²⁴ Ambos in Cassese *et al.* (2002a), p. 851.

ty is a form of principal or direct responsibility. It is the superior who fails to act.⁴²⁵

Bearing in mind the above, it seems best to describe superior responsibility as participation *sui generis*. However, this qualification is somewhat contrived when negligence suffices as the requisite mental element of superior responsibility. After all, complicity or participatory liability generally requires a degree of intent and connotes a closer link to the actual crime than superior responsibility.⁴²⁶ Consider the following statement of Damaška, in an essay on command responsibility:

One might wonder why national complicity laws refuse to hold a commander guilty of his subordinates' intentional crimes unless he is familiar with their criminal plans, or unless he wilfully ignores information to this effect. The short answer to this question is that the extension of responsibility beyond this point can be faulted on culpability grounds. To see this, pause for moment to consider the case of a commander who is convicted of a war crime committed by his underlings on the ground that he negligently failed to obtain information capable of putting him in position to prevent their criminal activity. What has taken place here? Sub silentio, as it were, a negligent omission has been transformed into intentional criminality of the most serious nature: a superior who may not even have condoned the misdeeds of his subordinates is to be stigmatized in the same way as the intentional perpetrator of those misdeeds.⁴²⁷

Dutch legal doctrine has also 'wondered' if and how the doctrine of functional perpetration, under which employers and presidents of legal entities can be held criminally responsible for 'intentional crimes' committed by their subordinates, should be qualified. Some scholars argued that it is was not a type of liability but just a *construction* upon which those in control could be identified and subsequently held accountable. This view has been criticised for introducing a type of vicarious liability.⁴²⁸ Others were of the opinion that functional perpetration is a type of *sui generis* criminal participation. At present, the latter view is the accepted one.⁴²⁹ One commentator suggests that it is appropriate to qualify it as *sui generis* participation as it shares certain characteristics with 'normal' participation/complicity, for instance, the link with an underlying crime.⁴³⁰

⁴²⁵ See also Wu and Kang (1997), p. 288.

⁴²⁶ Some national jurisdictions require an accomplice to share the *mens rea* of the principal. Other national legal systems require a 'reduced *mens rea* requirement', such as knowing assistance or encouragement. The ICTY also applies a reduced mental standard for 'aiding and abetting' in war crimes, crimes against humanity, and genocide. In *Furundžija*, it was determined that 'the knowledge that these acts assist the commission of the offence' constitutes the *mens rea* for aiding and abetting. Although reduced, complicity requires *mens rea*, or, to put it differently, a form of intent. The link with the underlying crime is maintained this way. See, § 2.06(3) MPC; Wu and Kang (1997), pp. 282-284; *Furundžija* Judgement, paras. 245-249.

⁴²⁷ M. Damaška, 'The Shadow Side of Command Responsibility', 49 *AJCL* (2001), p. 455.

⁴²⁸ See Remmelink/Hazewinkel-Suringa (1996), pp. 156-158; Topping (1984), pp. 119-120.

⁴²⁹ De Hullu (2000), pp. 273 *et seq.*

⁴³⁰ *Ibidem*, p. 275.

(c) **Separate crime of ‘failure to supervise’**

The peculiar structure of superior responsibility has been called ‘a stunning contradiction between the negligent conduct of the superior and the underlying intent crimes committed by the subordinates’.⁴³¹ Admittedly, ‘negligence liability’ for intentional acts is not a logical construction. A way out of this illogical impasse would be to regard superior responsibility as a separate offence of ‘failure to supervise’.⁴³² Some national superior responsibility concepts have adopted this approach, as does Article 28 of the ICC Statute. For this reason Article 28 of the ICC Statute must be welcomed. Its formula allows for qualifying superior responsibility as a distinct offence, which solves a theoretical incoherence. Consider, for instance, Schabas’ statement with regard to superior responsibility and the crime of genocide.

Indeed, even the ICC will probably be required, in practice, to treat command responsibility as a separate and distinct offence. In the case of genocide, for example, it is generally recognized that the mental element of the crime is one of specific intent. It is logically impossible to convict a person who is merely negligent of a crime of specific intent. Accordingly, the Court, if Article 28 of the Statute is to have any practical effect, will be required to convict commanders of a crime other than genocide, and one that can only be negligent supervision of subordinates who commit genocide.⁴³³

Having regard to the above, it only goes to show, how inappropriate a ‘should have known’ standard would have been in the context of Article 6/7(3) of the *ad hoc* Statutes. The ‘awkward’ formulation of the superior responsibility concept in the Statutes of the ICTY and the ICTR rules out negligent liability for specific intent crime, such as genocide and crimes against humanity

6. CONCLUSION

Different forms and types of superior responsibility can be found in law, also outside (inter)national criminal and/or military law. The legal concepts discussed above as analogies of superior responsibility all reflect the functional, cognitive, and operational aspects relevant in establishing liability. Not all, however, grant equal weight to these aspects, and this is where they then deviate from superior responsibility. The comparison with analogous concepts, such as political responsibility, demonstrated how the duty-aspect of superior responsibility determines its scope of liability. It further appeared that prosecuting superiors at policy or government level might be better based on joint criminal enterprise, or another conspiracy-complicity type of criminal participation, rather than on superior responsibility.

⁴³¹ Ambos in Cassese *et al.* (2002a), p. 852. See also Schabas (1998), p. 417; Damaska (2001), pp. 463–464.

⁴³² See also Ambos in Cassese *et al.* (2002a), p. 871.

⁴³³ Schabas (2000a), p. 342.

The above overview of national concepts of superior responsibility further served to identify the various forms the concept has adopted, ranging from active criminal participation/complicity to a separate crime of negligence. Some of the above-discussed national laws implementing the ICC Statute incorporate superior responsibility as a crime of omission. This may be seen as evidence that with Article 28 of the ICC Statute, the final form of the concept seems to have been identified; the concept of superior responsibility is a genuine crime of omission.

EVALUATION PART II

The ICC drafters are indebted to the *ad hoc* Tribunals for having developed the concept of superior responsibility. The latter allowed it to evolve into a true concept of *individual* criminal responsibility. While they affirmed the three constitutive elements already accepted in post-Second World War case law and encapsulated in Article 86 of the AP I, it merged disparate and sometimes contentious judgements into one concept.

The ICC inherited a concept that is uniform in its underlying principles and broad in its application whilst retaining its specific characteristics. The jurisprudence of the *ad hoc* Tribunals delivered the tools for variance with the introduction of the concept of 'effective control'. It further respected the boundaries set by criminal law by requiring knowledge of the underlying crimes. Unfortunately, the ICC concept is framed in two distinct standards, for military and non-military superiors. This is an unnecessary differentiation of the concept and denies its uniform nature, which is based in international customary law. On that point, the ICC concept of superior responsibility must be regarded as flawed and a step back.

Article 28 of the ICC Statute is, however, a step forward by allowing superior responsibility to be identified as a crime of omission, a 'failure to exercise control properly'. This has stopped the erosion of the concept of superior responsibility by, on the one hand, joint criminal enterprise and, on the other hand, complicity. In the Tokyo Judgement, where superior responsibility was presented in the disguise of cabinet responsibility, superior responsibility was understood in collective terms, discrediting the concept's peculiar features and endangering its nature as individual criminal responsibility. The fusion of accomplice liability and superior responsibility in the concept of complicity by omission is a process started at the *ad hoc* Tribunals. This is equally unwelcome as it might prevent us from regarding superior responsibility as a form of direct responsibility, as a separate crime of omission. Article 28 of the ICC Statute does away with this confusion and formulates superior responsibility as a genuine crime of omission connoting *individual* and *direct* criminal responsibility.

The negligence standard of 'should have known' in Article 28(a) of the ICC Statute has the potential to broaden the concept beyond the borders set by the *ad hoc* Tribunals. It is up to the ICC and national courts not to let that happen. Now that the limits of the concept have been identified, it is time to guard its borders. The ICC will have to define a superior's 'duty to know'. It is submitted here that this should be done along the lines of, not only objective factors such as task and function, but also according to subjective factors, such as a superior's function and experience. In this it should draw from ICTY/R case law and prevent, as much as possible the formation of a separate ICC superior responsibility concept. Uniformity should be the device.

In sum, whatever way we qualify superior responsibility, as a separate crime of omission, or as complicity, the following elements make up the modern concept of superior responsibility:

1. It consists of three equal and cumulative elements: functional, cognitive, operational;
2. It is based on a duty to know that has its limit in the criminal law principle of personal fault and blameworthiness;
3. It applies to military and non-military superiors turning on effective command/authority and control;
4. It extends to post-crime acts (punish/repress/submit to authorities), but only through a clear link to the crime through 'prevent'.
5. It is 'immune' to conflict classification

PART III

DEFENCES

Creon: And you made free to overstep my law?

*Antigone: Because it was not Zeus who ordered it,
Nor Justice, dweller with the Nether Gods,
Gave such a law to men; nor did I deem
Your ordinance of so much binding force,
As that a mortal man could overbear,
The unchangeable unwritten code of Heaven;*

SOPHOCLES, ANTIGONE

INTRODUCTION TO PART III

A third of this study on criminal responsibility covers an analysis of defences in international criminal law. This would not have been the case had this book been written a decade ago. The incorporation of a catalogue of defences in international criminal law is a relatively recent phenomenon and can be attributed to the ICC. The Rome Statute makes up for the imbalance that exist(ed) in the criminal law systems of Nuremberg, Tokyo and the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda. A study on the concept of individual criminal can therefore not disregard this 'averting-side' of criminal responsibility. This would equally lead to an imbalance.

Part III contains an analysis of criminal law defences in international criminal law. It takes Articles 31-33 of the ICC Statute as its starting point and examines the defences in the same format as in Chapter 2 of part I. Chapter six deals with Article 31 of the ICC Statute, containing the defences of mental capacity, intoxication, self-defence, duress, and 'other' non-statutory defences. The first part of Chapter six contains a 'general part' and deals with a few central issues, such as the distinction between justifications and excuses and the 'reasonable man standard'. This part has a similar function as the 'general part' of Chapter two and pertains to the defences discussed in Chapter seven as well.

Chapter seven examines Article 32 and 33 of the ICC Statute, which encapsulate respectively the defence of mistake (fact and law) and the defence of superior orders. Both can be usefully discussed in one and the same chapter. After all, the defence of superior orders is a *sui generis* defence of mistake of law.

CHAPTER 6

GROUND FOR EXCLUDING CRIMINAL RESPONSIBILITY

1. INTRODUCTION

The discussion on defences in war crimes law was for many years solely concerned with the defence of superior orders, but in recent years, it has expanded to include other grounds for excluding criminal responsibility as well.¹ Since the ICTY ruling in the case of *Erdemović*,² the defence of duress has received an increasing amount of attention, as did the defence of mistake of fact after a NATO bomb had hit the Chinese embassy.³ Despite lively debates in literature and academia, practice at international courts and tribunals has shown that there is a reluctance to allow a defence to exclude criminal responsibility for war crimes, crimes against humanity, and genocide. This reluctance was shared by some of the founding fathers of the ICC Statute. Nevertheless, the Rome Statute contains a catalogue of defences in Articles 31-33.

The defences discussed in this chapter are listed in Article 31 of the ICC Statute and all have a different nature and pedigree, which accounts for a differing format in analysing them. In the following, the defences will be described and evaluated by looking at the ICC drafting history, the national legal concepts behind them (if available), the texts and wording of each provision, and the jurisprudence of the Tribunals of the Former Yugoslavia and Rwanda and various national courts and tribunals. Before discussing the various defences in their development from Nuremberg to Rome, a few preliminary observations should be made.

2. PRELIMINARY OBSERVATIONS

The Nuremberg Judgement marked the end of the act of State doctrine and the *respondeat superior* or *Befehl ist Befehl* theory. According to the former doctrine, propounded most vigorously by Hans Kelsen, no State has jurisdiction over the acts of

¹ Early studies comprise Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law*, Leiden (1965); L.C. Green, *Superior Orders in National and International Law*, Leiden (1976); L.C. Green, 'The Defence of Superior Orders in the Modern law of Armed Conflict', 32 *Alberta LR* (1993) 320; N. Keijzer, *Military Obedience*, Alphen a/d Rijn (1978); E. Müller-Rappard, *l'Ordre supérieur militaire et la responsabilité pénale du subordonné*, Paris (1965). More recent studies include G.J. Knoop, *Defenses in Contemporary International Criminal Law*, New York (2001); C. Nill-Theobald, 'Defences' bei Kriegsverbrechen am Beispiel Deutschlands unter der USA, Freiburg (1998).

² ICTY, Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, A. Ch., 7 October 1997 (*Erdemović* Appeal Judgement).

³ This issue was raised by Fenrick, who is of the view that the defence of superior orders is relevant in connection with mistake of fact. Fenrick in Duyx *et al.* (2000) pp. 68-122, 99.

another State, and accordingly, when an individual in his capacity as an organ of a State violates provisions of international law, the delict should be attributed to that State. The individual cannot be brought to trial before a court of a foreign State.⁴ The *Befehl ist Befehl* theory considers obedience to superior orders an automatic and complete defence against criminal prosecution. It was professed by Oppenheim at the beginning of the twentieth century as follows:

[v]iolations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations *by order* of their Government, they are not war criminals and cannot be punished by the enemy; the latter can however, resort to reprisals. In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.⁵

Although different in their starting-points, conclusions, and applicability, both doctrines 'lend international offenders a mantle of immunity from responsibility'.⁶ In Nuremberg, the Judges cast both doctrines aside, ending a period in which only States could be held responsible for international offences and in which the individual accountability of a soldier was considered to be a matter of national rather than international law. One could say that in Nuremberg international law had been replaced by international *criminal* law, a legal system in which the individual rather than the State is an subject to the law. This development is best illustrated by the development of a system of 'defences' or 'grounds excluding criminal responsibility' for war crimes, crimes against humanity, or genocide.

(a) International law defences and criminal law defences

The fact that, since Nuremberg, the 'Kelsenian view' of international law was ousted in *attributing* responsibility does not mean that the international law defences *as such* were refuted. Classic 'international law defences' such as military necessity, reprisals, and *tu quoque* still play a role in barring conviction for international crimes.⁷ Together with the so-called 'criminal law defences', which have a national criminal law pedigree and are recognised as defences under the ICC Statute, 'inter-

⁴ See H. Kelsen, 'Collective and Individual Responsibility for Acts of States in International Law', *Jewish YIL* (1948), pp. 226-239.

⁵ L. Oppenheim, *International Law*, Vol. 2, London (1906), pp. 264-265 cited in Dinsteine (1965), p. 38. During the Second World War opinion changed and Oppenheim's *International Law*, edited by Lauterpacht, adopted the absolute liability approach, L. Oppenheim, *International Law* (ed. by H. Lauterpacht), London (1952).

⁶ Dinsteine (1965), p. 59. According to Dinsteine, 'The acts of State doctrine imputes the international delict, performed by the individual in his capacity as an organ of the State, to the State itself, and declares that the only applicable sanctions are those directed against the State – according to Kelsen: reprisals and war. Conversely, the doctrine of respondeat superior removes the responsibility from the shoulders of one person, the recipient of the order, and places it on the shoulder of another, the superior who issued the order (...)', Dinsteine (1965), p. 59-60.

⁷ Knoops (2001), pp. 30-31 and p. 37; Nill-Theobald (1998), pp. 59-60.

national law defences' form a catalogue of defences that individuals can invoke when charged with international crimes under International Humanitarian Law. However, as the latter are governed by principles closely connected to the concept of State responsibility, thus aiming at shielding of the State rather than protecting the individual, the fusion of both groups is not necessarily a happy marriage.⁸ It is clear that some of the classic international law defences are not admissible in international criminal law.

(b) Justification and excuse

The term 'defence' derives from Anglo-American law and is a rather broad and undifferentiated concept comprising both, substantive and procedural bars to punishability and prosecution.⁹ Most civil law systems refrain from putting both types of exoneration under one heading. They keep a strict separation between the substantive elements of a crime and the procedural requirements for its prosecution. Although the ICC Statute contains procedural defences,¹⁰ they will not be discussed in the ambit of this research, which is primarily focused on 'substantive defences' and the concept of criminal responsibility.

Most criminal law systems recognise the distinction between justifications and excuses, between wrongdoing in the sense of wrongfulness or unlawfulness of the act, and culpability in the sense of blameworthiness of the actor.¹¹ Some systems, like the German and the Dutch systems, cultivate the distinction between justification and excuses as basic elements in the structure of criminal acts. These systems, in doctrine and in law, construct a crime in three stages or units. Conduct is only punishable when, firstly, it satisfies the definitional elements of a crime, secondly, it is unlawful, and, finally, it is blameworthy.¹² Anglo-American law does not utilise

⁸ See TWC, Vol. XV, pp. 155-188.

⁹ According to Robinson, 'The term "defense" is commonly used, at least in a casual sense, to mean any set of identifiable conditions or circumstances which may prevent a conviction for an offense'. He distinguishes five categories: failure of proof defenses (where there is the negation of a required offense element caused, for instance, by mental illness, a State of intoxication or a mistake), offense modification defense (when all elements of the offense charged are satisfied, it exculpates the defendant because the harm is so trivial and lies outside the evil sought to be prevented), justifications (self-defence, necessity, exercise of public authority), excuses (insanity, intoxication, duress, excuses of mistake, military orders), and non-exculpatory public policy defenses (statute of limitations, double jeopardy, diplomatic immunity, entrapment). P.H. Robinson 'Criminal Law Defenses: A Systematic Analysis', 82 *Columbia LR* (1982), pp. 203-243.

¹⁰ For instance, 'ne bis in idem' in Article 20; 'non-retroactivity *ratione personae*' in Article 24; and 'exclusion of jurisdiction over persons under eighteen' in Article 26. As to the latter, despite its phrasing in procedural terms, Article 26 can also be seen to include a ground for excluding criminal responsibility under a certain age. See Eser in Triffterer (1999), margin No. 7, p. 541.

¹¹ See A. Eser, 'Justification and Excuse', in A. Eser and G.P. Fletcher (eds.), *Rechtfertigung und Entschuldigung, Rechtsvergleichende Perspektiven/ Justification and Excuse, Comparative Perspectives*, Vol. I, Freiburg (1987), pp. 20-21.

¹² See Jescheck (1996), p. 202; G. Knigge, *Strafuitsluitingsgronden en de structuur van het strafbare feit*, Preadvies voor de Vereniging voor de vergelijkende studie van het recht van België en Nederland, Den Haag (1993); and G.P. Fletcher, 'Introduction from a Common Law Scholar's Point of View', in Eser and Fletcher (1987), p. 9.

this differentiation in the same fundamental way; the criteria for justification and excuse are interwoven.¹³ Fletcher attributes this partly to the 'common law's affection for reasonableness' and its non-structured way of legal reasoning on this point.¹⁴ Assuming this proposition bears truth, the difference in legal reasoning can be explained by the fact that the Anglo-American systems (but also the French and the Belgian systems in a limited number of cases) employ a jury-system in which only one question needs to be answered: guilty or not guilty.¹⁵ Greenawalt's submission seems to confirm this:

If the law's central distinction between justification and excuse is to follow from ordinary usage, it will be drawn in terms of warranted and unwarranted behaviour. That, indeed, is the central distinction in existing American law insofar as one can be discerned (...).¹⁶

In the following, the distinction between justification and excuse will be utilised to illustrate the differences between Anglo-American and continental law in excluding punishability. This is of particular importance in the context of duress.

Not every defence, when successfully pleaded, leads to the exclusion of conviction. Some pleas result in mitigation of punishment rather than exemption. Unlike justification and excuse, mitigation presupposes that the person is convicted and liable to be punished. Mitigating circumstances playing a role in the sentencing stage reduce the severity of a punishment. As Hart points out, mitigation serves the utilitarian principle of excluding punishment that causes more harm than that generated by the offence. But he draws attention to another aim that is served by inflicting a less severe penalty. In situations where the,

[m]ental state of the convicted criminal is such that he was exposed to an unusual or specially great temptation, or his ability to control his actions is thought to have been im-

¹³ However, the common law of homicide distinguished between justification and excuse: 'Some homicides, like that done by the public hangman in carrying out the sentence of the court, were justifiable. Others, like killing by misadventure and without culpable negligence, were merely excusable. In both cases the accused that successfully raised the defence was acquitted of felony but, if the homicide was merely excusable, his goods were forfeited. In 1828 forfeiture was abolished and, ever since, there has been no difference, so far as the defendant is concerned, between the various general defences. If sufficiently raised, they result in a verdict of not guilty'. Smith & Hogan (1996). Moreover, there seems to be growing interest in distinguishing between the two defences. See Robinson (1982); Fletcher (1978), pp. 759-875.

¹⁴ To his mind 'reasonableness (...) provides the lever for this flattening of liability'. He characterises Anglo-American or common law legal reasoning as flat, opposed to German legal argument, which is termed 'structured'. He argues: 'The reasonable person enables us to blur the line between justification and excuse, between wrongfulness and blameworthiness, and thus renders impossible any ordering of the dimensions of liability. The standard "what would a reasonable person do under the circumstances?" sweeps within one inquiry questions that would otherwise be distinguished as bearing on wrongfulness or on blameworthiness'. G.P. Fletcher, 'The Right and the Reasonable', in Eser and Fletcher (1987), pp. 70, 89.

¹⁵ See Knigge, (1993).

¹⁶ K. Greenawalt, 'The Perplexing Borders of Justification and Excuse', 84 *Columbia LR* (1984), p. 1903.

paired or weakened otherwise than by his own action, so that conformity to the law which he has broken was a matter of special difficulty for him as compared with normal persons normally placed.¹⁷

Hart's submission is worth considering when examining the plea of superior orders in Anglo-American law and the plea of intoxication in some civil law systems.¹⁸

(c) *Mens rea*/mental element

The Anglo-American restrictive definition of 'intention', excluding the element of 'desire', raises questions with regard to conscious but involuntary conduct. The latter can manifest itself as a result of a mental defect. Fletcher refers to the case of a man suffering from a brain tumour throwing his son out of a window.¹⁹ Although it seems clear that the man did not wish to inflict injury on his son, he cannot be said to have acted unintentionally. He didn't throw the boy out of the window in a spasm. The crux lies here in the (in)voluntariness of the act, an element lacking in the Anglo-American interpretation of 'intention'. To prevent attribution of responsibility for involuntary acts, Anglo-American law assumes voluntary conduct in all cases and provides for the defence of 'automatism' in cases of involuntary acts.²⁰ Another way of dealing with this 'defined' concept of intention is to provide for a distinct provision denying liability in cases of involuntary acts. This is done in the American Model Penal Code (MPC) § 2.01(1):

A person is not guilty of an offense 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.

There is a dispute amongst scholars whether voluntariness should be regarded as part of *mens rea* or *actus reus*. Smith and Hogan observe the following in this context:

What is clear is that the voluntariness of an act is a *more fundamental element* of criminal liability than the intention to cause, or foresight of, results of the act which we normally think of as *mens rea*. It is a defence known as 'automatism', that this element has not been proved by the Crown.²¹ (*italics added, EvS*)

In practice, the defence of automatism is regarded as denying *mens rea*.²²

No comparable provision for voluntary acts or a defence of automatism can be found in civil law systems. This can be explained by the fact that the civil law intention concept is broader than the Anglo-American law concept and includes an element of will, thus rendering superfluous a separate provision.

¹⁷ H.L.A. Hart, *Punishment and Responsibility*, Oxford (1968), p. 15.

¹⁸ See Chapter 7 para. 3.

¹⁹ Fletcher (1978), pp. 443-444.

²⁰ See R.D. Mackay, *Mental Conditions Defences in the Criminal Law*, Oxford (1995).

²¹ Smith & Hogan (1996), p. 40.

²² Archbold (2000), § 17-84.

The ICC Statute, unlike the jurisprudence of the Tribunals for the Former Yugoslavia and Rwanda, does not adopt the *mens rea/actus reus* terminology and adopts the more neutral word 'mental element'. Moreover, the mental element defined in Article 30 of the Statute extends to the voluntary element as well.²³

Another point of interest regardingin discussing the Anglo-American concept of intention and the civil law notion of intention/*dol/dolus*, relates to the concept of knowledge. In Anglo-American theory and legal practice, it covers various *cognitive* graduations. One could, therefore, say that the knowledge element is the main fault element constituting *mens rea*. As Fletcher points out, intentional conduct basically turns on a person's 'conscious object' and his 'beliefs'.²⁴ The knowledge element is, however, limited to the world of fact. It does not extend to awareness of legal rules. Take the example put forward by Ashworth:²⁵

D was renting a flat, and during the course of his tenancy he fixed some panelling to the walls, to conceal the wires of his stereo equipment. When his tenancy ceased, he took down and destroyed the panelling – which he had put up for his own convenience. He was charged with criminal damage, on the basis that, in law, the panelling became the property of the landlord once it was fixed to the walls. The Court of Appeals quashed his conviction for criminal damage, pointing out that although he did intend to damage property, he believed that the property was his own, and therefore he lacked the fault element for the crime. If D had been asked whether the panelling was his own; he would surely have replied: 'Yes'. Yet it would be inaccurate to say that he knew this, since it was not in fact true. It is more accurate to say that he believed the panelling to be his own; this belief should not be described as knowledge, because it does not accord with the true position.²⁶

Making a mistake of law is seen as denying intention in Anglo-American law.²⁷ This is not because the Anglo-American concept of intention/knowledge includes awareness of legal rules and lawfulness of conduct. On the contrary, Anglo-American law employs a so-called 'neutral intention'. In the words of the MPC in § 2.02(9),

Culpability as to Illegality of Conduct

Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.

The neutral intention thus precludes the possibility of raising mistake of law as a 'failure of proof defence'.²⁸ How then does mistake of law negative the mental ele-

²³ See Chapter 2 para. 2.

²⁴ Fletcher (1978), pp. 440-441.

²⁵ Based on the case of *R v. Smith* DR (1974) QB 354.

²⁶ Ashworth (1999), p. 192.

²⁷ See also Smith & Hogan (1996), pp. 58-59.

²⁸ The term 'failure of proof defence' is taken from Robinson (1982), pp. 204-208, 221-229 and P.H. Robinson, 'Causing the conditions of one's own defense: A Study in the limits of Theory in Criminal Law Doctrine', 71 *Virginia LR* (1985), p. 3, footnote 7.

ment in Anglo-American legal systems? The answer lies in the absence of a distinction between justifications and excuses enabling a perpetrator to be *excused* despite the fact that his conduct was unlawful. No general culpability requirement, that is independent from a statutory provision, underlies the Anglo-American concept of intent/*mens rea*. Its scope is strictly linked to the *actus reus*. Only when the violated provision comprises a specific intention or separate ‘knowledge’ element can a mistake of law be a complete defence. Such an element can also be included through judicial interpretation. Take, for instance, the case of *Liparota v. U.S.*, where the Supreme Court interpreted the element of ‘knowingly’ to require,

[a] showing that the defendant knew his conduct to be unauthorized by statute or regulations.²⁹

By interpreting ‘knowingly’ this way, the Supreme Court in *Liparota* expanded the neutral intention concept to include awareness of unlawfulness and thus enabled the defendant to successfully raise the defence of mistake of law. A different technique, but generating the same result, is the insertion of an element of ‘unlawfulness’ into a crime’s definition. This was done in the English case of *R. v. Beckford*, where the Privy Council ruled that,

(i) Unlawfulness is an element in all crimes of violence (ii) intent, knowledge or recklessness must be proved as to the element and therefore (iii) a person who mistakenly believes in the existence of circumstances which would make the conduct lawful should not be criminally liable.³⁰

However, both cases constitute exceptions rather than rules. As will be set out later, the rule that ignorance or mistake of law is not a defence is deep-rooted in Anglo-American law.³¹ In any event, the above shows that the defence of mistake of law in Anglo-American law is regarded as negating *mens rea* because of its strict connection with the *actus reus*.

In the past, civil law systems employed a so-called *dolus malus*. This *dolus malus* notion differed from neutral intention in that it required – besides a will to commit the crime – an awareness of the unlawfulness of the act.³² The Bavarian Code of 1813, for instance, embraced the concept of *dolus malus*. These systems have now reverted to a concept of ‘neutral intention’. While Germany and the Netherlands have embraced the neutral intention concept, Belgium and France still apply a type of *dolus malus* intention. Intention comprises an element of awareness that the act is unlawful. Desportes and Gunehec define the French ‘dol’ as,

²⁹ 471 US 419 (1985), see LaFave (1988), pp. 175-186.

³⁰ (1988) 1 AC 130, see Ashworth (1999), p. 241.

³¹ Hall (1960), p. 383 and O.W. Holmes, *The Common Law*, Lecture II, the Criminal Law, S.M. Novick (ed.), *The collected works of Justice Holmes*, Chicago (1995).

³² Rammelink/Hazewinkel-Suringa (1996), pp. 225-226.

La faute intentionnelle peut être définie comme *la volonté de commettre un acte que l'on sait interdit* ou autrement dit, comme *l'intention de violer la loi pénale*.³³

This means that, in Belgium and France, a mistake of law, when successfully raised, will lead to an acquittal as it qualifies as a failure of proof defence.³⁴ In Germany and The Netherlands (and Switzerland and Austria), on the other hand, a mistake of law will *excuse* the perpetrator and exclude any further legal proceedings. While the net result is the same – the accused will not be punished – the approach is different. In the latter case an offence is committed, while in the former case no offence has been committed. The German and Dutch jurisdictions differ from those of France and Belgium in that they – like the Anglo-American legal systems – employ a neutral intention concept. They differ, however, from the Anglo-American systems by distinguishing between justifications and excuses and allow mistake of law as an excuse.

It appears from the above that there are neutral and non-neutral intention concepts. Moreover, there seem to be different ways to allow mistake of law, utilising different intention concepts. Firstly, by broadening a neutral intention concept through judicial interpretation, as in *Liparota* and *R. v. Beckford*. Secondly, by applying a non-neutral or *dolus malus* type of intention, as in Belgian and French criminal law. Lastly, by embracing a general culpability requirement underlying a neutral intention concept. The disparity amongst the various national notions of intention should be borne in mind when discussing defences on the international level, especially when discussing the defence of mistake of law in Article 32(2) of the ICC Statute.

(d) The 'reasonable man standard' and *Garantenstellung*

Municipal courts, in judging if and when a person can rely on a ground excluding criminal responsibility, are often confronted with the question as to whether 'a reasonable person' in the defendant's circumstances would have perceived the (accused's) conduct as necessary. The ICC will also have to find a standard to test illegal conduct. The concept of 'reasonableness' plays a central role in allowing defences such as self-defence, intoxication, and duress. However, it is better to concentrate on self-defence as it offers the most cogent examples to make the point.

The reasonable man standard is an 'objective' standard, in that it ignores the defendant's subjective or actual mental state. It seems to be rooted in the law's search for generally accepted standards of conduct applicable to all individuals.³⁵ However, numerous attempts have been made by (national) Courts to 'particularise' or 'indi-

³³ Desportes and Le Gunehec (2000), para. 470, p. 398.

³⁴ For Belgium: C.J. Vanhoudt and W. Calewaert, *Belgisch Strafrecht* (1976), p. 261.

³⁵ The 'reasonable man theory' owes its existence to Holmes (and, to a lesser extent, to Austin and Bentham). Holmes regarded subjective standards of reasonableness as a violation of the Rule of Law as they take into account, "the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men", Holmes/Novick (1881/1995) p 153. See also Hall (1960), pp. 152-158.

vidualise' this standard by taking, or allowing to be taken, into account a defendant's personal characteristics when determining the objective reasonableness of having acted in self-defence. In discussing the American law on this point, Heller distinguishes four standards:

There are, then, four analytically distinct reasonableness standards currently used by American courts: (1) the *objective standard*; (2) a standard that eliminates the reasonableness requirement entirely – what I will call the *purely subjective standard*; (3) a standard that retains a reasonableness requirement but asks the jury to assess the objective reasonableness of the defendant's act under the circumstances as he believed them to be – what I will call the *Model Penal Code or MPC standard*; and (4) a standard that retains a reasonableness requirement but requires the jury to take into account one or more of the defendant's personal characteristics when assessing the objective reasonableness of his act – what I will call the *particularising standard*.³⁶

The four standards can be found in various criminal legal systems and an understanding of each is illuminating in analysing and interpreting Article 31. We will take a closer look at each of them. The objective standard does not take into account subjective elements, *i.e.* personal (non-universal) elements concerning the defendant, in judging whether a defence can be relied upon. This test is applied in those legal systems that regard self-defence as a justification, thus exonerating the wrongfulness of the act.³⁷ Here the test is (predominantly) objective in that the standard of an imaginary third person, 'a reasonable or ordinary man', is applied in establishing whether the defendant's belief that he had to act in self-defence was reasonable. The standard is set in the circumstances at the time of the act (*ex ante*).³⁸ The second test, the subjective standard, is the most radical challenge to the first in that it eliminates the objective reasonableness requirement entirely. All that is relevant is the actor's honest belief that it was necessary to deploy a defence. Examples of the use of this standard are rare, but this test was applied in a few American self-defence cases.³⁹ The reasoning behind the application of a purely subjective test is often the right of self-defence as a 'natural right (...) based on the natural law of self-preservation.

³⁶ K.J. Heller, 'Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases', 26 *AJIL* (1998), p. 5.

³⁷ For instance, *Notwehr* in Germany (Article 32 of the German Penal Code) and *noodweer* in the Netherlands (Article 41(1) of the Dutch Penal Code).

³⁸ This is the test applied by German (Bundesgerichtshof *NJW* 1969, 802) and Dutch courts (Netherlands Supreme Court, *NJ* 1983, 468, 1 March 1983). The fact that the German and the Dutch employ strict objective tests can be explained against the background of the existence of another self-defence concept in these systems: 'excessive self-defence': *Notwehrexcess* (Article 33 of the German Penal Code) *noodwehrexces* (Article 41(2) of the Dutch Penal Code). This is an excuse-type of self-defence, which employs a (partly) subjective test: consider, for instance, the Dutch provision in Article 41(2): 'A person exceeding the limits of necessary defence, where such excess has been the direct result of a strong emotion brought about by the attack, is not criminally liable'. (Translation: *The American Series of Foreign Penal Codes, The Netherlands*, Vol. 30 (1997)).

³⁹ According to Heller, four American States use a purely subjective standard in assessing the reasonableness of a self-defensive act: Delaware, Kentucky, North Dakota, and Ohio, Heller (1998), p. 57 and Appendix, pp. 109-120.

Being so, it is resorted to instinctively in the animal kingdom by those creatures not endowed with intellect and reason, so it is not based on the “reasonable man” concept’.⁴⁰ The latter reasoning is founded upon what has been called a ‘determinist’ view of human action. When an individual honestly believed that he was acting in self-defence, he was causally determined to act on that belief and thus always has a defence of self-defence exempting him from liability. The objective test, on the other hand, is based on the assumption that human beings have a free choice to act. This can be termed an ‘intentionalist view’.⁴¹ According to the latter view, an individual who committed a crime in self-defence does not always have a defence of self-defence. When the act in self-defence was not proportionate in relation to the attack, or the defendant could have averted the attack by, for instance, walking away, he cannot be exempted from criminal liability. The intentionalist view lies at the basis of most criminal legal systems and equally underlies that of the ICC. The pure subjective approach is irrelevant in the context of this research and will, therefore, not be dealt with any further.

As always, the truth lies somewhere in the middle. The third test mentioned above, lies between the two extremes of pure objective and mere subjective, and is a mix of the reasonableness-test and the ‘belief-standard’. This is the standard drawn up in the context of the MPC, but it can also be found in legal systems beyond the reach of the MPC.⁴²

[t]he use of force upon or toward another person is justifiable when the actor *believes* that such force is immediately *necessary* for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion. [italics added, *EvS*]⁴³

Unlike the objective standard, the MPC standard values the objective reasonableness of the defendant’s act – caught in the term ‘necessary’ – in the light of what he *perceived* was reasonable. It can be referred to as ‘presumed or perceived self-defence’.⁴⁴ The difference between the objective standard and the MPC standard can be illustrated by the following example taken from Heller:

A police officer attempts to apprehend a fleeing youth whom he believes to be armed and dangerous, but who is, in fact, carrying only a cheap laser-tag pistol. After a lengthy chase, the officer traps the youth in an alley. He orders the youth to drop his ‘gun’ and turn slowly toward him. The youth, however, not realizing the seriousness of his predica-

⁴⁰ *Vigil v. People*, 353 P.2d 82 (Colo.1960), cited in Heller (1998), p. 57, n. 247.

⁴¹ See Kenny (1978), pp. 22–44.

⁴² The *légitime défense* in France also requires an objective test. Nevertheless, it is well-established case law that the defendant’s ‘perception personnelle’ plays a role in determining whether the defence was necessary and proportionate. See Angevin and Chavanne (1998), Articles 122-5 and 122-6, paras. 44–46.

⁴³ § 3.04 (1) MPC.

⁴⁴ In German law it is referred to as ‘Putativnotwehr’ and, in Dutch law, as ‘putatief noodweer’. Both systems recognise this plea as self-defence. In cases of presumed self-defence, exemption from criminal responsibility will be granted through the defence of mistake of fact. See Jescheck and Weigend (1996), pp. 490, 464–467; Rammelink/Hazewinkel-Suringa (1995), p. 327.

ment – after all, he is only carrying a laser-tag pistol – turns toward the officer without dropping the gun. The officer, mistaking the laser-tag pistol for a real gun, immediately shoots and kills the youth.⁴⁵

Applying the objective standard would amount to conviction. After all, no reasonable person would shoot a person who only carries a laser-tag pistol. Employing the MPC standard, however, would most likely acquit the officer. If he honestly perceived the laser-tag pistol as a real gun, the MPC standard would require assessing the reasonableness of the police officer's actions *as if* the laser-tag were a real gun.

Unlike the MPC norm, the fourth standard – the so-called particularising test – does inquire into the reasonableness of a person's perception and can, therefore, be positioned between the MPC standard and the objective standard. This standard applies an objective-reasonable test to the defendant's perceptions and acts, but particularises that standard by taking into account certain non-universal, personal characteristics which can be judged as being causally relevant to the defendant's act of self-defence. The particularising standard is often applied in domestic courts as an alternative or complement to the objective standard.⁴⁶ Particular characteristics, such as fear of the police caused by previous experiences of police brutality⁴⁷ or previous experience of being mugged,⁴⁸ have been taken into account in judging whether one could rely on self-defence in averting criminal responsibility. The particularising standard does not, however, allow that every non-universal characteristic influences perception and action in judging the reasonableness of a resort to a defence. The standard is based on the presumption that, to a certain extent, a (reasonable) person can control the influence of his/her non-universal characteristics. This brings us to the concept of *Garantenstellung*, a concept that brings into account the fact that persons in a certain capacity have a connected duty of extra good care.

The notion of *Garantenstellung* can be described as a special type of particularising standard. However, instead of *allowing* a defence, which is often the case when applying a particularising standard, it can *bar* resort to a defence. In some cases, taking into account a person's special responsibilities effectively establishes a higher standard than that of an ordinary (reasonable) man. A person can be required to act in a more firm and steadfast way than the ordinary citizen because of his or her function (police officer, soldier, doctor) or capacity (parent, superior). When we apply a particularised standard of *Garantenstellung* to our police officer in the above example, rather than being acquitted, he could be convicted of murder. Instead of granting him a defence relying on the 'reasonable belief' MPC standard, we can argue that such a defence is not reasonable as the officer should have 'kept his act together', and therefore fired a warning shot before actually shooting at the youth. Af-

⁴⁵ Heller (1998), p. 67.

⁴⁶ For instance, in Dutch criminal law, where courts have allowed for personal circumstances to play a role in judging whether a defence could be relied upon: Dutch Supreme Court, 1 March 1983, *NJ* 1983, 468 and 23 October 1984, *NJ* 1986, 56.

⁴⁷ *State v. Brown*, 573 P. 2d 675, 678 (N.M. 1977) in Heller (1998), p. 82.

⁴⁸ For instance, the (infamous) Goetz case: *People v. Goetz*, 497 N.E.2d 41, 52 (N.Y. 1986); A non-racial, and, therefore, less contentious, equivalent: Dutch Supreme Court *NJ* 1986, 56, 23 October 1984.

ter all, as a police officer, he has been trained to control his emotions, to be professional, and to be level-headed in dangerous and complex situations. This reasoning can also be applied to a military person and, therefore, it is hardly surprising that (a form of) *Garantenstellung* has often played a role in war crime trials, particularly in the context of command/superior responsibility.⁴⁹

(e) **The *culpa in causa* or ‘conduct-in-causing’ analysis**

Can a person rely on self-defence when he provoked the act of violence against which he defended himself? Can one who voluntarily gets drunk and commits a war crime in his state of drunkenness rely on a plea of intoxication? All legal systems encounter the question of whether criminal liability should be imposed on a person who, through his own fault, has placed himself in a state that would normally have negated liability for his offence. Instances such as those described above have been dealt with in different ways.

There are two routes to a common destination. One route is to consider the action to be a one-stage event and deny the resort to a defence because of the previous behaviour. The prior fault affects the offence directly and does not provide a ground for defence that is independent of the definition of the offence. The *actio libera in causa* doctrine provides for another, slightly different approach.⁵⁰ Under this doctrine, which has been developed in continental legal systems particularly in cases of voluntary intoxication, the actor cannot rely on a defence as he is blamed for having caused his own incapacity. Prior fault and offence are *connected*, but, unlike the one-stage approach, considered separately. This way, complicated discussions on the mental element that in reality *precedes* the (criminal) act are avoided. *Actio libera in causa* relates to a situation comprising two stages. In the first stage, the actor can choose between alternative courses of conduct – to drink or not to drink alcohol –, which then leads him to the second stage, in which the offence is committed in a state or situation which negates its criminality: intoxication, duress, necessity, or self-defence. The two-stage process lets the previous behaviour ‘correct’ resort to the defence and possibly nullify it.

An example to illuminate the distinction: the culpability for an accident caused by failing brakes lies in not having properly checked the brakes beforehand while the driver *knew* that they had to be replaced. In the first approach, the driver will be held culpable for having recklessly caused the accident. In the second approach, he will be held responsible for the accident, as his defence – that he did not *intend* to cause the accident – will fail as a

⁴⁹ See Ambos, who points to, for instance, the Tokyo Judgement, and the *Medical and High Command* cases. Ambos (2002), pp. 106, 133–139.

⁵⁰ See for the doctrine of *actio libera in causa*: M. Gur-Ayre, *Actio Libera in causa in Criminal Law*, Jerusalem (1984); G. Kuhn-Päbst, *Die Problematik der Actio Libera in Causa*, Mannheim (1984); Jescheck and Weigend (1996), pp. 445–448; Remmelink/Hazewinkel-Suringa (1996), pp. 289–294, 310–311; Joachim Herrmann, ‘Causing the Conditions of One’s Own Defense: The Multifaceted Approach of German Law’, in Eser and Fletcher (1987), pp. 745–773; C.J. van Netburg, *Eigen schuld? Actio libera in causa bij wettelijke strafuitsluitingsgronden*, Ministry of Justice (1994) (with English and French summary, pp. 49–52).

result of his failure to have the brakes repaired/replaced when he knew they were not working properly.

Strictly speaking, a distinction can be made between *actio illicita in causa* and *actio libera in causa*.⁵¹ The former relates to the illegality of the preceding conduct (provoking a person), while the latter concerns the actor's responsibility for voluntarily bringing about his incapacity (intoxication). For the sake of convenience and to prevent entanglement in a complicated scholarly debate on the concept, it is best to refer to both types as *culpa in causa* below. *Culpa in causa* is a generic term for all instances in which guilt on the part of the defendant relating to his previous behaviour prevents him from resorting to a defence. It extends to intoxication as well as duress, self-defence, and necessity.⁵²

A defendant can be blamed for previous behaviour in two ways: for his unintentional behaviour, as *culpa in causa*, or for his intentional behaviour, *dolus in causa*.⁵³ In *culpa in causa* cases, the perpetrator can be blamed for having put himself in a situation in respect of which he *should have known* that he would lack the required capacity or knowledge. The principle of *Garantenstellung* does not exclude application of *culpa in causa*. *Dolus in causa* concerns the perpetrator who intentionally puts himself in a situation in respect of which he can rely on a defence exempting him from criminal liability. In the first stage, the perpetrator must have been sure *that there was a considerable chance* that he would commit an offence. Cases of deliberate intoxication, to gain courage, can be thought of. This has – rather ironically – been referred to as ‘Dutch courage’.⁵⁴

3. ARTICLE 31 OF THE ICC STATUTE⁵⁵

Prior to the Rome Statute, international criminal law did not provide for a set of codified defences. Draft Codes were limited to the issue of the (in)admissibility of the defence of superior orders and the immunity of Heads of States. Post-Second

⁵¹ Herrmann in Eser and Fletcher (1987), pp.769-771.

⁵² The term *culpa in causa* can be found in Dutch criminal law and relates to situations in which a perpetrator can be blamed for his ignorance, lack of judgement, or inattention in putting himself in the situation that he (has to) commit(s) an offence. W.P.J. Pompe, *Handboek van het Nederlandse strafrecht*, Zwolle (1959), p. 180.

⁵³ G.A.M. Strijards, *Facetten van dwaling in het strafrecht*, Arnhem (1983) and P.J.A Feuerbach, *Lehrbuch des gemeine in Duetschland gültigen Peinlichen Rechts*, Giessen (1847), p. 102

⁵⁴ The story goes that the Dutch navy gave their sailors ‘jenever’ (geneva) to encourage them before they set sail for battle at sea. The Dutch expression ‘moed indrinken’ (gain courage by drinking) probably stems from that.

⁵⁵ Article 31: Grounds for Excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

- (a) The person 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;
- (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the un-

World War case law, nevertheless, shows that many more defences have been *invoked* in war crimes trials,⁵⁶ e.g. acting in an official capacity, duress, (military) necessity, self-defence, reprisal, mistake of law or fact, insanity, conflict of interests, consent of the victim, and *tu quoque*.⁵⁷ The ICC Statute codifies some of those defences in Articles 31-33.

According to one of its drafters, Article 31 of the ICC Statute was 'perhaps the most difficult one to negotiate in the Part on general principles, because of the conceptual differences which were found to exist between various legal systems'.⁵⁸ The 1994 Draft Statute did not mention specific grounds for excluding responsibility but merely determined that it was at the Court's discretion to allow a defence.⁵⁹ It was the 1995 *ad hoc* Committee Report that came up with a long list of possible defences in Annex II.⁶⁰ The 1996 Draft Code reiterated the 1994 Draft Statute provision on defences and determined in Article 14 that,

lawfulness 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;

- (c) The person 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. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
- (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court 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, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause greater harm than the one sought to be avoided. Such a threat may either be:
 - (i) Made by other persons; or
 - (ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in para. 1 where such a ground is derived from applicable law as set forth in Article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

⁵⁶ Whether they were allowed is a different matter. As was mentioned earlier, courts and tribunals have been reluctant in allowing resort to a defence in war crimes cases.

⁵⁷ A. Eser, 'Defences' in war crimes trials', 24 *Israel YBHR* (1994), pp. 201-222; TWC, Vol. XV, pp. 155-188. See also Schabas (1998), p. 421.

⁵⁸ Saland (1999), p. 206.

⁵⁹ As Eser submits, only Article 33 of the 1994 Draft Statute, dealing with applicable law, thereby allowing the application of general international law or any rule of national law, could have been used as source of grounds for excluding criminal responsibility. Eser in Triffterer (1999), margin No. 3, pp. 539-540.

⁶⁰ It divided defences into three categories: a) 'negation of liability', which contained error of fact and law and diminished mental capacity, b) 'Excuses and Justifications', including self-defence, defence

The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime.⁶¹

Two criteria had to be met. First, the court could only consider the validity of defences under general principles of international law. This means, that only defences that – according to the *ad hoc* Committee – were ‘well-established and widely recognised as admissible with respect to similarly serious crimes under national or international law’,⁶² could be allowed. Secondly, the court had to consider the applicability of the defence in the light of the character of each crime.⁶³ The Draft Code’s Commentary mentions as possible defences: self-defence, duress, military necessity, mistake of fact, and the ‘under age defence’.⁶⁴ More proposals of possible defences were put forward and compiled by the Preparatory Committee of 1996.⁶⁵ It was, however, not clear which defence would find its way into the Statute and what the format of codification would be. The December 1997 Preparatory Committee finally accepted a proposal using a single provision for several proposed defences (including self-defence and superior orders), until then covered in four different Articles.⁶⁶ The delegates, moreover, determined that the Statute would not contain an exhaustive list of defences, but that the Court can avail itself of defences ‘derived from applicable law as set forth in Article 21’.⁶⁷ This way, it was left to the Court’s discre-

of others and property, necessity, lesser of evils, duress/coercion/force majeure, superior orders, and law enforcement/other authority to maintain order’, and c) Defences under public international law, including military necessity, reprisal, and self-defence pursuant to Article 51 of the Charter of the United Nations, with reference to the ILC draft Articles on State responsibility. See the 1995 *ad hoc* Committee Report, para. 9, and Schabas (1998), p. 421.

⁶¹ 1996 ILC Draft Code.

⁶² See ILC Commentary to 1996 Draft Code, Article 14, para. 3.

⁶³ It is up to the competent court ‘to decide whether the facts involved in a particular case constituted a defence under the present Article or extenuating circumstances under Article 15 in the light of the jurisprudence of the Second World War as well as subsequent legal developments’. ILC Commentary to 1996 Draft Code, Article 14, para. 6.

⁶⁴ ILC Commentary to 1996 Draft Code, Article 14, paras. 8-13.

⁶⁵ *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. II (Compilation of Proposals), United Nations General assembly Official Records, Fifty-first Session, Supplement No. 22A, UN Doc. A/51/22 (1996) (1996 PrepCom Report Vol. II).

⁶⁶ UN Doc A/AC.249/1997/L.9/Rev.1.

⁶⁷ Article 21 ICC Statute: ‘Applicable Law’.

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this Article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, para. 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

tion to apply a ground for excluding criminal responsibility while, at the same time, the Court was not given a completely free hand in applying unwritten defences outside its Statute. The same approach underlying the 1996 Draft Code was applied, with the difference that the 'well-established and widely recognised defences' were now codified.

Article 31 of the ICC Statute is entitled 'grounds for excluding criminal responsibility' and not 'defences'. This reminds of civil law rather than Anglo-American law. Furthermore, the provision does not differentiate between justifications and excuses. It is not clear whether a given ground justifies the wrongful act or simply excuses the perpetrator. Here, the Anglo-American approach prevails.

It follows from the first paragraph of Article 31 that the provision does not pretend to contain an exhaustive list of grounds excluding criminal responsibility:

In addition to other grounds for excluding criminal responsibility provided for in the Statute, a person shall not be criminally responsible if, at the time of that person's conduct (...) (Italics, *EvS*).

The defences listed in Article 31 are: mental defect (subparagraph a), intoxication (subparagraph b), self-defence (sub-paragraph c), and duress (subparagraph d). Other defences under the ICC Statute are: abandonment (Article 25 paragraph 3(f)), exclusion of jurisdiction of persons under 18 (Article 26), mistake of fact and law (Article 32), and superior orders (Article 33).⁶⁸ The possibility for the Court to apply defences outside its Statute is provided for in paragraph three of Article 31:

At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in Article 21.

This means that the Court can resort to rules of international law or to general principles of law derived from municipal criminal legal systems. As to the former, general and/or military necessity, reprisals, and *tu quoque* can be included.⁶⁹ As to the latter, consent of the victim, conflict of interests, self-defence, and necessity exist as possible grounds for excluding punishability.⁷⁰ As we will see later, not all of the above-mentioned 'defences' are admissible within the context of international crimes.⁷¹ Two defences are explicitly rejected in the ICC Statute: the immunity of Head of State or Government (Article 27) and the 'statute of limitations' defence (Article 29).

Despite its seemingly supplementary character, Article 31 is the central provision

⁶⁸ Eser in Triffterer (1999), margin Nos. 5-9, pp. 541-542.

⁶⁹ See Eser in Triffterer (1999), margin No. 13, p. 543; Knoops (2001), pp. 30-31, 37; Nill-Theobald, (1998), pp. 59-60; Schabas (1998), p. 421.

⁷⁰ See Eser in Triffterer (1999), margin No. 13, p. 543; Nill-Theobald, pp. 60-61; Schabas, (1998), p. 421.

⁷¹ See para. 8 of this Chapter. See also Eser (1994), pp. 201-222.

in the Rome Statute that deals with the possible exclusion of criminal responsibility. This means that the provision could function as ‘the main instance of reference’ in those cases in which general issues relating to other grounds for excluding criminal responsibility are in question. Eser takes as an example the time at which a defence must be present.⁷² Neither Article 32 (mistake of fact or law), nor Article 33 (superior orders) establish the relevant time. Article 31, however, provides in the chapeau that ‘a person shall not be criminally responsible if, *at the time of that person’s conduct*’ (...) the grounds for a defence were available.

4. MENTAL INCAPACITY

In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

‘The person 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’

(a) Text and legal history

The first of the defences codified in Article 31 is incapacity. This ground was not subject of much debate in the course of the negotiation of the Statute. The wording of subparagraph 31(1)(a) has remained unchanged since its elaboration by the Working Group on General Principles.⁷³

(b) National underpinnings

The wording of Article 31(1)(a) resembles the ‘mental incapacity provision’ in the Model Penal Code (MPC), which reads,

A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform to the requirements of the law.⁷⁴

The wording of the MPC provision is a combination of the ‘right-wrong test’ of the M’Naghten rules, adopted by the Law Lords in England, establishing a ‘cognitive test’,⁷⁵ and the American ‘irresistible impulse test’, establishing a ‘volitional test’.⁷⁶

⁷² Eser in Triffterer (1999), margin No. 16, p. 544.

⁷³ See Eser in Triffterer (1999), margin No. 21, pp. 545-546; Schabas (1998), p. 423; Saland (1999), p. 207.

⁷⁴ MPC, par. 4.01(1).

⁷⁵ The ‘M’Naghten Rules’ constitute the answers of judges to hypothetical questions put to them by the Law Lords in the case of Daniel M’Naghten. Strictly speaking they are not a source of law, but in the

This means that under the MPC provision the defendant has an excuse for not *knowing* ('appreciating')⁷⁷ as a result of a mental disease or defect, or for not being able to exercise *will-power* to control acts ('conform to requirements of law') as a result of a mental disease or defect. Article 31(1)(a) also comprises a cognitive and a volitional standard. The cognitive M'Naghten standard can be identified in the first part of Article 31(1)(a): 'a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct'. The volitional test can be found in the second half of the formula: 'or capacity to control his or her conduct to conform to the requirements of law'.

The provision is solely concerned with a mental disease or defect 'at the time of that person's conduct'. The Statute does not deal with the defendant's sanity at the time of the inquiry or at trial.⁷⁸

It is not clear what exactly constitutes a 'mental disease or defect'. It seems to exclude certain abnormalities of the mind expressed in repetitive criminal or other 'anti-social' conduct (psychopaths). Like the MPC and various national penal codes, the mental incapacity defence in the ICC Statute can be understood to represent a 'mixed system' of, on the one hand, an illness in the psychiatric/pathological sense,

case of *Sullivan*, ((1984) AC 156, [1983] 2 All ER 673) the House of Lords accepted that they have provided for a comprehensive definition since 1843. The basic proposition reads: 'It must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from diseases 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'. See Smith & Hogan (1996), pp. 201-202.

⁷⁶ The irresistible impulse defence is based on the recognition by psychiatrists that a man may know the nature and quality of an act, may even know that it is wrong, and still perform it under an almost uncontrollable impulse. This test was considered in the *Kopsch* case ((1925) 19 Cr App R 50, CCA) before an American judge. English judges have long opposed the admissibility of this defence, considering it impossible to distinguish between an impulse which proves irresistible because of insanity and one which is irresistible because of ordinary motives such as jealousy and greed. Nowadays, a partial defence of irresistible impulse has been allowed into the law through the defence of diminished responsibility, a defence that only applies to murder. The Court of Criminal Appeal in *Byrne* ((1960) 2 QB 396, [1960] 3 All ER 1) ruled that, '(a)bnormality of mind', which has to be contrasted with the time-honoured expression in the M'Naghten Rules, 'defect of reason', means a State of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgement whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgement'. Smith & Hogan (1996), pp. 210, 218-219.

⁷⁷ The verb 'appreciate' is broader than 'know', which features in the M'Naghten Rules. Critics of the latter test have pointed out that 'know' leaves no room for a defendant who does not *understand* the norm. This defect seems to have been repaired with the word 'appreciate'. Article 31(1)(a) also employs the verb 'appreciate' and equally comprises the case of a 'non-comprehending' defendant.

⁷⁸ At Nuremberg, the IMT judged that the accused Gustav Krupp van Bohlen und Halbach "could not then be tried because of his physical and mental condition, but that the charges against him in the Indictment should be retained for trial thereafter, if the physical and mental condition of the defendant should permit", cited by Y. Dinstein, 'Defences', in G. Kirk McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law*, The Hague/Boston/London (2000), p. 378.

and, on the other hand, a mental state that impedes the exercise of will-power (psychological sense).⁷⁹ This means that Article 31(1)(a) requires more than a psychic disturbance to exclude criminal responsibility. The disturbance must be shown to have had an effect on the cognitive capacity or will-power. Moreover, the verb 'suffers' prevents the inclusion of any mentally affective influence and requires more than just a momentary mental disturbance. Article 31(1)(a) differs from the MPC provision concerning the notion of 'capacity'. The MPC defence requires a person to lack *substantial* capacity to appreciate the criminality of conduct or to conform to the requirements of the law.

The question remains on whom the burden of proof rests. The MPC provides that the defendant has to *raise* the defence (and submit sufficient evidence to that account), while, if that defence is raised, the prosecution has to *prove* beyond reasonable doubt that the accused was responsible at the time when he committed the act. This means that the defence having been raised, the prosecutor will have to *disprove* it.⁸⁰ It seems in line with national legal practice and criminal law principles to adopt this division of tasks in the context of Article 31(1)(a) as well.⁸¹

(c) Jurisprudence

The defence of mental incapacity is obviously derived from national criminal law, where it has been an accepted plea for many centuries. It played a limited role in the (subsequent) Nuremberg proceedings and has only recently been recognised in international criminal law. The Nuremberg Tribunal seemed to have recognised that insanity can affect criminal responsibility. This can be taken *a contrario* from its reasoning relating to Rudolf Hess, who resorted to the plea of insanity:

There is no suggestion that Hess was not completely sane when the acts charged against him were committed.⁸²

⁷⁹ Other examples of this mixed 'biological-psychological' system are Article 20 of the German Penal Code, Article 122-1 of the French Penal Code, Article 39 of the Dutch Penal Code and Article 8(1) of the Spanish Penal Code. The English M'Naghten Rules represent a stricter system in that they are limited to a psychological method (right-wrong test). See Jescheck and Weigend (1996), pp. 437, 444-445; Michèle-Laure Rassat, 'Trouble Psychique ou Neuropsychique contrainte', in Angevin and Chavanne (1998), Article 122-1 et 122-2; Rummelink/Hazewinkel-Suringa (1996), pp. 280-284.

⁸⁰ MPC para. 4.03.

⁸¹ The M'Naghten Rules, however, seem to suggest that the burden of proof lies on the accused. After all, the Rules determine that 'every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to (the jury's) satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved', *M'Naghten's* case 10 Cl & Fin 200, [1843-1860] All ER 229, p. 210. This clashes with the general rule that the prosecution has to prove *mens rea*, thus that the accused did know the nature and quality of his act. English practice solves this inconsistency by putting the onus of establishing insanity on the balance of *probabilities* upon the defendant. The defence has to introduce evidence that raises a reasonable doubt in the jury's mind. The burden of *proof*, however, remains on the prosecution. Smith & Hogan (1996), p. 211.

⁸² Nuremberg Judgement in Friedman (1972), pp. 971-972. In the trial of Wilhelm Gerbsch, the Court accepted a 'defect' in his mental state as a mitigating circumstance. UNWCC, Vol. XIII, pp. 131-137, referred to in Ambos (2002), p. 158. (*U.S. v. Peter Back* (1947) UNWCC, Vol. III, p. 60 *et seq.* See also Schabas (1998), p. 422.

The ICC defence of mental incapacity demands *destruction* of the defendant's capacity to know or control his or her conduct. It leaves no room for diminished responsibility. However, like the ICTY and ICTR, the ICC provides for diminished responsibility in its Rules of Procedure and Evidence. It provides for a plea of 'substantially diminished mental capacity' as a mitigating circumstance in determining a sentence.⁸³ In its Rules of Procedure and Evidence, the ICTY enables the Defence to rely on 'any special defence, including that of diminished or lack of mental responsibility'.⁸⁴ The ICTY Appeals Chamber in *Čelebići* established that the 'defence' of diminished mental responsibility in Rule 67(A)(ii)(b) is not a complete defence, but can be raised by the defendant as a matter in mitigation of sentence.

The Appeals Chamber accepts that the relevant general principle of law upon which, in effect, both the common law and the civil law systems have acted is that the defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense. This is the appropriate general legal principle representing the international law to be applied in the Tribunal. Rule 67(A)(ii)(b) must therefore be interpreted as referring to diminished mental responsibility where it is to be raised by the defendant as a matter in mitigation of sentence. As a defendant bears the onus of establishing matters in mitigation of sentence, where he relies upon diminished mental responsibility in mitigation, he must establish that condition on the balance of probabilities – that more probably than not such a condition existed at the relevant time.⁸⁵

From an Anglo-American point of view this position might raise questions, as diminished mental responsibility is regarded as negating specific intent, premeditation and deliberation on a charge of murder. In other words, 'diminished' is regarded as affecting *mens rea* and *actus reus*. Reduced punishment is then coupled with a lesser offence, for instance manslaughter instead of murder.⁸⁶

The *Čelebići* Appeals Chamber agreed that the mental defect defence as it is formulated in Article 31(1)(a) of the ICC Statute is different from the 'special defence' of diminished mental responsibility as stipulated in the Rules of Procedure and Evidence at the ICTY:

⁸³ See Article 78(1) of the ICC Statute and Rule 145(2) of the ICC Rules of Procedure and Evidence: In addition to the factors mentioned above, the Court shall take into account, as appropriate: (a) Mitigating circumstances such as:

(i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress; (...)

⁸⁴ Rule 67 (a)(ii) of the ICTY Rules of Procedure and Evidence: As early as reasonably practicable and in any event prior to the commencement of the trial: the defence shall notify the Prosecutor of its intent to offer: (b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence. ICTY Rules of Procedure and Evidence, <<http://www.un.org/icty/legaldoc/index.htm>>(IT/32/REV.26).

⁸⁵ *Čelebići* Appeal Judgement, para. 590.

⁸⁶ LaFare (1988), p. 409 *et seq.*; Archbold (2000), § 19-88.

This (Article 31(1)(a) ICC Statute, *EvS*) is not the same as any partial defence of diminished mental responsibility, as it requires the *destruction* of (and not merely the *impairment* to) the defendant's capacity and it leads to an acquittal. It is akin to the defence of insanity. There is no express provision in the ICC Statute that is concerned with the consequences of impairment to such a capacity.⁸⁷

Eser suggests the Court could resort to paragraph 3 of Article 31 to include this plea.⁸⁸ Three reasons can be put forward for objecting to this assertion. Firstly, 'systematic' reasons: Article 31 bears the general heading of 'grounds for *excluding* criminal responsibility'. Secondly, 'historical' reasons: at the Diplomatic Conference in Rome, the view was expressed that the Statute provides for no consequence of the plea of insanity other than acquittal.⁸⁹ This implies the exclusion of a defence of diminished responsibility. Thirdly, it is highly contentious that the plea of diminished responsibility is considered a complete defence under the 'general principles of law derived from national laws of legal systems of the world' of Article 21 to which Article 31(3) refers. In this, the ICC is in line with the ICTY jurisprudence. Consider the ruling of the ICTY Appeals Chamber in *Čelebići*.

The Appeals Chamber accepts that the relevant general principle of law upon which, in effect, both the common law and the civil law systems have acted is that the defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense. This is the appropriate general legal principle representing the international law to be applied in the Tribunal.⁹⁰

Bearing in mind the Anglo-American position on diminished responsibility, I would argue that the Appeals Chamber too readily accepted that it is a general rule that diminished mental responsibility is solely relevant to sentencing. In common law systems diminished mental capacity is considered to alter *mens rea* and *actus reus*, giving rise to a lesser offence for which a lesser sanction is appropriate.

(d) Observations

Knoop argues that, like national criminal law, substantive international criminal law should be receptive to developments in the field of behavioural sciences, such as psychiatry, psychology, genetic science, and neurobiology. This could lead to an inclusion of a set of special defences in international criminal law, of which the defence of mental defect is only just one example.⁹¹ In any event, the mental incapacity defence in Article 31(1)(a) is a breakthrough and a start.

⁸⁷ *Čelebići* Appeal Judgement, para. 587.

⁸⁸ He submits that the Preparatory Committee proposed a special rule for 'diminished responsibility' with possible reduction of sentence (art. L Prop. I, 1996 PrepCom Report Vol. II). Eser in Triffterer (1999), margin No. 22, footnote 33.

⁸⁹ See Schabas (1998), p. 423.

⁹⁰ *Čelebići* Appeal Judgement, para. 590. The Appeals Chamber based its reasoning on a comparative research of different criminal legal systems on the extent and nature of the diminished responsibility 'defence'. See paras. 588-590 and footnote 986.

⁹¹ Knoop (2001), p. 109.

5. INTOXICATION

In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

'The 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'

(a) Text and legal history

Until now, the defence of intoxication had a limited role to play in war crimes law. On the few occasions it has been resorted to, it resulted in an *ad hoc* application of national law, thus not allowing it to develop into an international legal concept.⁹² In some ways, the inclusion of the intoxication plea in the ICC Statute can also be regarded as adopted from national law. The plea is plainly one without an international criminal law pedigree. The pleas of both, mental incapacity and intoxication were added to the list of more 'established' defences, such as duress, superior order, and military necessity,⁹³ by legal comparatists. It was in the framework of the initiatives of Bassiouni and the ILA in drafting, respectively, a Draft International Criminal Code and a Model-Draft-Statute for the ICC that these concepts were 'lifted to an international level'. Both documents have heavily influenced the final draft of the ICC Statute, which explains why the latter represents a mix of (re)-formulated 'established' international criminal law defences and 'new' concepts which derive directly from municipal criminal law.⁹⁴

Intoxication as a ground for excluding criminal responsibility proved controversial when the Statute was being prepared and drafted, not the least because national regulation on this point differs greatly from nation to nation.⁹⁵ It was not *involuntary* intoxication that caused this difference in views.⁹⁶ Most countries provide for exon-

⁹² The *Yamamoto Chusaburo* case (1946) by a British Military Court in Kuala Lumpur was in fact the application of English legal concepts of self-induced drunkenness. UNWCC, Vol. III, pp. 76-80.

⁹³ For an overview of defence pleas that have played a role in war crimes trials see TWC, Vol. XV, pp. 155-188; Eser (1994), pp. 201-222; Dinstein (2000), pp. 371-388.

⁹⁴ See § 14 in Ambos (2002), pp. 475-496, in which he analyses the Bassiouni and ILA Draft Codes/Statutes.

⁹⁵ As Schabas admits, the 1995 *ad hoc* Committee did not envisage a defence of intoxication, but by 1996 different proposals were presented in the report of the 1996 Preparatory Committee. (1996 PrepCom report Vol. II, p. 98). Although the main approach of the present provision can be found in the Report of the Working Group as accepted by the Preparatory Committee in the December 1997 session, much of the text was still in square brackets and open to negotiation until the Diplomatic Conference. (A/AC.249/1977/L.9/Rev.1, 1997, p. 19). See Eser in Triffterer (1999), margin No. 24, pp. 546-547; Schabas (1998), p. 423.

⁹⁶ After all, one could say that the defendant was not to blame. This is the reasoning applied in civil

eration from responsibility of a person when the person has committed a crime whilst involuntarily intoxicated. It is *voluntary* intoxication that divides the various national criminal systems.

The provision on intoxication in the ICC Statute is composed of three elements. The basic structure resembles that of the mental incapacity defence in sub-paragraph (a). It first requires a state of intoxication, secondly that the person's capacity to appreciate and control is destroyed and, finally, that the accused was not voluntarily intoxicated.

As to the first requirement, intoxication implies a toxic impact caused by the consumption of an exogenous substance, and rules out any state of excitement or acceleration. While the first drafts of this provision had required intoxication to be caused by alcohol or drugs, the Statute eventually opened the defence to other means. Knoop suggests that the distinction between intoxication by alcohol or drugs and intoxication by sedative or soporific drugs, for instance Valium, should be drawn in the ICC Statute in the same manner as in Anglo-American courts.⁹⁷ The defence of intoxication would then be admissible in the case of sedative drugs unless the accused had known, contrary to general belief, that Valium might have disinhibiting instead of sedative effects, or the accused was warned of the possible effects.⁹⁸ This rule effectively establishes a recklessness test, which fits the provision in Article 31(1)(b).⁹⁹

The second requirement relates to the capacity to appreciate or control. As with the defence of mental incapacity in subparagraph (a), a person's capacity to appreciate the unlawfulness or nature of his conduct, or capacity to control his conduct to conform to the requirements of law, must be *destroyed*. It is not sufficient that the intoxication merely diminishes the person's ability to appreciate that his behaviour is unlawful.¹⁰⁰ Intoxication is a complete defence in the ICC Statute, leading to acquittal. It is not a defence of diminished responsibility resulting in a mitigation of sentence (or reduced *mens rea* and *actus reus* to alter the offence).

law systems. See Pradel (1995), p. 296; Rummelink/Hazewinkel-Suringa (1996), p. 293. In Anglo-American law involuntary intoxication is regarded as lacking the mental element, *mens rea*. See Smith & Hogan, (1996), p. 225. The MPC admits intoxication as a defence so far as it negates 'an element of the offense'. See Fletcher (1978), p. 851. Section 2.08 (1) MPC: 'Except as provided in Subsection (4) of this Section, intoxication of the actor is not a defense unless it negatives an element of the offense'.

⁹⁷ Knoop (2001), p. 122.

⁹⁸ This follows from *Bailey* (1983) 77 Cr App R 76 and *Hardie* (1985) 80 Cr App R 157 cases. See Smith & Hogan (1996), pp. 233-234; Ashworth (1999), pp. 221-222.

⁹⁹ In the so-called Siracusa Draft II (AIDP/ISISC/MPI *et al.* *Siracusa Draft II*, Siracusa/Freiburg/Chicago (1996) <<http://www.iuscrim.mpg.de>>), a predecessor of the ICC Statute and a private initiative of scholars working in the field of international criminal law, a plea of intoxication for recklessly committing crimes was explicitly excluded: '[w]ith respect to crimes requiring the mental element of recklessness, voluntary intoxication shall not constitute a defense'. See Siracusa Draft II in Ambos (2002), p. 944.

Siracusa Draft II was an update of the Siracusa Draft I, drawn up as an alternative to the 1994 ILC Draft Statute (AIDP/ISISC/MPI *et al.*, *Siracusa Draft I*, Siracusa/Freiburg/Chicago (1995)) <<http://www.iuscrim.mpg.de>>).

¹⁰⁰ See also Eser in Triffterer (1999), margin No. 26, p. 547.

The third requirement is the most important one. It is this part of the provision that excludes exculpation if the person became 'voluntarily intoxicated' himself. This invokes the Anglo-American voluntary/involuntary intoxication discussion and the civil law notion of *culpa in causa*. When the accused puts forward a plea of intoxication and produces evidence of a state of intoxication, the prosecution has the onus of proving that the accused either a) intentionally became drunk/intoxicated to give himself (Dutch) courage to commit the crime,¹⁰¹ or b) that he knowingly took the risk that, as a result of intoxication, he would commit a crime.¹⁰² In other words, intoxication can be invoked as a defence if the person was involuntarily intoxicated or, although voluntarily intoxicated, was not aware of the risk that he could engage (or was engaging) in criminal conduct as a consequence of the intoxication. The latter contention is difficult to uphold when drugs or alcohol caused the voluntary intoxication. In practice, it is only *bona fide* voluntary intoxication, such as intoxication caused by 'other means' than drugs or alcohol, that can exculpate.

In sum, the intoxication plea in Article 31(1)(b) implies three steps:

- I. A complete defence for involuntary intoxication;
- II. The presumption that, in cases of voluntary intoxication, the accused knew or disregarded the risk that as a result of intoxication he would engage in criminal conduct. This is effectively a recklessness test in regard to the subsequent crime.
- III. However, there is room here for a defence in situations of *bona fide* voluntary intoxication.

(b) National underpinnings

In Anglo-American legal systems, as a rule, voluntary intoxication is not a defence.¹⁰³ Only in a few exceptional cases can voluntary intoxication provide for a defence, for instance, for crimes of 'specific intent'.¹⁰⁴ The latter includes murder, wounding or causing grievous bodily harm with intent, robbery, burglary with intent to steal, theft, indecent assault where proof of indecent purpose is required. In those cases, the prosecution has to prove the 'specific intent' and the jury must take into account evidence of the (voluntary) intoxication put forward by the defence in de-

¹⁰¹ Consider the English case of *A-G for Northern Ireland v. Gallagher* (1963) AC 349, [1961] 3 All ER 299 where the defendant having decided to kill his wife, bought a knife and a bottle of whisky. He drank most of the whisky and then killed his wife with the knife. See Smith & Hogan (1996), p. 235.

¹⁰² See Eser in Triffterer (1999), margin No. 27, pp. 547-548.

¹⁰³ Involuntary intoxication, on the other hand, like the so-called 'spiked drink' defence, *i.e.* that someone put vodka in a beer or a drug in someone's drink whilst they are distracted or temporarily absent, can be a defence. Where as a result of involuntary intoxication a person lacks the mens rea of the offence, he must be acquitted. Smith & Hogan (1996), p. 225.

¹⁰⁴ It was confirmed by the House of Lords in *D.P.P. v. Majewski* ((1977) AC 443, [1976] 2 All ER 142) that evidence of self-induced intoxication negating *mens rea* is a defence to a charge of a crime requiring specific intent but not to a charge of any other crime. Thus 'specific' was contrasted with 'basic intent'. Smith & Hogan (1996), pp. 227-231. American courts generally follow the English approach in *Majewski*. See LaFave, (1988), pp. 439 *et seq.*

ciding whether the prosecution has proved intent.¹⁰⁵ The MPC excludes ‘self-induced’ (voluntary) intoxication as a defence.¹⁰⁶ Civil law systems differ from one another in that some allow the plea of voluntary/self-induced intoxication, although not as a complete defence but as a form of diminished responsibility, while others do not admit the defence at all.¹⁰⁷

Different tests

In establishing culpability in case of self-induced intoxication, courts can apply different tests. These stem from different views on the relationship between the ‘intoxication-intent’/prior fault and the (mental) elements of the subsequent offence. As we saw earlier, the issue of causing the circumstances of one’s own defence can be dealt with as a one-stage or a two-stage *culpa in causa* situation. In the case of voluntary intoxication, the one-stage view can take two forms. The simplest solution is to regard the evidence of intoxication as relevant to issues of *mens rea*. The plea will be raised as a ‘failure of proof’ defence and will only rarely lead to acquittal.¹⁰⁸ The prior fault affects the offence directly, but unlike justifications and excuses, the ‘failure of proof’ defence does not provide a ground for a defence that is independent of the definition of the offence. Another approach, that I will refer to as the recklessness test, is to base the *mens rea* of the subsequent offence on the prior state of mind, at the time of intoxication: the voluntariness of the intoxication can provide a basis for recklessness or *dolus eventualis* of the offence. This approach, which was already discussed in sub-paragraph 3, can appear contrived with regard to offences requiring a degree of intent that is higher than recklessness.¹⁰⁹ The *culpa in causa* doctrine is a third possibility. As we saw earlier, an offence can be regarded a two-stage process, where the pre-offence behaviour (first stage) bars recourse to a defence for the criminal conduct (second stage). Prior fault and offence are *linked*; the former bars recourse to a defence for the latter. A fourth possibility is to *disconnect*

¹⁰⁵ Archbold (2000), § 17-109.

¹⁰⁶ See section 2.08 (2) MPC: When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial; (...) (4) Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality (wrongfulness) or to conform his conduct to the requirements of law; (5) Definitions. In this Section unless a different meaning plainly is required; (...) (b) ‘self-induced intoxication’ means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defence to a charge of a crime.

¹⁰⁷ In Italy, Russia, and France, an actor who commits an offence in an intoxicated condition is ‘fully’ punished, while in Spain and Portugal, he is punished to a lesser extent. See Pradel (1995), pp. 296-298. See also Kuhn-Päbst (1984), pp. 21-28.

¹⁰⁸ Some common law jurisdictions, like those of New Zealand and the non-Code States of Australia, adopt this as the standard approach in cases of intoxication. See Keogh, (1964) VR 400, and O’Conner (1980) 54 AJIL 349, referred to in Ashworth (1999), pp. 221 (footnote 73), 225.

¹⁰⁹ Consider English legal practice and the distinction between specific and basic/general. See Chapter 2 para. 2(a).

the prior fault from the subsequent crime. The state of intoxication is ignored when examining the culpability required by the definition of the offence. Where a person's intoxication was self-induced, he is presumed to have acted as if he was not intoxicated. This is a simple solution with the advantage of clarity, but with the disadvantage of possibly stretching the concept of intent too far, namely, to cases where the defendant did not intend to commit the offence. A fifth possibility foreseen in, for instance, the German Penal Code is to provide for a separate crime of intentional or negligent intoxication.¹¹⁰ An actor can be punished by imprisonment of up to five years if he commits a wrongful act in an intoxicated condition.

It is up to the Court to decide which test it will apply. Some tests are better suited to particular facts than others; it depends on the individual case. The recklessness test would be suitable in cases of intoxication by other means than drugs or alcohol. A 'failure of proof' defence can be applied in cases of 'special intent offences' and the *culpa in causa* test would fit in contentious cases of 'bona fide' voluntary intoxication. Overall, the *culpa in causa* test seems the most coherent. When applying the *culpa in causa* principle, thus considering the *cause* of the crime rather than the *mens rea* or 'special' or 'basic intent' of the crime, the two elements are connected but not based on one another. Thus, a way is found around the problem of *mens rea* not coinciding with the conduct that caused the *actus reus*.¹¹¹ This seems a less contrived route than the path chosen by some municipal courts attempting 'to stretch the established meaning of 'intent' and 'recklessness' by equating culpability as to intoxication with culpability as to the offence'.¹¹²

(c) Observations

In concluding this paragraph, three observations should be made. First, that the exclusion in Article 31(1)(b) of the defence of voluntary intoxication only relates to 'a crime within the jurisdiction of the Court'. Even if a person is aware of the likelihood that he could engage in criminal conduct, he is only barred from exculpation if the crime he is likely to get involved in would be "within the jurisdiction of the court". As Eser submits,

This means that even in a case in which a soldier is aware that, due to his drunkenness, he might commit a murder, he could hardly be barred from invoking intoxication as a de-

¹¹⁰ Article 323a German Penal Code. See Jescheck and Weigend (1996), p. 449; Fletcher (1978), pp. 846-852; Herrmann in Eser and Fletcher (1987), pp. 771-772.

¹¹¹ This problem with the English approach (which has influenced the common law on this point all over the world) to the defence of intoxication is noted by Ashworth (1999), p. 221 and Smith & Hogan (1996), p. 236.

¹¹² Ashworth (1999), pp. 220-221. According to Ashworth the recklessness-approach to intoxication has been criticised because it 'rests on a fiction'. He writes that '(t)he attempts of Lord Elwyn-Jones in *Majewski* to argue that intoxicated persons really are reckless because "getting drunk is a reckless course of conduct" (AC 443, p. 475) involve a manifest confusion between a general, non-legal use of the term "reckless" and the technical, legal term, which denotes (for almost all offences) that D was aware of the risk of the result which actually occurred'. Ashworth (1999), p. 220.

fence as long as he was not aware of the genocidal or anti-humanitarian character of the murder in terms of Article 6 or 7 of this Statute.¹¹³

A second point that should be made here concerns the relationship between intoxication and insanity. When examining municipal criminal law, it can be seen that some legal systems allow the rules applicable to insanity to extend to intoxication. However, most systems require that the intoxication must amount to a 'disease of the mind', which would rule out situations of simple drunkenness.¹¹⁴ In Anglo-American law, application of the M'Naghten Rules to cases of intoxication is allowed when drinking causes temporary insanity.¹¹⁵ It is not clear whether the drafters wanted Article 31(1)(a) to include a state of intoxication. The text of the provision allows for it. One of the precursors to Article 31(1)(a) provided that 'a mental disorder resulting from/caused by intoxication may exclude criminal responsibility only if not procured voluntarily'.¹¹⁶ The above leads us to conclude that the possibility of applying the defence of mental incapacity to cases of intoxication resulting in temporary insanity should not be excluded.

The third and last point concerns the practical value of the intoxication plea in international criminal law. In Schabas' view, the inclusion of an intoxication plea in the ICC Statute 'borders on the absurd'.¹¹⁷ He continues,

While soldiers and thugs under the influence of drugs and alcohol may commit many individual war crimes, the court was established for a relatively small numbers of leaders organisers and planners, in cases of genocide, crimes against humanity and large-scale war crimes. The nature of such crimes, involving planning and preparation, is virtually inconsistent with a plea of voluntary intoxication. In practice, examples in case law, even for mere war crimes, are as infrequent as in the case of insanity.¹¹⁸

¹¹³ Apparently the limitation to the 'jurisdiction of the court' was added to the proposal for Article 31(1)(b) at a late stage in the drafting process (UN Doc. A/CONF.183/C.1/WGGP/L.8/Rev.1 (25 June 1998)). See Eser in Triffterer (1999), margin No. 27, pp. 547-548.

¹¹⁴ The French provision requires a transformation of the mental state in Article 122.1 of the Code Pénal ('un trouble psychique ou neuropsychique ayant altéré son discernement'). The German insanity provision covers intoxication as long as it can be qualified as a 'pathological mental disturbance' ('krankhafte seelische Störung') under § 20 of the German Penal Code. This includes psychosis caused by intoxication. See Jescheck and Weigend (1996), p. 438. On the other hand, a *lego-historic* interpretation of the Dutch mental incapacity defence, encapsulated in Article 39 of the Dutch Penal Code, and a rigid application of the *actio libera in causa* principle has resulted in the exclusion of intoxication under Article 39. See Rummelink/Hazewinkel-Suringa (1996), pp. 292-293.

¹¹⁵ See the ruling of the House of Lords in the *Beard* case: '(...)drunkenness is one thing and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, he would not be criminally responsible'. *D.P.P. v. Beard* (1920) AC 479, p. 501, cited in Smith & Hogan (1996), pp. 234-235.

¹¹⁶ Article 33 c (4) of the 'Freiburg Draft' prepared by a working group of the Siracusa committee of experts amongst whom Eser, Koenig, Lagodny and Triffterer, published as an Annex in O. Triffterer, 'Acts of Violence and International Criminal Law', 4 *Croatian Annual of Crim. L. & Practice* (1997), which served as a basis for the Siracusa Draft II, cited in Ambos (2002), p. 944.

¹¹⁷ Schabas (1998), p. 423.

¹¹⁸ *Ibidem*.

Article 31(1)(b) is not likely to be applied frequently. However, there are cases in which the plea of intoxication can be invoked. There have been instances where armies supply drugs to their forces to keep them alert when patrolling for extended periods of time. The intensifying and boosting effects of drugs are well known and the chances of behaviour being influenced as a result of taking them, in that behaviour exceeds the normal standards (*i.e.* without drugs), should not be excluded. Moreover, one can imagine cases of ‘Dutch courage-type’ intoxication taking place, where persons take drink or drugs to gain confidence and courage prior to a military operation.

The inclusion of an intoxication plea in war crimes law is new, and not only on the international level. Some national military laws have traditionally excluded a plea of voluntary intoxication when it involved a breach of international humanitarian law committed in a military capacity.¹¹⁹ The ICC Statute, more than the Statutes of the *ad hoc* Tribunals, displays features of a Penal Code as we know it from national legal systems. It is in that context that one should embrace the intoxication plea laid down in Article 31(1)(b). However, to claim that the defence is redundant would be an exaggeration.

6. SELF-DEFENCE

In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

‘The person 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. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph’

(a) Preliminary observations

The concept of self-defence in the context of breaches of international humanitarian law raises three complications. Firstly, the defence exists on *two levels*, on micro-individual and on macro-State level. Secondly, a distinction can be made between two *types* of self-defence: self-defence in the context of the laws of war, and self-defence in the context of criminal law. Thirdly, we need to distinguish between combatants acting in their public capacity (as state agents) and in a private capacity (as mere individuals).

¹¹⁹ For instance, the German Military Penal Code. See J. Schölz, *Wehrstrafgesetz*, München (1975), pp. 78-80 and Jescheck and Weigend, (1996), p. 448.

As to the first point, on a State level, self-defence is regulated, on the one hand, by Article 51 of the UN Charter and is, as such, part of *ius ad bellum*, and, on the other hand, by the law on belligerent reprisals as part of *ius in bello*. Article 31(1)(c) of the ICC Statute, however, refers to individuals rather than States. It ignores the reality of individuals committing crimes for which a State incurs international responsibility.

The second point requires us to make a clear distinction between two types of self-defence: self-defence in the context of the laws of war, and self-defence in the context of criminal law. The former type concerns self-defence by acts that are *lawful* under the rules of war. It covers situations of ‘regular’ combat, *i.e.* where the rules of war – often specified in ROE’s, – are respected.¹²⁰ The latter type of self-defence concerns violations of the rules and principles of war. Here war crimes law provides the individual soldier with a defence exonerating liability.

The third point is the most important as it might clarify a lot of misunderstandings in the debate surrounding self-defence in the context of war crimes law. International crimes such as war crimes, crimes against humanity and genocide, can be committed by individuals in their public capacity, acting as organs of the State, and in their personal capacity. In both capacities they can be held accountable under international law.¹²¹ The laws of war and criminal law are connected but different legal systems. As Keijzer submits:

War crimes law is criminal law. The criminal law is used as an enforcement system for the maintenance of the laws of war. In war crimes law, rules and principles of humanitarian law are enforced through the repression of violations through the criminal liability of individuals.¹²²

Criminal law has rules and principles of its own. This proposition demonstrates itself most prominently in the context of self-defence. An individual might not have a

¹²⁰ The use of force in self-defence by Peacekeeping Forces (PKF) falls outside the scope of the laws of war. PKF cannot be qualified as combatants as they are not a party to the armed conflict. They are not ‘lawful targets’ and, strictly speaking, they do not have the right of self-defence under the laws of war. However, they can *act as* combatants. This is especially the case when they enforce a mandate under Article 42 of the UN Charter. The Secretary General’s Bulletin and the UN ROE introduce a separate catalogue of rules applying to PKF as an analogy of the Rules of War to fill this gap and thus ‘justify’ the use of force in self-defence. When a UN soldier returns force consistent with UN ROE, he will have acted in a way permitted by the Security Council and will not incur liability under international law. If a UN soldier uses force that could not be considered to be self-defence he could be liable under the ICC Statute. On the topic of UN soldiers and the use of force, see: P. Rowe, ‘The United Nations Rules of Engagement and the British Soldier in Bosnia’, 43 *ICLQ* (1994), pp 946-956.

¹²¹ Contrary to these two approaches, the Act of State doctrine negates the stipulation that an individual can be held accountable for crimes under international law for acts committed in his public capacity. Every act of the individual performed as an organ of the State is thought to be attributable to the State. The veil of the State thus covers the individual’s act and prevents the latter for being held accountable under international law. This doctrine has been proclaimed by Kelsen, its influence in present (post-Cold War) international law, however, seems to have dwindled.

¹²² N. Keijzer in ‘L’Article 31, § 1 c, Du Statut de la Cour Pénale Internationale, Travaux de l’atelier organisé par la Commission consultative de Droit internationale humanitaire de la Croix-Rouge de Belgique Communauté Francophone’, Tiré à part de la *Revue Belge de Droit International* 2000/2, p. 440.

plea of self-defence under the laws of war, in his public capacity, because, under the circumstances, the laws of war do not provide for this, but in his private capacity, he might still have a right of self-defence. After all, the right of self-defence is an inherent right of every human being. The latter premise is grounded in the theory of autonomy of the individual, which underlies most modern criminal law and can be traced back to John Locke's theory of protecting one's liberty and other rights from violation by an aggressor.¹²³

Discussing the individual-State relationship, *i.e.* the private-public distinction in the context of self-defence, we discern two approaches. The first can be called a *pragmatic* view, and can be ascribed to Bassiouni. The second reflects a *normative* view and is propounded by Keijzer. Bassiouni divides individuals into three strata of perpetrators: decision-makers and senior executors; intermediate-level public personnel who facilitate the mobilisation of State capabilities to carry out the policy and execute higher directives; and thirdly, those in the lower echelons who carry out the policy and directives and who commit the material element of the crime.¹²⁴ The purpose of this distinction is to apply different elements of criminal responsibility to each of these different categories. In other words, the strata of perpetrators correspond with strata of responsibility. In Bassiouni's view, a general part of international criminal law is needed to reflect specific goals and policies justifying the division of these strata of responsibility.¹²⁵ As to the application of defences to these three strata of perpetrators, he deems that,

Thus, for example, such defences as insanity and intoxication would not apply to decision-makers, since it would be inappropriate, to say the least, to have a leader ordering mass-victimisation escape criminal punishment because he was intoxicated when he gave such orders. Similarly, self-defence would be inapplicable since it applies to immediate personal danger.¹²⁶

Keijzer, on the other hand, adopts a normative view in his reasoning on private-public capacity and self-defence. Rather than discerning strata of perpetrators, he distinguishes between the public and the private side of every human being:

¹²³ Its fundamental value accounts for recognition of the right in Article 2(2) of the European Convention of Human Rights. Taking a closer look at the theory of individual autonomy as it has taken shape in national law and doctrine we see mainly two reasons underlying this theory. First, self-defence is an instinctive reaction of every human being against invasion of his personal territory. This 'territorial conduct' cannot be equated with a crime and therefore has to go unpunished. Second, in a society which has evolved in a way that its structure provides for a collectivity (police and justice system) defending the rights of its members, an individual member has the right to serve as a representative of the collectivity in defending its interests and maintaining social order. See Fletcher (1978), pp. 860-864; J-P Delmas Saint-Hilaire, 'Faits Justificatifs, Légitime Défense', in Angevin and Chavanne (1998).

¹²⁴ Bassiouni (1999), p. 396.

¹²⁵ 'A criminal justice policy is therefore needed to distinguish between these *strata* of responsibility for purposes, *inter alia*, of determining a form of mental element (specific or general intent, or recklessness) as may be required for each of these three *strata* of perpetrators'. Bassiouni (1999), p. 396.

¹²⁶ *Ibidem*.

[W]e must start by realising that there are two sides to every human being: a private side and a public side. In other words: every human being is an individual and, at the same time, a member of one or more groups. A military person is an individual private person as well as an instrument of his State.¹²⁷

In his view, an individual might not have a right to self-defence in his public capacity, under the law of war, but still have a ground excluding responsibility under criminal law, which regulates his behaviour as an individual in his private capacity. There is a parallel here with corporations' law. Keijzer uses the following example:

Suppose a chemical factory brings more sulphur-dioxide into the air than it is licensed to. Suppose this is the result of one of the employees having opened a safety valve. When prosecuted, the employee can invoke *force majeure*, if he opened the safety valve to prevent an explosion which would have cost the lives of himself and some of his fellow employees. Such a defence will normally be open to an employee, but not to the corporation, which should have prevented such situations from occurring in the first place.¹²⁸

As with *ius in bello*, on the one hand, and the law of self-defence in criminal law, on the other, the example supposes two sets of rules regulating behaviour that differ in scope and aim. One regulates corporations' behaviour in observing environmental rules, the other is concerned with individual criminal responsibility and applies to the employee as a human being. On the macro-level, under the environmental rules, the company does not have a defence. On the micro-individual level, under criminal law, the employee can resort to a defence warding off criminal responsibility. He does not have that defence from the company that employs him, but from the inherent right of an individual to save his life if the costs are not unreasonable.

The rules and principles of criminal law are not identical to the rules and principles of the laws of war. Moreover, the responsibilities of individuals under criminal law are not the same as those of the State and the limits and scope of defences under both systems do not coincide. Bassiouni's model incorporates this disparity by establishing different types of responsibility for different types of perpetrators and for granting international law defences to the first strata of perpetrators, but excluding them from criminal law defences. Arguably this model unnecessarily complicates international criminal law. First, because it denies the reality that every human being also acts in a private capacity. Even a Head of State, as a human being, has an inherent right of self-defence. Second, because the differences between the various categories of perpetrators, such as decision-makers and individual soldiers, can be taken into account by applying concepts such as *culpa in causa* and *Garantenstellung*. I would, therefore, argue that both systems of law (the laws of war, on the one hand, and criminal law, on the other) can best be reconciled by applying the normative model propounded by Keijzer.

It follows from the above that the nature of the laws of war does not bar the resort to the defence of self-defence.

¹²⁷ N. Keijzer, 'Self-Defense in the Statute of Rome', in Duyx *et al.* (2000), p. 102

¹²⁸ *Ibidem*.

(b) Text and legal history

'A classic defence to a crime is self-defence', as the ILC submitted in its Commentary to the 1996 Draft Code of Crimes.¹²⁹ It was in the ICC Statute that this was codified on the international level for the first time.¹³⁰ Article 31(1)(c) of the Statute encapsulates the defence of self-defence. The subparagraph proved to be 'the real cliff-hanger' in drafting Article 31 and its phrasing remained controversial until the very last moment.¹³¹

The first sentence of Article 31(1)(c) stems from an American proposal of June 1998.¹³² This proposal, however, did not specify the element of 'property'. Attempts had been made to narrow the meaning of the word 'property' by restricting it, but no single term was acceptable to the parties. Eventually, the clause 'essential for accomplishing a military mission' was inserted. In earlier drafts, this clause was conceived in terms of military necessity as a separate ground excluding criminal responsibility.¹³³ Narrowing down the defence of property even further, it was argued that the defence of property could never excuse genocide or crimes against humanity and, therefore, could only exonerate in war crimes cases. Saland points out that, from a legislative point of view, this was to the detriment of the Statute as the general principles of criminal law (part III of the Statute) were deemed to be applicable to all the crimes within the jurisdiction of the Court.¹³⁴ Some have contended that the special intent of genocide and the knowledge requirement of crimes against humanity is not met by the mere intent to defend oneself, which excludes the exoneration from self-defence for those crimes.¹³⁵ This effectively means that self-defence under Article 31(1)(c) is not available as a defence in cases of genocide and crimes against humanity. To my mind, this unnecessarily narrows the scope of this provision beforehand. After all, reality can confront us with unpredictable situations. We will have to trust the Court, when asked to consider a plea of self-defence, to take into account all relevant circumstances, the nature of the crimes, and the text and history of the provision.

¹²⁹ ILC Commentary to the 1996 Draft Code, Article 14, para. 7.

¹³⁰ It had been included in the Preparatory Committee's compilation of proposals in 1996 under Article N, 1996 PrepCom Report Vol. II.

¹³¹ 1998 Working Group Report, UN Doc. A/CONF.183/C.1/WGPP/L4/Add.1, p. 5, footnote 13 referred to by Eser in Triffterer (1999), margin No. 28, p. 548; Saland (1999), p. 208.

¹³² Paragraph 1(b) of this proposal reads, 'The person acts reasonably to defend himself or herself or another person or property against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or property protected', 1998 Working Group Report, UN Doc. A/CONF.183/C.1/WGPP/L.2 (1998).

¹³³ The Report of the Preparatory Committee on the establishment of an International Criminal Court contained a provision in which military necessity was a 'possible defence specifically referring to war crimes and grave breaches of the Geneva Conventions of 1949', Article R, 1996 PrepCom Report Vol. II.

¹³⁴ Saland (1999), p. 208.

¹³⁵ See G. Abi-Saab, L. Condorelli, G. Rona and D. Vandermeersch in 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2, pp. 406-407, 447, and 454.

The person 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.

The fundamental flaw of the self-defence provision in the ICC Statute is that its unclear wording might be interpreted as allowing for a plea of military necessity. The clause 'property which is essential for accomplishing a military mission' might be taken to constitute a blank and open-ended allowance for a plea of military necessity, which would, however, be a violation of the laws of war. According to Cassese, former President of the ICTY,

[I]t is highly questionable to extend the notion at issue (self-defence, *EvS*) to the need to protect 'property which is essential for accomplishing a military mission'. This extension is manifestly outside *lex lata*, and may generate quite a few misgivings. Firstly, via international criminal law a norm of international humanitarian law has been created whereby a serviceman may now lawfully commit an international crime for the purpose of defending any 'property which is essential for accomplishing a military mission' against an imminent and unlawful use of force. So far such unlawful use of force against the 'property' at issue has not entitled the military to commit war crimes. They could only react by using lawful means or methods of combat or *ex post facto*, by resorting to lawful reprisals against enemy belligerents.

Secondly, the notion of 'property essential for accomplishing a military mission' is very loose and may be difficult to interpret.¹³⁶

Critique has come also from a group of Belgian scholars who maintain that Article 31(1)(c) is incompatible with international humanitarian law.¹³⁷ They argue that the provision negates the rule, laid down in customary and 'black letter' international law, that the laws of humanity prevail over political, military, or national interest or necessity.¹³⁸ To their mind, Article 31(1)(c) violates fundamental treaty provisions such as Articles 4(2) of the ICCPR and 15(2) of the ECHR in which the absolute and 'non-dérogeable' nature of the right to life and the right not to be subjected to torture or inhumane treatment is encapsulated. Moreover, they assert that as the defence of property 'essential for accomplishing a military mission' introduces a justification of military necessity, which, to their mind, is banned under international humanitarian law, Article 60(5) of the Vienna Convention on the Law of Treaties,

¹³⁶ A. Cassese, 'The Statute of the International Criminal Court: Some preliminary Reflections', 10 *EJIL* (1999), pp. 154-155.

¹³⁷ A. Andries, vice-president of the interdepartmental commission on humanitarian law, professor E. David, Free University of Brussels; J. Verhaegen, professor emeritus, Catholic University of Louvain, professor Ch. van den Wyngaert, University of Antwerp. Open Letter to La Libre Belgique, 15 April 1999. See also 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2, pp. 359-488.

¹³⁸ In their view this follows from the 'Martens' clause' encapsulated in the preamble of the Hague Rules of Land Warfare, the Nuremberg Statute, and the Human Rights Declaration, Treaties, and Conventions. They also refer to Article 5 of the Belgian War Crimes Act of 1993, where this rule has been laid down as follows: 'aucun intérêt, aucune nécessité d'ordre politique, militaire ou national ne peut justifier, même à titre de répressailles, les infractions prévues par les Articles (...)'.

proscribing the uni-lateral suspension of observance of a multilateral convention concerning international humanitarian law to justify another Party's violation of that treaty, is violated by Article 31(1)(c). The four further deem the Articles 63, 62, 142, and 158 of the four 1949 Geneva Conventions to be infringed as these provisions stipulate that no denunciation of the Conventions shall take effect until peace has been concluded and the written notification to the High Contracting Parties has been given effect a year in advance.

This argument is not convincing. The latter provisions are aimed at *States* and not at international courts and prohibit the former from suspending certain human rights provisions rather than proscribing the ICC to reach just results in individual cases. In short, the fact that individuals are granted 'non-dérogeable rights' under human rights treaties does not mean that an individual cannot claim self-defence when prosecuted for a crime under the ICC's jurisdiction.

The person acts reasonably to defend himself or herself or another person (...) 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.

In essence, four requirements need to be met to grant an accused the defence of self-defence under Article 31(1)(c). The accused must have been acting a) reasonably, and b) proportionately against, c) an imminent, and d) unlawful use of force. Moreover, the defence must be consistent with Article 21(1a-c). This means that the claims of self-defence cannot be granted when that would violate (1a) the Statute, Elements of Crime, Rules of Procedure and Evidence; (1b) applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; or, (1c) general principles of law derived by the Court from the national laws of the legal systems of the world including the national laws of States that would normally exercise jurisdiction over the crime (1c).

Reasonableness

The first criterion is that the defence is 'reasonable'. Which standard will the Court apply in judging what is 'reasonable', a subjective or an objective one? Applying a subjective standard would mean approaching the matter from the viewpoint of the accused. What was reasonable in his mind? An objective standard, on the other hand, would consider the defence in the light of what a reasonably prudent person would have done under similar circumstances. The latter test can be 'particularised' by using the following test: 'did the accused reasonably believe that he was unlawfully attacked'. This 'reasonable belief' test appeared in earlier drafts of Article 31(1)(c) but was not reiterated in the final draft and text.¹³⁹ Article 31(1)(c) contains an objective test and does not allow for an excusable excess. It encapsulates a justification. The Court might take the exceeding of the limits of necessary defence into

¹³⁹ See Article N 1996 PrepCom Report Vol. II; *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, A/AC.249/1998/L.13 ('Zutphen Draft Statute') (Article 25 (L)(c)).

account in the sentencing stage. Moreover, in an exceptional case, an emotion brought about by an attack may amount to mental disease for which the defence of mental incapacity is available (Article 31(1)(a)). The term 'reasonable' is one of the two elements constituting the objective test for the Court to go by. Although the subsidiarity principle is not expressly mentioned, it can be taken to form part of 'acting reasonably'. This is likely, as Anglo-American law on self-defence understands the notion of 'reasonableness' to encompass necessity and proportionality.¹⁴⁰ 'Reasonable' means that the defence must be necessary and adequate to avoid the danger.

Proportionality

Self-defence is not an unlimited right; it requires a proportionate reaction.¹⁴¹ Consequently, it is hard to imagine situations in which genocide and crimes against humanity can be justified as measures that for lack of less radical means, were necessary and proportionate.¹⁴² However, I agree with Keijzer, that excluding self-defence *a priori* in cases of genocide and crimes against humanity is undesirable. After all, reality often provides us with a richer catalogue of examples than even our imagination does. Keijzer uses the following example to illustrate a possible case of genocide in self-defence:

A certain country suffers from strong racial tensions between the white-skins and the red-skins. A genocide breaks out; many red-skins are killed by white-skins. A certain white-skin named John, although he would like to see red-skins wiped out, does not participate in the killing, aware as he is of the criminal consequences that would have. On a certain day, however, three red-skins trespass in his home with the apparent purpose of raping his wife. John kills the three red-skins. This gives him double satisfaction: he has saved the honour of his wife and has by the same act added to the destruction of the red-skins as a group. When prosecuted on a charge of genocide, can John successfully invoke Article 31(1)(c)?¹⁴³

¹⁴⁰ According to Williams 'the defence of private defence resembles that of preventing crime in the twin requirement that the act must be immediately necessary (there must be no milder way of achieving the end) and proportional to the harm feared'. Williams (1983), p. 503.

¹⁴¹ The link between personal autonomy and the concept of self-defence (Notwehr) in German criminal law is so powerful that German legislators abstained from inserting a proportionality requirement into the provision on self-defence (§32). This has been the law ever since the infamous Supreme Court Judgement in 1920, where the principle of personal autonomy and the upholding of the Legal Order was deemed to justify the shooting and killing of an apple thief on the run. 20 September 1920, RGst 55, 82 See A. Schönke *et al.* (eds.), *Strafgesetzbuch: Kommentar*, München (2000), § 32; Fletcher (1978), pp. 861, 870-875; A.J.M. Machielse, *Noodweer in het Strafrecht*, Amsterdam (1986), pp. 56-57.

¹⁴² See the majority view in 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2.

¹⁴³ N. Keijzer in his conference paper at the congress entitled 'Preparing for the ICC. Course for Policymakers, Lawyers and the Military, 19-21 December 2001', The Hague (unpublished). A similar example can be found in 'Débats', 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2, p. 478.

Some have said that in the above example the special intent was lacking and that it was not a case of genocide but only of 'killings' committed in self-defence.¹⁴⁴ It has further been argued that not only the objective requirements of self-defence (necessity and proportionality), but also the subjective requirement (the will to defend oneself against an unlawful attack) are incompatible with the special intent of genocide.¹⁴⁵ Both arguments essentially turn on one and the same point; that self-defence is inconsistent with the special nature and concept of genocide. This applies equally to the concept of crimes against humanity and its special knowledge requirement.

It may be that the above example is somewhat contrived. It seems unlikely that genocide can be committed 'by chance'. The argument that genocide and crimes against humanity can never live up to the requirement of proportionality is especially persuasive. However, it is far from established that the subjective element of self-defence is incompatible with the special intent and knowledge elements of respectively genocide and crimes against humanity. Here the example provides us with a useful 'mental experiment'. There is no fundamental reason why one could not have the special genocide intent and on top of that the will to defend oneself or another person. Consider examples derived from national law where one can commit 'murder' in self-defence.¹⁴⁶ The special intent for premeditated murder (malice aforethought) is thus combined with the will to defend oneself, or another. Self-defence and special intent seem to be reconcilable as long as the situation in which one finds oneself poses a *continuous threat*.¹⁴⁷

Imminent and unlawful use of force

Turning to the third and fourth criterion, we see that the danger must constitute 'an imminent and unlawful use of force'. Force is not specified and can be understood to extend to both a physical attack and psychic threat.¹⁴⁸ The use of force can be re-

¹⁴⁴ Szurek and Rona in 'Débats', 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2, p. 478.

¹⁴⁵ Abi-Saab and Condorelli in 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2.

¹⁴⁶ Dutch Supreme Court 8 May 1990, 87, *DD* 90.291. The defendant A had bought a gun with the intention of killing his victim B. This happened the next day, in a house to which both A and B had access. Prior to the actual killing, however, A was under continuous threat of being killed by B, who was armed with an axe and a knife. A tried to leave the house, but B prevented him from doing that. Before actually killing B, A shot him in the leg. When B then attempted to kill A with the knife, A pulled the trigger and gave the final blow. The Supreme Court held that the special intent and the will to defend could co-exist. However, self-defence was not available to A as the fatal shot was not preceded by an imminent attack; the victim was about to jump out of the window when the bullet hit him in the back. See Machiels (1986), p. 602; Rummelink/Hazewinkel-Suringa (1996), p. 314. In a German case, it was found that the will to defend oneself can be accompanied by feelings of hatred and revenge: BGHSt, *NSiZ* 1983, p. 117. See also Rummelink/Hazewinkel-Suringa (1996), p. 314; Jescheck (1996), pp. 342-343.

¹⁴⁷ H.A. Demeersseman, *Met voorbedachten rade*, Arnhem (1989), pp. 96-97.

¹⁴⁸ Earlier drafts provided for a further qualification of force, Zutphen Draft Statute, Article 25(L)(d): '(the person reasonably believes that) there is a *threat of (imminent) death or serious bodily harm* against that person or another person (or against his or her liberty) (or property or property interests) (...)' (italics, *EvS*). See also Eser in Triffterer (1999), margin Nos. 28-29, pp. 548-549.

garded as 'imminent' when there is a direct threat of force, or the force is already deployed/taking place, or is ongoing. Self-defence is not allowed once the danger has been averted or the attack has ended. The use of force must be 'unlawful' to exempt the act of defence from criminal liability. 'Unlawful' must be construed in the light of applicable treaties and principles of the law of armed conflict.¹⁴⁹ In war, killing another person, if he is an enemy combatant, is not a crime. As we saw earlier, two types of self-defence can be distinguished. Each is regulated by different rules: one by the laws of war and the other by criminal law, more specifically, Article 31(1)(c). If one were confronted with an unlawful attack carried out by a civilian or a POW, the latter would lose his special status and the act of defending oneself could not be qualified as a war crime.¹⁵⁰ In such a case, the justification of the defensive act stems from the macro-level, and resort to Article 31(1)(c) is unnecessary.

Culpa in causa

A *culpa in causa* reasoning might prevent a person from successfully resorting to the defence of self-defence. Although *culpa in causa* is not an explicit part of the provision as it is with intoxication, it can be interpreted as implied in Article 31(1)(c). National law doctrine on this point has concentrated on whether or not a *culpa in causa* reasoning can be applied in cases of provocation and foreseeable assault. In most cases, in both Anglo-American and civil law legal systems, courts have been reluctant to bar resort to self-defence because of *culpa in causa*.¹⁵¹ Only when it could be shown that a person *intentionally* put himself in a state in which he could claim self-defence, *culpa in causa* (or better: *dolus in culpa*) was relied upon to find the defendant liable despite his plea of self-defence.

The ICC must judge on a case-by-case basis whether it will apply the exception to the defence of self-defence, *i.e.* *culpa in causa*, or not. It should not be excluded beforehand. In allowing self-defence under Article 31(1)(c), the Court can resort to the rule that committing a war crime in self-defence is allowed despite *culpa in causa* when the initiative of the unlawful conduct lies with the attacker.¹⁵² In this,

¹⁴⁹ In this context the UN Secretary General's Bulletin and the 1994 UN Safety Convention are relevant as well. It is noteworthy that the ICC Statute penalises for the first time 'to direct 'attacks against personnel, installations, material, units or vehicles involved in 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', Article 8(2)(b)(iii)(international armed conflicts) and Article 8(2) (e)(iii)(non-international armed conflicts) of the ICC Statute. See M. Zwaneneburg, 'The Secretary General's bulletin on observance by United Nations forces of international humanitarian law: a pyrrhic victory?', 39 *Revue de Droit Militaire et de Droit de la Guerre*, (2000), pp. 13-43.

¹⁵⁰ Consider, for instance, Article 51(3) of the API, 'Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities'. See Andries and Verhaegen in 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2, pp. 429-431.

¹⁵¹ Gur-Ayre (1984), pp. 82-91

¹⁵² In cases of foreseeable self-defence, where the defendant equipped himself with a legal or illegal weapon for protection, a resort to self-defence is usually successful despite *culpa in causa*. This was decided in the case of a woman who was attacked by two assailants. She had grabbed her (illegally ob-

the Court can apply a *Garantenstellung*. After all, in cases of provocation, a peace-keeper, because of his training and qualification, could be expected to have more resistance to temptation than an ordinary citizen.

To conclude the considerations relating to Article 31(1)(c) consider the following example, put forward by Keijzer:

Suppose occupation forces keep their weapons in a depot, which is located within the occupied territory. The depot is surrounded by armed guards. During a certain night, however, civilians silently kill the guards, enter into the depot, and steal an important number of weapons. As a reaction, more guards are posted, but in vain: again guards are killed and weapons are stolen. After several repetitions, the commander decides, notwithstanding Article 34 of the IVth Geneva Convention, to take hostages. Twenty-one hostages are taken from the civilian population, and it is made known that on the occurrence of another theft of weapons the hostages will be killed. As a result, no more weapons are stolen.¹⁵³

Assuming that there was no other possibility of securing the depot, the requirements of Article 31(1)(c) seem to have been met in the above example. This would not be the case if the hostages were killed. The reaction of the guards would then fail to meet the reasonable and proportionate standard.

The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph

The last sentence of the self-defence provision in the ICC Statute was inserted to limit the resort to self-defence, which was made available by the clause on defence of property ‘essential for accomplishing a military mission’. In reality, the clause is superfluous, as a defensive operation does not qualify as a reaction to an ‘unlawful use of force’.

(c) National underpinnings

While every national criminal system provides for the defence of self-defence, different tests are applied in allowing the defence. In essence, the systems can be divided into those that apply an objective test and those that apply a subjective test. The ‘reasonable belief test’ connoting a subjective test appeared in earlier drafts of the ICC provision on self-defence and can be found in Anglo-American law, allowing for self-defence as an excuse rather than a justification.¹⁵⁴ Another group of legal

tained) gun and fired two warning shots before she shot both, one fatally. The Supreme Court judged that she could rely on self-defence as she had found herself in a defence-situation, despite the illegally obtained weapon: Dutch Supreme Court, 23 October 1984, *NJ* 1986, 56. In his commentary to this judgement, Keijzer pointed out that the initiative of the illegal attack was with the attackers.

¹⁵³ Keijzer, ‘Introductory Observations’, in Duyx *et al.* (2000), pp. 77-78.

¹⁵⁴ In most American States and in the Model Penal Code, one can find this ‘reasonable belief’ test: MPC §3.04, §198 Californian Penal Code and *Brown v. U.S.*, 256 US 335 (1921). For English Law: *R. v.*

systems takes the objective approach and only provides for self-defence as a justification: it is a defence when the requirements of subsidiarity (the defence must have been necessary in that no other way of averting the attack was possible) and proportionality are met. A third group of systems, notably the German and the Dutch systems, provides for two concepts of self-defence: as a justification and as an excuse. In the latter case, a type of 'excessive self-defence' ('Nothwehr excess' and 'noodweer excess' respectively) is allowed to excuse criminal conduct. A reaction to an attack can be disproportionate but still be excused, provided certain conditions are met.

Most national legal systems require the action in self-defence to be 'proportionate'. This is sometimes done by including a proportionality element in the provision encapsulating the defence of self-defence, like Article 31(1)(c). Sometimes, this is considered part of the element of necessity and sometimes it is applied in case law because of a lack of general rules stipulating a proportionate reaction.¹⁵⁵

The scope of self-defence differs from one legal system to another. Not all jurisdictions allow for the defence to extend to defence of property. This accounts for the discussion in Rome on this point. In general, it can be said that Anglo-American legal systems allow self-defence to include defence of property, while there is a split between civil law legal systems on this point.¹⁵⁶ Germany and Belgium, for instance, do not recognise defence of property while France and the Netherlands do.¹⁵⁷

A last point concerns the point of *culpa in causa* barring a successful plea of self-defence. At least in Dutch law, resort to self-defence is excluded where the actor *intentionally* placed himself in a situation in which he had to defend himself (provocation). If, however, the actor found himself in that situation out of carelessness, thoughtlessness, or inadvertence, he may still invoke self-defence.

A different point is the issue of retreat. Is the 'self-defender' obliged to retreat from the crime scene or not? This is a contentious issue and the question seems to be answered in the affirmative for those systems that provide for a subsidiarity element of the concept of self-defence.¹⁵⁸ In Anglo-American systems, the law generally re-

Gladstone Williams, 78 Cr App R 276, CA and *R. v. Beckford* (1998) AC 130, PC. Although self-defence is considered a justification in Anglo-American law, it plays an 'excuse role' as well. See Robinson on the hybrid character of self-defence: Robinson (1982), pp. 235-236.

¹⁵⁵ In Article 122-5 of the French Code Pénal and in Article 52 of the Italian Codice Penale, it is expressly mentioned. In Spanish and Dutch law, it is considered part of the notion 'necessary' (Article 8 Nr. 4 II of the Spanish Codice Penal and Article 41 of the Dutch Penal Code). English law contains a proportionality test in Article 3 of the Criminal Law Act 1967: 'reasonable use of force' and American law embraces the principle of proportionality in case law: *State v. Metcalfe*, 203 Iowa 155, 212 N.W. 382 (1927), *United States v. Black*, 692 F.2d 314, 318 (4th Cir. 1982). The MPC reflects the notion of proportionality in the element of 'necessary' in sub-paragraph 2 of § 3.0.4. See Jescheck and Weigend (1996), pp. 350-351, Angevin and Chavanne (1998), Article 122-5; Fletcher (1978), pp. 860, 870, Remmelink/Hazewinkel-Suringa (1996), pp. 320-321; Smith & Hogan (1996), p. 260; LaFave (1988), pp. 832-833.

¹⁵⁶ France (Article 122-5 Code Pénal) and The Netherlands (Article 41 Wetboek van Strafrecht). Most American jurisdictions, and the MPC, § 3.06 allow for the defence of property, as does English common law, see s. 3 of the Criminal Law Act 1967 and *R. v. Hussey*, 18 Cr App R 160, CCA.

¹⁵⁷ Germany (Article 33 Strafgesetzbuch), Belgium (Article 416 Strafwetboek).

¹⁵⁸ See, however, Machielse in his impressive analysis of self-defence in Dutch, French, and German

quires one to retreat if one can. Exceptions to this rule appear to be determined by the *locus*, workplace or home.¹⁵⁹

(d) Jurisprudence

In the Nuremberg trials, self-defence was not granted the autonomous status it has in the ICC Statute. It was considered either in the collective sense (Germany did not have the right of self-defence as the attack of the Allies was legitimate)¹⁶⁰ or, on the individual level, in connection with necessity.¹⁶¹ The defence was recognised in some of the war crimes trials conducted after the Second World War documented by the UNWCC. In the case of *Willi Tressmann and others*, it was allowed but only as the 'last resort'. As the Judge Advocate acting in the trial advised the court,

So far as the defence of self-defence is concerned, I need add but little to that which has been said. The law permits a man to save his own life by despatching that of another, but it must be in the last resort. He is expected to retreat to the uttermost before turning and killing his assailant (...).¹⁶²

A right to self-defence was invoked and granted in the case of the killing of an American paratrooper who was believed to have drawn his weapon (presumed self-defence).¹⁶³ The defence was, however, refused in the case of a Japanese officer, who out of fear emanating from an enraged crowd, killed a civilian in a moment of fury and fear (no unlawful attack by the victim).¹⁶⁴

The Yugoslavia and Rwanda Tribunals do not provide for the defence of self-defence in their Statutes. However, the defence is mentioned in case law. In the *Kordić & Čerkez* case, the defence in vain argued that the Bosnian Croats were victims of Muslim aggression in Central Bosnia and that they "fought a war of self-defence".¹⁶⁵ The ICTY Trial Chamber noted, however, that,

'Defences' however form part of the general principles of criminal law which the International Tribunal must take into account in deciding cases before it.¹⁶⁶

law. He is of the view that the person acting in self-defence does not necessarily violate the subsidiarity requirement by not retreating. Machielse, (1986), pp. 653-655.

¹⁵⁹ *McInnes* [1971] 3 All ER 295, *Julien* [1969] 2 All ER 856, and MPC § 3.04 (2)(b)(I): 'the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor (...).'

¹⁶⁰ *U.S. v. von Weizsäcker et al.*, TWC, Vol. XIV, p. 329, referred to in Ambos (2002), p. 121; K. Ambos, 'Other Grounds for Excluding Criminal Responsibility', in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: a commentary*, Oxford (2002) (Ambos in Cassese *et al.* (2002b)), pp. 1004-1005.

¹⁶¹ *U.S. v. Krupp et al.*, TWC, Vol. IX, p. 1438, referred to in Ambos (2002), p. 122.

¹⁶² British Military Court in Hamburg, 1st-24th September, 1947, UNWCC, Vol. XV, p. 177.

¹⁶³ The case of *Weiss and others*, TWC, Vol. XIII, pp. 149-150 or Vol. XIV, p. 129. See Ambos in Cassese *et al.* (2002b), pp. 1004-1005.

¹⁶⁴ The case of *Chusaboro*, TWC, Vol. III, pp. 77-80). See Ambos in Cassese *et al.* (2002b), pp. 1004-1005.

¹⁶⁵ *Kordić and Čerkez* Judgement, para. 448, footnote 625, referring to Kordić's Final Brief, p. 5.

¹⁶⁶ *Ibidem*, para. 449.

Referring to Article 31(1)(c) of the ICC Statute, the Trial Chamber ruled that,

The principle of self-defence enshrined in this provision reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law.¹⁶⁷

In relation to the defence's argument that the acts were committed in a 'defensive operation', the Chamber referred to the last paragraph of Article 31(1)(c):

Of particular relevance to this case is the last sentence of above provision to the effect that the involvement of a person in a 'defensive operation' does not 'in itself' constitute a ground for excluding criminal responsibility. It is therefore clear that any argument raising self-defence must be assessed on its own facts and in the specific circumstances relating to each charge. The Trial Chamber will have regard to this condition when deciding whether the defence of self-defence applies to any of the charges. The Trial Chamber, however, would emphasise that military operations in self-defence do not provide a justification for serious violations of international humanitarian law.¹⁶⁸

(e) Observations

A question that has been at the core of the discussion on self-defence and *ius in bello* has been whether the nature of the laws of war allow for such a defence to exonerate a person from criminal responsibility. In order to reply to that question in a reasoned way, it is necessary to understand the intrinsic difference between different notions of self-defence. This requires a closer look at the nature of the defence and an examination of the individual-State relationship in war crimes law.

7. DURESS

In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

'The conduct which is alleged to constitute a crime within the jurisdiction of the Court 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, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or*
- (ii) Constituted by other circumstances beyond that person's control'*

¹⁶⁷ Ibidem, para. 451.

¹⁶⁸ Ibidem, para. 452.

(a) Text and legal history

The duress-provision in the ICC Statute is a mixture of two types of duress: duress as a choice of evils and duress as compulsion. It appears from the legislative history that the ILC recognised the different forms of duress, but did not attach any legal consequences to that distinction.¹⁶⁹ The Special Rapporteur held that necessity (choice of evils) and duress are in essence one and the same concept as it is applicable under the same requirements.¹⁷⁰ It appears better, however, to identify the two duress-concepts in subparagraph (d), if only to understand the ICC duress concept as to its content and range. Basically, three elements can be distinguished:¹⁷¹

1. a threat of imminent death or continuing or imminent serious bodily harm against the person concerned or another person
2. a necessary and reasonable reaction to avoid threat
3. the intent not to cause a greater harm than the one sought to be avoided

The first element applies to both, choice of evils-duress and compulsion-duress. The second element embodies the proportionality and subsidiarity requirement, which is 'traditionally' a characteristic of choice of evils-duress. The third element concerns the mental element and is phrased in wording appropriate to a 'choice of evils wording', as a balancing exercise. The distinction between different sources of threats is reminiscent of the Anglo-American distinction between duress by threat and duress by circumstances.

Duress in Article 31(1)(d) is further of interest as it marks a debut in international 'black letter' law. Where the *existence* of a duress plea was recognised, its *status* was contested in international jurisprudence. Excluding criminal responsibility for war crimes and crimes against humanity proved controversial¹⁷² and unclear¹⁷³ prior to the Rome Statute. A survey of post-World War II jurisprudence on duress will demonstrate this. To understand the ICC duress provision in all its complexity requires identification of the various elements of which it is composed. Only by distinguishing and analysing the roots of duress and necessity in municipal law can one appreciate the different ingredients fused in this concept.

¹⁶⁹ See *YBILC* (1986), Vol. II/2, p. 51; *YBILC* (1987), Vol. II/2, p. 11. See Ambos in Cassese *et al.* (2002b), pp. 1015-1016.

¹⁷⁰ M. Thiam, Twelfth Report (A/CN.4/460), para. 159, '[p]resent and immediate danger, not caused by the actor's behaviour proportionality between the protected and violated legal interest'.

¹⁷¹ See also Ambos in Cassese *et al.* (2002b), p. 1037.

¹⁷² The *Erdemović* case at the ICTY brought about a real split among the Appeals Chamber. See further subpara. (c).

¹⁷³ The 'moral choice test' articulated in the Nuremberg Judgement in the context of superior orders has been interpreted as a reference to duress (necessity). M.R. Lippman, 'The Development and Scope of the Superior Orders Defense', 20 *Penn State ILR* (2001) (Lippman (2001b)), p. 185.

(b) National underpinnings

Anglo-American law

Two distinctions can be made when discussing duress in Anglo-American law: one between duress as a justification and duress as an excuse, and the other between duress by threats and duress of circumstances. The first distinction concerns the nature of the defence of duress, whereas the second is a mere factual distinction.

As to the first distinction, when duress is a justification, the defendant is confronted with a *choice of evils*, and having made the right choice, his act will be deemed justified. When duress is an excuse, the defendant has acted under such a *severe threat* that refraining from the crime could not be reasonably demanded; he would not be considered blameworthy.

Unlike the first distinction, the second is of appearance rather than principle. Duress by threat and duress by circumstances are distinguished as to the source of threat. Duress by threat (duress *per minas*) emanates from a human threat while duress by circumstances implies a threat of natural origin: a 'circumstantial threat'.¹⁷⁴ In the English case of *Willer*,¹⁷⁵ duress by circumstances was recognised for the first time. The case is discussed in Smith and Hogan's Criminal Law Textbook as follows:

D was charged with reckless driving after he had driven very slowly on a pavement in order to escape from a gang of youths who were obviously intent on doing violence to him and his passengers. The trial judge declined to leave the defence of necessity to the jury. The Court of Appeal quashed D's conviction. They said that there was no need to decide on any defence of necessity that might have existed because 'the defence [sic] of duress arose but was not pursued', as it ought to have been. It should have been left to the jury to say whether D drove 'under that form of compulsion, *i.e.* under duress'. But this was not an instance of the previously recognised defence of duress by threats – the youths were not saying, 'Drive on the pavement – or else...' ¹⁷⁶

They continue,

There is a closer analogy with private defence. But in substance the court was simply allowing the defence of necessity which it purported to dismiss as unnecessary to the decision. It should surely make no difference whether D drove on the pavement to escape from the youths, or a herd of charging bulls, a runaway lorry, or a flood, if he did so in order to escape death or serious bodily harm.¹⁷⁷

Duress by circumstances seems to be a defence that partakes of the classic defence of avoidance in emergency situations, where one attempts to avert dire circumstances. This way, it could qualify as a 'choice of evils' defence, which is a *justification*, distinguishing it from duress *per minas*, which *excuses* the actor who

¹⁷⁴ J.B. Brady, 'Aufsätze-Duress', 85 *Archiv für Rechts- und Sozialphilosophie* (1999), p. 384.

¹⁷⁵ (1986) 83 Cr App R 688, (1963) 1 WLR 841, CCA.

¹⁷⁶ Smith & Hogan (1996), pp. 248-249.

¹⁷⁷ *Ibidem*.

commits a crime under a severe threat. However, that is a fallacy. Duress by circumstances is, like duress by threat, an *excuse*. As said earlier, the distinction goes to fact. Both defences excuse the perpetrator who acted under severe threat. In this, they are regarded as part of the overall category of necessity.¹⁷⁸ To quote Lord Simon of Glaisdale in *Lynch*, ‘duress (...) is merely a particular application of the doctrine of ‘necessity’.¹⁷⁹

The duress/necessity terminology in Anglo-American law is confusing. As duress by circumstances is also referred to as ‘necessity’, it confounds the exact meaning of the latter defence. Necessity, can also be referred to as ‘state of necessity’, which has long been recognised in common law, and qualifies as a *justification* for the commission of a crime.¹⁸⁰ Another term for it is choice of evils. ‘Necessity’ as duress by circumstances, however, is a form of duress and thus an *excuse*. This leaves us to conclude that necessity has a hybrid character in Anglo-American law. Below, we will refer to it as duress when it serves as an excuse and choice of evils when it is a justification.

Bearing in mind what has been said above, Robinson’s observation that the Anglo-American debate on duress is ‘a bewildering array of theories concerning the definition of duress and the distinction between duress and necessity’ is understandable.¹⁸¹ In his study on criminal law defences, he suggests that – at least in American jurisdictions – the distinction between sources of threat (natural versus human) has been abandoned. The fact that the Model Penal Code codifies necessity under ‘General Principles of Justification’ and duress under ‘General principle of Liability’, a division which is reflected in most modern American codes, shows a growing awareness of the distinction between duress and choice of evils as one between excuse and justification.¹⁸² Section 3.02 of the MPC¹⁸³ encapsulates choice of evils and section 2.09 of the MPC¹⁸⁴ encapsulates duress. Both notions are – as we shall see –

¹⁷⁸ Williams (1961), §124 (e)1.

¹⁷⁹ *D.P.P. for Northern Ireland v. Lynch*, (1975) AC 653, p. 692.

¹⁸⁰ Hall (1960), pp. 415-436 and LaFave (1988), pp. 527-530.

¹⁸¹ Brady (1999) p. 384.

¹⁸² Robinson (1982), p. 235.

¹⁸³ Section 3.02 Justification Generally: Choice of Evils

- (1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
 - (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;
 - (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved;
 - (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
- (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

¹⁸⁴ Section 2.09 Duress

- (1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

very close to, in particular German, civil law concepts of duress and choice of evil/state of necessity.¹⁸⁵ We should, however, not overstate this fact as only a minority of States has incorporated the MPC and the majority still seems to adhere to the common law. It would go beyond the scope of this study to analyse the different theories and scholarly debates on duress as justification and/or excuse in Anglo-American law.¹⁸⁶ In the following, we shall concentrate on the law as it stands today, as it is interpreted by the courts.

In the following we will use the term ‘duress’ when we mean duress as an excuse (including duress by circumstances and duress *per minas*), and ‘choice of evils’ when we mean duress as a justification (necessity).

Duress and murder charges

At present, duress is not considered a defence against a murder charge in Anglo-American law. In a few American jurisdictions, it can, however, exonerate a person from a felony murder charge.¹⁸⁷ The developments in England on this point can be briefly discussed by mentioning a few landmark cases. Until 1975, the generally accepted view in England was that duress could not exempt a person from liability for murder. However, in that year, the House of Lords in *D.P.P. for Northern Ireland v. Lynch*¹⁸⁸ held that the defence was available to a charge of being an aider or abettor to murder. In *Lynch*, the defendant played a minor role in the killing of a police officer:

The defendant drove a motor car containing a group of the I.R.A. in Northern Ireland on an expedition in which they shot and killed a police officer. On his trial of aiding and abetting the murder there was evidence that he was not a member of the I.R.A. and that he acted unwillingly under the orders of the leader of the group, being convinced that, if he disobeyed, he would himself be shot.¹⁸⁹

Prior to *Lynch* English criminal law did not allow duress as a defence to murder, a rule that can be traced back to, and has been heavily influenced by, Hale’s Pleas of the Crown,¹⁹⁰ Blackstone’s Commentaries on the Laws of England,¹⁹¹ Stephen’s *His-*

(2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged (...)

¹⁸⁵ See for a German-American/MPC comparison: Nill-Theobald, (1998), pp. 190-226; Fletcher (1978), pp. 779-798 and pp. 833-834.

¹⁸⁶ For a more elaborate discussion on duress as excuse and/or justification see: Brady (1999), pp. 384-397; Greenawalt (1984), p. 1897 *et al.*; N.M. Padfield, ‘Duress, Necessity and the Law Commission’, *Crim. LR* (1992), p. 779 *et seq.*

¹⁸⁷ C.L. Carr, 10 *Law and Philosophy* (1991), p. 170.

¹⁸⁸ (1975) AC 653.

¹⁸⁹ *D.P.P. for Northern Ireland v. Lynch* (1975) AC 653, p. 653.

¹⁹⁰ 1 Hale PC 51.

¹⁹¹ J.F. Stephens, *A history of the criminal law of England*, London (1883).

tory of the Criminal Law,¹⁹² and the (in)famous case of *Dudley and Stephens* where two shipwrecked men killed the cabin boy and ate him in order that they might survive.¹⁹³ *Lynch* left unanswered the question whether duress could be a defence for the principal (in the first degree), i.e. the perpetrator. The answer came two years later in *Abbott*, when the Privy Council ruled that duress was not a defence if the person was the actual killer.¹⁹⁴ Finally, in *Howe*,¹⁹⁵ the House of Lords departed from *Lynch* and ruled that duress cannot be a defence to any charge of murder, thus returning to how the law had been prior to 1975. In *Howe*, the appellants jointly assaulted and killed the victims:

In the first appeal, the two appellants with an intended victim were driven by M. to an isolated area where the appellants and M assaulted the victim and then M killed him. On a second similar occasion the appellants jointly strangled a victim. On a third occasion the intended victim escaped. The appellants were tried on indictment on two counts of murder and one of conspiracy to murder. Their defence was that they feared for their own lives if they did not do as M. directed.¹⁹⁶

As to the test to be applied, it was held in *Graham*¹⁹⁷ and *Howe* that 'mistaken belief' is not a defence. This way, a subjective test was rejected. The actor is required 'to have the self-control reasonably to be expected of an ordinary citizen in his situation'.¹⁹⁸ Since *Abbott* the Law Commission examined the question of duress, setting out in its report the arguments for and against the defence and dealing in particular whether it should apply to murder. They balanced the argument of the sanctity of human life, which denies the defence to a murder charge against the argument put forward in *Lynch* that the law should not demand more than human frailty can sustain.¹⁹⁹ In *Howe*, the former was thought to weigh heavier than the latter. As Lord Hailsham judged in *Howe*,

In general, I must say that I do not at all accept in relation to the defence of murder it is either good morals, good policy or good law to suggest, as did the majority in *Lynch* and the minority in *Abbott* that the ordinary man of reasonable fortitude is not to be supposed

¹⁹² Stephens is outspoken in his refusal to allow duress as a defence. Compassion with human weakness has no place in his view of law: 'The criminal law is a system of compulsion on the widest scale'. His views influenced the Queen's Bench in deciding *R. v. Dudley and Stephens*.

¹⁹³ (1884) 14 QBD 273, [1881-5] All ER 61. The leading case in the United States on duress/necessity and murder is *U.S. v. William Holmes et al.*, Fed. Cas. 360 (No. 15,383) where Holmes a member of the crew of a ship that had struck an iceberg, had thrown overboard some of the passengers in order to save himself and some others. See Hall (1960), pp. 427-430.

¹⁹⁴ *Abbot v. R.* (1977) AC 755.

¹⁹⁵ *R. v. Howe* (1987) AC 417; 1 All ER 771.

¹⁹⁶ *Ibidem* (1987) AC 417, p. 417.

¹⁹⁷ (1982) 1 WLR 294. The Law Commission's Draft Criminal Code does not follow this ruling; a subjective test putting emphasis on the actor's knowledge and belief applies. See The Law Commission's Consultation Paper No. 122 (1992), *Legislating the Criminal Code: Offences against the Person and General Principles*, para. 18.9. See Padfield (1992), p. 778.

¹⁹⁸ *R v. Graham* [1982] 1 All ER 801, p. 806; *R v. Howe* [1987] All ER 771, p. 800.

¹⁹⁹ The Law Commission's Report No. 83 (1977), *Defences of General Application*.

to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own. Doubtless in actual practice many will succumb to temptation, as they did in *Dudley and Stephens*. But many will not, and I do not believe that as a 'concession to human frailty' the former should be exempt from liability to criminal sanctions if they do.²⁰⁰

At this point, we return to the difference between justification and excuse. The rationale of distinguishing between excuse and justification, and between duress and necessity, is to answer the question whether a plea of duress for murder should succeed. It is conspicuous that the *Dudley and Stephens* case is often quoted and referred to in the context of duress. The latter authority has played an important role in the debate on duress and necessity. Taking a closer look at the judgement reached by the Queen's Bench Division in *Dudley and Stephens*, voiced by Lord Coleridge CJ, we see that the plea put forward by the two defendants was regarded an appeal for justification by necessity:

Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what was called 'necessity'.²⁰¹

The resort to *Dudley and Stephens* in *Howe*, coupled with the rejection of the 'concession to human frailty' argument – expressed most strongly by Lord Hailsham of Marylebone L.C.²⁰² – puts duress in a negative light. The defence of duress almost becomes one of *justifying* criminal behaviour. This would explain why the public policy argument has been put forward as an argument against a general defence of duress.²⁰³

If the Lords in *Lynch* and *Howe* had clearly distinguished between justification and excuse, classifying duress (including the *Dudley and Stephens* necessity) as an *excuse*, thus not justifying the defendant's behaviour but merely excusing him, duress might not have such a contested status in English criminal law. Indeed, as Smith, one of the few English scholars who recognises the importance of the distinction between justifications and excuses, observes:

²⁰⁰ *R. v. Howe* (1987) AC 417, p. 432; 1 All ER 771, pp. 779-780.

²⁰¹ [1881-5] All ER 61, p. 67.

²⁰² 'In general, I must say that I do not at all accept in relation to the defence of duress that it is neither good morals, good policy or good law to suggest, as did the majority in *Lynch's* case and the minority in *Abbott v. R.*, that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he asked to take an innocent life rather than sacrifice his own. Doubtless in actual practice many will succumb to temptation, as they did in *Dudley and Stephens*. But many will not, and I do not believe that as a 'concession to human frailty' the former should be exempt from liability to criminal sanctions if they do', *R. v. Howe* (1987) AC 417, p. 432; 1 All ER 771, pp. 779-780.

²⁰³ Lord Simon Glaisdale for the minority in *Lynch* speaks of the 'social evils which might be attendant on the recognition of a general defence of duress', *D.P.P. for Northern Ireland v. Lynch*, (1975) AC 653, p. 687.

To allow a defence to crime is not express approval of the action of the accused but only to declare that it does not merit condemnation.²⁰⁴

He further submits that 'A court may be more ready to acknowledge the existence of a defence if it is not seen to be given approval to what has been done'.²⁰⁵

At this point it serves to recall the three-step process of attributing liability in civil law systems. As was mentioned earlier, civil law systems tend to construct a crime in three stages. Conduct is only punishable when, firstly, it satisfies the definitional elements of a crime, secondly, the act is not justified, and, finally, the perpetrator is blameworthy.²⁰⁶ In the second stage, a justification provides exemption; it negates an act's unlawful character. This is usually the case when the actor chooses the lesser evil in a choice between two evils. The latter defence is not the same as 'necessity' in *Dudley and Stephens*, which – to distinguish it from state of necessity – could better be referred to as duress by circumstances and as such belongs in the third stage of the 'attribution-scheme'. It is an excuse: the act is unlawful, but the actor is not blameworthy.

Considering both forms of duress *excuses* that do not *justify* an act might have found a more receptive ear in the English legal community, not in the least because in this way, it does not appear that the law 'allows' you to take another man's life to save your own skin. This approach would render the public policy objection to acceptance of duress as a defence against a murder charge void. Moreover, it sheds a rather different light on the requirement of heroism and the simultaneous rejection of the human frailty argument. Allowing duress as an excuse might make this reasoning somewhat unrealistic.

A point worth considering in discussing duress and murder charges is the factual background, which tends to be overlooked by lingering on points of principle. Taking a closer look at the facts of *Lynch* and *Howe*, one can already – without relying on jurisprudence and legal philosophies – predict opposite outcomes. Had a more refined distinction been endorsed, namely, between aiding and abetting murder and actually committing (perpetrating) the murder, there might have been more 'room' to allow for a defence of duress in murder cases. It was not necessary to regard *Howe* as departing from the previous ruling in *Lynch* and accordingly as re-establishing the 'ban' on duress in murder-cases.

We should finally point out that the Law Lords have recognised the fictitious distinction between duress by threats and duress of circumstances/necessity. Lord Simon of Glaisdale in *Lynch* touched the core of the discussion on duress by pointing to the misconceived distinction between duress and 'necessity':

²⁰⁴ J.C. Smith, 'A Note on Duress', *Crim. LR* (1974), p. 352. Cited by Lord Edmund-Davies, *D.P.P. for Northern Ireland v. Lynch* [1975], AC 643, p. 716.

²⁰⁵ J.C. Smith, *The Hamlyn Lectures. Justification and Excuse in the Criminal Law*, London (1989), p. 13.

²⁰⁶ See para. 2(b) of this Chapter.

So the question must be faced whether there is a sustainable distinction in principle between 'necessity' and 'duress' as defences to a charge of murder as a principal. In the circumstances where either 'necessity' or duress is relevant, there are both *actus reus* and *mens rea*. In both sets of circumstances there is power of choice between two alternatives; but one of those alternatives is so disagreeable that even serious infraction of the criminal law seems preferable. In both the consequence of the act is intended, within any permissible definition of intention. The only difference is that in duress the force constraining the choice is a human threat, whereas in 'necessity' it can be any circumstance constituting a threat to life (or, perhaps, limb). Duress, is thus considered, merely a particular application of the doctrine of 'necessity' (...) In my view, therefore, if your Lordships were to allow the instant appeal, it would be necessary to hold that *Reg. v. Dudley and Stephens* either was wrongly decided or was not a decision negating 'necessity' as a defence to murder; and, if the latter, it would be further incumbent, I think, to define 'necessity' as a criminal defence and lay down whether it is a defence to all crimes, and if not why not.²⁰⁷

Lord Hailsham and Lord Mackay in *Howe* agreed, although not explicitly with this contention. They thought that to hold that duress was a defence for a person charged with murder would be to overrule *Dudley and Stephens*. Therefore, we can conclude, like Smith, that 'even if necessity and duress are different defences they are, in some respects at least, governed by the same principles'.²⁰⁸

A last point of interest in discussing duress in Anglo-American law relates to duress in military law. The US military law contains a specific provision entitled 'coercion by duress':

It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.²⁰⁹

The British Manual of Military Law²¹⁰ comprises two provisions, one for duress and one for necessity:

§ 629 Duress: No criminal responsibility is incurred by a person for an act performed by him under an immediate and well-grounded fear for his own life, provided that the act does not involve the taking of an innocent life. Otherwise threats afford no defence to a person accused of a war crime but may be considered in mitigation of sentence.

²⁰⁷ *D.P.P. for Northern Ireland v. Lynch*, (1975) AC 653, p. 692.

²⁰⁸ He points out that this is the line taken by the Law Commission's codification team in their Report of the Codification of the Criminal Law: The Law Commission's Report No. 143 (1985), *Codification of the Criminal Law: A Report to the Law Commission*, pp. 119-121. Smith (1989), p. 84.

²⁰⁹ 1969 U.S. Manual for Courts-Martial, R.C.M. 307(2), 916 (h), see Nill-Theobald (1998), p. 205.

²¹⁰ British Manual of Military Law (1958).

§ 630 Necessity: Compulsion arising from hunger or from immediate danger to a person's life or property will not excuse the commission of a war crime, although such compulsion may be considered by a court in mitigation of punishment.

The distinction between duress and necessity in English military law is based on the source of threat.

It seems that the American and English military law provisions for duress do not differ from their equivalents in non-military criminal law.

Civil law

German criminal law is an example of the European continental approach. It distinguishes between choice of evils as a justification²¹¹ and duress as an excuse.²¹² The defence of choice of evils justifies an act when the right choice has been made in the event of being confronted with an unavoidable choice of evils. This defence has been employed in a variety of situations, predominantly in road traffic and medical cases where the defendant was faced with conflicting interests. The defence of duress in German criminal law provides for an excuse when one commits a crime under such a severe threat that refraining from it could not reasonably be expected. Exceptions to the defence are codified in the duress-provision. Firstly, the perpetrator is not excused if he himself caused the danger to occur (*culpa in causa*), and, secondly, if there is a special legal relationship, for instance, a professional obligation, by which he is obliged to withstand the danger to a certain degree (*Garantenstellung*). The German Military Code contains a *Garantenstellung* in § 6:

Fear for personal danger is no excuse when military duty requires one to endure the danger (translation, *EvS*).²¹³

²¹¹ StGB §34 Rechtfertigender Notstand (necessity as justification):

Whoever commits an act in order to avert an imminent and otherwise unavoidable danger to the life, limb, liberty, honor, property or other legal interest of himself or of another does not act unlawfully if, taking into consideration all the conflicting interests, in particular the legal ones, and the degree of danger involved, the interest protected by him significantly outweighs the interest which he harms. This rule applies only if the act is an appropriate means to avert the danger.

²¹² StGB §35 Entschuldigender Notstand (necessity as excuse):

(1) Whoever commits an unlawful act in order to avert an imminent and otherwise unavoidable danger to his own life, limb, or liberty, or to that of a relative or person close to him, acts without guilt. This rule does not apply if under the prevailing circumstances the perpetrator could be expected to have assumed the risk, especially because he was himself the cause of the danger or because he found himself in a special legal relationship. If however, the perpetrator did not have to assume the risk with regard to a special legal relationship, the punishment may be reduced in accordance with the provisions of § 49(1). (2) If, in committing the act, the perpetrator assumes the existence of circumstances which under subparagraph (1) would excuse his conduct, he shall be punished only if he could have avoided the error. The punishment shall be reduced in accordance with the provisions of § 49(1).

(Translation: *The American Series of Foreign Penal Codes. Germany*, Vol. 28 (1987))

²¹³ § 6 Wehrstrafgesetz, Furcht vor persönlicher Gefahr: 'Furcht vor persönlicher Gefahr entschuldigt eine Tat nicht, wenn die soldatische Pflicht verlangt, die Gefahr zu bestehen'. As this paragraph explicitly relates to duress as an excuse, a soldier could still raise the defence of choice of evils to justify his act. Nill-Theobald (1998), p. 191.

The fact that the provision refers to 'personal' danger means that it does not extend to goods or members of his family.²¹⁴ In the latter case the general duress clause of § 35 applies.

It is noteworthy that the defence of choice of evils in German Criminal law is not a defence to murder ('notstandsbedingte Tötung'). This follows from the thought, so eloquently expressed in the English debate and repeated in German Courts, that one human life cannot be weighed against another.²¹⁵ Here we return to *Dudley & Stephens* and the discussion on duress in Anglo-American law. In my view the latter debate seems appropriate in the context of duress as *justification*, when duress is considered a choice of evils, but not when duress is regarded an *excuse*. German criminal law allows duress as an excuse for murder charges. German influence on this point is probably responsible for the fact that the MPC does not refuse the defence of duress in murder cases.

Duress as a choice of evils has been termed 'état de nécessité'²¹⁶ in French and 'noodtoestand'²¹⁷ in Dutch law and is recognised as such in codes and case law. Both notions require a *proportionate* and *necessary* (subsidiary) reaction. This means that it is a requirement for this defence that the act, which constitutes a crime, was proportionate to the harm avoided and there was no other (or less harmful) way of avoiding the harm than by committing the crime. *Culpa in causa* and *Garantenstellung* corrections apply.²¹⁸ It is noteworthy that the French Penal Code contains a provision that excludes resort to the defence of superior orders and legal requirement in cases of 'les actes inhumains'.²¹⁹ According to a leading commentary, this

²¹⁴ 'Personal' means a danger to the person of the perpetrator, to his mental and/or physical being. Schölz (1975), § 6, para.5, p. 75.

²¹⁵ OGHSt 1, 321; OGHSt 2, 117; BGHSt 35, 350. See Schöncke *et al.* (2000), § 34, margin No. 23. See also Nill-Theobald (1998), p. 195.

²¹⁶ Article 122-7 Nouveau Code Pénal: N'est pas pénalement responsable la personne qui, face à un danger actuel ou imminent qui menace elle-même, autrui ou un bien, accomplit un acte nécessaire à la sauvegarde de la personne ou du bien, sauf s'il y a disproportion entre les moyens employés et la gravité de la menace. (A person is not criminally responsible if that person, facing an actual or imminent danger threatening himself, herself, or another, or property, performs an act necessary for the preservation of person or property, unless there is a disproportion between the means employed and the seriousness of the threat. Translation: *The American Series of Foreign Penal Codes, France*, Vol. 31 (1999)). This defence was not recognised as such in the Code Napoléon. It was adopted, however, in case law and finally codified in the 1994 Nouveau Code Pénal. See Desportes and Le Gunehec (2000), § 742-751, pp. 637-644.

²¹⁷ In Dutch law, 'noodtoestand' is not codified separately. It is a defence developed in case law (for the first time in Dutch Supreme Court 15 October 1923, *NJ* 1923, p. 1329) that has played an important role in, for instance, euthanasia cases. The defence of 'noodtoestand' can be characterised as a choice of evils, or more specifically, a conflict of duties: '(...) that the defendant has carefully weighed the conflicting duties and interests, and has made a choice – which objectively, and mindful of the special circumstances of the case – was justified' (Dutch Supreme Court 27 November 1984, *NJ* 1985, 106). This jurisprudential rule is regarded as incorporated in the duress provision of Article 40 (that obviously does not distinguish between justifications and excuses): A person who commits an offence as a result of a force he could not be expected to resist, is not criminally liable.

²¹⁸ See Angevin and Chavanne (1998), Article 122-7; De Hullu (2000), pp. 285-292.

²¹⁹ This means that a perpetrator or accomplice of a crime against humanity, or racial persecution, 'ne peut être exonéré de sa responsabilité du seul fait qu'il a accompli un acte prescrit ou autorisé par des dispositions législatives ou réglementaires ou un acte commandé par l'autorité légitime', but 'la

means that 'inhuman acts' can never be *justified* under Article 122-7.²²⁰ It follows from this that, as 'état de nécessité' is regarded as a justification authorised by the law, the 'exclusionary provision' extends to Article 122-7. The Dutch legislator leaves it up to the court to decide whether a case of murder or 'inhuman acts' can allow as a defence of 'noodtoestand'.²²¹

Duress as an excuse is known in French law as 'contrainte' and is codified separately from 'état de nécessité'.²²² The Dutch concept of 'overmacht' is encapsulated in a broad provision that extends to both.²²³ In Dutch and French law, duress emanates from an irresistible force that can be caused by man or be the result of the forces of nature. This force is required to be imminent and must result from external circumstances. The requirements of proportionality and subsidiarity are applied less strictly than in cases concerning choice of evils. This can be explained by the fact that a person who acts under duress suffers from an abnormal mental state. If duress functions as an excuse – *i.e.* the will is overborne by threats – it should not be an impediment to invoking it for any wrongful act, including murder. This is the approach in civil law systems such as those of Germany, France and the Netherlands (and the Model Penal Code recommends the same principle for the United States).

Neither Dutch nor French law applies different concepts of duress in a military context. The German provision relating to duress merely establishes a *Garantenstel-*

jurisdiction tient compte de cette circonstance lorsqu'elle détermine la peine et en fixe le montant'. Desportes and Le Guehec (2000), para. 724, pp. 625-626. ('A perpetrator or accessory to a felony cited in this title may not be exonerated from his or her responsibility by the fact that he or she performed an act prescribed or authorized by legislative or regulatory provisions or an act ordered by a legitimate authority. However, the court shall take into account that circumstances when or determines the penalty and fixes the amount'. (Translation: *The American Series of Foreign Penal Codes, France*, Vol. 31 (1999)).

²²⁰ Angevin and Chavanne (1998), Article 122-7.

²²¹ This is highly unlikely, apart from the fact that the act must be proportionate and necessary in averting the threat, the defence of 'noodtoestand' requires a person to save the greater interest by committing the criminal offence. An objective test is applied in this.

²²² Article 122-2 Nouveau Code Pénal: N'est pas pénalement responsable la personne qui a agi sous l'empire d'une force ou d'une contrainte à laquelle elle n'a pu résister. (A person is not criminally liable if he or she acted the influence of a force or a compulsion that he or she was not able to resist. Translation: *The American Series of Foreign Penal Codes, France*, Vol. 31 (1999)). Article 122-2 distinguishes between 'contrainte physique' (in common law also known as physical compulsion) and 'contrainte morale' (duress). In the former case, the force is exercised against a person's *body* and normally arises from a human or natural threat. In the latter case, pressure is exercised on a person's *will*. The difference between the two can be illustrated in the following example: if A forces B to shoot C by holding a gun against B's head, it would qualify as 'contrainte morale'. If A twists B's arm forcing him to shoot C it would qualify as 'contrainte physique'. This is a factual distinction and has no further legal consequence, except for the fact that French courts have traditionally been more restrictive in allowing 'contrainte morale'. Both notions qualify as duress. See Desportes and Le Guehec (2000), paras. 661-672, pp. 579-584.

²²³ Article 41(1) Dutch Penal Code: A person who commits an offense where this is necessary in the defense of his person or the person of another, his or another person's integrity or property, against immediate, unlawful attack is not criminally liable. (Translation: *The American Series of Foreign Penal Codes, The Netherlands*, Vol. 30 (1997))

lung. There does not seem to be a different approach to duress in military law in either of the above-discussed civil law systems.

Considering the above, it may be agreed that no consistent rule on duress can be deduced from the legal systems discussed. Judge McDonald and Judge Vohrah came to the same conclusion in their joint separate opinion in the Appeals Chamber Judgement in *Erdemović*. After an extensive comparative research into codes and case law, they concluded that,

It is clear from the differing positions of the principal legal systems of the world that there is no consistent concrete rule which answers the question whether or not duress is a defence to the killing of innocent persons. It is not possible to reconcile the opposing positions and, indeed, we do not believe that the issue should be reduced to a contest between common law and civil law.²²⁴

Before taking a closer look at the duress provision in Article 31(1)(d), which, as can be seen, is a mix of the above notions of duress, it is opportune to analyse the resort to duress in case law relating to violations of international humanitarian law.

(c) Jurisprudence

Nuremberg jurisprudence

The Nuremberg judgements failed to clearly distinguish between duress as an excuse and choice of evils as a justification. The confused use of the terms compulsion, duress, and necessity in the various judgements complicates matters further and a close examination of the various judgements is required to establish what kind of defence was put forward. In the following, I will mention the Nuremberg terminology but, where necessary, clarify which (national) legal concept was actually referred to.

In the IMT's judgement, what became known as the 'moral choice test' was introduced. In declining the defence of superior orders, the IMT pointed to Article 8 of its Statute and stated the following:

The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not existence of the order, but whether moral choice was in fact possible.²²⁵

This profound statement was quoted in many subsequent cases and in literature, and has marked every serious discussion on the defence of duress in international crimi-

²²⁴ *Erdemović* Appeal Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 72.

²²⁵ Nuremberg Judgement in Friedman (1972), Vol. II, p. 940.

nal law.²²⁶ The 'moral choice' test in the last sentence of the passage is not part of the text of Article 8 and has been referred to as 'cryptic'²²⁷ and 'not easy to fathom'.²²⁸ Dinstein is of the opinion that the moral choice test was meant to complement the exclusion of the defence of superior orders in Article 8 in that 'a defendant ought to be acquitted anyway in accordance with the general principles of the law owing to the other circumstances of the case and without any consideration being given to the fact of obedience to orders'.²²⁹ Greenspan seems to endorse this view and contends that the moral choice test implies that a person who had a moral choice in carrying out an illegal order is criminally responsible. The absence of such a choice leads to freedom from responsibility.²³⁰ In considering Greenspan's contention, the judges of the Israeli Supreme Court in *Eichmann* submitted that the moral choice test could be interpreted as 'constraint' or 'necessity'.²³¹ In any event, an overall conclusion could be that *the restriction of freedom of will or choice* was considered a defence in the Nuremberg Judgement and subsequent trials. This – non-legally formulated – defence has operated as both a justification and an excuse, and has been termed as necessity and coercion.²³²

Defence counsel at the Nuremberg trials often based their 'lack of freedom of will or choice defence' on the contention that the defendants had acted under threat of political pressure from the Nazi leadership and security organs. National concepts of duress/necessity required a threat by *other men* or *circumstances* (such as forces of nature). Therefore, the threat stemming from a *political system* was unprecedented and typical of the duress-concept at Nuremberg.²³³ As Von Knieriem points out,

The danger by which the lives and bodily integrity of the Nuremberg accused and their family members had been threatened originated with the National Socialist State rather than with forces of nature. It consisted in the threat of cruel punishment to be expected with certainty for the entire duration of the National Socialist regime. As the regime was clearly in a condition always to carry out its threats, all the conditions of state of necessity were in existence.²³⁴

²²⁶ See Dinstein, who gives an overview of the relevant cases and literature, Dinstein (1965), p. 148, footnote 482.

²²⁷ M. Greenspan, *The Modern Law of Land Warfare*, Berkeley (1959), p. 493.

²²⁸ Dinstein (1965), p. 148.

²²⁹ Ibidem, pp. 150, 152.

²³⁰ Greenspan (1959), p. 493.

²³¹ *Eichmann* case in Friedman (1972) Vol. II, p. 1684.

²³² Taken in isolation, a 'moral choice defence' could take both forms; duress as a justification (necessity) or as an excuse. After all, both defences assume a limitation of a defendant's freedom to act. Considering the facts however, one is inclined to interpret it here as the excuse form of duress. In common law, the term 'coercion' was reserved for a special defence that was available to a wife who committed certain crimes in the presence of her husband. 'It was then presumed that she acted under such coercion as to entitle her to be excused, unless the prosecution were able to prove that she took the initiative in committing the offence. The exact extent of the defence at common law is uncertain'. See Smith & Hogan (1996), p. 249.

²³³ This would probably nowadays be referred to as duress of circumstances/ necessity (Anglo-American law), or choice of evils (civil law).

²³⁴ A. von Knieriem, *The Nuremberg Trials*, Chicago (1959), p. 260.

It fell to the IMT and tribunals in subsequent proceedings to, first, establish general criteria in order to determine when duress caused by the Nazi regime reached such a degree that voluntary decisions could not be taken, and second, to inquire on a case by case basis whether the defendants actually had been exposed to the coercion.

The Nuremberg jurisprudence on duress is far from uniform. Still, the following general remarks can be made. First of all, the case law shows that only a threat leaving no moral choice constitutes duress. However, mere moral pressure cannot provide exemption; there must be a life-threatening danger,²³⁵ or – as was stated in the *Einsatzgruppen* case – an ‘imminent, real and inevitable threat’.²³⁶ Secondly, duress at Nuremberg was a hybrid creature with features of choice of evils as well as duress. In *U.S. v. Flick et al.*, the American Tribunal applied choice of evils and referred to it as ‘duress’. The judges relied on Anglo-American (case) law on necessity and moulded the plea of coercion relied upon by the defence, and earlier referred to by the judges as ‘compulsion’ (*i.e.* duress), into a defence of choice of evils:

Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil.²³⁷

A similar test was applied in *U.S. v. Krupp et al.*, where the tribunal adopted a proportionality test, again rendering the plea of duress to one of choice of evils rather than duress.²³⁸ The United Nations War Crimes Commission, in its analysis of the subsequent trials, also failed to recognise the distinction between the concepts of coercion and choice of evils when it stated,

The general view seems therefore to be that duress may prove a defence if (a) the act was done to avoid an immediate danger both serious and irreparable; (b) there was no other adequate means of escape; (c) the remedy was not disproportionate to the evil (...).²³⁹

A third conspicuous point concerns *culpa in causa*. In the *I.G. Farben* case, the American tribunal, judging on the admissibility of a duress plea in the context of superior orders, adopted a *culpa in causa* reasoning when it considered the situations in which one can rely on the defence of duress (here termed by the judges as ‘necessity’):

²³⁵ *High Command* case, TWC, Vol. XI, p. 509; *U.S. v. Flick et al.*, TWC, Vol. VI, p. 1200; *Trial of Max Wielen and Seventeen Others*, TWC, Vol. XI, p. 47.

²³⁶ *U.S. v. Ohlendorf et al.* (*Einsatzgruppen* case), UNWCC, Vol. VII, p. 91.

²³⁷ F. Wharton, *Wharton's Criminal Law*, Vol I, chapter III, subdivision VII, para. 126, quoted in *U.S. v. Flick et al.*, TWC, Vol. VI, p. 1200.

²³⁸ *U.S. v. Krupp et al.* (*Krupp* case), TWC, Vol. IX, pp. 1443-1444;. An analogous standard was relied upon in the *Trial of Gutav Jepsen et al.*, referred to in the *Trial of Valentin Feuerstein et al.*, UNWCC, Vol XV, pp. 172-173.

²³⁹ UNWCC, Vol. XV, p. 174.

It follows that the defence of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such an order or decree (...).²⁴⁰

A fourth point relates to the exclusion of a resort to duress. When evidence showed that the defendant had actively participated in the illegal acts, he was barred from resorting to a ground excluding criminal responsibility. In the *Krupp* case, a plea of coercion (referred to as necessity) was refuted:

In such cases, if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct.²⁴¹

A fifth point relates to the test applied in allowing/dismissing the coercion plea. Referring to the writings of the Anglo-American scholar Wharton on self-defence, the Tribunal in *Krupp* determined that a subjective standard should apply in judging whether there was a danger that caused the defendants to act under compulsion:

Wharton himself says 'that the danger of the attack is to be tested,...from the standpoint of the part attacked, not from that of the jury or of an ideal person.' We have no doubt that the same thing is true of the law of necessity. The effect of the alleged compulsion is to be determined not by objective but by subjective standards. Moreover, as in the case of self-defense, the mere fact that such danger was present is not sufficient. There must be an actual bona fide belief in danger by the particular individual.²⁴²

Finally, it should be noted that duress could never exempt in cases of mass killing. In the *Einsatzgruppen* case concerning an organisation (the *Einsatzgruppen*) that was set up with the sole function of liquidating ruthlessly all opposition to National Socialism for present, past, and future purposes, and did so accordingly, the plea of necessity was put forward by the defence. It was, however, dismissed by the U.S. military tribunal with the argument that mass killings of civilians are never permitted.²⁴³ In other words, post-Second World War case law shows that there are absolute limits to the application of duress. Von Knieriem, in a critical evaluation of this judgement, compares a single case of execution by a soldier, who overcome by fear of death, pulls down the lever only once, with that of a member of a death 'formation', such as the *Einsatzgruppen*, who under the threat of court-martial and the firing squad, kills an endless chain of victims, day after day:

²⁴⁰ *U.S. v. Krauch et al. (I.G. Farben case)*, TWC, Vol. VIII, p. 1179.

²⁴¹ *Krupp case*, TWC, Vol. IX, p. 1436. In *Krupp* the Tribunal established that an agreement between the defendants and the political leadership with regard to slave labour excluded the reliance on the defence of necessity. See further *U.S. v. Flick et al.*, TWC, Vol. VI, p. 1202 in which the defendant Weiss, who was found to have actively participated in the exploitation of Russian prisoners of war, was barred from relying on a defence of necessity.

²⁴² *Krupp case*, TWC, Vol. IX, p. 1438.

²⁴³ *Einsatzgruppen case*, TWC, Vol. IV, p. 465.

Every day he sees groups of ten, twenty, or even more people; he knows that new groups will arrive perhaps for years to come; also, he has time for contemplation; he can sleep and relax and he is not on 'special duty' uninterruptedly.²⁴⁴

He then asks himself the very important and most difficult question,

Might it not be possible to deny the plea of state of necessity to such a man without relapsing into an attitude which now fortunately belongs to the past and without sacrificing that hard-won principle that 'no man must be punished unless he has acted with a guilty mind'? Should the denial of the plea not be possible where a man although in fear for his life but after quiet deliberation and in full knowledge of the significance of his acts has allowed himself to become the participant in atrocities of the most horrendous kind?²⁴⁵

Post-Nuremberg jurisprudence

Continuing the survey of jurisprudence on duress in war crimes cases, the *Eichmann* case deserves a mention. As was said earlier, the Israeli Supreme Court suggested that the Nuremberg concept of 'moral choice' constituted a defence of coercion (duress) or necessity. The judges considered that, although those defences were not available in respect of war crimes and crimes against humanity, Eichmann would have had to demonstrate that (1) the danger to his life was imminent; and (2) that he carried out the criminal task out of a desire to save his own life and because he saw no other possibility of doing so. The Supreme Court held that, the latter requirement in particular, was negated as Eichmann had executed his tasks with great ambition:

But we stress in particular the non-fulfilment of the second condition because each of the said two defences goes to the question of *motive* that urged the accused to carry out the criminal act to save his own life – and also because the District Court relied in the main on its finding that the appellant performed the order of extermination of all times *con amore*.²⁴⁶

In *Touvier*, the French 'Cour d'Appel de Versailles' and the 'Cour de Cassation' took a similar approach and denied the defence of duress because the accused was deemed to have committed the crime enthusiastically.²⁴⁷ The trial centred on the question of whether the crimes were committed on his *initiative* or upon *order* from Germany.²⁴⁸ Touvier, a former official of the French 'Milice' and the first French citizen to be convicted of committing crimes against humanity, claimed that he was exposed to the pressure of the German occupying power and invoked the defence of duress. The Court of Appeal, however, declined his plea as he was found to have

²⁴⁴ Von Knieriem, (1959), p. 264.

²⁴⁵ Ibidem.

²⁴⁶ Friedman (1972), Vol. II, p. 1684.

²⁴⁷ *Bull. Crim.* (1993), pp. 770-774; 100 *ILR* (1995).

²⁴⁸ The 'Cour de Cassation' adopted its own interpretation of crimes against humanity. In its decision of 27 November 1992, it ruled that crimes can only be qualified as crimes against humanity when the accused acted upon order of one of the European Axis Powers. J.Merchant, 'History, Memory and Justice: the Touvier Trial in France', 23 *J of Crim. Jus* 5 (1995), pp. 425-438.

voluntarily joined the militia, which was held responsible for the killing of 7 Jews. Moreover, the judges found that he had played an active role in the commission of the crimes. His argument that because of his intervention he had reduced the number of victims from 30 to 7, was rebutted by holding that a balancing of one life against another is not possible as all lives are of equal value.

The Dutch Special Court of Cassation in *Fullriede* was asked to consider a similar balancing of interests.²⁴⁹ Fullriede was a member of the German occupation forces in the Netherlands and as such the governing military authority of the village of Putten. As a reprisal measure for an assault on German officers, he was ordered to inflict collective punishment on the population of Putten and burn down the whole village and deport the men to Germany. Ninety houses were burnt down and a few hundred men were arrested and deported to Germany. Fullriede claimed that he had executed the order in a mild way and that if it had been left to another it would have been executed in full severity. His resort to the defence of choice of evils ('noodtoestand') was declined as it had not been proved that he could not have prevented the execution of the order in its entirety by other means. Moreover, the Court dismissed the accused's argument that his mitigated execution of the order justified his act. The Court refused to balance 90 lives against 2000 lives. The Court held a defence of choice of evils could *never* justify an act when it involved human lives. Fullriede's plea was considered in mitigation of punishment. The case reminds us of the American case of *Holmes*²⁵⁰ and the English *Dudley and Stephens* case. Here, again, we see that the plea of choice of evils as a *justification*, is not appropriate in cases where human life has been sacrificed to serve a 'greater cause'. However, as a commentary to this case suggests, duress can serve as an *excuse* rather than as a justification, in similar cases.²⁵¹

The Canadian Supreme Court ruled in the case of *Finta* that duress could operate as a complete defence. Finta, a Hungarian commander who fled to Canada after the Second World War and had taken Canadian citizenship, was prosecuted for war crimes and crimes against humanity under the Canadian Criminal Code. He was charged with having actively participated in the 'Endlösung' of 8617 Jews. In ruling on the plea of duress the Supreme Court interpreted the Nuremberg 'moral choice test' as an extension of the superior orders defence by duress. It held that acting in situations of compulsion, *i.e.* when there is an 'imminent, real and inevitable threat', when being forced to comply with a superior order, could lead to the exclusion of criminal responsibility. The Court adds that this can even be the case where it relates to a manifestly illegal order. The latter ruling seems superfluous as the defence of duress is centred on the *threat* that emanates from an order, not the *nature* of the underlying order. When duress is raised in the context of superior orders, the (manifest) illegality of the order is irrelevant.²⁵² It is not the nature of the order that influences the mental state of a subordinate, but the dire consequences for him of any

²⁴⁹ Dutch Special Court of Cassation, 10 January 1949, *NJ* (1949) 541.

²⁵⁰ See para. 7(b) of this Chapter.

²⁵¹ B.V.A. Röling, Commentary to the Judgement of the Dutch Special Court of Cassation, 10 January 1949, *NJ* (1949), 541, pp. 989-990.

²⁵² This is different when it is raised as a defence of superior orders *per se*.

failure to carry it out.²⁵³ The Supreme Court also ruled that when a person acts under duress, he lacks the 'culpable intent'. This way, the plea of duress is a failure of proof defence rather than a justification or excuse. Difficult questions of proportionality and subsidiarity do not arise.

Another national war crimes trial, in which a plea of duress was raised is the case of *Priebke*.²⁵⁴ The latter was prosecuted and convicted on 24 March 1944 for his participation in the killing of 335 civilians at the Ardeatine Caves ('Fosse Ardeatine'). He pleaded that he had acted under duress ('*stato di necessità*') as a refusal to carry out the order to kill the civilians would have resulted in being shot himself. The Rome Military Tribunal²⁵⁵ and the Rome Military Court of Appeal,²⁵⁶ as well as the Court of Cassation,²⁵⁷ dismissed the duress plea. First, because there was no sufficient evidence that he had acted under an imminent threat; it was deemed unlikely that a refusal would have caused serious danger to life. The Court held that appropriate proceedings would have been instituted against him before a special SS tribunal. A second reason for refusing his plea of duress was a 'lack of proportionality'. In a comment on the *Priebke* case, Cassese submits that it is not clear what the Court meant by this 'lack of proportionality':

Does it concern the possible death (by killing) of the defendants on the one side, and their participation in the execution, on the other? Or does it instead relate to the fear by the defendants to be court-martialled by an SS-court on the one side, and their participation in the execution, on the other?²⁵⁸

This proportionality requirement should not be read as ruling out duress as a defence in murder cases. Neither the duress provision in the Italian Penal Code,²⁵⁹ which also

²⁵³ See A.S. Paphiti, 'Duress as a Defence to War Crimes Charges', 38 *Revue de Droit Militaire et de Droit de la Guerre* (1999), pp. 249-288.

²⁵⁴ See for commentary: F. Martines 'The Defence of Reprials, Superior Orders and Duress in the Priebke Case before the Italian Military tribunal', in 1 *YIHL* 1998, pp. 354-361; G. Sacerdoti, 'A Proposito del Caso Priebke: La Responsabilità per l'Esecuzione di Ordini Illegittimi Costituenti Crimini di Guerra', 80 *Rivista di Diritto Internazionale* (1997), pp. 130-151; P. Gaeta, 'War Crimes Trials Before Italian Criminal Courts: New Trends', in H. Fischer *et al.* (eds), *International and National Prosecution of Crimes under International Law*, Berlin (2001), pp. 751-768.

²⁵⁵ By its Decision of 1 August 1996, *Cassazione penale* (1997).

²⁵⁶ By its Decision of 7 March 1998 (in: *L'indice penale* (1999) 959, at 970)

²⁵⁷ By its Decision of 16 November 1998.

²⁵⁸ *Erdemović* Appeal Judgement, Separate and Dissenting Opinion of Judge Cassese, Judgement, para. 34, n. 69.

²⁵⁹ The Italian provision contains an explicit proportionality requirement:

Article 54 of the Codice Penale: State of necessity

- (1) No one shall be punished for acts committed under the constraint of necessity to preserve himself or others from the actual danger of a serious personal harm, which is not caused voluntarily nor otherwise inevitable, and the acts committed under which are *proportionate* to the threatened harm.
- (2) This article does not apply to a person who has a legal duty to expose himself to the danger
- (3) The provision of the first paragraph of this article also applies if the state of necessity arises from the threat of another person; however, in this case, the responsibility for the acts committed under the threat belongs to him who coerced the commission of the acts. (*italics added, EvS*).

encapsulates duress as an excuse, nor the ruling of the Military Tribunal in *Priebke*²⁶⁰ would warrant such a conclusion. It seems that the resort to the defence of duress, as applied in *Priebke* failed on the facts and because, in principle, duress can be a defence to a charge of killing.

ICTY

The leading case on duress at the *ad hoc* Tribunals is *Erdemović*.²⁶¹ The judgement was delivered by the ICTY on 29 November 1996. Erdemović had participated in the killing of some 1200 innocent men in connection with the events at Srebrenica. He admitted to the charges and stated that he had killed about 70 persons. His guilty plea was, however, equivocal as he invoked the defence of duress: he claimed he had been forced to participate in the killing.²⁶² In dealing with the question of duress as a defence in combination with a guilty plea, the Trial Chamber held that, although neither the report of the Secretary General of the United Nations nor the Tribunal's Statute provide for such a defence, duress can be a complete defence for a violation of international humanitarian law. In drawing that conclusion, it relied heavily on post-Nuremberg case law.²⁶³ The Trial Chamber, however, dismissed the plea of duress owing to lack of evidence and sentenced Erdemović to a ten-year term of imprisonment.

The Appeals Chamber rejected by a 3-2 majority the Trial Chamber's findings on duress as a defence.²⁶⁴ Instead of a full reasoning, the Appeals Chamber Judgement refers to several separate opinions annexed to the decision, in particular the joint separate opinion of Judge McDonald and Judge Vohrah.²⁶⁵ Judge Li agreed with

²⁶⁰ 'In this event (of imminent threat of death) he could have backed down from refusing to obey the order and participated in the executions only in order to save his own life, claiming the defence of state of necessity, which is provided for in all legal orders, including German law; indeed, in this case, no person could have expected Priebke to act as a hero and to sacrifice his own life in order to avoid participating in the inhumane execution'. Cited in: *Erdemović* Appeal Judgement, Separate and Dissenting Opinion of Judge Cassese, para. 34, footnote 69.

²⁶¹ See for a more elaborate discussion of the case; D. Turms, 'The International Criminal Tribunal for the Former Yugoslavia: The Erdemović Case', 47 *ICLQ* (1998), pp. 461-474; O. Swaak-Goldman, 'Prosecutor v. Erdemović, Judgement. Case No. IT-96-22-A, 92 *AJIL* (1998), pp. 282-287; P. Rowe, 'Duress as a Defence to War Crimes after Erdemović: a Laboratory for a Permanent Court?' 1 *YIHL* 1998, pp. 210-228; H.G. van der Wilt, 'Commentary on Sentencing Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-T, T. Ch.I, 29 November 1996' in Klip/Sluiter ALC-I- 534-536; H.G. van der Wilt, 'Commentary on Sentencing Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, T. Ch.II ter, 5 March 1998' in Klip/Sluiter ALC-I- 654-656; H.G. van der Wilt, 'Commentary on Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, A. Ch, 7 October 1997' in Klip/Sluiter ALC-I- 676-678.

²⁶² ICTY, Sentencing Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-T, T.Ch. I, 29 November 1996 (*Erdemović* Sentencing Judgement I), para. 10, where Erdemović stated; 'Your honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: "If you're sorry for them, stand up, line up with them and we will kill you too." I am not sorry for myself but for my family, my wife and son who then was nine months, and I could not refuse because they then would have killed me.'

²⁶³ *Erdemović* Sentencing Judgement I, paras. 16-20.

²⁶⁴ *Erdemović* Appeal Judgement, para. 19.

²⁶⁵ *Erdemović* Appeal Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah.

McDonald and Vohrah in their conclusion that duress is not a complete defence but merely a mitigating circumstance, but he differed in his reasoning.²⁶⁶ Dissenting opinions were expressed separately by Judge Cassese and Judge Stephen.²⁶⁷ The majority of the Appeals Chamber held that customary international law does not provide for a rule on duress for war crimes and/or crimes against humanity. Post-Nuremberg war crimes trials law produced different and contradictory conclusions and the 'general principles of law recognised by civilised nations', the other important source of customary international law, did not provide a consistent rule either. Extensive research into duress in national law was carried out by the judges, which led to differing views. The majority sought to find a solution of policy rather than principle. In their joint and separate opinion, Judge McDonald and Judge Vohrah expressed the view that, in order to 'facilitate the development and effectiveness of international humanitarian law and to promote its aims and application by recognising the normative effect which criminal law should have upon those subject to them', duress should not be admitted as a complete defence. Citing the *Abbott and Lynch* cases and Stephen's 'History of the Criminal Law in England', they agreed that,

The resounding point from these eloquent passages is that the law should not be the product or slave of logic or intellectual hair-splitting, but must serve broader normative purposes in the light of its social, political and economic role.²⁶⁸

Cassese, dismisses McDonald and Vohrah's pragmatic approach and considers it 'extraneous to the task' of the Tribunal.²⁶⁹ Moreover, he is of the view that under international criminal law duress may *generally* be a defence, provided certain requirements are met.²⁷⁰ With regard to war crimes or crimes against humanity, he finds that as no *specific* rule of customary law allows for a defence of duress, the general rule on duress applies. Cassese also touches upon the question of *culpa in causa*. The defence of duress should not be allowed when a person has voluntarily put himself in a situation of duress. Relying on Nuremberg (*Einsatzgruppen*) and post-Nuremberg (*Touvier*) case law, he holds the view that,

Duress or necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law.²⁷¹

The Trial Chamber that eventually sentenced Erdemović seemed to have taken into account the accused's claim that he had to join the Bosnian-Serb Army (BSA) unit

²⁶⁶ Ibidem, Separate and Dissenting Opinion of Judge Li.

²⁶⁷ Ibidem, Separate and Dissenting Opinion of Judge Cassese, and Separate and Dissenting Opinion of Judge Stephen.

²⁶⁸ Ibidem, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 75.

²⁶⁹ Ibidem, Separate and Dissenting Opinion of Judge Cassese, para. 11.

²⁷⁰ Ibidem, Separate and Dissenting Opinion of Judge Cassese, para. 12.

²⁷¹ Ibidem, Separate and Dissenting Opinion of Judge Cassese, para. 17.

in order to feed his family. Before joining the BSA, he had, however, voluntarily joined the 10th Sabotage Unit. As this choice seemed inspired by pragmatism and aversion to brutality rather than militarism and nationalistic motives, the judges seemed not to make much of it.²⁷² Cassese finally urged the Trial Chamber to take into account that Erdemović was of a low rank, a factor that plays a role in determining whether or not the accused acted under duress. The logic appears to be, the lower the rank the greater the propensity to yield to compulsion.²⁷³

Stephen followed a different path to come to the same conclusion as Cassese. He points to the debate surrounding duress in relation to murder charges and manslaughter in Anglo-American law. He adduces abundant material to demonstrate that the exclusion of duress as a defence against murder charges is contentious within the common law system. He further contends that relevant Anglo-American case law had only dealt with situations where there was a direct choice between the life of the person under duress and the life of the victim. In the *Erdemović* case, no such choice existed. The Appeals Chamber in the latter case had to deal with a situation in which the victim would have been killed anyway. Erdemović could never have averted the imminent death of the victim by sacrificing himself. Stephen and Cassese agreed that in the latter situation, as in the infamous *Masetti* case,²⁷⁴ duress should be allowed as a complete defence. This way, the balancing exercise and proportionality problem – it is impossible to balance one life against another – was circumvented, or simply not applied.²⁷⁵ The other judges dismissed the ‘*Masetti* approach’.²⁷⁶ Shahabuddeen points out, that despite their differences in legal reasoning and background (one has a background in the civil law and another in the common law), Stephen and Cassese ‘were united in the view that duress is a complete defence in international humanitarian law to a charge of killing an innocent human being’ and that ‘there may be something in this position taken by them’.²⁷⁷

The Appeals Chamber’s decision in *Erdemović* did not allow the defence of duress to be a complete defence; it was to be taken into account in mitigation of punishment. As the plea of duress was thought to have invalidated the guilty plea, which in return was ‘not informed’, the Appeals Chamber referred the whole case back to another Trial Chamber. Before this Trial Chamber, Erdemović pleaded guilty to a war crime and he was finally sentenced to a 5-year term of imprisonment.

²⁷² ‘According to the accused he chose this unit because “it did not involve the loss of human lives. It involved artillery, old iron”. In addition, he chose it as there were other non-Serb soldiers in it and it did not have a reputation for brutality at the material time’. ICTY, Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-*Tbis*, T. Ch, 5 March 1998 (*Erdemović* Sentencing Judgement II), para. 16.

²⁷³ *Erdemović* Appeal Judgement, Separate and Dissenting Opinion of Judge Cassese, para. 51.

²⁷⁴ Special Court of Assize of Forlì, 11 October 1946 (unpublished). See *Erdemović* Appeal Judgement, Separate and Dissenting Opinion Judge Cassese, paras. 35–36.

²⁷⁵ *Ibidem*, para. 50.

²⁷⁶ See Van der Wilt in Klip/Sluiter ALC-I- 654–656.

²⁷⁷ M. Shahabuddeen, ‘Duress in International Humanitarian Law’, in J.M. Ruda and C.A. Armas Barea (eds.), *Liber Amicorum ‘In Memoriam of Judge José Maria Ruda*, The Hague (2000), pp. 563–574.

Evaluation

The above survey provides us with a wide variety of situations in which a duress plea can arise. The resort to duress in the specific context of national and international war crimes trials does not involve a fundamentally different application of the concept of duress. It retains its common criminal law features, which accounts for misapprehension and a clash of legal cultures (Anglo-American law and civil law) when it is applied in a non-national context (*Erdemović*). In essence, the problem with duress and war crimes is the same as the problem with duress and murder in common criminal law: the concept of equivalence, of proportionality, is incompatible with the weighing of human lives.

It can be seen from the overview of case law in the previous and in this paragraph, that two outcomes are possible when a duress plea is raised: duress is a complete defence – including murder cases – or duress is a defence in all other cases. In the latter case, duress is considered in mitigation. When taking a closer look at the above overview, it is possible to group the various duress provisions and their judicial interpretation in three categories:

1. No clear distinction between choice of evils and duress. Duress is not a complete defence against murder charges, but can be considered in mitigation.
2. A distinction is made between choice of evils and duress. Duress is not a complete defence against murder charges, but can be considered in mitigation.
3. A distinction is made between choice of evils and duress. Duress is a complete defence against murder charges.

Category 1 concerns the Anglo-American approach; Categories 2 and 3 the civil law approach. How is the above scheme in keeping with the general idea that civil law and common law systems differ on (dis)allowing duress as a complete defence against murder charges? How should Category 2 be valued? The key to understanding the difference between 2 and 3 and the duress controversy in general lies in applying a clear distinction between choice of evils as a justification and duress as an excuse (duress *per minas*, by threat, compulsion, coercion). When duress is considered a *justification*, thus as choice of evils, civil law systems will through the proportionality requirement also dismiss it as a complete defence (Category 2).²⁷⁸ We are reminded here of the analogy between the Dutch *Fullriede* case and the English *Dudley & Stephens* case. Judge McDonald and Judge Vohrah were, therefore, right when they stated, '[C]ourts in certain civil law jurisdictions may well consistently reject duress as a defence to the killing of innocent persons on the ground that the proportionality requirement in the provisions governing duress is not met'.²⁷⁹ This conclusion, however, only applies to choice of evils, a *justification*. Duress as an *excuse* can still be a complete defence in civil law systems (Category 3). Thus, duress

²⁷⁸ German criminal law precludes a defence of duress (as a justification, choice of evils) in murder cases. See para. 7(b) of this Chapter.

²⁷⁹ See *Erdemović* Appeal Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 68.

has two faces: a justifying and an excusing one. When they are distinguished clearly, the incompatibility between common law and civil law is less apparent than it seems. The fact that the Anglo-American legal system does not uphold this distinction accounts for the diverging views in *Erdemovic* and the arguably harsh position on duress as a defence against murder charges (Category 1).

The common law-civil law divergence regarding duress can be reconciled by recognising and adopting the above distinction between different types of duress. It is probable that the national, Anglo-American debate on duress could benefit from adopting this distinction. As was stated earlier, if duress was recognised and accepted as an actor-oriented excuse, *i.e.* going to the mental state of a defendant (his will was overborne by the threat, he was in an abnormal mental state and did not have time for reflection) and excusing him rather than justifying his act, duress might not have such a contested and uncertain status in murder cases.

(d) Observations

The Military Court in the *Einsatzgruppen* case held that,

No court will punish a man, who, with a loaded pistol at his head is compelled to pull a lethal lever.²⁸⁰

In this one sentence, the American Military Court represents the view of the author on duress (as an excuse) as a defence. Therefore, Article 31(1)(d) should be considered a step closer to a mature and fair body of international criminal law.

Principles of fairness warrant the availability of a defence of duress. It cannot be allowed that criminal-policy arguments thwart reliance on duress in situations in which any reasonable person would have yielded to the pressures. This is why the majority decision in *Erdemović* should be met with criticism. The pragmatic and utilitarian reasoning of the Judges McDonald and Vohra sacrificed principles of fairness. The competing values of deterrence and compassion resulted in a hopeless trade-off. In an essay on decision rules (addressed to officials) and conduct rules (addressed to the general public), a distinction already employed by Bentham²⁸¹ and corresponding with Hart's²⁸² differentiation between primary and secondary rules, Dan-Cohen demonstrates that a strict ('acoustic') separation of the two sets of rules can accommodate competing values in criminal law.²⁸³ To his mind, duress belongs to the world of decision rules. He eliminates it from the world of conduct rules, and argues,

²⁸⁰ *Einsatzgruppen* case, TWC, Vol. IV, p. 480.

²⁸¹ J. Bentham, *A Fragment on Government and an Introduction to the Principles of Morals and Legislation*, Oxford (1948).

²⁸² H.L.A. Hart, *The Concept of Law*, Oxford (1961).

²⁸³ M. Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,' 97 *Harvard LR* (1984), pp. 625-677.

Knowledge of the existence of the defense of duress would not be permitted to shape individual conduct; conduct would be guided exclusively by the relevant criminal proscriptions.

And,

Eliminating the defense from the conduct rules addressed to the public allows the system to reap the benefits of maximum obedience to the law.²⁸⁴

8. NON-STATUTORY DEFENCES

At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in Article 21. (...)

The third paragraph of Article 31 leaves room for the Court to consider defences not enumerated in paragraph 1 and derived from applicable law pursuant to Article 21. These could include both 'procedural defences' concerning the punishability of the defendant and 'substantive defences' relating to the criminal liability of an individual. Although not explicitly recognised in the Statute, the *travaux préparatoires* of the ICC Statute imply their admissibility.²⁸⁵ Only the latter are of interest in the context of this chapter and three defences come to mind: belligerent reprisals, *tu quoque*, and military necessity. All three are classical 'international' defences, in that they all originate in the international context of the laws and customs of war and, unlike most of the defences discussed above, have no national counterpart. All three defences are controversial in that they constitute a (justified) derogation of the rules of war. Each of them will be discussed briefly below.

(a) Belligerent reprisals

The defence of 'belligerent reprisal' can be defined as, 'an act, in breach of a rule of the law of armed conflict, directed by one belligerent party against the other, with a view to inducing the latter party to stop violating that or another rule of this branch of international law'.²⁸⁶ It is a *justified* violation of the law of armed conflict and should, therefore, be distinguished from other forms of retaliation.²⁸⁷ Although the

²⁸⁴ Ibidem, p. 633.

²⁸⁵ 1995 *ad hoc* Committee Report, annex II, p. 60; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), United Nations General Assembly Official Records, Fifty-first Session, Supplement No. 22, A/51/22 (1996) (1996 PrepCom Report Vol. I); UN Doc. E/AC.25/SR.6, para. 209, p. 47; 1996 PrepCom Report Vol. II, p. 103; UN Doc. A/AC.249/1997/L.9/Rev.1, p. 23; UN Doc. A/AC.249/1997/WG.2/CRP.8.

²⁸⁶ F. Kalshoven, 'Belligerent Reprisals Revisited', 21 *NYIL* (1990), p. 44 and F. Kalshoven, *Belligerent Reprisals*, Leiden (1971) pp 1-44.

²⁸⁷ C. Greenwood, 'Belligerent Reprisals in the Jurisprudence', in Fischer *et al.* (2002), p. 41; F.J.

four Geneva Conventions (GC I-IV)²⁸⁸ and the First Additional Protocol (AP I)²⁸⁹ have considerably limited the scope of the defence of reprisal, it still plays a role in international humanitarian law. Firstly, because the Protocol does not have the same uncontested customary law status as the Geneva Conventions, especially since a number of States have expressed reservations about becoming party to the Protocol designed to limit the effect of the reprisal provisions.²⁹⁰ Secondly, because its ban is limited. The prohibition applies to reprisals in derogation of rules designed to protect certain categories of persons and (arguably) not rules concerning the methods and means of warfare.²⁹¹ The biggest problem relating to the application of reprisals remains the complete silence on the issue in the context of non-international armed conflicts. Additional Protocol II does not contain any provision on belligerent reprisals. Kalshoven, rather than interpreting the silence as a general permission to resort to reprisals, pleads for analogous application of the prohibition contained in Additional Protocol I and the Geneva Conventions on international armed conflicts. His most convincing argument – which applies with equal force in non-international armed conflicts – in rejecting their application is, however, the ‘general futility and escalating effect’ of reprisals.²⁹²

Reprisal as a defence has not been included in any of the ILC Draft Statutes or Codes. Nor is it part of the Statutes of the Tribunals of the Former Yugoslavia and Rwanda. It would have to be brought within the ambit of international criminal law through applicable treaties and general principles of law.²⁹³ Bearing in mind the above, it is doubtful whether the ICC will allow resort to the defence of reprisal under Article 31(3) and Article 21 of the Statute. On the other hand, when requirements of proportionality, express warning in advance, and termination as soon as the adversary has discontinued its unlawful attacks are adhered to, and when the decision is made at the highest level of government, reprisals can have a useful part to play. Hampson points out that reprisals can prevent the escalation of a conflict, for instance, when a warring party knows of the opponent’s possession of a weapon and willingness to use it by way of reprisal.²⁹⁴

The defence of reprisal has been raised in various criminal trials, *e.g.* in the *Hos-*

Hampson, ‘Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949’, 37 *ICLQ* (1988), pp. 819-820.

²⁸⁸ Art. 46 of the GC I; Art. 47 of the GC II; Art. 13(3) of the GC III; Art. 33 of the GC IV.

²⁸⁹ Articles 20, and 51-56 of the AP I.

²⁹⁰ The UK, Italy, and Germany have made statements retaining a right of reprisal. See Greenwood (2002), pp. 543-546; F. Kalshoven and L. Zegveld, *Constraints on the waging of war*, Geneva (2001), pp. 145-146; Hampson (1988), pp. 832-835.

²⁹¹ Kalshoven and Zegveld (2001), p. 144.

²⁹² Kalshoven (1990), p. 78.

²⁹³ See Nill-Theobald (1998), pp. 297-298, who points to Article 14 of the 1991 ILC Draft Code and Article 33 of the 1994 ILC Draft Statute as both referring to ‘applicable treaties and general principles of law’. It is noteworthy that the Siracusa Draft I contains a reference to reprisals in a list of public international law defences (Article 33 IV(B)(3)). See Nill-Theobald (1998), pp. 454-455.

²⁹⁴ For instance, poison gas in the Second World War and nuclear weapons in the Cold War period. See Hampson (1990), pp. 841-842.

*tages*²⁹⁵ and *Einsatzgruppen*²⁹⁶ cases, where it was allowed *in principle*, and in the *Calley*²⁹⁷ and *Priebke*²⁹⁸ cases, where it was denied. Most recently, the defence of reprisal was rejected by the ICTY in the *Kupreškić* case.²⁹⁹ The Trial Chamber ruled (*obiter*) that,

[w]hile reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner.³⁰⁰

It then embarked on an enquiry into the customary law status of the concept of reprisals and concluded that reprisals are also precluded in internal armed conflicts as

[t]he demands of humanity and the dictates of public conscience, as manifested in opinion necessitates, have by now brought about the formation of a customary rule (...).³⁰¹

The findings of the Trial Chamber have been convincingly opposed and it remains to be seen whether the ICC will adopt the Trial Chamber's position.³⁰² It can be observed that a gap seems to exist between international law and criminal law thinking on the matter. The latter is in favour of excluding the defence from the array of defences in international criminal law adopting a teleological reasoning, while the former points to treaty and customary law in upholding the defence.

It can be taken from what was said on self-defence in paragraph 6 that criminal law can provide an individual with a defence while the laws of war do not. Does this also work the other way around? Can an individual in his public capacity have a defence which he would not have when acting in his private capacity? This is true when discussing any of the international defences. When a soldier bombs a church

²⁹⁵ The shooting of prisoners in reprisal was considered 'justified as a last resort in procuring peace and tranquillity in occupied territory and has the effect of strengthening the position of a law-abiding occupant'. The US Military Tribunal, moreover, stipulated that it 'excessive reprisals are in themselves criminal and guilt attaches to the persons responsible for their commission'. *Hostages* case, TWC, Vol. XI, 1250-1251.

²⁹⁶ 'Reprisals in war are the commission of acts which, although illegal in themselves may, under the specific circumstances of the given case, become justified because the guilty adversary has himself behaved illegally, and the action is taken in the last resort, in order to prevent the adversary from behaving illegally in the future'. *Einsatzgruppen* case, TWC, Vol. IV, p. 493, cited in Ambos (2002), p. 123.

²⁹⁷ Court of Military Appeals, *U.S. v. Calley*, 16 February 1973, 48 CMR 19, p. 1174.

²⁹⁸ See Ambos (2002), pp. 215-221.

²⁹⁹ Greenwood points in this context to another ICTY case: *Prosecutor v. Martić*. In the *Martić* case, the defendant was accused of having ordered the bombardment of Zagreb with cluster bombs following the Croatian recapture of the Krajina region from Serb forces. The bombardment killed a group of civilians and the Trial Chamber stated that customary international law contained an absolute prohibition on reprisals against civilians in both internal and international conflicts. *Martić* Decision, paras. 15-18. See Greenwood (2002), p. 548.

³⁰⁰ *Kupreškić* Judgement, para. 530.

³⁰¹ *Ibidem*, para. 533.

³⁰² For a different view see Greenwood (2002), pp. 549-556.

as a reprisal measure and his action complies with the requirements mentioned above, he acts justifiably under international humanitarian law in his public capacity and can, therefore, not be regarded as having committed a war crime. If this same soldier were to throw a bomb at the church in his private capacity, thus not as a representative of one of the warring parties, (in theory) he could be held criminally responsible for, at least, criminal damage.

(b) *Tu quoque*

Closely related to the defence of reprisals is the *tu quoque* defence. This defence, which literally means ‘you also’, can be traced back to the Old Testament retaliation principle ‘an eye for an eye, a tooth for a tooth’. It allows for the commission of a war crime to the extent of, and because of, the adversary’s wrongful behaviour. The defence of *tu quoque* differs from the defence of reprisal in that it does not aspire to compel the adversary to act in accordance with international norms.

In Nuremberg, *tu quoque* was raised in the case of Dönitz. It is not entirely clear whether it played a role in establishing responsibility or it was merely considered in mitigation of punishment.³⁰³ The Tribunal did not hold Dönitz guilty for his conduct in carrying out submarine warfare against British merchant ships. The relevant – somewhat cryptic – paragraph of the Judgement reads,

In view of all the facts proved, and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at night in the Skagerrak, and the answer to interrogatories by Admiral Nimitz that unrestricted submarine warfare was carried out in the Pacific Ocean by the United States from the first day that nation entered the war, the sentence of Dönitz is not assessed on the ground of his breaches of the international law of submarine warfare.³⁰⁴

It is hardly surprising that the defence was not allowed by either the Tribunal or the Judges in the subsequent proceedings because of the vulnerability stemming from such a plea for the Allied victors.³⁰⁵ In *Von Weizsäcker and High Command*, the defence of *tu quoque* was explicitly denied, essentially by holding that one’s wrong cannot make another person’s right.³⁰⁶ Moreover, it was established in the *Einsatzgruppen* case that the allied violations of the laws and customs of war were not comparable to those committed by the Nazi regime:

[t]here still is no *parallellism* between an act of legitimate warfare, namely the bombing of a city, with a concomitant loss of civilian life, and the premeditated killing of all members of certain categories of the civilian population in occupied territory.³⁰⁷

³⁰³ See Jescheck (1952), pp. 411–413.

³⁰⁴ Nuremberg Judgement in Friedman (1972), Vol. II, p. 998.

³⁰⁵ See Best (1994), p. 78.

³⁰⁶ See *U.S. v. Von Weizsäcker et al.*, TWC, Vol. XIV, p. 322 and *High Command* case, TWC, Vol. XI, p. 482, referred to in Ambos (2002), p. 124.

³⁰⁷ *Einsatzgruppen* case, TWC, Vol. IV, p. 457.

The defence of *tu quoque* has also been rejected by the ICTY. In *Kupreškić* the Trial Chamber ruled that a defence of *tu quoque* was 'fallacious and inapplicable'.³⁰⁸ When the defence counsel produced a list of crimes allegedly committed by the adversary, the Trial Chamber pointed to post-Second World War trials and customary international law in expressing the view that *tu quoque* was not a valid defence. Moreover, it deemed the *absolute* nature of the norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity, and genocide, which it referred to as *jus cogens*, in principle insusceptible to *tu quoque* arguments.³⁰⁹ The *tu quoque* reasoning was raised before the International Court of Justice (ICJ) in the case of *Bosnia Herzegovina v. Federal Republic of Yugoslavia*. The former contested claims put forward by the latter arguing that one could not rebut a genocide charge by pointing at offences committed by the opponent. The ICJ did not expressly rule on this discussion, but Vice-President Weeramantry, dissenting from the majority, endorsed the argument of Bosnia-Herzegovina.³¹⁰

It seems that the *erga omnes* character of international humanitarian law norms makes the defence of *tu quoque* defence inapplicable in the field of war crimes law. The defence is met by growing opposition and seems an outdated and controversial plea. It seems unlikely that the ICC would apply the defence under Articles 31(3) and 21(1) of its Statute.

(c) Military necessity

Before taking a closer look at the defence of military necessity, it is first necessary to tackle a question of terminology. As we saw in earlier, the term 'necessity' is also used to denote the *criminal law* defence of, what I have called 'choice of evils'. The latter defence exempts the defendant who, when confronted with an unavoidable choice of evils, made the right choice, and therefore, acted justifiably. Military necessity, however, is an *international law* defence. In essence, it concerns a choice of evils too, namely, between military and humanitarian interests, but it will be referred to below as military necessity to distinguish it from the criminal law type of necessity/choice of evils.³¹¹ In the same way as choice of evils was distinguished from duress in the above example, military necessity should be distinguished from *force majeure*. The latter connotes extraneous events that make compliance with the rules impossible, while military necessity always involves a deliberate choice to disregard a rule.³¹² Furthermore, military necessity differs from reprisals and *tu quoque* in that it is not only justifiable if preceded by a breach of international humanitarian law by the adversary, but it 'consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the

³⁰⁸ *Kupreškić* Judgement, para. 515.

³⁰⁹ *Ibidem*, paras. 515-520.

³¹⁰ ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims, Order of 17 December 1997, ICJ Reports (1997), 243.

³¹¹ Nill-Theobald refers to it as a type of 'State necessity'. Nill-Theobald (1998), p. 232.

³¹² See B.M. Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity', 92 *AJIL* (1998), p. 218.

modern law and usages of war'.³¹³ Put differently, it is the principle *justifying* measures which are indispensable for securing the ends of the war. Military necessity is an interest of a State or another party to an armed conflict. It is not an inherent right of every human being, such as his life, or property essential for his survival. If military necessity can be a justification under the laws of war, it can only exonerate an individual as an instrument of his State.

Taking a closer look at the laws of war, it can be seen that the laws and customs of war are a result of striking a balance between military and humanitarian interests. This would warrant the conclusion that outside those rules there is no separate place for military necessity. After all, a balance between military necessity and humanitarian concerns has been made in advance. One could argue, however, that in a limited number of cases, military necessity can still justify a violation of the laws of war, especially since some international humanitarian law provisions have explicitly left room for a resort to military necessity. This concept can be found in international instruments (mainly) concerned with the means and methods of warfare. Article 23(g) of The Hague Rules of Land Warfare (1907), Article 4-2 of the Cultural property Convention (1954), and Articles 54(5) and 62(1) of API prohibit certain conduct, unless 'imperative military necessity' requires otherwise. While the ILC Drafts do not contain any explicit reference to military necessity,³¹⁴ the ICTY Statute refers to it in Article 2(d) as encapsulating a grave breach, namely, 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'. The ICC Statute contains references to military necessity as well. In Articles 8(2) sub (a)(iv) and sub (e)(xii) destruction of property is qualified as a war crime when it is 'not justified by military necessity', or 'unless demanded by the necessities of the conflict'.

The defence of military necessity was extensively considered and allowed under certain conditions, in the post-Second World War cases of *Hostages*³¹⁵ and *High Command*.³¹⁶ In the former case, the Tribunal stipulated that Article 23(g) of the Hague Rules of Land Warfare prohibited 'the destruction or seizure of enemy property except in cases where this destruction or seizure is urgently required by the necessities of war'.³¹⁷ In the latter case, the U.S. Tribunal allowed a plea of military

³¹³ Article 14 of the *Instructions for the Government of Armies of the United States in the Field* (Lieber Code), Washington D.C. (1863). This definition is still referred to by modern authorities on the law of war: U.S. Department of the Airforce, *International Law-The Law of Armed Conflict and Air Operations*, paras. 1-3a(1); FM 27-10, para. 3a. M.S. McDougal & F.P. Feliciano, *Law and minimum world public order: the legal regulation of international coercion*, New Haven (1961), p. 528; M. Bothe *et al.*, *New Rules for Victims of Armed Conflicts: commentary on the Two 1977 Protocols additional to the Geneva Conventions of 1949* The Hague (1982), p. 194. The latter add a requirement of proportionality. Citation and references: Carnahan (1998), p. 215, footnote 20.

³¹⁴ However, the Siracusa Draft I contains the defence of military necessity in a list of Public International Law Defences (Article 33 IV(B)(2)). The Siracusa Draft II also provides for a provision recognising the defence of military necessity 'only as provided by the international law of armed conflict'. Article 33-13(3). See Nill-Theobald (1998), pp. 454-455.

³¹⁵ *Hostages* case, TWC, Vol. XI, pp. 1230-1319.

³¹⁶ *High Command* case, TWC, Vol. XI, pp. 462-697.

³¹⁷ *Hostages* case, TWC, Vol. XI, p. 1296.

necessity to exculpate the defendant Reinecke from spoliation: 'The evidence on the matter of plunder and spoliation shows great ruthlessness, but we are not satisfied that it shows beyond a reasonable doubt acts that were not justified by military necessity'.³¹⁸ However, the defence of military necessity was more often rejected than accepted and the *Hostages* and *High Command* cases qualify as exceptions rather than rules.³¹⁹ Jurisprudence at the *ad hoc* Tribunals, of which the ICTY would be the most appropriate arena to raise a defence of military necessity bearing in mind Article 2(d) of its Statute, does not produce an acceptance or a recognition of the defence of military necessity.³²⁰ The concept of military necessity in the context of 'Geneva law' is contentious to say the least, and the ICRC has tried to convince State representatives and others in the field of international humanitarian law that the concept is an 'evil spirit' that, along with State sovereignty, should be exorcised soon.³²¹

There is, however, another way of looking at the concept of military necessity and that requires going back to the origins of the laws of war, the Lieber Code. Rather than a 'licence for mischief', Lieber's principle of military necessity was a restraint on warfare and a tool of 'enlightened advance'³²² in the laws of war in the nineteenth century. In fact, military necessity is one of the principles underlying the modern law of war. Unfortunately, Lieber's concept of military necessity has been misunderstood and was developed into a theory of *Kriegsraison* in the twentieth century by the German army who used it to justify many violations of laws and customs of war.³²³ It is this extreme form of military necessity that was rejected after the Second World War and which brought about the modern denigration of the concept. In its original form, however, it still has a role to play. As mentioned earlier, certain provisions still leave room for it.³²⁴ Consider the following example:

Suppose a lightly armed unit is charged with the protection of a village, which harbours an important historic monument, e.g. a medieval church. The enemy attacks this village by heavy mortar fire, especially aimed at the monument. Air support, in order to put the mortars out of action, is not available. Then, not seeing any other way to save the church, the commander of the unit decides to send saboteurs, wearing enemy uniforms, in order to

³¹⁸ *High Command* case, TWC, Vol. XI, p. 609.

³¹⁹ UNWCC, Vol XV, pp. 175-176.

³²⁰ Bing Bing Jia in his analysis of ICTY case law on destruction of protected property, points to the cases of *Blaskic*, *Delalic et al.* (*Čelebići*), *Jelisić*, *Kordić & Cerkez*, and *Rajić* where the defence of military necessity could have been, or was raised, but nevertheless put aside, or ignored completely by the respective Trial Chambers. See Bing Bing Jia, "Protected Property" and Its Protection in International Humanitarian Law', 15 *LJIL* (2002), pp. 131-153.

³²¹ Kalshoven and Zegveld (2001), p. 203.

³²² Carnahan (1998), p. 217.

³²³ Kalshoven (1971), p. 366.

³²⁴ Although not explicitly referred to as such, in practice, military necessity plays a very important role in military-strategic planning and targeting. Carnahan uses the example of the Korean War (1950-1953) and the plans of the U.S. Far East Air Force to cause flooding by bombing an irrigation dam and destroying North Korean rice crop. UN command did not regard the flooding to be a military necessity and, therefore the dam was never the subject of attack. Carnahan (1998), pp. 228-230.

destroy the enemy ammunition. The saboteurs succeed in penetrating the enemy lines and in blowing up an important ammunition depot, which results in the mortar fire dying out. After the war, one commander has to stand trial for attacking a historic monument in violation of Article 4-1 Cultural Property Convention. The other commander is charged with having violated Article 23-(f) Rules of Land warfare and Article 39-2 Protocol I, which latter provisions prohibit the use of the uniforms of the adverse party while engaging in attack.³²⁵

The first commander could raise a plea of military necessity by claiming that the immunity of the cultural object was withdrawn for reasons of 'imperative military necessity' pursuant to Article 4-2 of the Cultural property Convention (1954) and 52(2) of the API applied through Article 31(3) of the ICC Statute, or even by relying on Articles 8(2) sub (a)(iv) and sub (e)(xii) of the ICC Statute. He must argue that the reasons for attacking the church can be qualified as 'imperative military necessity'. This defence would be available to him while acting as an organ of the state in his public capacity. Whether his conduct could be *justified* by military necessity depends on the proper weighing of the values at stake. It seems unlikely that a defence of military necessity would succeed when raised by the second commander. The only provision on military necessity that might avail him is Article 23(g) of the Hague Rules on Land Warfare. Nevertheless, the attack on the ammunition depot to defend the church hardly seems 'required by the necessities of war'.³²⁶ Moreover, under Article 39(2) of the API the use of enemy uniforms 'in order to impede military operations' is prohibited.

The argument put forward by the Belgian scholars Andries, Verhaegen, and Van Den Wyngaert³²⁷ that the defence of military necessity can never be open to an individual seems too definite.³²⁸ As a general rule, no violations of the laws of war are justified by military necessity. The above-mentioned provisions, however, leave room for this defence. The example of the two commanders illustrates that circumstances are conceivable where a violation of the rules of war can be justified by military necessity. Thus, the *ius in bello* military necessity provisions, which apply on the macro-State level, can have effect on the micro-individual level for a person in his public capacity. Note that the provision on self-defence in the report of the Working Group on General Principles at the Diplomatic Conference in Rome provided for the following footnote after 'military mission':

This provision only applies to action by individuals during an armed conflict. It is not intended to apply to the use of force by States, which is governed by applicable international law.³²⁹

³²⁵ Article 8(2)(b)(vii) of the Statute provides for jurisdiction of the ICC if the 'improper use (...) of the uniform of the enemy (...) results in 'death or serious personal injury'. The example is taken from Keijzer in 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2, p. 443.

³²⁶ Article 23(g) Rules of Landwarfare.

³²⁷ See para. 6(b) of this Chapter.

³²⁸ Andries and Verhaegen in 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2.

³²⁹ UN Doc. A/Conf.183/C.1/WGGP/L.4/Add.3, p. 2, footnote 1, See Schabas (1998), p. 424.

9. CONCLUSION

The catalogue of defences in Article 31 ICC Statute should be welcomed as another step towards a sophisticated system of international criminal law. The provision itself is a curious mix of Anglo-American and civil law concepts, the traces of which are still clearly visible in the provision, even in its title. The prime example of such a mix is Article subparagraph (d) encapsulating duress. This defence is of particular importance as its inclusion may be regarded an implicit rejection of the ICTY position in the case of *Erdemović* where duress was not awarded the status of complete defence. The recognition of self-defence as an autonomous criminal law defence is also noteworthy. This provision is unfortunate in its wording and as a result has a contentious reputation. This should, however, not cloud the Court's vision and judgement in including this very important defence, which in the end is an inherent right of every human being.

A recurring theme in the above-discussed defences is the distinction between justification and excuse. It is submitted that, although the provision itself does not provide for it, the Court should draw that distinction, if only to be able to interpret the provision in all its complexities. A distinction between wrongdoing in the sense of wrongfulness of the act, and culpability in the sense of blameworthiness of the actor, enables the Court to strike the balance between on the one hand, principles of fairness in the individual case, and on the other, the wider context of criminal-policy arguments and contribution to a process of reconciliation

CHAPTER 7

THE DEFENCE OF MISTAKE AND OF SUPERIOR ORDERS

1. INTRODUCTION

'Article 32 of the ICC Statute heralds a breakthrough to a more comprehensive understanding of culpability which doesn't fully equate to the psychological-mental elements of intent or knowledge but also requires some sort of normative blameworthiness'.³³⁰ What Eser means to say here is that the acceptance of the defence of mistake in the ICC Statute is evidence of the existence of 'some sort of moral blameworthiness' that needs to be covered by a defence of mistake and where mere lack of *mens rea* won't do. In the following we will take a closer look at the defence of mistake of fact and law, and the *sui generis* defence of mistake: superior orders, and examine the scope of this 'moral blameworthiness'.

2. ARTICLE 32 ICC STATUTE: MISTAKE

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

(a) Preliminary observations

Before examining Article 32 we should attempt to answer the question what exactly is a mistake of fact and what is a mistake of law. This is a relevant question because of the above-mentioned difference in scope and content between the two concepts. Since German criminal law theory offers an elaborate discussion on the distinction between mistake of fact and mistake of law it seems useful to draw from the findings of German scholars on this point.³³¹ Both Eser and Triffterer in their commentaries on Article 32 devise a refined catalogue of conceivable errors and organise them in, on the one hand, mistake of fact and, on the other hand, mistake of law.³³² Rather than repeating their findings, it is worth highlighting some of the most conspicuous points.

³³⁰ Eser in Cassese *et al.* (2002b), p. 891.

³³¹ Jescheck and Weigend (1996); Schöncke *et al.* (2000). For a comparative study (Anglo-American, French and German law) on this point see Fletcher (1978), and Eser and Fletcher (1987).

³³² Eser in Cassese *et al.* (2002b), pp. 921-930, 935-944; O. Triffterer in Triffterer (1999), Article 32, margin Nos. 15-18 (Triffterer in Triffterer (1999a), pp. 563-565).

First, a distinction should be made that relates to the *ground* of a mistake. Material elements can be divided into *descriptive* and *normative* elements. The former relates to the elements of a crime perceivable by means of the human senses, such as sight, hearing, smell, taste, or touch. In most cases, these are neutral and 'objective' elements in that they are universally seen, heard, etc. Eser refers to attacks on 'vehicles' and 'installations' in Article 8(2)(b)(iii) as examples of descriptive elements.³³³ An erroneous perception of a descriptive element will always qualify as a mistake of fact.

Normative elements require more than simple perception by a human sense; they require interpretation and application of a rule as well. This means that 'vehicle' is a normative element when it refers to a 'vehicle' in terms of the crime definition, thus, an object that demands immunity (as it belongs to peacekeeping missions). Another example of a normative element relates to clauses that explicitly refer to legal provisions (also termed 'referential elements'), such as imprisonment 'in violation of fundamental rules of international law'.³³⁴ Elements that establish the status of a person, such as 'protected',³³⁵ are also normative in nature. Lastly, elements that are inherently evaluative in nature, such as 'inhumane treatment',³³⁶ are normative. In all these cases, normative evaluation takes place. Sometimes such an evaluation will be almost automatic, but in other cases, it might require some time. The more normative a material element, the more evaluation by the perpetrator it requires. In all this, the psychological state of the perpetrator needs to meet the standard formulated in Article 30(3) of the Statute: 'awareness that a circumstance exists or a consequence will occur'. Normative evaluation does not necessarily require the perpetrator to know the relevant legal provision, nor that he interprets the definition of a crime the way a lawyer does. It suffices that the perpetrator is aware of the existence of protective norms in the area concerned and knows the effect of his act.

Elements are seldom purely descriptive or purely normative. The material elements of a crime often have a double nature. After all, normative material elements are not abstract legal definitions but legal evaluations of facts, the false perception of which can qualify both as mistake of fact and mistake of law.

A second distinction of different types of mistake relates to the *way* in which a mistake is made: as regards descriptive norms, a mistake results from the *non-recognition* of a certain fact, while a mistake concerning a normative norm normally results from an *erroneous evaluation*.³³⁷

The above leads to the following list of *types* of mistakes: with regard to *all* manners of elements, one can err as to 1) the positive material elements of a crime, for instance, when a person believes oneself to be shooting at an animal but it turns out to be a human being, 2) the negative material elements, for instance, mistaken self-defence, and 3) the exemption from criminal prosecution, as in the case of a Head of

³³³ Eser in Cassese *et al.* (2002b), p. 921.

³³⁴ Article 7(1)(e) of the ICC Statute.

³³⁵ Article 8(2)(a)(v) of the ICC Statute.

³³⁶ Article 8(2)(a)(ii) of the ICC Statute.

³³⁷ Eser in Cassese *et al.* (2002b), p. 936.

State who believes he has immunity from criminal prosecution. With regard to *normative* elements, one can 1) misinterpret a normative element, for instance, 'inhuman treatment', 2) not know the content of a referential norm such as 'fundamental violations of international law', 3) be unaware of the prohibition as such, for instance, of the use of flag of truce,³³⁸ 4) erroneously assume a justification or excuse, and 5) mistakenly believe that the ICC lacks jurisdiction over a certain act.

Mistake of fact

Mistakes concerning descriptive elements always qualify as mistakes of fact. If a soldier does not realise that the building he is shooting at, has been turned into a civilian kindergarten, he can rely on mistake of fact to exempt him from criminal responsibility (provided his mistake was reasonable).³³⁹ This is not the case, however, with a mere *error in persona*. After all, not every case of mistaken identity entails the negation of the mental element. If A intended to kill B but instead killed C, whom he held to be B, A is culpable, as the material element of killing a human being, regardless of his identity, would be fulfilled in any event.³⁴⁰ As long as B and C qualify as the same definitional element (which is not the case with a corpse and a living human being), A can be held responsible for the crime.

As was pointed out earlier, the defence of mistake of fact relates solely to the positive material elements of a crime. Article 32(1) thus refers to cases in which a person is not aware of (or misconceives) factual circumstances or consequences that qualify as material elements of a crime's definition, provided this negatives the mental element.

Mistake of law

Mistakes relating to normative elements can qualify as both mistakes of fact and mistakes of law, depending on the *way* in which the mistake is made: as failed recognition or as an erroneous evaluation. This is clear when considering the following example concerning a mistake with regard to a material element involving 'distinctive emblems':³⁴¹

If combatant A sees walking towards him B who is a doctor with the Red Cross but held by A to be an enemy soldier as the distinctive emblem is not clearly visible and A shoots at B, it would be a clear mistake of fact. If the emblem is clearly visible to A but A is ignorant on the rules of distinctive emblems and shoots B, his ignorance of protective criteria might qualify as mistake of law.

One could argue in the latter case (mistake of law) that one cannot 'hide behind' ignorance of rules of distinctive emblems, as even a layman knows what the symbol of the Red Cross means.³⁴² The 'layman's' test is of German origin and is specifically

³³⁸ Article 8(2)(b)(vii) of the ICC Statute.

³³⁹ Example taken from Eser in Cassese *et al.* (2002b), p. 938.

³⁴⁰ See Eser in Cassese *et al.* (2002b), p. 938.

³⁴¹ Article 8(2)(b)(xxiv) of the ICC Statute.

³⁴² Eser in Cassese *et al.* (2002b), p. 925

applied in the context of German theory on intent and mistake of law. A layman is contrasted with a lawyer and is, in fact, nothing more than the 'reasonable man' in the world of fact.³⁴³ The 'layman test' basically stipulates that a person does not need to know the specialised interpretation of certain legal terms. In this context, that means that notions such as 'inhumane treatment' and 'persecution' do not need to be understood as to their specific meanings. The perpetrator can be treated as being aware 'if he understands the social significance of the elements concerned in a layman's manner'.³⁴⁴ Thus, normative ignorance would constitute a mistake of law negating the mental element only if the perpetrator did not realise the social everyday meaning of the material element of the crime.

In the context of international humanitarian law, however, a higher standard than just the everyday meaning can be required. Military persons, especially those in command, can be required to know more than the average person about certain specific concepts and doctrines applicable in the field of the laws of war. A *Garantenstellung* applies to those in a certain capacity who have a connected duty of extra good care. A commander will have to satisfy more stringent requirements by virtue of his function and will be less easily excused by way of mistake of law. This was acknowledged in the *Hostage* case:

An officer is duty bound to carry out only the lawful orders that he receives. One who distributes, issues, or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character. Certainly, a field marshal of the German Army with more than 40 years of experience as a professional soldier knew or ought to have known of its criminal nature.³⁴⁵

A commanding officer is supposed to know the content of the rules of war. The fact that he might turn to a legal advisor for expert advice does not alter this fact. If he is wrongly advised, in attempting to avert responsibility, he cannot 'hide behind' his legal advisor, who is usually his subordinate. The bad advice might be relevant in sentencing, but not in establishing criminal responsibility.

There is, however, a limit to his knowledge. The Tribunal in the *High Command* admitted this when it determined that a military commander

[c]annot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgement as to disputable legal questions.³⁴⁶

In the *Peleus* trial in 1945, the Judge Advocate observed that

³⁴³ One could maintain that the term 'layman' should be reserved as the standard for mistake of law and the term reasonable man for mistake of fact.

³⁴⁴ Eser in Cassese *et al.* (2002b), p. 925.

³⁴⁵ *Hostages* case in Freidman (1972), Vol. II, p. 1323.

³⁴⁶ *High Command* case in Freidman (1972), Vol. II, p. 1433.

It is quite obvious that no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject.³⁴⁷

In all this, we should bear in mind that, although military commanders and those effectively acting as such, are presumed to know the laws of armed conflict, this premise should not be maintained at all costs. This is particularly true when bearing in mind that the laws and customs of war can be vague, while war *crimes* law, through which some of the grey areas are interpreted, is not necessarily an area of law mastered by military commanders and their advisors. An example is the crime of persecution, a crime against humanity with a specific, and (even amongst lawyers) a contested and still unclear legal meaning.³⁴⁸ Here, the social 'everyday' meaning might suffice as a test and a *Garantenstellung* should not be required. The defence of mistake of law should be based upon a lack of knowledge of *wrongdoing*, not of *punishability*. When moral and legal culpability coincide this is not usually a problem. This would be the case with persecution.

As to *culpa in causa*, Article 32 does not provide for a clause referring to the 'avoidability' of the mistake of law. A resort to the defence of mistake of law can be barred when it can be shown that the person could have properly informed himself of the rules. A commander cannot be exempted from liability for having relied on wrong advice from his legal advisor, but the fact that he *asked* for advice keeps the possibility of resort to the defence of mistake of law open. When it can be shown that he tried everything within his power to inform himself on a particular rule or legal position, a defence of mistake of law should be open to him. His ignorance may then be deemed to be excusable.³⁴⁹ Although a *culpa in causa* clause was provided for in the draft texts, it was left out in the final text.³⁵⁰ I agree with Triffterer that, though it is not stated explicitly, it is an implicit element of Article 32(2). Moreover, as most national legal systems provide for such a bar in allowing the defence of mistake, it can be applied through Article 21(1)(c) as well.³⁵¹

It remains to be seen if and how the defence of mistake of law will exempt a person from criminal responsibility. As it is impossible under Article 32(2) of the ICC Statute to claim ignorance of a legal provision (first sentence), and only a claim of not having been aware of the social meaning of the (positive) material elements of a crime (second sentence) *may* exempt a person from criminal responsibility, one could conclude that the provision will have little practical value.

³⁴⁷ *Peleus* Case by a British Military Court, Hamburg 1945, 13 *ILR* 248, p. 249.

³⁴⁸ Article 5(h) of the ICTY Statute, Article 3(h) of the ICTR Statute, Article 7(1)(h) of the ICC Statute. See Boot (2002), pp. 517-526.

³⁴⁹ Here a parallel can be drawn with Dutch criminal law, see para. 2(c) of this Chapter.

³⁵⁰ Article 24K, Option 1: Unavoidable mistake of fact or of law shall be a ground for excluding criminal responsibility provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact or law may be considered in mitigation of punishment, Zutphen Draft Statute, p. 60. Also proposal 2 of the 1996 PrepCom Report, p. 96.

³⁵¹ Triffterer in Triffterer (1999a), margin No. 38, p. 570. See also Eser in Cassese *et al.* (2002b), p. 942.

A final observation remark relates to the distinction between mistake of fact and mistake of law; it should not be exaggerated. Rather than grouping the defence of mistake into two distinct categories, the different types of mistake can be marked along a graduated scale with mistake of fact at one end and mistake of law at the other. The longer it takes (in time) to interpret the material elements of a crime, the more normative the element and the more likely that the mistake will be termed a mistake of law.

(b) Text and legal history

Despite the fact that the need to regulate mistake of fact (*error facti*) and mistake of law (*error iuris*) has been debated ever since Nuremberg, it was only in 1980 that, on the international level, a Draft International Criminal Code – a private initiative by Bassiouni – recognised the defence of mistake for the first time.³⁵² In 1987, the International Law Commission demonstrated awareness of that same need by referring to ‘error of law or of fact’ as a possible ‘exception to the principle of responsibility’ in its 1987 Draft Code.³⁵³ Subsequent ILC Drafts lacked a provision on mistake and left it to the ‘competent court’ to ‘determine the admissibility of defences under the general principles of law’. Moreover, the drafters of the ICTY and ICTR Statutes of 1993 and 1994 refrained from codifying it. Again, it was left to the discretion of the Judges, who in *Erdemović* demonstrated a willingness to apply generally accepted legal rules on defences not explicitly provided for in the Statute.³⁵⁴ It took another non-governmental initiative to cause the defence of mistake to be recognised again. In 1995 and 1996, a group of scholars drafted Statutes providing for the defence of mistake.³⁵⁵ The latter efforts were of influence in the drafting of the provision on mistake in the ICC Statute.³⁵⁶ There were in reality two approaches in the discussions on mistake: one allowing only mistake of fact as a defence, and one allowing both mistake of fact and mistake of law, to exclude criminal responsibility.³⁵⁷ The latter opinion prevailed, and both defences are now included in the Statute. However, the defence of mistake of law is narrowed down to such an extent

³⁵² Article IX(7) in M.C. Bassiouni, *Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, Dordrecht (1987), p. 110.

³⁵³ Article 9(d), *YBILC* (1987), Vol. II/1, p. 7 f.

³⁵⁴ *Erdemović* Sentencing Judgement II, para. 16. See further para. 7(c) of Chapter 6.

³⁵⁵ For instance, the Siracusa Drafts I and II, and the Freiburg Draft. See Eser further in Cassese *et al.* (2002b), pp. 894–895.

³⁵⁶ See for a more elaborate drafting history of Article 32 of the ICC Statute: Eser in Cassese *et al.* (2002b), pp. 896–898; Triffterer in Triffterer (1999a), margin Nos. 1–10, pp. 555–560.

³⁵⁷ 1996 PrepCom Report, Vol. II, (Suppl.), proposal 4: ‘Mistake of law may not be cited as a ground for exemption from criminal responsibility’; See for a similar provision Zutphen Draft Statute, Article 24 K, option 3. The latter Report included the following two options as well: ‘(1) Unavoidable mistake of fact or of law shall be a ground for excluding criminal responsibility provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact or of law may be considered in mitigation of punishment. (2) A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime (...)’.

that it is doubtful as to whether it may really operate as such and concluding in hindsight that the former approach was victorious in the end.

Article 32 has been called 'repetitious'.³⁵⁸ As a mistake of fact and law shall only exempt the defendant from criminal responsibility when it negates the mental element, it simply repeats what has already been stated in Article 30(1) of the Statute:

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

A link between mistake, the mental element, and the material element of the offence is clearly made in Section 2.04 paragraph 1 of the Model Penal Code, which probably served as an example for Article 32 of the ICC Statute:

- (1) Ignorance or mistake as to a matter of fact or law is a defense if:
 - (a) the ignorance or mistake negates the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or
 - (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense. (...)

Article 32(1)(a) seems to be nothing more than a negative formulation of Article 30(1).³⁵⁹ This depends, however, on how we interpret the 'mental element'. Do we regard it as limited to the definitional elements of a given crime (positive mental element), or does it extend to grounds excluding criminal responsibility as well (negative mental element)?³⁶⁰ In the latter case, the mistake could then also be regarded as a defence, for instance, A mistakenly believes that B is attacking him by pointing a loaded gun at him, which as it turns out is a laser-tag pistol. A kills B in presumed self-defence.

Taking a closer look at Article 32(1), which encapsulates the defence of mistake of fact, it can be seen that the word 'only' emphasises the restrictive nature of this defence. This prevents a broad construction of mental element extending to both positive and negative mental elements. Furthermore, the narrow interpretation is in line with Article 30(1), which is concerned with 'material elements committed with intent and knowledge' and as such relates solely to the positive (definitional) elements of a crime.³⁶¹ In other words, in the context of the ICC, mistaken self-defence cannot qualify as a mistake of fact pursuant to Article 32(1). In the above example, 'A' cannot rely on mistake of law either, if only because the error is a factual and not a legal one. Article 31(1)(c), which encapsulates the defence of self-defence,

³⁵⁸ Eser in Cassese *et al.* (2002b), p. 934.

³⁵⁹ This was already recognised when drafting Article 32. The Zutphen Draft Statute reads in footnote 103, 'Some delegations were of the view that mistake of fact was not necessary because it was covered by *mens rea*'.

³⁶⁰ This interpretation of 'material element' can be found in some civil law legal system, such as those of Italy, Germany, and Spain. See Eser in Cassese *et al.* (2002b), p. 940.

³⁶¹ See Chapter 2 para. 2 (b) and Chapter 6 para. 2 (c).

will not exempt the defendant in the event of an erroneous act in self-defence either. It can be concluded from the replacement of 'reasonable belief' in the draft text by 'acts reasonably' in the final text, that mistaken self-defence is not explicitly provided for in the ICC Statute. However, as Triffterer points out, it can be brought within the ICC's framework by applying 'general principles of law derived from national laws of legal systems of the world' pursuant to Article 21(1)(c).³⁶² According to the national regulations of Austria and Germany, for instance, mistaken self-defence (*putativ Notwehr*) may lead to exoneration.³⁶³ Most American jurisdictions allow mistaken self-defence as a ground for excluding criminal responsibility. However, on the basis of Article 21(1)(c), only principles that are not 'inconsistent with the Statute' may be applied. Bearing in mind the above, a broad interpretation of the mental element, and thus the defence of mistake, might be a bridge too far at this stage. It is up to the Court to decide this matter. To conclude this account of mistaken self-defence, if, in an exceptional case, an emotion brought about by an attack resulted in an excessive reaction and A lost command over his emotions, he could have a defence of mental incapacity pursuant to Article 31(1)(a) of the Statute.

Can the 'mental element' in Article 32(2) as to mistake of law be construed in broader terms, as to include a mistaken defence of law? Consider the case where a soldier (*bona fide*) mistakenly believes that he is justified by military necessity in shelling a village. Admittedly, the word 'only' does not appear in Article 32(2), but the 'exclusionary wording' of Article 32(2) warrants the inference that a broad interpretation of mental element, *i.e.* including the negative mental element, would be inappropriate here. Besides, a broad interpretation would result in a discrepancy with Article 30(1) of the Statute. Article 33 on superior orders might cover cases of misperception regarding a justification. Returning to our example, and assuming that the soldier was ordered to shell the village, this means that the soldier, when prosecuted for a war crime, would have a defence under Article 33 of the ICC Statute.

In addition to the above noted difference between mistake of fact and mistake of law, there are two other disparities. Firstly, they differ on the point of legal consequence. Mistake of fact *shall* be a ground for excluding criminal responsibility while a mistake of law *may* be a ground for excluding criminal responsibility. As to mistake of law, it is at the Court's discretion whether it will grant a complete exoneration or a mitigation of punishment pursuant to Article 78(1) of the ICC Statute and Rule 145(2) of the RPE. Secondly, mistake of law is much more narrowly circumscribed than mistake of fact. The first sentence of Article 32(2) precludes mistakes 'as to whether a particular type of conduct is a crime within the jurisdiction of the Court'. This sentence stems from the general rule that ignorance of the law is no excuse (*ignorantia iuris nocet*). With regard to 'the most serious crimes of concern to the international community as a whole',³⁶⁴ the drafters must have thought it undesirable and impossible that one could claim ignorance of the law. Moreover, Article 32(2) and *error iuris* in general proved contentious amongst the drafters of the ICC

³⁶² Triffterer in Triffterer (1999a), margin No. 28, pp. 567-568.

³⁶³ See Jescheck and Weigend (1996), pp. 350-351.

³⁶⁴ Article 5 (1) of the ICC Statute.

Statute because of their lack of familiarity with the defence in some of their own legal systems. It is its controversial nature that makes mistake of law, as it is encapsulated in Article 32(2), look like a contradiction in its own terms. In the first sentence of the provision the defence is excluded unconditionally, while in the second sentence, as allowing under certain conditions. The unfortunate wording of Article 32(2) must be understood, however, as to allow for a defence of mistake of law, albeit a conditional one.

(c) National underpinnings

It is worth taking a comparative 'glance' at civil law and Anglo-American law on the defence of mistake. While some striking differences between civil law and Anglo-American law on this point will be discussed, an elaborate discussion on mistake of fact and mistake of law is beyond the ambit of this research.³⁶⁵

Anglo-American law bases the defence of mistake of lack of *mens rea*. This demonstrates the common law influence on Article 32, which also requires a mistake to negative the mental element. Consider Section 2.04 of the MPC:

- (1) Ignorance or mistake as to a matter of fact or law is a defense if:
 - (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offence; or
 - (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.
- (..)
- (3) A belief that conduct does not legally constitute an offence is a defense to a prosecution for that offence based upon such conduct when:
 - (a) the statute or other enactment defining the offence is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or
 - (b) he acts in reasonable reliance upon an official statement of the law, afterwards determined to be invalid or erroneous, contained in (i) a state or other enactment; (ii) a judicial decision, opinion or judgement; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with the responsibility for the interpretation, administration or enforcement of the law defining the offence.
- (...)

Anglo-American law on the defence of mistake shows a focus on the *type* of mistake: of fact or of law. This is relevant as the former, mistake of fact, has a considerably wider scope than the latter. This is due to the fact that the mental element of most crimes does not include any knowledge of the existence and scope of the prohibition defining the offence. Although the maxim *ignorantia juris neminem excusat*

³⁶⁵ For an elaborate comparison between civil law and Anglo-American law on the defence of mistake: Fletcher (1978), pp. 683-759. See further the writings of G. Arzt, J. Kaplan, A.T.H. Smith, G. Stratenwerth, and K. Tiedemann in Eser and Fletcher (1987), pp. 1003-1149.

(ignorance of the law does not excuse) is considered an 'archaism',³⁶⁶ it still seems to exert an influence on the modern law of mistake. However, ways have been found to move away from the effect of a strict interpretation and application of the mistake of law.

Analysis of Anglo-American case law shows that the distinction between mistake of law and mistake of fact is susceptible to 'manipulation'.³⁶⁷ This flexibility allows the defence of mistake to cover a wide range of cases, including those that in civil law systems would qualify as mistake of law.³⁶⁸ In American law, a second way has been found to widen the scope of the defence of mistake of law. On the basis of the so-called doctrine of 'reasonable reliance', a mistake of law can be a defence when one reasonably relied on an official interpretation of the law. The source of advice will normally be the State itself, or its agencies. The idea behind this 'doctrine' is that it would be unfair to make the citizen 'pay' for the failure of the State – by its representatives – to inform or wrongly inform its citizens.³⁶⁹ Paragraph (3) of the above-cited MPC provision encapsulates this doctrine. Subparagraph (a) deals with situations in which the defendant did not know of the rule while subparagraph (b) refers to those situations in which the defendant mistakenly relied on advice given by an official source. It is not exactly clear on whose advice a person may rely. It has been held that when the basis of the defence is the *reasonableness* of the reliance, the source of advice matters less, and does not necessarily have to be an agent of the State. Case law shows that reliance on the advice of an attorney is not regarded as an excusable defence.³⁷⁰ A third way of allowing reliance on a mistake of law has developed in American case law through the principles of due process. When a Statute or a clause is too vague and the defendant successfully argues that he could not direct his conduct to it because of its indeterminate nature, he can rely on a defence of mistake of law exempting him from criminal responsibility.³⁷¹

English law has proved less generous in granting a defence of mistake of law than American law. Of interest is the English debate on the element of reasonableness. This element only really plays a role in the context of crimes committed owing to negligence. The approach of the common law that, if the defendant had reasonable grounds for his mistaken belief, he could rely on a defence of mistake was not adopted by the House of Lords in the landmark case of *D.P.P. v. Morgan*.³⁷² Their Lordships held that reasonableness was not a requirement for liability with regard to crimes requiring *mens rea*, i.e. intent or recklessness. In later decisions, this was

³⁶⁶ See Hall (1960) p. 376; Archbold (2000), § 17-22.

³⁶⁷ A.T.H. Smith, 'Error and Mistake of Law', in Eser and Fletcher (1987), p. 1085.

³⁶⁸ We are reminded here of the *Smith* case (1974) QB 354, in which the defendant was charged with criminal damage to property by taking wooden panelling with him at the termination of a tenancy, which had become the property of his landlord by operation of the civil law. It was held that his mistake as to the ownership was a mistake of fact rather than a mistake of law and, therefore, a defence. See Smith in Eser and Fletcher (1987), pp. 1097-1098.

³⁶⁹ Smith in Eser and Fletcher (1987), pp. 1086-1092.

³⁷⁰ *State v. Downs*, 116 N.C. 1064, 21 S.E. 689 (1895).

³⁷¹ *Lanzetta* 306 US 451; *Smith v. Cogan*, 415 US 566, see Pradel (1995), p. 305.

³⁷² (1976) AC 182.

confirmed and the rule was developed that a putative ('belief') defence was sufficient for relying on mistake, no matter how – to quote Ashworth – 'outlandish that belief was'.³⁷³ This has led to a *subjective* approach to mistake, which enabled concessions to the otherwise strict English rule on exclusion of mistake of law as a defence.³⁷⁴ Although it is generally not considered a defence, mistake of law can be relevant in mitigation of punishment.³⁷⁵

Most civil law legal systems recognise both the defence of mistake of fact and the defence of mistake of law in either statute or case law. Under Dutch law, the defence of mistake is based on the principle underlying its criminal law that absence of blameworthiness excludes criminal responsibility.³⁷⁶ Absence of blameworthiness or fault ('afwezigheid van alle schuld') is a general excuse that can take the form of a mistake of fact and a mistake of law. For mistake of fact to exonerate, the actor must have erred at the time of the offence and his mistake must be excusable, *i.e.* the actor should not have known better. Mistake of law is less easily accepted than mistake of fact and also *excuses* criminal behaviour. Three requirements must be met for it to exclude responsibility. Firstly, the defendant must have been convinced that he did not commit an offence. Secondly, he must have properly informed himself on the legal norm at stake. If there was any doubt on his part, he should have made enquiries with the appropriate authorities.³⁷⁷ Lastly, if the defendant relied on advice tendered by a third person, the latter must be someone credited with such authority that he might have reasonably relied on the soundness of the advice.³⁷⁸ The Supreme Court ruled that under certain circumstances this advisor might be a person's attorney.³⁷⁹

German criminal law has developed a sophisticated system for and elaborate doctrine on mistake of fact and mistake of law. Banning the old categories of fact and law, German legal doctrine and practice distinguish between mistake concerning definitional elements ('Tatumstände')³⁸⁰ of a crime, which can roughly be equated to

³⁷³ Ashworth (1999), p. 241. The relevant decisions: *Kimber* (1983) 77 Cr App R 225, *Gladstone Williams* (1984) 78 Cr App R 276 *Beckford* (1988) 1 AC 130.

³⁷⁴ Smith in Eser and Fletcher (1987), pp. 1092-1107; Smith & Hogan (1996) pp. 222-224; Ashworth (1999), pp. 240-250.

³⁷⁵ *Johnson v. Youden* (1950) 1 KB 544. See also Archbold (2000), § 17-22.

³⁷⁶ This was recognised by the Dutch Supreme Court on 14 February 1916, *NJ*, p. 681. See also De Hullu (2000), pp. 344-356.

³⁷⁷ However, this might not always avail the defendant. In the recent euthanasia case 'Bongersma', the Dutch Supreme Court did not allow the mistake of law defence, despite the fact that the doctor had consulted medical authorities before he carried out the request of his patient (as is required in Dutch law on euthanasia). The Dutch Supreme Court held that the doctor had not consulted the *appropriate* authorities as the opinions of medical authorities did not answer the question of whether his act was within the law. Dutch Supreme Court, 24 December 2002, *NJ* 2003, 167.

³⁷⁸ See Dutch Supreme Court decisions of 20 November 1973, *NJ* 1974, 52; 14 September 1981, *NJ* 1981, 642; 20 January 1987, *NJ* 1987, 747; 14 December 1960, *NJ* 1961, 416; 14 April 1987, *NJ* 1988, 60; 19 May 1987, *NJ* 1988, 218. Remmelink/Hazewinkel-Suringa (1996) pp. 379-386.

³⁷⁹ Dutch Supreme Court, 13 January 1987, *NJ* 1987, 863.

³⁸⁰ § 16: (1) Whoever in committing an act is mistaken about the existence of facts which are part of the statutorily defined constituent elements of a crime does not act intentionally. The possibility of imposing criminal punishment for negligent conduct remains unaffected. (2) Whoever in committing an act

mistake of fact,³⁸¹ and mistake about a legal prohibition ('Verbotsirrtum'),³⁸² which can be equated with mistake of law.³⁸³ The German equivalent of mistake of fact relies on the presumption that, if a perpetrator who erred with regard to a definitional element of a crime, he is regarded as having acted without (criminal) intent ('nicht vorsätzlich'). The mistake of law concept is more circumscribed than the mistake of fact concept in that it contains criteria for 'avoidability'. If the mistake of law was unavoidable, the perpetrator is excused. If the perpetrator could have prevented the mistake of law, for instance, by inquiring with the proper authorities regarding a certain rule, he remains punishable for a crime of intent but punishment may be mitigated.³⁸⁴ Mistake of law does not have to exclude intent.

French law seems to regard mistake of *fact* as negating the mental element and, therefore, a complete defence. This is probably why it is not codified in the Nouveau Code Pénal, unlike mistake of law, which is encapsulated in Article 122-3.³⁸⁵ The defence of mistake of fact has been recognised and developed in case law and requires an objective test: as long as the mistake is not gross or unreasonable, the element of intention is regarded as negated and mistake of law is a valid defence.³⁸⁶ Like in most criminal systems, mistake of law is not easily accepted in French law. Basically, three conditions must be satisfied: the defendant must have erred in respect of a legal rule, he must have (honestly) believed he was acting within the law and, the error must have been unavoidable.³⁸⁷ The requirements are similar to those in Dutch law on mistake of law.

Most civil law systems provide for a more restricted concept of mistake of law than of mistake of fact, while recognising both as a defence. Unlike Anglo-American law on mistake, which focuses on the type of mistake and the *mens rea* required for the underlying crime,³⁸⁸ most civil law systems regard mistake as an excuse bearing on culpability, which does not necessarily imply lack of *mens rea*.³⁸⁹

mistakenly assumes the existence of circumstances which would form part of the statutorily defined constituent elements of a lesser offense can only be punished for intentional conduct in accordance with the statute defining the lesser offense. (Translation: *The American Series of Foreign Penal Codes, Germany*, Vol. 28 (1987))

³⁸¹ See Pradel (1995), p. 300.

³⁸² Adopted in 1952 by the German Supreme Court in a Judgement of 6 June 1952, BGHSt 3, 105, and later codified in § 17: A person who commits an act in the mistaken belief that it is lawful acts without guilt, provided he could not have avoided making the mistake. If he could have avoided it, the punishment may be reduced in accordance with the provisions of § 49(1). (Translation: *The American Series of Foreign Penal Codes, Germany*, Vol. 28 (1987)).

³⁸³ See Pradel (1995), p. 304.

³⁸⁴ G. Arzt, 'The Problem of Mistake of Law', in Eser and Fletcher (1987), p. 1031 *et seq.*

³⁸⁵ Article 122-3 of the French Penal Code: 'N'est pas pénalement responsable la personne qui justifie avoir cru, par une erreur sur le droit qu'elle n'était pas en mesure d'éviter, pouvoir légitimement accomplir l'acte'. (A person is not criminally responsible if that person proves that, because of an error of law, he or she was not in a position to avoid believing that he or she was able legally to perform the act. Translation: *The American Series of Foreign Penal Codes, France*, Vol. 31 (1999)).

³⁸⁶ See Bell *et al.* (1998), p. 231.

³⁸⁷ Desportes and Le Gunehec (2000), p. 588 *et seq.*

³⁸⁸ For a comparison between German and American law on mistake: Fletcher (1978), pp. 737-758.

³⁸⁹ For instance, in Italy where the defence of mistake of law is developed in case law and is a devia-

Summarising, it can be said that the most conspicuous differences between civil law and Anglo-American law in respect of the defence of mistake concern its focus and its test. While Anglo-American lawyers base the defence of mistake on lack of *mens rea*, civil lawyers (especially with regard to mistake of law) base it on lack of culpability. While these will often coincide, lack of culpability – at least on paper – has a wider scope than lack of *mens rea* and thus there is a greater possibility of relying on the defence of mistake. On the other hand, most civil law systems adopt an *objective* test in allowing resort to the defence of mistake by applying the requirements of reasonableness. This is a narrower test than the *subjective* test relied upon in Anglo-American law, particularly in England. Overall, and certainly in practice, the requirements under which the defence of mistake may exempt a person from liability are not fundamentally different in the Anglo-American and civil law legal systems.³⁹⁰

(d) Jurisprudence

The defence of mistake of fact and the defence of mistake of law have been raised on various occasions in post-World War II war crimes trials.³⁹¹ Although the UN War Crimes Commission distinguished between mistake of fact and ‘ignorance of the law’, the dividing line between the two is not clear and requires some analysis. One of the cases mentioned in the Commission’s compilation on the defence of mistake is the *Hans* trial.³⁹² In 1947, the Court of Appeal in Norway acquitted Hans, who was charged with the execution of numerous Norwegians without trial, but mistakenly believed that he was carrying out regular court sentences. Another example of mistake of fact relating to executions was the *Almelo* trial, in which the defendant was not found guilty, as

[t]he circumstances were such that a reasonable man might have believed that this officer (*i.e.* the victim, added *EvS*) had been tried according to law, and that they were carrying out a proper judicial legal execution, then it would be open to the court to acquit the accused.³⁹³

tion from the maxim *ignorantia juris neminem excusat* laid down in Article 5 of the Codice Penale: ‘Nessuno può invocare a propria scusa l’ignoranza della legge penale’. (No one may excuse himself by pleading ignorance of penal law. Translation: *The American Series of Foreign Penal Codes. Italy*, Vol. 23 (1978)). The landmark case is that of the Corte Costituzionale, 24 March 1988. The Court held that exclusion of the defence of mistake would not accord with the principle of culpability laid down in Article 27 of the Constitution. See Pradel, pp. 303-304.

³⁹⁰ This is certainly the opinion of Pradel, Pradel (1995), p. 304, footnote 7.

³⁹¹ See also Dinstein (1965), pp. 76-87; Nill-Theobald (1998), pp. 342-349; Ambos (2000), pp. 115-116, 151-153.

³⁹² 14 ILR 305, p. 306. See Dinstein in McDonald and Swaak-Goldman (2000), p. 377.

³⁹³ Trial of *Otto Sandrock and Three Others*, TWC, Vol. I, p. 41. There were other cases in which mistake of fact related to executions. For instance, the trial of *Rath & Thiel* by a British Military Court at Hamburg, in which the defendant was found to have honestly believed that the executions were lawful. UNWCC, Vol. I, pp. 50-51. See UNWCC, ‘Defence Pleas’, in *Digest of laws and Cases*, Vol. XV, HMO (1949), pp. 155-188.

It appears that a *bona fide* mistaken justification or excuse, such as that of military necessity and duress, does not exempt a person from criminal responsibility.³⁹⁴ This is of interest, as it could be considered an argument in justifying the above interpretation of mental element as being limited to positive elements and the subsequent exclusion of a mistake of fact and/or law with regard to defences. Moreover, as observed earlier, a *Garantenstellung* was applied, still leaving room for 'an honest error in judgement'. In the *Hostages* case, the US Military Tribunal at Nuremberg ruled that

In determining the guilt or innocence of an army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situations as it appeared to him must be given the first consideration. Such commander will not be permitted to ignore obvious facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision and, if he wilfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error in judgement, such army commander is entitled to the benefit thereof by virtue of the presumption of innocence.³⁹⁵

Mistake of law proved to be more contentious as a defence in post-World War II war crimes trials. In the *Scuttled U Boats* case, which the UN Commission considered a case of ignorance of the law, the accused had not been aware of the surrender of Germany and scuttled British submarines. The Judge Advocate made it clear in his summing-up, that, in establishing the accused's guilt, it turned to the following questions:

Are you satisfied that the man's state of mind at the time in question was this: 'I honestly believed I had an order; I did not know anything about any surrender; it was not for me to inquire why the higher command should be scuttling submarines; I honestly, conscientiously and genuinely believed I had been given a lawful command to scuttle these submarines and I have carried out that command and I cannot be held responsible?'³⁹⁶

This is in fact a case of superior orders and demonstrates how closely the defence of mistake and that of superior orders are related; the defence of superior orders is a *sui generis* defence of mistake.

The findings in the *Hostages* and the above-mentioned *High Command* and *Peleus* cases regarding the defence of mistake of law make it clear that a *Garantenstellung* can deny a military commander's resort to a defence of mistake, while at the same time, a commander cannot be required to know everything. This somewhat contradictory statement should be understood against the background of a person's rank and seniority. A *Garantenstellung* should be applied predominantly to those higher up the chain of command. Commanders in the lower echelons of a chain of

³⁹⁴ UNWCC (1949), p. 184.

³⁹⁵ *Hostages* case, UNWCC, Vol. VIII, p. 58.

³⁹⁶ TWC, Vol V, pp. 69-70, cited in UNWCC, Vol XV, p. 183.

command may rely upon the defence of mistake of law (and superior orders). The division between those of higher and (alternatively) of lower rank is likely to be highly subjective in application and should be established on a case-by-case basis. Level of training, possibility to influence decision-making and availability of information are relevant elements in determining whether one occupies a low or high rank.

More recent cases involving the defence of mistake in war crimes trials are *Finta*³⁹⁷ and *Calley*.³⁹⁸ The defence was raised in these cases in the context of superior orders and will, therefore, be discussed more extensively in paragraph 3. Worth mentioning here is, that the standard applied by the US Military Court of Appeal in the *Calley* case to the order he had to carry out was

[s]o palpably illegal that whatever conceptual difference there may be between a person of 'commonest understanding', and a person of 'common understanding', that difference could not have had any impact on a court of lay members receiving wordings in instructions.³⁹⁹

The earlier mentioned 'reasonable man' and 'layman' standards would have been too high for Calley, who in reality carried out a *manifestly* unlawful order and was, therefore, denied the defence of superior orders.

In the context of the Tribunals for the Former Yugoslavia and Rwanda, mistake of fact or of law is not explicitly recognised. Neither Statute lists mistake as a possible defence. It can, however, qualify as a 'special defence' pursuant to Rule 67 (A)(ii)(b) or lead to acquittal because of lack of *mens rea*.

(e) Observations

Despite their narrow scope, the defences of mistake of fact and of law enshrined in Article 32 of the ICC Statute can be seen as contributions to a more mature and developed system of international criminal law. While mistake of fact can be regarded as a mere mirror image of Article 30(1), it is mistake of law in Article 32(2) of the ICC Statute that constitutes a 'breakthrough' in war crimes law. Its scope is limited, however, and should be understood against the background of national law on mistake of law, which has been strongly influenced by the premise *ignorantia juris non excusat*. On the other hand, mistake of law is an appropriate defence in the context of international humanitarian law. Bearing in mind the vagueness of the laws of war and the 'relative uncertainty of many rules',⁴⁰⁰ mistake of law may be regarded as a 'necessary' defence in war crimes law. A certain degree of flexibility in the normative system should be reflected in the system of defences, offering leeway through mistake of law. The leeway granted in Article 32(2) of the ICC Statute, is very narrow, however, and in that sense one could maintain that, to use Eser's words, the

³⁹⁷ *R. v. Finta*, ILR 98, pp. 520-663.

³⁹⁸ *U.S. v. William Calley*, 46 CMR 1131 (1971), pp. 1131-1200.

³⁹⁹ *Ibidem*, p. 1184.

⁴⁰⁰ Dinstein in McDonald and Swaak-Goldman (2000), p. 377.

'penal-political preparedness for recognising misperceptions of the perpetrator as a defence' in war crimes law should not be exaggerated.⁴⁰¹

As paragraphs (1) and (2) of Article 32 of the ICC Statute lacks an element of 'reasonableness' constituting an *objective* test, it seems – reasoning *a contrario* – that any mistake of fact or mistake of law can exempt a person from responsibility. In other words, as long as the defendant can demonstrate that he erred *subjectively*, irrespective of his naïveté or even stupidity in making the mistake, he would have a defence under Article 32 of the ICC Statute. Bearing in mind the objective tests laid down in Article 31(c) and (d) ('reasonably') and Article 33 ('manifest'), and the limited scope the drafters envisaged for a defence of mistake, it is submitted here that an objective test should apply in the context of Article 32. This would mean adding the element of 'reasonableness' in interpretation.⁴⁰²

As to the nature of the defence of mistake, the mistake of fact and of law *excuse* the perpetrator. They do *not justify* the act. Article 33, which will be discussed below, is a special type or *sui generis* the defence of mistake and applies in the context of military hierarchies and schemes of obedience.

3. ARTICLE 33 ICC STATUTE: SUPERIOR ORDERS

Article 33

1. *The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:*

- (a) *The person was under a legal obligation to obey orders of the Government or the superior in question;*
- (b) *The person did not know that the order was unlawful; and*
- (c) *The order was not manifestly unlawful*

2. *For the purposes of this Article, orders to commit genocide or crimes against humanity are manifestly unlawful*

(a) Text and legal history

Legal history

This defence is probably the best well known defence in war crimes law. In case law as well as in scholarly debates, it has been at the forefront of the debate on 'defences'. As the United Nations War Crimes Commission observed, 'the plea of superior orders has been raised by the Defence in war crime trials more frequently

⁴⁰¹ Eser in Cassese *et al.* (2002b), p. 934.

⁴⁰² The reasonableness requirement is not applied in the same way in national legal systems. In Anglo-American law, an element of reasonableness is only applicable to crimes that require negligence, not intent or recklessness. In (some) civil law systems, a mistake has to meet the requirement of reasonableness in any case.

than any other'.⁴⁰³ The legal debate on superior orders has produced three main 'schools of thought': 1) the *respondeat superior* doctrine, 2) the absolute liability or full responsibility doctrine, and 3) the conditional liability or limited responsibility doctrine that, which, as will be shown later, exists in different versions.⁴⁰⁴ Much has already been written on the defence of superior orders. The debate below will be limited to the main points in the superior orders debate.

According to the *respondeat superior* theory, propounded by Oppenheim and briefly discussed in paragraph 2, the subordinate was exempted from criminal responsibility if he committed a war crime. As the subordinate was regarded an instrument in the hands of the superior, it was the superior who could be held accountable for the commission of the crime. The subordinate could thus successfully invoke a defence of superior orders. The Nuremberg Judgement disposed of this doctrine, which had by that time already come under heavy criticism. The Statute of the Nuremberg Tribunal established the absolute liability doctrine, which stipulated that superior orders are no defence but can be considered in mitigation. The British Military Manual and the US Field Manuals, both of which had previously embraced the *respondeat superior* doctrine, changed accordingly.⁴⁰⁵ However, in 1956 the American viewpoint changed again. What had already been developed in US national law was now put down in the Field Manual: the limited responsibility doctrine:

The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, *unless he did not know and could not reasonably have been expected to know that the order was unlawful*. In all cases where the order is held not to constitute a defense to an allegation or war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.⁴⁰⁶ (italics added, *EvS*)

This theory has a 'positive formulation' as well leading to the same result. Under the latter approach, the plea of superior orders is, as a general rule, a complete defence unless the subordinate *knew or should have known* that the order was illegal, or the *illegality* of the order was *manifest*. Thus, two criteria, formulated here as *alternatives*, condition the resort to a complete the defence of superior orders.

The conditional/limited liability approach was proclaimed for the first time in a decision of the Austro-Hungarian Military Court in 1915.⁴⁰⁷ The German military penal code of 1872 comprised a similar formula.⁴⁰⁸ It was further reaffirmed in the well known and much cited cases which came before the Leipzig Court after the

⁴⁰³ UNWCC, Vol. XV, p. 157.

⁴⁰⁴ See also Dinstein (1965); Keijzer (1978); Lippman (2001b), pp. 153-251.

⁴⁰⁵ British Military Manual (1944), para. 443; See UNWCC (1948), p. 282; FM 27-10, para. 345. See Keijzer (1978), pp. 168-169 and pp. 176-178.

⁴⁰⁶ FM 27-10, para. 509

⁴⁰⁷ See P. Gaeta, 'The defence of Superior Orders; The Statute of the International Criminal Court versus customary international law', 10 *EJIL* (1999), p. 175.

⁴⁰⁸ See further Keijzer (1978), pp. 190-191.

First World War: the *Llandovery Castle*⁴⁰⁹ and *Dover Castle*.⁴¹⁰ In the *Llandovery Castle* case, the Leipzig Court stated,

However the subordinate obeying an order is liable to punishment if it was known to him that the order of the superior involved the infringement of civil or military law (...). It is certainly to be urged, in favour of the military subordinates, that they are under no obligation to question the order of their superior officer and they can count upon its legality. But no such confidence can be held to exist if such an order is universally known to everybody including the accused, to be without any doubt whatever against the law.⁴¹¹

At Nuremberg, the limited/conditional liability approach made room for the absolute liability approach. As was submitted by Garraway, however, the Nuremberg text was 'situation specific rather than a general reflection of the views for all war crimes at that particular time'.⁴¹² At Nuremberg, the crimes alleged were of such a magnitude and nature that the absolute denial of the plea of superior orders was in the end accepted. Moreover, it was thought that such a plea could not avail the *leaders* of the Nazi regime.

The negotiating history of the Nuremberg Statute demonstrates, however, that its 'founding fathers' were neither unanimous nor definite in rejecting the limited/conditional liability rule and in adopting the absolute liability rule instead. Indeed, in 1941, the Sub-Committee on superior orders, after having conducted a survey of national codes and laws on the plea of superior orders, concluded that,

Generally speaking the codes of law of the respective countries recognise the plea of superior order to be valid if the order is given by the superior to an inferior officer within the course of his duty and within his normal competence, provided the order is not blatantly illegal.⁴¹³

The Committee further submitted that each case must be considered on its own merits and that the plea of superior orders was not an automatic defence. In 1944, the Enforcement Committee that was engaged in drafting a Convention on the Trial and Punishment of War Criminals recommended adopting the limited responsibility approach.⁴¹⁴ This recommendation was, however, not unanimous. It was suggested by the Czech representative that, if this rule would be adopted, it would place individuals such as SA, SS, and Gestapo members in a better position than that prescribed in

⁴⁰⁹ 16 July 1921, 16 *AJIL* 708 (1922), pp. 721-723.

⁴¹⁰ 4 June 1921, 16 *AJIL* 708 (1922), pp. 706-708.

⁴¹¹ 16 *AJIL* 708 (1922), p. 721-722.

⁴¹² C.H.B. Garraway, 'The defence of superior orders', in P. Duyx, *et al.* (2000), 39 *Revue de Droit Militaire et de Droit de la Guerre* (2000), p. 97.

⁴¹³ UNWCC (1948), p. 98.

⁴¹⁴ The recommendation reads, 'The defence of obedience to superior orders shall not constitute a justification for the commission of an offence against the laws and customs of war, if the order was so manifestly contrary to those laws or customs that, taking into account his rank or position and the circumstances surrounding the commission of the offence, and individual of ordinary understanding should have known that such an order was illegal'. UNWCC (1948), p. 279.

the law already in existence in some Allied countries.⁴¹⁵ In that, he seemed to refer to the British Military Manual and the United States Rules of Land Warfare, which by that time had adopted the absolute liability position. After much debate, the United Nations War Crimes Commission, in a statement transmitted to the Governments, decided

[t]o leave it to the court itself in each case to decide what weight should be attached to a plea of superior orders. But the Commission wants to make it clear that its members unanimously agree that *in principle* this plea does not of itself exonerate the offenders.⁴¹⁶ [italics added, *EvS*]

In spring 1945, however, the issue was re-opened by the Czech and French representatives. The Commission laid down in the Explanatory Memorandum to its Draft Convention for the Establishment of a United Nations War Crimes Court the following statement:

The commission unanimously maintains the view which it expressed in connection with the United Nations War Crimes Court that the mere fact of having acted in obedience to the orders of a superior does *not of itself* relieve a person who has committed a war crime from responsibility.⁴¹⁷

In this way the Commission left the court no discretion in deciding what to do with a plea of superior orders. It is of interest, however, that the superior orders plea was not considered a defence *of itself (per se)*, thus leaving open the possibility that it can be considered a defence in conjunction with other facts to exempt the defendant from responsibility. This clause was, however, because of the Soviet position at the London Conference,⁴¹⁸ left out in the actual provision for superior orders in the Tribunal's Charter, Article 8:

The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the tribunal determines that justice so requires.

The provision on superior orders in the Charter of the Tokyo Tribunal, on the other hand, maintained the clause in Article 6:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, *of itself*, be sufficient to free

⁴¹⁵ UNWCC (1948), p. 279.

⁴¹⁶ *Ibidem*, p. 280.

⁴¹⁷ *Ibidem*.

⁴¹⁸ The Russians wanted the adoption of the absolute liability principle in all its extremes, See Dinstein, (1965), pp. 113-115. General Nikitchenko, the Soviet Union delegate at the London Conference asked himself, "Would it be proper really in speaking of major criminals to speak of them as carrying out some order of the superior? This is not a question of principle really, but I wonder if that is necessary when speaking of major criminals", cited by Garraway in Dux et al. (2000), p. 96.

such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

According to Dinstein,

The authors of the Tokyo Charter prescribed a more flexible, and a more logical, rule than that enunciated in London. It is not the doctrine of absolute liability, but rather the principle which permits all the circumstances of the case to play their parts, that prevails here.⁴¹⁹

In the Tokyo Judgement, however, the Nuremberg moral choice test was repeated. The Judges seemed to have been under the impression that they operated under the same law as that of the Nuremberg Tribunal. This is true for the most part, but not on the point of superior orders. There was room for a plea of superior orders at Tokyo while it was ruled out in Nuremberg.

The attempts in the post-war period to formulate a generally accepted rule on superior orders, in order to codify it in a valid international instrument, were in vain. Neither at the negotiating table around which the delegates assembled to draft the genocide convention, nor at the diplomatic conferences drawing up the 1949 Geneva Conventions and the 1977 Additional Protocols, could a satisfactory text be adopted.⁴²⁰ After considerable debate, proposals ranged from a draft proposal eliminating the defence to a provision allowing the superior orders plea in case of mistake, and the delegates at these conferences decided to drop the issue and not to include a provision on superior orders. It is noteworthy, however, that the final draft text of the 1977 Additional Protocols, in Article 77, contained the following provision:

The mere fact of having acted pursuant to an order of an authority or a superior does not absolve an accused person from penal responsibility if it be established that in the circumstances of the time *he knew or should have known* that he was committing a grave breach of the conventions or of this protocol. It may, however, be taken into account in mitigation of punishment.⁴²¹ (emphasis added, *EvS*)

This provision reflected traces of the manifest illegality test and knowledge requirement of early Austrian, German, and post-Second World War US law on superior orders. It was not adopted, however, as it did not attract the required two-thirds majority, albeit a majority.⁴²²

⁴¹⁹ Dinstein (1965), p. 157.

⁴²⁰ See Schabas (2000), pp. 326-329; Dinstein (1965), pp. 217-225.

⁴²¹ See Garraway in Duyx *et al.* (2000), p. 95, citing from the Official Records of the Diplomatic Conference on the Reaffirmation and Development of International a Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-1977), Vol. I, p. 392, Protection of War Victims Protocol I to the 1949 Geneva Conventions, p. 26.

⁴²² Garraway in Duyx *et al.* (2000), p. 95.

The debate on the defence of superior orders continued within the framework of the ILC. It is noteworthy that the 'moral choice test' reappeared in the 1951 Draft Code of Offences against the Peace and Security of Mankind:

The fact that a person charged with an offence defined in this code acted pursuant to order of his Government or of a Superior order does not relieve him of criminal responsibility, provided a moral choice was in fact possible to him.⁴²³

The 'moral choice' clause was replaced in the 1954 Draft Code by the wording 'in the circumstances at the time it was possible for him not to comply with that order'.⁴²⁴ The latter formula returned in the 1991 ILC Draft Code. In this way, the ILC did not allow superior orders to be a defence *per se*. It could, however, be a defence in relation to other defences such as those of duress or choice of evils. The initiatives of the Association Internationale de Droit Pénal (AIDP) and the International Law Association (ILA) in drafting an ICC Statute also shows restraint in allowing superior orders as a defence *per se*.⁴²⁵

When the Statutes of the *ad hoc* Tribunals were drawn up there was no generally accepted international rule on superior orders and no example other than the Statute of the Nuremberg Tribunal to draw inspiration from. It is hardly surprising that the ICTY and ICTR Statutes contain in Article 7(4) and Article 6(4), respectively the following wording:

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

It is noteworthy that the Secretary General, in his explanatory report to the ICTY Statute, argued – in line with the ILC's views on this point – that

Acting upon an order of a Government or a superior cannot relieve the perpetrator of the crime or his criminal responsibility and should not be a defence. Obedience to superior orders may, however, be considered a mitigating factor, should the International Tribunal determine that justice so requires. For example, the International Tribunal may consider the factor of superior orders in connection with other defences such as coercion or lack of moral choice.⁴²⁶

⁴²³ Article IV, UNGAOR, Supp. No. 9, UN Doc. A/CN.4/44, p. 13, in Nill-Theobald (1998), p. 77.

⁴²⁴ Article IV, UNGAOR, Supp. No. 9, UN Doc. A/2693, p.12 in Nill-Theobald (1998), p. 77

⁴²⁵ The Siracusa Draft II contained the 'moral choice test' and referred to 'necessity, coercion, duress or mistake of law' as possible defences in connection with a plea of superior orders. See Article 33-16 of the Siracusa Draft II in Nill-Theobald, (1998), Annex B, p. 459.

The ILA Draft Statute did not allow 'obedience to superior orders as a justification *per se*, but it can be taken into consideration in conjunction with other facts of the case in the context of Excuses (...), Mistake of Fact, Mistake of Law, Duress'. See ILA-Report of 64th Conference (1990), p. 187

⁴²⁶ Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UNSC Doc. S/25704 (1993), reprinted in 32 *ILM* 1163 (1993), para. 57.

In adopting the Nuremberg rule, the drafters of the ICTY and ICTR Statutes failed to appreciate the 'situation specific' nature of the Nuremberg rule on superior orders. Practice at the ICTY, however, has shown that, as in the subsequent proceedings after the Second World War, resort to a defence of superior orders is possible through another defence such as those of duress and mistake.⁴²⁷

The delegates drafting the ICC Statute were divided into two groups: one advocating the absolute liability approach (in particular Germany and the United Kingdom) and another group supporting the conditional/limited liability approach (the United States).⁴²⁸ After many long and difficult debates, the two opposing positions found a compromise in one rule. Article 33 can be seen to constitute the conditional/limited liability approach. The provision, however, reverses the presumption that the plea of superior orders is a defence. A *positive* version of the conditional/limited liability rule would have formulated conditions that render the defence invalid, the existence of which the *prosecution* would have to prove. Article 33 of the ICC Statute in its current *negative* formulation requires the *defence* to demonstrate that the requirements under paragraph 1 (the person was under a legal obligation to obey orders, *and* he did not know that the order was unlawful, *and* the order was not manifestly unlawful) were present. The absolute liability approach reappears in paragraph 2 of Article 33, where one reads that 'orders to commit genocide or crimes against humanity are manifestly unlawful'.

The negative formula and the exclusion of the defence in relation to crimes against humanity and genocide leave a limited scope for the defence of superior orders in the ICC framework. As the defence is limited to the crimes within the Court's jurisdiction, the provision has no direct effect on existing rules in domestic rules on this point. However – and here I agree with Zimmermann – strictly speaking, the principle of complementarity could make the Court seize jurisdiction over domestic proceedings more broadly admitting the defence as the latter proceedings might be not deemed a genuine prosecution under Article 17 of the Statute.⁴²⁹

⁴²⁷ The *Erdemović* case is an example of the simultaneous resort to duress and superior orders. It has been suggested that the defence of superior orders can come up at the ICTY in connection with a mistake of fact. The bombing of the Chinese Embassy during the Kosovo conflict by NATO might be an example of a mistake of fact to which the aircrew might have recourse. Fenrick in his reaction to Garraway in Duyx *et al.* (2000), p. 99.

⁴²⁸ The US proposal reads, 'In addition to other grounds for excluding criminal responsibility permitted by this Statute, a person is not criminally responsible if at the time of that person's conduct (...) (c) The person was a member of forces acting pursuant to the order of a Government or of a military commander, unless the person knew the order to be unlawful or that the order was manifestly unlawful'. 16 June 1998, A/CONF.183/C.1/WGPP/L.2. The provision that satisfied the opposing groups, and the wording of which has been retained to a large extent in Article 33, reads as follows, '(1) The fact that a person's conduct was pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve the person of criminal responsibility unless the order did not appear to be manifestly unlawful. (2) In respect of the commission of the crime of genocide or a crime against humanity, a person shall not be exempted from criminal responsibility on the sole ground that the person acted pursuant to an order of a Government or a superior, or pursuant to national legislation'. Option B of the working paper on Article 32 of the Draft Statute A/CONF.183/C.1/WGPP/L.9, 24 June 1998.

⁴²⁹ See A. Zimmermann, 'Superior Orders', in Cassese *et al.* (2002), p. 968.

Text

The heading of Article 33 'Superior orders and prescription of law' raises questions as to the inclusion of the second part: prescription of law. Prescription was included as part of the heading to express the view that, citing Triffterer,

Irrespective of the type of order, the rank of the superior or the kind of prescription of law that lead to the commission of one of the most serious crimes of concern to the community of nations, all three 'shall not relieve' the subordinate 'from criminal responsibility unless'.⁴³⁰

The prescription of law requirement is mirrored in the clause stipulating that the superior order under consideration can also emanate from 'a Government', *e.g.* in the form of legislation. The reason for including 'prescription' in Article 33 stems from the view that the crime originated from an unlawful source: superior order or legislation, and as such requires the subordinate to carry it out accordingly.

The notion of 'order' in Article 33 should be taken to have a broad scope and extend to any written or unwritten communication between a superior and his subordinate within a balance of power, *i.e.* presupposing that the superior has the right to demand obedience should suffice in this context. An order should reach its addressee and clearly state what is expected from the recipient. An order can be directed to an individual or to an entity. In the latter case, it can still be regarded as an order to a person. The order that 'no quarter shall be given' directed to a military force can be regarded as an order to every person belonging to that force, although not individually addressed.

Orders 'of a Government or of a superior' usually relate to orders emanating from the hierarchy of Government to commanders of military units to be delivered to their subordinates. Such a commander may either simply pass the order on to another commander or address his subordinates directly. 'Government' and 'superior' are normally limited to *de iure* authorities. This raises an important point.

Superior-subordinate relationships should be interpreted more strictly in the context of superior orders than in the context of superior responsibility. It is, therefore, misleading to suggest that Articles 28 and 33 'represent two sides of the same coin'.⁴³¹ In the context of superior responsibility (Article 28), *de facto* relationships have been understood to include informal relationships based on effective control.⁴³² This includes civilian superiors, such as the director of a tea company,⁴³³ as long as a civilian superior can be found to have the duty and the 'material ability' to prevent his subordinates from committing crimes, or punish them when they have committed one. It is submitted here that *de facto* relationships and unofficial subordination

⁴³⁰ O. Triffterer in Triffterer (1999), Article 33, margin No. 13 (Triffterer in Triffterer (1999b)), p. 580.

⁴³¹ Triffterer in Triffterer (1999b), margin No. 33, p. 588.

⁴³² *Čelebići* Judgement, paras 377-378, endorsed by the Appeals Chamber in *Čelebići* Appeal Judgement paras. 197-199.

⁴³³ *Musema* Judgement, para. 135.

seem irrelevant in the context of superior orders. The only 'civilian' that counts in the context of superior orders is the political superior or government representative. This is why the word 'civilian' was included in the 'chapeau' of Article 33. It refers to civilian departments and administration within Government. The latter is traditionally divided into civilian and military departments.

An exception to the above statement can be made for a *de facto* superior who qualifies as a person effectively acting as a *de iure* military commander. For instance, the subordinate of a military commander, who is not yet formally designated commander, but already acts as one in anticipation of his official appointment. This was the case with General Krstić, who was found to be a *de facto* commander as he already fulfilled his functions as Drina Corps Commander while awaiting his formal appointment, which was already 'officially on paper'.⁴³⁴ In the latter type of situation, being so close to a *de iure* command, *de facto* command and the orders emanating from it may suffice to qualify as 'orders of the superior' pursuant to Article 33(1)(a) of the ICC Statute.

The reason for the disparity between Articles 28 and 33 regarding the superior-subordinate relationship lies in the basis of a plea of superior orders: the unique relationship between a military superior and his subordinate, which is based on the military duty to obey and the ensuing presumption of legality of orders. In reality, the defence of superior orders is reserved for the military. This leaves us to conclude that, while the superior-subordinate relationship may be interpreted in a broad way for establishing a superior's *responsibility* for failure to act, it should be interpreted in a strict way in the context of averting *responsibility*.

A causal connection between order and conduct needs to be established. Article 33 requires that a crime has been committed 'by a person pursuant to an order'. If the person commits the crime independently from the order, he does not have a defence under Article 33. The order must have inspired or initiated the subordinate to act. Moreover, as customary international law on superior orders (in connection with duress) has shown,⁴³⁵ 'superior orders' is no defence when the crimes are committed *con amore*.⁴³⁶

Three conditions

The three cumulative conditions under which a person has recourse to the defence of superior orders follow in subparagraph (a)-(c). These requirements serve to establish that the subordinate was *bona fide* or in good faith when (wrongfully) believing that he was under a legal obligation to obey orders.

The first condition refers to the 'legal obligation to obey orders'. The formula refers to orders in general, which must have existed at the time when the subordinate

⁴³⁴ *Krstić* Judgement, paras. 328, 300, and 625.

⁴³⁵ See UNWCC, Vol. XV, p. 174, and *Erdemović* Appeal Judgement, Separate and Dissenting Opinion Judge Cassese, para. 16.

⁴³⁶ Shakespeare in *Hamlet*: Rosencrantz and Guildenstern act under orders as well, yet Hamlet punishes them as 'they did make love to their employment'. *Hamlet*, Act V, scene 2.

committed the crime. In essence, the clause 'legal obligation to obey orders' expresses the presumption that a superior has the right to expect obedience of the subordinate. 'Legal' refers to national law as well as international law. Peacekeepers, for instance, often have obligations under two chains of command; a national and an international one. Triffterer points to the possibility that the subordinate wrongly believes he is 'under a legal obligation to obey orders', which in fact he is not. He is of the view that the subordinate has a possible defence under Article 32. Bearing in mind the narrow scope of Article 32, which covers only mistakes that negative *mens rea* and relate to a positive material element of the underlying crime, it seems unlikely, however, that Article 32 could offer a solution.

At this point, it is opportune to return to the defence of duress in connection with superior orders. With Paphiti I agree that '[i]n the case of an order accompanied by a threat, the legality or otherwise of the order is, to the individual, really quite irrelevant'.⁴³⁷ In other words, duress can still be a defence when a subordinate carries out an *unlawful* order. Not the nature of the order, but the *threat* accompanying it makes one act under duress. With the defence of superior orders *per se*, however, the nature of the order is relevant. The 'legal obligation' clause in essence implies that both the superior and the subordinate operate within the boundaries of their normal/usual competence. Only under such circumstances can a mistaken belief on the part of a subordinate be excused under Article 33. Secondly, because obedience to lawful superior orders is another type of defence.

The second condition constitutes the *subjective* requirement of the superior orders defence and refers to the subordinate's knowledge of the legality of the order. To be relieved of criminal responsibility, the subordinate-defendant must have to argue that he did not know that the order was unlawful. Moreover, he needs to *demonstrate* (burden of coming forward) that the order was not manifestly unlawful, while the prosecutor then has to *prove* the contrary (burden of proof). This brings us to the next condition

The third condition contains the manifest unlawfulness test, which constitutes the *objective* requirement circumscribing the scope of application of the plea of superior orders. The manifest unlawfulness test is subject to a *Garantenstellung*. What is manifestly unlawful for specialised military personnel is not necessarily manifestly unlawful for the average soldier. The *Garantenstellung* thus effectively narrows the scope of the superior orders defence for specially trained military personnel who 'should know better'. In the view of the author, the *Garantenstellung* should be applied as a 'particularising standard', where individual circumstances such as rank and experience are taken into account as well.

The second paragraph of Article 33 contains the exclusion of the defence of superior orders for genocide and crimes against humanity. Orders to commit the latter crimes are considered manifestly unlawful *per se*. The inclusion of this clause in Rome was plainly to appease the delegates supporting the absolute liability rule. It marks Article 33 as the ultimate compromise. Strictly speaking, the condition is superfluous. After all, an order to commit either crimes against humanity or acts of

⁴³⁷ Paphiti (1999), p. 255.

genocide can be considered 'manifestly unlawful' under subparagraph 1(c) bearing in mind the special intent and grave nature of the crimes. Furthermore, the clause results in a distinction between war crimes on the one hand and crimes against humanity and acts of genocide on the other hand. This same distinction appeared with regard to self-defence in connection with 'property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission' in Article 31(1)(c).⁴³⁸ It seems that the delegates in Rome considered war crimes a less apparent and less serious breach of international humanitarian law than crimes against humanity and genocide.⁴³⁹ These stand lower on the ladder of moral repudiation than crimes against humanity and genocide, the latter being the most serious crime or 'the crime(s) of crimes'.⁴⁴⁰ A similar distinction can be found in the jurisprudence of the Tribunals of Rwanda and the Former Yugoslavia.⁴⁴¹

One needs to be aware of this classification when prosecuting acts that can qualify either as crimes against humanity or as war crimes. As Zimmermann observes, even in situations in which the defendant can rely on a defence of superior orders with regard to war crimes, he can still be punished for the same acts as crimes against humanity.⁴⁴² To my mind, this is unacceptable and would violate the principles of equity and fairness. After all, a successful plea of superior orders implies a non-manifestly unlawful order. The Court should, therefore, reason *a contrario* with regard to Article 33(2) and adopt the premise that if it deems an order non-manifestly unlawful, the subsequent crime is *not* a crime against humanity or (an act of) genocide.

(b) Jurisprudence

The *Llandovery Castle* and *Dover Castle* cases constitute the first international precedents in which the conditional liability approach was recognised. The absolute liability approach was born in Nuremberg. The International Military Tribunal did not question this rule, which it thought was in conformity with the law of all nations. When a senior commander raised the defence for what the IMT deemed 'shocking crimes', it did not even grant mitigation of punishment. In the case against Keitel, it held,

There is nothing in mitigation. Superior orders, even to a soldier, cannot be considered in mitigation where crimes so shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification.⁴⁴³

⁴³⁸ See para. 6 (b) of Chapter 6.

⁴³⁹ For a different view see Zimmermann in Cassese *et al.* (2002), p. 972.

⁴⁴⁰ Referred to as such by Schabas in the subtitle of his book on Genocide (2000).

⁴⁴¹ See to *Erdemović* Appeal Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 19 *et seq.*

⁴⁴² Zimmermann in Cassese *et al.* (2002), p. 972.

⁴⁴³ Nuremberg Judgement in Friedman (1972), Vol. II, p. 977.

Thus, there are two different approaches on the international level, a conditional liability and an absolute liability approach. Both have encountered resistance and confirmation in jurisprudence. Without venturing into an elaborate survey of international case law – this has been done elsewhere⁴⁴⁴ – a few comments can be made on the plea of superior orders in international adjudication.

First of all, despite the absolute denial of the defence by the International Military Tribunal, the military tribunals and courts pronouncing judgement under CCL 10 displayed a lenient attitude towards the defence of superior orders in the subsequent proceedings. They dealt with soldiers and officers from the middle and lower ranks of the chain of command and occasionally allowed a plea of superior orders, which was raised in almost every trial. Article II(4)(b) of the Law No. 10 of the Allied Control Council for Germany, however, stipulated the absolute denial of such a defence:

The fact that the person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.⁴⁴⁵

The provision differs slightly from Article 8 of the Nuremberg Statute in that it does not contain the clause ‘if the Tribunal determines that justice so requires’ relating to the mitigation of punishment, and ‘for a crime’ was inserted into Article II(4)(b) while absent in article 8 of the Nuremberg Statute. I agree with Dinstei that not much weight should be given to these differences and that in substance both provisions are similar.⁴⁴⁶ CCL 10 also excludes the possibility of a superior orders plea to exempt from liability. Nevertheless, the military tribunals, although they did not allow the defence of superior orders in the cases before them, submitted that under certain circumstances a plea of superior orders *could* exempt the defendant from liability. In *Einsatzgruppen*, *High Command*, and *Hostages*, several observations were made in relation to allowing a defence of superior orders in connection with the defences of duress,⁴⁴⁷ mistake of fact, and mistake of law.⁴⁴⁸

As to mistake of law, the US Military Tribunal in the *High Command* case retained the possibility that under certain circumstances a defendant, because of excusable ignorance of the unlawful order, could rely on superior orders as a defence *per se*.

Within certain limitations, a soldier in a subordinate position has the right to assume that the orders of his superiors and the state which he serves and which are issued to him are in conformity with international law.⁴⁴⁹

⁴⁴⁴ For a more elaborate study of the defence of superior orders in international (case) law: Dinstei (1965); Green, (1976); Green (1993) p. 320 *et seq.*; Keijzer (1978); Lippman (2001b), pp. 153-251.

⁴⁴⁵ Cited in UNWCC (1948), p. 283.

⁴⁴⁶ Dinstei (1965), pp. 162-164.

⁴⁴⁷ With regard to duress the Tribunal in the *Einsatzgruppen* case held that: ‘No court will punish a man, who, with a loaded pistol at his head is compelled to pull a lethal lever’. TWC, Vol. IV, pp. 411-589.

⁴⁴⁸ See Dinstei (1965), pp. 165-174, 214; Garraway in Duykx *et al.* (2000), pp. 94-95.

⁴⁴⁹ Friedman (1972), Vol. II, p. 1433.

In other words, a superior's orders may be presumed to be legal by the subordinate. When they turn out not to be legal, the subordinate has a defence of superior orders/mistake of law. However, there is a limit to this presumption, especially when the subordinate occupies a certain position or rank. In the *Hostages* case, the US Military Tribunal ruled that,

An officer is duty bound to carry out only the lawful orders that he receives. One who distributes, issues, or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character.⁴⁵⁰

The Tribunals in *High Command* and *Hostages* seem to have recognised that the presumption of legality, within certain limits, is the basis for accepting a plea of superior orders when the order turns out to be illegal. The defence of superior orders is considered an *excuse* (thus not justifying the subordinate's conduct,) and is based on the subordinate's (reasonable) reliance on his superior.

The ICTY and ICTR Statutes confirm the absolute liability approach on the international scene. As was shown earlier, its provisions are almost exact copies of the Nuremberg articles. The only trial in which the defence played some role was *Erdemović*. However, the plea of superior orders raised by the accused was in reality a resort to the defence of duress and was treated as such. The Trial Chamber in *Erdemović* acknowledged that the strict absolute liability rule was applied in a less rigid way in the subsequent Nuremberg proceedings. The defence was admitted as a mitigating factor, especially with regard to lower-ranked accused.⁴⁵¹ Relying on this precedent and the fact that Erdemović occupied a very low rank in the Bosnian Serb army, it deliberated that,

In practice, the Trial Chamber therefore accepts that tribunals have considered orders from superiors as valid grounds for a reduction of penalty. This general assertion must be qualified, however, to the extent that tribunals have tended to show more leniency in cases where the accused arguing a defence of superior orders held a low rank in the military or civilian hierarchy.⁴⁵²

The Trial Chamber, however, would not accept a plea of superior orders to mitigate punishment where the accused had carried out the order *con amore*, i.e. with the requisite *mens rea*

If the order had no influence on the unlawful behaviour because the accused was already prepared to carry it out, no such mitigating circumstances can be said to exist.⁴⁵³

⁴⁵⁰ Friedman (1972), Vol. II, p. 1323.

⁴⁵¹ *Erdemović* Sentencing Judgement I, paras. 51-52.

⁴⁵² *Ibidem*, para. 53.

⁴⁵³ *Ibidem*.

While the Trial Chamber in *Erdemović* was of the view that superior orders and duress were necessarily connected,⁴⁵⁴ the Appeals Chamber ruled that the concepts of superior orders and duress should be distinguished.⁴⁵⁵ Superior orders were deemed to serve merely as a factual circumstance confirming (or not) the existence of duress. The following statement of Judge McDonald and Judge Vohrah (the majority) makes it clear that superior orders is not considered a defence *per se* at the ICTY:

We subscribe to the view that obedience to superior orders does not amount to a defence *per se* but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defences of duress or mistake of fact are made out.⁴⁵⁶

Whatever the exact meaning of the preceding case law, it is clear that the absolute liability approach in international case law is not as absolute as one might think. The decisions of the US military Tribunals and some of the deliberations in the *Erdemović* case leave us with a more nuanced picture. The fact that the ICC Statute has adopted the conditional liability approach in reality marks the end of the absolute liability approach altogether.

(c) National underpinnings

Since the *Llandovery Castle* and *Dover Castle* cases, most States have adopted the conditional/limited liability approach in their national criminal laws and military manuals. This has, however, been done in different ways and sometimes even in combination with an absolute liability rule. In order to give a reasoned answer to the question of whether general principles of law derived from national law accept the defence of superior orders as a defence *per se*, we need to take a closer look at the defence in a national context.

The conditional liability approach, different types

The subjective or knowledge requirement of the superior orders defence can take three forms.⁴⁵⁷ Firstly, the subordinate 'should have known' that the order was illegal; secondly, the order was not (pertaining to an act that was) 'manifestly illegal'; thirdly, the subordinate can be acquitted if he 'honestly' or in 'good faith (*bona fide*) believed' that he had to obey the order. The first two standards connote an *objective* test, *i.e.* irrespective of the actual mental state and departing from an imaginary person in a similar position, while the latter constitutes a *subjective* test, taking the actual mental state of the defendant into consideration. The tests are not mutually exclusive and are sometimes applied side by side in the same case. Some States, such as the US, provide for all three tests in their (case) law.⁴⁵⁸

⁴⁵⁴ *Ibidem*, para. 19.

⁴⁵⁵ *Erdemović* Appeal Judgement, paras. 34-36.

⁴⁵⁶ *Ibidem*, para. 34.

⁴⁵⁷ See also Gaeta (1999), pp. 176-177, footnote 14.

⁴⁵⁸ Keijzer (1978), pp. 158-166.

The best known proponent of the 'should have known' test on the national level is paragraph 509 of the US Army Field Manual of 1956, cited in the preceding paragraph. This clause was instructive in the debates on superior orders in Rome. A prominent example of the 'should have known' standard in case law is the *Calley* case, in which the American lieutenant Calley was convicted for his participation in the massacre at My Lai, Vietnam. The jury in this trial was instructed as follows:

Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful, you must proceed to determine whether, under the circumstances, a man of ordinary sense and understanding *would have known* the order was unlawful.⁴⁵⁹ [italics added, *EvS*]

The 'manifest illegality' standard appears in Canadian, Italian, Israeli, German, and American (case) law.⁴⁶⁰ The 'manifest illegality' test can already be found in a decision of the Austro-Hungarian Military Court in 1915 and Article 158 of the 1855 Military Penal Code of the Austro-Hungarian Monarchy on disobedience, the reverse side of the coin, which reads,

A subordinate who does not carry out an order is not guilty of a violation of his duty of subordination if (a) the order is obviously contrary to loyalty due to the Prince of the land; (b) if the order pertains to an act or omission in which *evidently* a crime or an offence is to be recognised.⁴⁶¹ [italics added, *EvS*]

In Germany, the Military Penal Code of 1872, which was in force throughout the Second World War, made punishable disobedience to *binding* orders irrespective of their legality.⁴⁶² The superior was the one responsible when carrying out an order resulted in an offence, the rationale behind this being the assurance of obedience and military discipline. The provision, however, left room for finding a subordinate liable for compliance with a criminal order, namely, when he *knew* the order pertained to the commission of a crime. Meanwhile, an interesting development took place in German jurisprudence in the post Second World War era. German courts denied nazi war criminals the plea of superior orders by declaring null and void all those laws, orders, and regulations that denied the 'quest for justice'.⁴⁶³ Superior orders were declared void *ab initio* and the plea inaccessible.⁴⁶⁴ This was a reaction to the excesses of legal positivism during the Third Reich and it solved the anomaly of *binding* orders to commit war crimes. In 1975, the legislator introduced the 'manifest illegality' test to German Military Penal law.⁴⁶⁵ In recent German case law, the

⁴⁵⁹ 46 CMR 1131 (1973), 1183 *et seq.*

⁴⁶⁰ See Gaeta (1999), pp. 176-177, footnote 7-13, and Keijzer (1978), pp. 167-168, 188-195, and 205-210.

⁴⁶¹ Cited by Gaeta (1999), p. 175, footnote 5.

⁴⁶² See Nill-Theobald (1998), pp. 108-121.

⁴⁶³ Gustav Radbruch, cited in K.A. Adams, 'What is Just? The Rule of Law and Natural Law in the Trials of Former East German Border Guards', 29 *Stanford JIL* (1993), p. 301.

⁴⁶⁴ See Adams (1993), pp. 301-306.

⁴⁶⁵ Article 5(1) of the Military Criminal Code ('Wehrstrafgesetz') which reads: 'Begeht ein Unter-

'manifest illegality' test played a role in the trial of two DDR soldiers who were accused of having killed civilians who tried to escape to Western Germany. The court interpreted 'manifest' as 'beyond any doubt'.⁴⁶⁶

Other cases in which the 'manifest illegality' test was applied are the *Priebke* and *R. v. Finta* cases. A well-known American example is *U.S. v. Kinder*, which was dated after the Nuremberg trial. Here, the 'manifest illegality' test was applied alongside the 'should have known test'. As both are in substance the same, they were just used to say the same with different words. The court, in approving the conviction of the subordinate who killed a Korean civilian, found that the orders he had obeyed were

[m]anifestly beyond the scope of the issuing officer's authority so palpably illegal on their face that a man of ordinary sense and understanding would know them to be illegal [italics added, *EvS*].⁴⁶⁷

A slightly different approach, but one which reflects the same principle, is the subjective approach of *bona fide* belief, which is applied in, for instance, Dutch law on superior orders.⁴⁶⁸ Article 43(2) of the Dutch Penal Code provides that

An official order issued without authority does not remove criminal liability unless the order was assumed by the subordinate in *good faith* to have been issued with authority and he complied with it in his capacity as subordinate. [italics added, *EvS*]⁴⁶⁹

US case law also provides us with examples of the 'good faith' criterion. Keijzer shows in a review of US cases that it is mostly expressed together with the objective test in one and the same consideration. An example is *U.S. v. Baugh*:

[t]he acts (...) done in *good faith and without malice*, in the compliance with the orders of a superior are justifiable, unless such acts are *manifestly beyond the scope of his authority*

gebener eine rechtswidrige Tat, die den Tatbestand eines Strafgesetzes verwirklicht, auf Befehl, so trifft ihn eine Schuld nur, wenn er erkennt, daß es sich um eine rechtswidrige Tat handelt oder dies nach den ihm bekannten Umständen offensichtlich ist'. ('A subordinate who, in compliance with a superior order has violated the actual prohibition of a punishable offence, will only be liable to punishment if it was known to him, or if it was manifest from the circumstances known to him, that the act was unlawful'. [Transl., *EvS*]. Schölz (1975), pp. 67-74.

⁴⁶⁶ BGHSt, *NSiZ*, 1993, p. 129.

⁴⁶⁷ *U.S. v. Kinder*, 14 CMR 742 (1954), referred to in Keijzer (1978), p. 165.

⁴⁶⁸ As regards the notion of 'good faith', Dutch legal doctrine is not uniform in the test it applies. While some scholars interpret the notion of 'good faith' subjectively (Pompe and Remmelink), others apply a more objective test (Van Bemmelen). In case law, a more objective approach has been adopted, for instance, in the 'De Zeven Provinciën' case, which concerned a mutiny on the Dutch cruiser 'HNLMS De Zeven Provinciën': 'The court ruled that even if an order not to apply force had been issued by that officer (*quod non*), it was impossible, under the circumstances, that the defendants could in good faith have taken such an order to be justified. For in a situation like this they were under no legal obligation to use force, and there were no circumstances which would absolve them of penal liability for failure to carry out this duty'. Keijzer (1978), pp. 200-201.

⁴⁶⁹ *De Zeven Provinciën* case, High Military Court of the Netherlands East Indies, 25 July 1934, *MRT*, 1934/1935, p. 477.

and such that a man of ordinary sense and understanding would know them to be illegal.⁴⁷⁰ [italics added, *EvS*]

It is also noteworthy that the Model Penal Code in Section 2.10, entitled 'Military Orders', provides for a complete defence of superior orders requiring a subjective 'knowledge test':

It is an affirmative defense that the actor in the conduct charged to constitute an offense, does no more than execute an order of his superior in the armed services which he does not know to be unlawful.

In nineteenth century English law and scholarly debate the 'good faith' criterion was relied upon to allow for a defence of superior orders. This is of interest as the United Kingdom is often regarded as one of the few States that have excluded the defence of superior orders and have adhered to the absolute liability rule ever since the *respondeat superior* doctrine – advocated by Oppenheim – was abandoned.⁴⁷¹ It is not so simple, however. Stephen,⁴⁷² Halsbury,⁴⁷³ and Glanville Williams⁴⁷⁴ all favoured the opinion that compliance with superior orders can provide a defence *per se*. Moreover, the 'honest belief' test was adopted in some of the nineteenth-century cases establishing what would now be referred to as the conditional/limited liability rule.⁴⁷⁵ Admittedly, the limited liability rule was embraced during the period preceding the First and Second World Wars, yet as the following demonstrates, the position changed in the post-Second World War era to acceptance of the absolute liability rule.

The absolute liability approach

A second point of interest when discussing the defence of superior orders in national law is the absolute liability approach. This approach has an international pedigree and originated in Nuremberg, yet is used on the national level as well, albeit not by many States. The United Kingdom is the most conspicuous example of a State ad-

⁴⁷⁰ *U.S. v. Baugh* (1944), CM 265848, 4 BR NATO, MTO 359 (1944), referred to in Keijzer (1978), pp. 162, 165-166.

⁴⁷¹ See Gaeta (1999), p. 179.

⁴⁷² '[a] soldier should be protected by orders for which he might reasonably believe his officer to have good grounds', Stephen (1883), Vol. I, p. 205, cited in Keijzer (1978), p. 176.

⁴⁷³ 'A soldier in a subordinate position is not, as it would seem, criminally responsible for the consequences of obeying the orders he is bound to obey, provided those orders are not, having regard to the occasion upon which they are given and executed, manifestly illegal'. Halsbury (1909/1955), cited in Keijzer (1978), p. 177.

⁴⁷⁴ Williams (1983), pp. 455-456.

⁴⁷⁵ Keijzer (1978), pp. 172-174. His analysis shows that the *bona fide* criterion can be found in: *R. v. James*, [1837] All ER 173, 429; *R. v. Trainer* [1864] All ER 176, 488; *Keighly v. Bell* (1866) 4 Foster and Finlason 763, 790, 805; and *R v. Smith* (1900) 17 Special Court Reports of Cape of Good Hope, 561. The 'manifest illegality' test was applied alongside the good faith test in two of these cases, namely in *Keighly v. Bell* and *R v. Smith*.

hering to the absolute liability principle.⁴⁷⁶ Paragraph 627 of the Manual of Military Law states,

Obedience to the order of a government or of a superior, whether military or civil, or to a national law or regulation, affords no defence to a charge of committing a war crime but may be considered in mitigation of punishment.⁴⁷⁷

The Nuremberg and subsequent proceedings have left their traces in British scholarly debate and (military) case law. From both sources, one can conclude that the opinion is widely held that compliance with an order does not provide a defence *per se*.⁴⁷⁸ In a statement of the High Court in Australia, confirmed by the House of Lords and the Privy Council, this view was worded as follows:

It is fundamental to our legal system that the executive has no power to authorise a breach of the law and that it is no excuse for an offender to say that he acted under the authority of a superior officer.⁴⁷⁹

In reassuring those who criticise this approach for its possibly harsh implications, commentators have pointed to the royal prerogative of pardon and the common sense of judicial authorities.⁴⁸⁰ Moreover, the plea of superior orders is thought to give rise to 'negating a particular intent which may be a complete defence or reduce the crime to one of a less serious nature, or by excusing what appears to be culpable negligence'.⁴⁸¹ A State Party to the ICC Statute that excludes the defence of superior orders in its own jurisdiction will probably accommodate Article 33(1) of the ICC Statute and change its legislation accordingly. The complementarity principle underlying the Rome Statute encourages Member States to adopt the (narrowly formulated) conditional liability approach. The English International Criminal Court Bill, however, does not provide for a national equivalent of Article 33(1). To avoid being found 'unwilling or unable', which would trigger the ICC's jurisdiction, English courts have to rely on international customary law to bring the conditional liability approach within their jurisdiction.

A combined approach

Some States adopt both the absolute liability and the conditional liability approaches. They apply a conditional liability approach to nationals following orders based on national law while they provide for the absolute liability approach in case of war crimes committed by enemy nationals or by those carrying out orders based

⁴⁷⁶ Other States adopting this approach include Argentina, Austria, Iran, and Romania. Gaeta (1999), p. 179, footnote 21.

⁴⁷⁷ British Manual of Military law (1958).

⁴⁷⁸ Clegg [1995] 1 All ER 334; *R. v. Howe and Others* (1987) AC 417 (in particular Lord Hailsham of Marylebone L.C., pp. 427-428).

⁴⁷⁹ *A. v. Hayden* (1984) 156 CLR 532, p. 540.

⁴⁸⁰ Halsbury (1909/1955), Vol X, p. 620.

⁴⁸¹ Declaratory statement in British Manual of Military Law (1971), cited in Keijzer (1978), pp. 171-172.

on foreign legal systems.⁴⁸² France is an example of the latter situation. After a period in which the rule of unconditional obedience applied, the French adopted the theory of *baïonnettes intelligentes* in the Regulation of General Discipline of 1966. A soldier is now required to 'think by himself', *i.e.* to execute only lawful orders and in doing so to demonstrate initiative and form independent judgements.⁴⁸³ He is personally responsible for all offences he commits, whether ordered or not.⁴⁸⁴ The absolute denial of a superior orders defence is encapsulated in Article 396 of the Code Justice Militaire, which determines that obedience to laws, orders and rules of the enemy authority does not provide a *justification* but can be considered in mitigation or be an *excuse*.⁴⁸⁵ However, superior orders is a defence under Article 122-4 of the Code Pénal.⁴⁸⁶

N'est pas pénalement responsable la personne qui accomplit un acte prescrit ou autorisé par des dispositions législatives ou réglementaires. N'est pas pénalement responsable la personne qui accomplit un acte commandé par l'autorité légitime, sauf si cet acte est manifestement illégal.

Superior orders is a defence *per se*, unless the order pertained to an act that can be qualified 'manifestement illégal'.⁴⁸⁷ According to Elliot, Article 122-4 'exists in France to promote obedience in the civil service and to acknowledge that a subordinate's free will is reduced when they receive an order from their superiors'.⁴⁸⁸ The defence, however, does not apply to crimes against humanity and genocide. As was pointed out earlier, in the context of duress, Article 213-4 of the Nouveau Code Pénal excludes resort to the defence of superior orders and legal requirement in cases of 'les actes inhumains'.

The Dutch legal system excludes the superior orders defence for war crimes in Article 10(1) of the War Crimes Act and for genocide in Article 3 of the Genocide Act.⁴⁸⁹ As such, these articles are exceptions to the earlier mentioned Article 43 of

⁴⁸² See Gaeta (1999), pp. 179-180, n. 22.

⁴⁸³ Desportes and Le Guehec (2000), pp. 621-624.

⁴⁸⁴ Keijzer (1978), pp. 151, 180-181.

⁴⁸⁵ V.d. Bosch *et al.* (ed.), *Militair straf- en tuchtrecht* (Military Criminal and Disciplinary Law) Suppl. 14 (November 1994), Wet Oorlogsstrafrecht (Dutch War Crimes Act), Art. 10-20/24; Gaeta (1999), p. 179, footnote 22.

⁴⁸⁶ Article 122-4:

N'est pas pénalement responsable la personne qui accomplit un acte prescrit ou autorisé par des dispositions législatives ou réglementaires.

N'est pas pénalement responsable la personne qui accomplit un acte commandé par l'autorité légitime, sauf si cet acte est manifestement illégal

⁴⁸⁷ As was mentioned earlier in the context of duress, Article 213-4 of the Nouveau Code Pénal excludes resort to the defence of superior orders and legal requirement in cases of 'les actes inhumains'. See Chapter 6 para. 7(b).

⁴⁸⁸ C. Elliot, 'A Comparative Analysis of Defences in English and French Criminal Law', 8 *Eur. J Crime, Crim. L & Crim. Jus* (2000), p. 322.

⁴⁸⁹ The legislator wanted to exclude the defence of superior orders as a *justification* of violations of the laws and customs of war. Committing a war crime pursuant to superior orders could, however, still be *excused*. See Explanatory Memorandum to the Dutch War Crimes Act: *Kamerstukken II*, 1950-1951,

the Dutch Penal Code that does provide for a defence of superior orders. The idea behind the exclusion was that the legislator deemed application of Article 43 inappropriate in time of war and to the laws and customs of war.⁴⁹⁰ Both the Dutch War Crimes Act and the Genocide Act have been replaced by the International Crimes Act.⁴⁹¹ The new Act provides for a copy of Article 33 of the ICC Statute in Article 11, thus establishing the conditional liability approach for war crimes as well.

Justification or excuse?

Another point of interest is the nature of the defence of superior orders: as justification or as excuse. Although this distinction is not given much weight in Anglo-American law and is predominantly applied in civil law legal systems, it is worth elaborating on as it raises some questions in the context of the defence of superior orders. When one deems the act carried out in obedience to an *unlawful* superior order *justified* and within the law, *i.e. legal*, an inconsistency exists. An act cannot be illegal in ordering and legal in execution. Therefore, the defence of obedience to *unlawful* superior orders, *i.e.* pertaining to the commission of a war crime, is generally considered an *excuse*. Many civil legal systems⁴⁹² provide for a defence of superior orders as a *justification* as well, namely, when a person commits an offence in carrying out a *lawful* order. Consider the policeman who orders someone to drive through a red traffic light in an emergency. Dutch law provides a good example of this differentiation in Article 43. The second paragraph of this Article stipulates that obedience to unlawful superior orders can excuse a subordinate when he *bona fide* believed the order to be within the law (the conditional liability rule). In Article 43(1), the Dutch Penal Code encapsulates the execution of a lawful superior order as a justification:

A person who commits an offence in carrying out an official order issued by the competent authority is not criminally liable.

In French law, Article 122-4 of the French Penal Code *justifies* behaviour ordered by a legitimate authority.⁴⁹³ The same provision, by reasoning *a contrario*, also provides for a defence in case of a non-‘manifestement illégal’ order. It seems, however, that the execution of such an order also qualifies as a justification.⁴⁹⁴ Even though French doctrine and case law is not clear on this point, non-manifest unlaw-

2258, nr. 3, p. 10 and *Kamerstukken II*, 1951-1952, 2258, nr. 5, p. 3, cited in V.d. Bosch *et al.* (1990), *Wet Oorlogsstrafrecht*, Art. 10-8/12. See further G.L. Coolen, ‘Is gehoorzaamheid aan een onbevoegd gegeven dienstbevel strafbaar?’ [Is obedience to an unlawful order a criminal act?], 94 *MRT* (2001) pp. 351-355.

⁴⁹⁰ V.d. Bosch *et al.* (1990), *Wet Oorlogsstrafrecht*, Art. 10-8/12.

⁴⁹¹ Act of 9 June 2003, Stb. 2003, 270. English translation: <<http://www.iccnw.org/resourcestools/ratimtoolkit/nationalregionaltools/legislationdebates/NL.IntCrAct.doc>.

⁴⁹² The MPC also provides for such a defence in Section 3.03 ‘Execution of Public Duty’.

⁴⁹³ Desportes and Le Gunehec (2000), pp. 621-623.

⁴⁹⁴ *Ibidem*, p. 624.

ful orders are then apparently considered *quasi* lawful orders and to be within the law. In Germany the nature of the superior orders defence has been subject of much debate. This can be explained by the German practice to consider all acts lawful that are committed in consequence of a *binding* order, even if it concerns an *unlawful* order. A subordinate's duty to obey is considered more fundamental than obedience to the legal order in general.⁴⁹⁵ This explains why the defence of superior orders is regarded as a justification in German law. Another argument was that if the execution of an order were not justified, a victim of the act would have the right of self-defence against it.⁴⁹⁶ At present in Germany, the view has gained ground that the subordinate is under no obligation to comply with an order to commit an illegal act. From Article 5 of the German Military Penal Code, constituting the conditional liability rule, one could even deduce that the subordinate is under an obligation to *dis-obey* orders which he knows to pertain to unlawful behaviour.

As was demonstrated earlier (in the context of duress), the distinction between grounds of justification and grounds of excuse can assist in merging Anglo-American concepts and civil law notions with regard to duress and might enhance legal understanding among practitioners and scholars belonging to each of those legal systems. The defence of (unlawful) superior orders laid down in Article 33 qualifies as an excuse according to Triffterer:

Since orders to commit crimes within the jurisdiction of the Court are neither justified as such nor can they justify a corresponding act of the subordinated person, the crime committed by the subordinate cannot be justified either. In case of the exception recognised in paragraph 1 the subordinate therefore can only be excused. He is free from punishment, because the situation as specified by the elements mentioned under paragraph 1(a)-(c) approximate defences like duress, coercion or error which also may exclude criminal responsibility.⁴⁹⁷

Bearing in mind the above, one might conclude that superior orders in international criminal law could never justify the commission of a war crime. It can, under narrowly defined circumstances, merely excuse the subordinate who commits a war crime in carrying out a superior order. This contention might colour the transition between the distinction between the absolute and the conditional liability approach in shades of grey rather than in a stark black and white contrast. In this, I agree with Eser who submits:

If, however, methods of reasoning (absolute liability, conditional liability, and 'lack of *mens rea* approach', added *EvS*) leading to this result (to preclude superior orders as a defence, added *EvS*) quite often appear to be anything but clear and stringent, this may be caused by a failure to distinguish between justification or excuse or other(...) grounds for excluding criminal prosecution. Since certain authors seem to be afraid that conceding a defence would be interpreted as endorsement of an unlawful order, they feel forced to

⁴⁹⁵ See Jescheck and Weigend (1996), pp. 394-395; Keijzer (1978), pp. 191-192.

⁴⁹⁶ Jescheck and Weigend, (1996), p. 395.

⁴⁹⁷ Triffterer in Triffterer (1999b), margin No. 29, p. 586.

refuse reliance on an order even in cases where the subordinate performed it in good faith. If, however, they were aware that by rejecting justification and merely conceding an excuse, the disapproval of an order and its execution remains intact, certain alleged contradictions might appear to be reconcilable.⁴⁹⁸

It can be concluded from the above that under certain conditions, compliance with superior orders is a defence *per se* in most national legal systems. Only a minority of States has implemented the full responsibility rule stemming from Nuremberg. Under this rule, a subordinate who carries out superior orders in good faith, however, may have a defence of 'lack of *mens rea*' or may rely on the defence of mistake to evade criminal responsibility. In any event, the *respondeat superior* doctrine is no longer adhered to and all States subscribe to the notion of a subordinate with a responsibility and initiative of his own rather than considering a subordinate to be an unthinking instrument of the superior to whom he owes unlimited obedience.

(d) Observations

According to Gaeta, Article 33 must be faulted as it deviates from customary international law. To her mind, international customary law adopts the absolute liability approach: the plea of superior orders can never exempt a person from criminal responsibility in case of war crimes. Below, I will argue that the conditional liability approach in Article 33 is the right approach. I will first discuss the legal reasons, and then point out the 'social reasons' that support my argument.

Legal reasons for adopting conditional liability approach

I disagree with Gaeta for four reasons. Firstly, because her argument that there is a *communis opinio* among States confirming the absolute liability approach under customary international law is still very much based on the Nuremberg precedent. However, as set out above, I would agree with Garraway that Nuremberg was 'situation-specific' and, therefore, not a reliable source of customary international law.⁴⁹⁹ Secondly, beyond Nuremberg there have been attempts to codify the conditional liability approach on the international level in the framework of the 1949 Geneva Conventions and the 1977 Additional Protocols to the Geneva Conventions. This weakens the alleged existence of general agreement among States on the absolute liability rule. Thirdly, various examples above have shown that a number of national war crimes trials have recognised and applied the conditional liability approach, even when it concerned a non-national. State practice after Nuremberg does not warrant the conclusion that superior orders can never amount to a defence in cases of war crimes. Lastly, what exactly is meant by war crimes? The concept, with its rigid

⁴⁹⁸ Eser (1994), pp. 209-210.

⁴⁹⁹ See also T. Vogler, 'The Defence of 'Superior Orders' in International Criminal Law', in M. Ch. Bassiouni and V.P. Nanda, *A Treatise on International Criminal Law*, Vol. I (Crimes and Punishment), Springfield (Ill.) (1973), p. 621; J.W. Grayson, 'The Defence of Superior Orders in the International Criminal Court', 64 *Nordic JIL* (1995), pp. 247-248.

requirements as to context and capacity, has changed radically under the influence of the jurisprudence of the Tribunals for the Former Yugoslavia and Rwanda and has been partly replaced by crimes against humanity. The latter notion proved much more useful and flexible in dealing with mass crime. This resulted in a 'devaluation' of war crimes, evidenced in some of the findings in *Erdemović* and also in the ICC Statute itself in Article 31(1)(c) and Article 33. Thus, when Gaeta refers to the absolute liability approach and 'war crimes', she might well mean the most serious international crimes, *i.e.* 'manifestly unlawful' acts that in the past were all grouped under the term 'war crimes' but nowadays qualify as crimes against humanity and genocide. If that is the case, we are less in disagreement than might appear at first sight.

The absolute and the conditional liability approaches lead to the same result in the ambit of crimes against humanity and genocide.⁵⁰⁰ The latter crimes almost always qualify as 'manifestly illegal/unlawful' and generate an exclusion of the plea of superior orders. Therefore, Article 33(2) has no added value and to my mind it would have been better if it was left out. The absolute liability approach is now subsumed in the conditional liability approach. That both approaches now form one rule becomes even clearer when we put the wording into a negative formula, like in Article 33 of the ICC Statute,:

Execution of an unlawful superior order is no defence unless the order was not manifestly unlawful and the subordinate did not know the order was unlawful.

The absolute liability approach has influenced the 'traditional' conditional liability approach by reversing the presumption that the plea of superior orders is a defence.

The survey of national and international criminal law has shown that national legal systems by and large adopt the conditional liability rule while adjudication on the international level shows a resort to the absolute liability approach. It seems that the principle of absolute liability was *specifically* suited to the international arena where *major war criminals* stood trial who, in addition, were *non-nationals* of the states that established the tribunals. As to the latter, political reasons may be considered 'responsible' for this inequality.

The two-track development has now been fused into one rule in Article 33 of the ICC Statute. Bearing in mind the national and international backgrounds of each of the two approaches, this seems appropriate. The institutional framework and the substantive law of the ICC – more than its predecessors – accommodates a rapprochement between national and international criminal law. As a result of the complementarity principle underlying the ICC Statute, State Parties will prosecute nationals and non-nationals for the crimes listed in the ICC Statute. Bearing in mind that the conditional liability approach has been favoured by a majority of States (applying it predominantly but not exclusively to nationals), the conditional liability ap-

⁵⁰⁰ See also Gaeta (1999), p. 185.

proach in Article 33 is the satisfactory result of a very difficult negotiating process.⁵⁰¹

The 'battlefield reality' and social reasons for adopting conditional liability approach

Apart from its established legal status in international and comparative criminal law, the conditional or limited liability approach is the correct approach to the defence of superior orders for 'social reality reasons'.⁵⁰² A soldier is trained (and conditioned) to obey his superior. He may, therefore, presume that an order given by his superior is lawful. The laws and customs of war are not always clear and, although the war crimes provision of the ICC Statute is an improvement in that it lists the numerous violations of the law of war, the provision still leaves room for multiple interpretation, and grey areas undecided.⁵⁰³

A soldier cannot always be expected to know the legal rule. Moreover, he often lacks information: he should be able to rely on his superior for this. In this, it should be borne in mind that the 'battlefield reality' is one of extreme chaos. An armed conflict confronts those participating in it with a capricious reality in which orders emanating from commanding officers are welcomed by subordinates as beacons of light in a situation of dark disorder.⁵⁰⁴ It is thus unlikely and undesirable that a subordinate will question the legality of every order he is required to obey. Against this background, the conditional liability approach is the best way to maintain the balance between a subordinate's duty to obey and his duty to respect the law. On the other hand, the conditional liability approach serves the more modern approach of 'self-thinking soldiers' as well. The military in most western (NATO) countries rely more and more on delegation of powers down the chain of command to the actual battlefield. Soldiers are required to think and decide for themselves, within certain limits.

As was said earlier when discussing the text of Article 33, the defence of superior orders is available solely to *military* subordinates, not civilian subordinates. Admittedly, the latter can also find themselves in situations where they are forced to obey an order from a superior. In those circumstances, they can resort to the defence of duress pursuant to Article 31(1)(d) of the ICC Statute. The reason for being more lenient towards a soldier than an ordinary citizen in allowing the defence of superior orders lies in the special relationship between a subordinate and a superior. Super-

⁵⁰¹ See further C.H.B. Garraway, 'Superior orders and the *International Criminal Court: justice delivered or justice denied*', 81 *IRRC* (1999), pp. 785-794.

⁵⁰² See also Keijzer (1965), pp. 1-65; N. Keijzer, 'A plea for the Defence of Superior Orders', 8 *Israel YBHR* (1978), pp. 78-103; M.J. Osiel, *Obedying Orders: atrocity, military discipline & the law of war*, New Brunswick/London (1999); M.J. Osiel, 'Obeying Orders: atrocity, military discipline and the law of war', 86 *Calif. LR* (1998), pp. 939-1129.

⁵⁰³ For instance, it is not clear which weapons are included in Article 8(2)(b)(xvii): 'Employing poison or poisoned weapons'; and (xviii): 'employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices', see M. Boot (2002), pp. 597-598.

⁵⁰⁴ See for an alternative theory of obeying orders based on general standards rather than bright-line rules and requiring the subordinate 'to exercise situational judgment on the basis of local knowledge assessed in light of prior experience', Osiel (1999), p. 359 *et seq.*

riors are *authorised* to give orders and they are *responsible* for giving lawful orders. Superiors may be relied upon and their orders are presumed lawful. The military duty to obey is unique in that it is based upon the legal presumption of legality, which is expressed in national military codes and manuals.⁵⁰⁵ As the United States Court of Military Appeals held in the case of an order to perform close under drill, given as punishment, which was not authorised in accordance with Article 15 of the Uniform Code of Military Justice (1950),

It is a familiar and long-standing principle of military law that the command of a superior officer is clothed with a presumption of legality, and that the burden of establishing the converse devolves upon the defence (...) Certainly the presumption of legality of orders emanating from a superior officer is, and of necessity must be, a strong one, requiring for an adverse determination a clear showing of unlawfulness.⁵⁰⁶

This presumption of lawfulness should be reflected in a defence of superior orders.⁵⁰⁷ As far as a superior order may be trusted to be legal, compliance with the order must be excused if the order appears to have led to an illegal act.

A problem remains, however, in the category of large-scale criminality. Hanna Arendt refers to this.⁵⁰⁸ When a system has rendered a person 'immune' to unlawful orders, even manifestly unlawful ones, because such orders are lawful in the system and the person is numbed by being exposed to them on an everyday basis, the question arises as to how, and if, that person should be held accountable for the crimes committed by him in obedience to orders. As already mentioned earlier, German courts dealt with such cases. The defence of superior orders was not available to Nazi criminals. The German judiciary in post-war Germany ruled that there was a higher order that had been violated by Nazi crimes: natural law. Every rule or law violating natural law was considered void and invalid *ab initio*. This seems to be a correct and philosophically coherent way of dealing with mass criminality and a correspondingly distorted 'norm-consciousness'. The soldier of such a criminal system does not have a defence under Article 33 exempting him from criminal responsibility. This is a case that goes to sentencing, *i.e.* mitigation of punishment.

Position of Article 33 in the ICC Statute

The last point to be made is on the relationship between Article 33 and Article 25 (participation) of the ICC Statute. Article 25 of the ICC Statute on perpetration and participation is relevant in the context of the defence of superior orders as well. Sub-

⁵⁰⁵ See Keijzer (1978), pp. 282-285, where he points to the 1969 U.S. Manual for Courts-Martial, the British Manual of Military Law (1958), the explanatory note to the Netherlands Military Criminal Code, German writings on military law, and French law.

⁵⁰⁶ *U.S. v. Trani* (1952), 1 USCMA 293, 3 CMR 27 (1952), cited in Keijzer (1978), p. 114.

⁵⁰⁷ British law, however, denies the defence of superior orders while at the same time its Manual of Military law (1971) provides for the presumption of legality in the context of military disobedience (para. 3(a)). This leads to an inconsistency and the fact that a subordinate's trust in his superior's judgement can be – to put it in Keijzer's words – 'ill rewarded'. Keijzer (1978), p.180.

⁵⁰⁸ H. Arendt, *Eichmann in Jerusalem. A report on the Banality of Evil*, New York-London (1994).

paragraph 25 (3)(b) regulates the responsibility of a superior who *actively* participates in the crime committed by a subordinate by ordering its commission. Article 33 and Article 25 are not mutually exclusive. One can imagine situations in which the subordinate successfully resorts to a plea of superior orders and in which the superior can be found criminally responsible for having ordered the crime. If the latter superior just passed on an order emanating from a higher authority, he could also resort to Article 33. However, the closer to the top and, thus, to the source of information, the more difficult it will be to claim ignorance under Article 33. The plea of superior orders seems to be reserved for those in the lower echelons of the chain of command. This explains again why it is hard to conceive that the defence will ever be accessible to 'major war criminals'.

4. CONCLUSION

The inclusion of a defence of mistake in Article 32 the ICC Statute creates expectations that on a closer look it cannot fulfil. As appeared from the above analysis that there are quite some situations where the defence will not avail. However, its inclusion still marks a step forward in the progress towards a concept of criminal responsibility based on culpability requiring blameworthiness. In this we must be aware of the fact that many national legal systems do not provide for the defence of mistake in their own criminal laws. This is particularly true with regard to *error juris*.

As to the inclusion of superior orders, this is a welcome development and constitutes a break from the Nuremberg and *ad hoc* Tribunals. The ICC Statute codifies on the international level what was widely accepted in national legal systems already. The exclusion of the superior orders defence was the last noticeable convulsion of the Nuremberg legacy in modern war crimes law. By rejecting the absolute liability approach in Article 33, the ICC Statute can thus be regarded a definite move away from this legacy. The ICC, as a criminal court and not a military tribunal, should dispose over the means to grant such a defence, albeit under very strict conditions. Despite its constrained wording and its unnecessary second paragraph, its inclusion as a defence should be welcomed.

EVALUATION PART III

The catalogue of defences listed in Article 31-33 of the ICC Statute is in comparison to previous international criminal law drafts and provisions an improvement and sets the ICC Statute apart from its predecessors. The inclusion of defences such as self-defence, duress and superior orders seems to bring us closer to our goal: developing a mature system and sophisticated system of international criminal law. However, we should not stop here. Taking a closer look it appears that some of the defences, in particular mistake of fact and law have a very narrow scope. We might be further away from our goal than we thought at first.

To achieve our goal rather sooner than later and to make the ICC system of defences an effective system of defences, the author submits that the ICC make three distinctions. First, the Court should have an open eye for the underlying 'cultural differences' and take as point of departure the distinction between justifications and excuses. Secondly, in considering pleas put forward by an accused, the Court should distinguish between a person's public and private capacity. Thirdly, and this relates to the second point, the distinction between international and criminal law defences should be clearly maintained, this to prevent an irrational limitation of the resort to a defence. This is particularly true with regard to the defence of self-defence as an autonomous criminal law defence and inherent right of every human being. By making these distinctions the Court will be able to maintain a clear vision of the matter before it. This is essential, as it is especially in the field of defences that the two legal systems – international law and criminal law – come together, and where cultural differences between the two main legal cultures – Anglo-American law and civil law – most evidently surface.

The inclusion of the superior orders defence in the ICC Statute might have been a struggle, it may be regarded as the crown on top of the drafters' work. Although one can criticise its contrived wording, its acceptance is a definite break from the result-oriented approach of the Nuremberg and Tokyo Tribunals, and to a certain extent, that of the *ad hoc* Tribunals. The ICC Statute allows for the development of a more comprehensive and general system of criminal law. And as the ICC claims to be a *criminal court* and not a (military) *tribunal*, it is only logical that its list of defences contains that of superior orders.

EPILOGUE

The famous quote from the Nuremberg Judgement that 'crimes against international law are committed by men, not by abstract legal entities'⁵⁰⁹ has often been cited to substantiate the existence of the principle of individual criminal responsibility in international criminal law. The latter principle was primarily professed as a victory over the Act of State doctrine. This approach is also found in the Report of the Secretary General of the United Nations serving as a Commentary to the ICTY Statute. With regard to Article 7 on the concept of individual criminal responsibility it reads,

The Secretary General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible.

Virtually all of the written comments received by the Secretary General have suggested that the Statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment.⁵¹⁰

In national law the principle of individual criminal responsibility has evolved over centuries. The idea that a person is only culpable to the extent of his own will or guilty mind can be traced back to canonical law and the insights of Italian jurists in the Renaissance.⁵¹¹ It was further developed in the period of Enlightenment where individuals were perceived as rational and autonomous actors.⁵¹² This range of thought lies at the heart of criminal law in many Western States and has shaped the values of our Western legal culture. Individualism constitutes a clear break with the collective past of the law. 'Collective-responsibility arrangements', such as the Anglo-Saxon compulsory universal suretyship where a man's next of kin were his sureties who could guarantee his good conduct and the frank-pledge system where every member of a group could be called to answer criminal charges if an offender could

⁵⁰⁹ Nuremberg Judgement in Friedman (1972), Vol. II, p. 940.

⁵¹⁰ Report of the Secretary General, 32 *ILM* 1163 (1993), paras. 54-55.

⁵¹¹ C. Wichmann, *Beschouwingen over de historische grondslagen der tegenwoordige omvorming van het strafbegrip*, Nijmegen (1983), pp. 49-53; H. Liermann, 'Das kanonische Recht als Grundlage europäischen Rechtsdenkens', *Zeitschrift für evangelisches Kirchenrecht* (1956), pp. 37-51; F. Schaffstein, *Die Allgemeinen Lehren vom Verbrechen in ihrer Entwicklung durch die Wissenschaft des gemeinen Strafrechts*, Aalen (1972), p. 94; W.C. van Binsbergen, *Poenaal Panorama*, Zwolle (1986), pp. 39-48 and pp. 58-64; M. Metz, 'La responsabilité pénale dans le droit canonique médiéval', in J. Leauté (ed.), *La Responsabilité Pénale, Travaux du Colloque de Philosophie Pénale de l'Institut de Sciences Criminelles et Pénitentiaires* (12 au 21 janvier 1959), Paris (1961), pp. 83-116.

⁵¹² A.C. MacIntyre, *After virtue, a study in moral theory*, London (1981), p. 19.

not be identified, were regarded as offending this modern idea of individual responsibility.⁵¹³

History thus witnessed two different 'births' of individual criminal responsibility at different stages. While the birth of the national concept of individual criminal responsibility was a matter of emancipation from collective responsibility, the origination of the international concept of individual criminal responsibility was a break with the immunity of state officials. On closer examination this may prove to be a somewhat unsatisfactory reasoning. Both developments connote the emancipation of individual criminal responsibility as a divergence from collective responsibility that for so long hindered individuals from being recognised as bearers of individual rights and duties. After all, State responsibility can be regarded as a type of collective responsibility as well. The international concept of individual criminal responsibility may equally be considered as emancipating from collective responsibility, since the State itself is a collective which for a long time could not be reduced to individual actors because of the Act of State doctrine. We might have been witnessing a development of criminal responsibility in national and international law along similar paths but in different stages. Be that as it may, there are differences between these types of collective responsibility that bear examination.

1. THE NATIONAL PEDIGREE

This research has evolved around the concept of individual criminal responsibility consisting of basically two elements: personal fault (i), for one's own conduct (ii), termed earlier as the 'parameters of culpability'.⁵¹⁴ This notion of criminal responsibility is of national origin and has been used as a guide to analyse and evaluate the scope and content of individual criminal responsibility in international criminal law. This is why the various participation modes, the superior responsibility concept, and the defences have each been mirrored with national ancestors. While the analysis of international jurisprudence was essential in establishing the *content* of these concepts, the comparison with national underpinnings proved particularly instructive in understanding and evaluating the *scope* of the various international criminal law concepts, *i.e.* putting the content in perspective. This helped to establish how broad or narrow the concept of individual criminal responsibility in international criminal law is.

The *ad hoc* Tribunals have incorporated and processed Nuremberg law in such a way that it meets acceptable standards of criminal law. The Tribunals have refined the broad Second World War concept of criminal participation, developed the concept of superior responsibility into a mature concept of individual criminal responsibility, and made an important start with the formulation of a criminal law theory on the international level by explicating and interpreting the subjective and objective

⁵¹³ J. Feinberg, *Doing & Deserving, Essays in the theory of Responsibility*, New Jersey (1970), pp. 238-239.

⁵¹⁴ In para. 1 of the Introduction.

components of individual criminal responsibility: *mens rea* and *actus reus*. The Tribunals have done away with the disputed Nuremberg legacy and scepticism that an international Tribunal cannot guarantee a fair trial and live up to criminal law principles such as personal fault. The ICC Statute endorses the jurisprudence of the *ad hoc* Tribunals on many points. Its prolonged drafting process allowed legal comparatists to further shape and develop the general part of this body of law. On the other hand, its wording reflects political compromise, which also accounts for its rather high threshold in attributing responsibility. Yet, the recognition of co-perpetration as a separate head of responsibility, the codification of superior responsibility as a crime of omission, the adoption of the concept of perpetration by means and the inclusion of a catalogue of defences, can all be welcomed as further developments towards a coherent and sophisticated system of international criminal law. In all this, neither the jurisprudence of the ICTY and the ICTR nor the Statute of the ICC demonstrates a fundamental deviation from national legal concepts through which criminal responsibility is attributed. It is only with regard to *averting* criminal responsibility that differences surface. It is opportune to concentrate here on *attribution*, a lot remains to be said on that.

As was said in the introduction to this study, the concept of individual criminal responsibility in international criminal law comes with a certain 'flavour' because of the nature of international crimes as system-criminality. This type of crime might generate system-responsibility, which puts pressure on the principle of individual criminal responsibility by bringing in collective elements. The question rises then whether this same pressure exists in national criminal law. After all, if concepts such as 'collateral liability' and 'complicity by omission' have national counterparts, how does this affect the principle of individual criminal responsibility in national law?

The concept of individual criminal responsibility in most national legal systems seems to have undergone three major developments since the Renaissance and the period of Enlightenment. At first there was a change of emphasis in attributing responsibility: from an individual's guilty mind to his conduct and capacity. This shift in emphasis enabled the penetration into criminal law of concepts such as strict and vicarious liability.⁵¹⁵ A second development has been the broadening of the notion of perpetration. Concepts such as perpetration by means and functional liability expanded the concept of perpetration beyond that of *physical* conduct. This development also influenced the concept of criminal participation. Psychological rather than physical support sufficed as *actus reus*. Many national legal systems now provide for concepts that penalise non-tangible support to the commission of a crime or membership responsibility for knowingly furthering the aim of a criminal organisation. A third development is more fundamental in that it constitutes a break from the classic concept of individual criminal responsibility and introduces corporate responsibility. With the latter concept we accept that a legal entity can be an actor, with its own *mens rea* and *actus reus*. The concept of criminal legal entities is challenging to traditional legal thinking, which is still premised on the principle of indi-

⁵¹⁵ Hart (1968), pp. 183-209.

vidual criminal responsibility. This explains why corporate crime is often simply regarded as the sum of its constituent individual parts.

What we can take from this condensed overview is that the classic concept of individual criminal responsibility, as developed in national law, has undergone major changes over the last few centuries. All three developments arose from the need to meet the demands of a changed society where collective actors interact like individuals and crime is highly organised and carried out on a large scale. Individual responsibility has expanded in such a way that it shows collective traits. This has led to the suggestion of abandoning the concept of individual criminal responsibility completely and of basing criminal responsibility on a person's role or capacity in society.⁵¹⁶

With this partial return to collective responsibility, it seems that individual criminal responsibility in national law has made a detour. After moving to eliminate collective elements from criminal law, they are now embraced again, albeit in a somewhat different form.⁵¹⁷ System-criminality, generating system-responsibility, is not only the domain of international criminal law.

The concept of individual criminal responsibility in international criminal law has never made this detour. It has always retained collective elements and has not matured from its collective origins, it is still 'a stage behind'. This contention is based on the premise that the development of law is a unified process in which national and international law are simply developing at different stages.⁵¹⁸ This (partly) explains why the concept of collective responsibility has not encountered opposition on the same scale as in national law.

However, the collective trend in national criminal law has come under fire and has been met with criticism. Collective responsibility is regarded as violating the still highly valued classic principle of individual responsibility. To compare the international concept of individual criminal responsibility with broad national legal concepts on participation, or special concepts of group crime, and take them as the *starting point* of a research into the scope of individual criminal responsibility in international criminal law is misleading and not wholly satisfactory.⁵¹⁹ A step to a more abstract level of legal thinking seems warranted. It is, however, worthwhile to first explore the relationship between moral and legal responsibility.

⁵¹⁶ R.S. Downie, 'Responsibility and social roles', in French (1972), pp. 65-80.

⁵¹⁷ Feinberg (1970), pp. 222-223.

⁵¹⁸ G.I. Tunkin, *Theory of International Law*, London (1974), p. 399.

⁵¹⁹ It is submitted here that the return of collective responsibility in national criminal law is often restricted to special legal concepts (criminal organisations) and special legislation (drug criminality, terrorism and 'public welfare offences'). It seems that most legislators are keen to keep general criminal law clear from collective elements. This does not mean that the general concept of individual criminal responsibility has been kept completely secured from collective trends in criminal law. Judicial interpretation of general criminal law concepts such as criminal participation has expanded the scope of these concepts beyond their initial 'individual limits'.

2. MORAL AND LEGAL RESPONSIBILITY⁵²⁰

In ordinary life, including moral debates, the concept of responsibility plays a similar role as in legal life. It differs, however, in that it is couched in different terms. 'Liable to punishment' in moral terms is 'deserving blame' while in legal terms it means 'to pay compensation' or undergo a criminal sentence.⁵²¹ Moreover, different criteria are applied in attaching responsibility or blame. These differences will be highlighted below, as moral and legal responsibility should be clearly distinguished from one another. An equation, or worse, confusion of these two types of responsibility can endanger the rationality of the legal process.⁵²²

Moral responsibility primarily turns on a person's 'mental condition', which comprises all the conditions that relate to a person's psychological state, such as knowledge, intention and motives.⁵²³ According to this approach moral responsibility cannot exist without this mental condition whereas legal responsibility can. The political responsibility of ministers and strict liability in civil law demonstrate that legal responsibility may well attach to an individual's acts when there is an absence of mental condition. This type of responsibility was for a long time not accepted in the world of moral responsibility. As Hart observes:

[t]he hypothesis that we might hold individuals morally blameworthy for doing things which they could not have avoided doing, or for things done by others over whom they had no control, conflicts with too many of the central features of the idea of morality to be treated merely as speculation about the a rare or inferior kind of moral system.⁵²⁴

However, concepts of morality, as society itself, change, and even Hart admits that it is not impossible that concepts such as vicarious and strict liability can qualify as moral responsibility:

It may be an exaggeration to say that there could not logically be such a morality or that blame administered according to principles of strict or vicarious responsibility, even in a minority of cases, could not logically be moral blame; none the less, admission of such a system as a morality would require a profound modification in our present concept of morality, and there is no similar requirement in the case of law.⁵²⁵

Moral responsibility can even attach to collectivities. As such it was part of public debate after the Second World War where the opinion was voiced that the German people were collectively responsible for the events of the war. It was this idea that

⁵²⁰ This paragraph draws on the excellent essay of Annemarieke Beijer on collective responsibility in law and morality. A. Beijer, 'Collectieve Verantwoordelijkheid bij groepsgeweld in recht en moraal' [Collective responsibility regarding group violence in law and morality], in M. Moerings and C.M. Pelser (eds.), *Morele kwesties in het strafrecht*, Deventer (1999), pp. 137-155.

⁵²¹ Hart (1968), p. 225.

⁵²² See further para. 6 below.

⁵²³ M.A. Loth, *Handeling en Aansprakelijkheid in het recht*, Arnhem (1988), p. 9.

⁵²⁴ Hart (1968), p. 226.

⁵²⁵ *Ibidem*.

prompted Colonel Bernays to devise his collective criminality theory.⁵²⁶ The proposition of moral collective responsibility revived after the My Lai massacre in Vietnam, where the debate turned on the question whether the American people could be held collectively responsible for the My Lai disaster and more generally for the Vietnam war.⁵²⁷ More recently this question has been explored with regard to the Balkan war.⁵²⁸ The debate on 'business ethics' can be mentioned in this context as well for accepting moral responsibility of corporate collectivities.⁵²⁹

It is important at this point to conclude that shifting views and beliefs in public opinion and (national and international) society shape the concept of moral responsibility. Moral responsibility is not a static concept, as moral judgement is susceptible to change.

The differences between legal and moral responsibility do not only relate to the criteria triggering responsibility or blame, but also concern the nature of law and morality itself.⁵³⁰ Legal responsibility arises from the violation of a legal norm whereas moral responsibility arises from a violation or a disturbance of the social order. The legal order, unlike the social order, is an institutionalised order, created with the main purpose of making and enforcing rules. Within the legal order decision-making is more circumscribed. Moral judgement usually connotes a greater discretionary power than in the legal decision-making process. This can be partly explained by the absence of procedural rules, which play an essential role in the legal decision-making process.

Another difference between law and morality concerns the role of politics. Balancing individual and social interests and enforcing set policy goals through law reflects on the concept of legal responsibility.⁵³¹ Law, in particular criminal law, can apart from anything else be considered a means to a political end. This counts for international law as well, in particular international humanitarian law, which is mainly enforced through criminal law. This 'instrumental' approach to law cannot be found with regard to moral responsibility where responsibility is often *discovered* rather than *decided*.⁵³² In law, particularly in difficult cases, the question whether a person should be held responsible when it is established that he committed the act, can still be an open and controversial question as sentencing is a way of implementing criminal policy goals. It is instructive to think of the *Erdemović* case and the defence of duress in war crimes cases in this context.

A third difference between legal and moral responsibility is that moral responsibility is less dependent on chance, and can therefore be qualified as 'regular and pre-

⁵²⁶ Smith (1982), pp. 33-37. See also Chapter 1 para. 2.

⁵²⁷ P.A. French (ed.), *Individual and collective responsibility, the massacre at My Lai*, Cambridge (Mass.) (1972).

⁵²⁸ A. Jokić (ed.), *War Crimes and Collective Wrongdoing. A Reader*, Oxford (2001).

⁵²⁹ Loth (1988), p. 240.

⁵³⁰ Loth (1988), p. 10.

⁵³¹ Feinberg (1970), p. 29.

⁵³² *Ibidem*, p. 27.

dictable'.⁵³³ Feinberg gives the example of a man who shoots and kills his enemy, and another man who with exactly the same intention shoots at his enemy but misses, because of a last-minute movement. The latter cannot be held legally responsible, as he did not cause a death, the former, however, can be held legally responsible for murder. From a moral point of view, there is no real difference between these two men, the one who missed is only 'luckier' than the former.⁵³⁴ Moral responsibility is not something one can escape by chance. From a moral point of view there is no reason to suppose that a person who commits a crime during a non-international armed conflict is less responsible than a person who commits that same crime during an international armed conflict.

3. COLLECTIVE RESPONSIBILITY

A return to legal philosophy seems warranted in the endeavour to value individual criminal responsibility in international criminal law.

Feinberg defines collective responsibility as: '[t]he *vicarious* liability of an organized group (either a loosely organized, impermanent collection or a corporate institution) for the actions of its constituent members. When the group itself is held responsible for the actions of one or some of its members, then, from the point of view of any given "responsible" individual, his liability in most cases will be vicarious' [*italics added, EvS*].⁵³⁵

In philosophical literature generally two types of collective responsibility can be distinguished:⁵³⁶

- i) The first type of collective responsibility can be referred to as *corporate responsibility*. Responsibility is ascribed to the collective itself. Characteristic for this type of collectivity is that it can exist with varying membership. A change in the persons associated in it does not affect the identity of the collectivity.⁵³⁷
- ii) The second type of collective responsibility can be termed *group responsibility*. It relates to the responsibility of a member of a collectivity for what is done by

⁵³³ Ibidem, p. 31.

⁵³⁴ Ibidem, pp. 31-32.

⁵³⁵ Ibidem, p. 233.

⁵³⁶ P.A. French, *Collective and Corporate Responsibility*, New York (1984), pp. 1-18.

⁵³⁷ In this context the issue of the principle of 'methodological individualism' is relevant. This maxim states that 'social processes and events should be explained by being deduced from (a) principles governing the behaviour of participating individuals and (b) descriptions of their situations' (French, (1984), p. 2). Proponents of this principle, such as Feinberg and Downie, argue that corporate responsibility is in the end nothing more than the sum of its individual parts. Opponents, such as Cooper, deny this and assert that collectivities have their own identity going beyond that of its constituent members. See: Feinberg, (1970), p. 243; R.S. Downie, 'Collective Responsibility (A Reply)', in L. May and S. Hoffman (eds.), *Collective Responsibility. Five Decades of Debate in Theoretical and Applied Ethics*, Maryland (1991), pp. 47-51; D.E. Cooper, 'Responsibility and the "System"', in French (1972), pp. 85-92; D.E. Cooper, 'Collective Responsibility (A Defense)', in May and Hoffman (1991), pp. 35-46.

one or more of its members. The collective may be grouped under a common characteristic, like an armed unit, usually connoting a strong bond of solidarity. But it may also attach to an unorganised ('random') collective, brought together in a certain time and place because of each individual's pursuit of his own ends.⁵³⁸ Unlike the first category, a change in membership will always entail a change in the identity of the group.

Feinberg, who is generally critical of the concept of collective responsibility and watches its return in national criminal law with suspicion and criticism, admits that 'under certain circumstances, collective liability is a natural and prudent way of arranging the affairs of an organization, which the members might well be expected to undertake themselves, quite voluntarily'.⁵³⁹ He admits that individual responsibility is not an eternal concept and that collective responsibility can meet demands of a changed society, even in criminal law where collective responsibility is 'most likely to offend our modern sensibilities'.⁵⁴⁰ He sets, however, two limits. Collective criminal responsibility is only acceptable when (1) 'there is a high degree of antecedent group *solidarity*' – this condition pertains particularly to corporate responsibility – and (2), 'that those held vicariously liable have some reasonable degree of *control* over those for whom they are made sureties'.⁵⁴¹ The latter seems to be predominantly relevant in the context of group responsibility.

At this point it is interesting to discuss Downie's theory of moral responsibility for collective action, which must be placed in the context of the American philosophical debate on the responsibility for the My Lai massacre.⁵⁴² He describes moral responsibility in terms of social roles. With this theory he argues that group members can be morally blamed for the good or the bad 'action' of the collective they represent, or in which they participate. By voluntarily accepting a role, the individual adds to his share of rights and duties those of the collective (morality of role-acceptance).⁵⁴³ This role-acceptance generates moral responsibility for the actions of the collective. After all, Downie submits, a group member can refuse to accept the role and distance himself from the collective action. A second dimension of collective role-responsibility is what he calls the morality of role-enactment.⁵⁴⁴ When there is scope for variation in how one exercises his role or function within the system, there is room for moral judgement about the enactment of the role. A third dimension to the morality of collective action is the morality of the role itself. For instance, some say that the role of a soldier is evil and that if it is operated it will lead to evil action no matter who the soldier is and no matter what he does.⁵⁴⁵

⁵³⁸ French, (1984), p. 12.

⁵³⁹ Feinberg, (1970), p. 233.

⁵⁴⁰ Ibidem, p. 238.

⁵⁴¹ Ibidem, p. 241.

⁵⁴² Downie in French (1972), pp. 65-80.

⁵⁴³ Ibidem, p. 70.

⁵⁴⁴ Ibidem, p. 71.

⁵⁴⁵ Ibidem.

Turning to the question of moral responsibility for the My Lai massacre and the case of Calley, Downie observes that the first dimension, role-acceptance, is not very helpful in establishing moral responsibility.⁵⁴⁶ First of all because the acceptance of a soldier's job is not necessarily a choice of free will, and secondly because it is quite misleading to speak of 'resignation' in the military context. Downie submits that the second dimension, 'role-enactment', can be problematic bearing in mind that the organisation of a military system is very strict and authoritarian and little room is left to vary behaviour, let alone refuse to obey orders. It is here, however, that Calley's case most profitably and relevantly could be analysed in moral terms. The third dimension, the morality of the role itself, is inappropriate with regard to the Calley case. Downie suggests, 'if moral judgments are to be made hostile to the role of army officer they must be made (it can be argued) from the point of view of pacifism'.⁵⁴⁷

Downie's theory is attractive in that it insists on the premise that moral responsibility rests with the individual. It is, however, applicable in only a few situations as he demonstrates himself. It can really only usefully apply to structured groups where it is clear beforehand what the purpose of the group is and what the scope of a given role will be. Moreover, the idea that one could distance oneself from the collective by abandoning the role, ignores the reality of social pressure that can make it very difficult to actually leave the system.

Summarising, we can state that moral responsibility for the conduct of others is accepted when:

1. there is a high degree of solidarity in the collective; or
2. there is a degree of control over those whose conduct generates collective responsibility; or
3. one voluntarily accepted a certain role within the collective, and was in the position to distance oneself from that group by abandoning that role.

4. SYSTEM-RESPONSIBILITY

Having explored the national pedigree of the international concept of individual criminal responsibility, and having devised a framework within which its moral counterpart can be evaluated, it is necessary to turn to system-responsibility in international criminal law.

Criminal law categorises collective responsibility somewhat differently than as described above. Criminal responsibility is termed 'collective' when it either attaches to a collective (criminal responsibility of a collective) or when it exceeds one's actual contribution to a crime (collective criminal responsibility of individuals). Three types can be distinguished.

⁵⁴⁶ Ibidem, pp. 75-77.

⁵⁴⁷ Ibidem, p. 76.

First, the collective is criminally liable through acts of individuals, which are imputed to it. Examples of collectives to which this type of collective responsibility attaches are legal entities such as an enterprise or an organisation.⁵⁴⁸ Corporate responsibility in criminal law only attaches to entities that are legal persons, *i.e.* legal entities such as a limited liability company that are independent bearers of rights and duties.⁵⁴⁹

The second type of collective responsibility in criminal law is the mirror image of corporate responsibility. One or a plurality of persons is held responsible for the crimes committed by the collective to which they belong and which they represent. For instance the director or managing board of a legal entity to which criminal conduct is imputed.

The third type of collective responsibility concerns the responsibility of members of a collective who are each held criminally responsible for conduct of the collective they belong to. This category is broad in that it covers group crime in the widest sense. It may cover both, organised and unorganised group crime. The latter is merely a more organised form of what Feinberg termed 'group responsibility'. In criminal law this type of collective responsibility can be referred to as membership responsibility or as complicity in group crime.

Returning to our object of study, system-responsibility, the following can be said. The first type of collective criminal responsibility is not relevant to system-criminality. Although a concentration or detention camp may be termed a criminal organisation, it does not generate responsibility that attaches to the entity itself. The second form of collective responsibility finds its counterpart in war crimes law in the concept of superior responsibility. Joint criminal enterprise and second category common purpose liability qualify as the third type of collective criminal responsibility. These participation modes all qualify as membership responsibility.

With regard to the latter type of collective responsibility a distinction can be made in membership of an organised group, institutionalised in such a way that it can exist with varying membership, and membership of a less or unorganised group. The former will be referred to as 'institutionalised membership responsibility' where attribution is based on a person's function within an institution/organisation, and the latter as 'collateral membership responsibility', where attribution is based on the foreseeability of the consequences of a common plan or purpose. This type of responsibility has two variants: conspiracy-complicity and responsibility arising from mob violence.

Institutionalised membership responsibility

The concept of criminal organisations in Nuremberg generated membership responsibility that was based on one's function within collectives such as the Leadership

⁵⁴⁸ This type of collective responsibility is known as corporate responsibility and should be distinguished from 'corporate responsibility' as understood by Feinberg, which is a much broader concept.

⁵⁴⁹ See further H. de Doelder and K. Tiedemann (eds.), *Criminal Liability of Corporations*, The Hague (1996).

Corps of the Nazi Party, the Gestapo, and the SS and SD. This type of responsibility also reared its head at the ICTY. The second type of common purpose liability ('concentration camp cases'), distinguished by the ICTY Appeals Chamber in *Tadić*, and qualifying as a 'modern version' of Bernays' concept, can also be brought under the category of 'institutionalised membership responsibility'. Participants are part of a criminal system that exists with varying membership. Responsibility for crimes committed by the system, such as ill-treatment of detainees, is imputed on those individuals that participate in the system while being aware of its nature. Their participation is regarded as furthering the common criminal design of the system. Criminal responsibility is inferred from a position within the criminal system. It is obvious that this type of collective responsibility leaves little room for variance in participation and individual circumstances.

Both concepts, the Nuremberg and the ICTY concept, raise serious concerns with regard to their compliance with criminal law principles. In the post-Nuremberg case law, membership of a criminal organisation was enough to generate criminal responsibility, as long as it could be shown that the members had knowledge of the system's purpose and had voluntarily joined the organisation.⁵⁵⁰ The ICTY adopted a more circumscribed concept of institutionalised membership responsibility, yet still very broad. Participation in a criminal organisation like a detention camp may be inferred from one's position of authority within the system. This way criminal responsibility is based on an objective factor like function, which may not necessarily correspond to personal culpability. The arguments put forward by Downie in his social role theory may be instructive here. In his view it would be important to establish whether a person voluntarily accepted that role within the criminal organisation and could have refused to occupy that position, before he can be held responsible for the role in the collective. This is particularly important with regard to those in lower and mid-level positions where the freedom to 'vary ones role' is more restricted.

The shortcomings of this type of membership responsibility is illustrated by the attempt of the ICTY Trial Chamber in *Kvočka* to 'correct' the function-based test by distinguishing between significant participation in a joint criminal enterprise generating co-perpetration on the one hand, and insignificant participation connoting participation in a joint criminal enterprise as an aider or abettor on the other hand. The Trial Chamber in *Krnjelac*, however, rejected the *Kvočka* approach and endorsed the function-based test established by the ICTY Appeals Chamber in the *Tadić* case. It emphasised that joint criminal enterprise is a mere legal construction to establish criminal responsibility of those who are not the principal offenders, *i.e.* physical perpetrators. In its view it is in the sentencing stage, not the attribution stage, that categorisation plays a role. The ICTY Appeals Chamber will have to pronounce on this matter. It suffices here to say that the '*Kvočka* approach' can be welcomed as a better way of guaranteeing that low-level participants in a criminal system are not held collectively responsible for the crimes of that system, *i.e.* the parameters of personal fault for one's own behaviour are thus better respected.

⁵⁵⁰ For instance, Karl Brandt who was held responsible for being a member of the SS. *U.S. v. Karl Brandt et al. (Medical Case)* in Friedman (1972), Vol. II, pp. 1196-1253.

The question rises as to how this 'second category common purpose liability', has a place in modern war crimes law. It should be met with suspicion as it bears the danger of basing criminal responsibility on one's position rather than on his conduct, and could amount to strict liability. Post-Nuremberg case law provides us with examples of a rebuttable presumption of participation in the crimes committed in a concentration camp for those who were holding an executive or administrative role in the camp. It must be clear to all that we should leave this type of criminal responsibility behind us for good.⁵⁵¹ Criminal responsibility requires at least personal fault.

ICC

The strongest suggestion that the concept of criminal organisations belongs to the past is its absence in the ICC Statute. The negotiating history of the ICC makes clear that the Court was to have no jurisdiction over legal entities. Strictly speaking the text of Article 25(3)(d) of the ICC Statute on complicity in group crime allows for the second category common purpose concept as devised in ICTY jurisprudence. Bearing in mind, however, the explicit rejection of corporate responsibility in drafting the ICC Statute, it is unlikely that the Court will allow this concept to be part of its jurisdiction.

Collateral membership responsibility

In Nuremberg most defendants were convicted on the basis of a broad participation concept which was caught in factual rather than in legal terms. Although not specified in the Judgement, most defendants seem to have been found 'participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes' and were held 'responsible for all acts performed by any persons in execution of such plan'.⁵⁵² Whether this mixed conspiracy-complicity concept generates collective responsibility depends on the separate counts and varies from case to case. The Judgement does not make clear to what extent the defendants were held responsible for the crimes physically committed by others. Some counts seem to point at collective responsibility, *i.e.* exceeding ones own contribution to the crime. Governor General Frank for instance was held responsible for crimes committed by the Government General of which he had no knowledge and to whose policy he had occasionally even opposed.⁵⁵³ With regard to other defendants, however, there was an emphasis on the active involvement in and contribution to crimes. For instance Göring, who was described and convicted as 'the creator of the oppressive program against the Jews and other races'.⁵⁵⁴ The latter case could be usefully described as instigation or perpetration by means generating individual criminal responsibility rather than conspiracy-complicity. Be that as it may, it suffices here to

⁵⁵¹ For a different view: N.H.B. Jørgensen, 'A Reappraisal of the Abandoned Nuremberg Concept of Criminal Organisations in the Context of Justice in Rwanda', 12 *Criminal Law Forum* (2001.), pp. 371-406.

⁵⁵² As stipulated in Article 6(c) of the London Charter.

⁵⁵³ Friedman (1972), Vol. II, p. 984.

⁵⁵⁴ *Ibidem*, p. 969.

say that the setting, a joint trial where the defendants were equally referred to as 'major war criminals', points in the direction of collective responsibility. The convictions, however, cannot all be qualified as such. The sentences reflected the variance in roles.

The mixed complicity-conspiracy concept relied upon in Nuremberg has a modern counterpart at the ICTY: the 'collateral common purpose', or third category common purpose concept, also referred to as joint criminal enterprise. On the basis of this concept a person can be held criminally responsible for a crime that goes beyond the original common plan. *Dolus eventualis* on the underlying crimes suffices as the requisite *mens rea*. The joint criminal enterprise concept has been instrumental in prosecuting political and military leaders at the ICTY like Milošević, Plavić and General Krstić. With regard to Plavić and Milošević the concept of joint criminal enterprise serves to attribute responsibility for crimes that fall within the object of the criminal enterprise, and alternatively those that fall outside the object of the criminal enterprise but are foreseeable consequences of the execution of the object of the joint criminal enterprise of which the accused were aware as the 'possible outcome'.⁵⁵⁵ As in Nuremberg, the inequality in influence and control among the leaders at the top level of the conspiracy is a matter taken into account in the sentencing stage rather than in the attribution stage.

At the ICTR the joint criminal enterprise concept has not played a significant role in conviction. The prosecutorial policy of joint trials, however, leaves a strong suggestion of a collective type of responsibility. The concept of 'conspiracy to commit genocide' in Article 2(3)(b) of the ICTR Statute makes the ICTY devised concept of joint criminal enterprise redundant. Although it was for a long time not clear whether the conspiracy concept at the ICTR was an inchoate crime or a conspiracy-complicity concept, the ICTR Trial Chamber in *Musema* determined that 'it is, indeed, the act of conspiracy itself, in other words, the process ("*procédé*") of conspiracy, which is punishable and not its result'.⁵⁵⁶ The concept is instrumental in prosecuting senior officials who have participated in a common criminal plan to commit genocide.⁵⁵⁷ The conspiracy concept in national law is based on the assumption that as collective criminality is more harmful and dangerous than individual criminality, the possibility of early intervention is essential. This same assumption underlies its acceptance on the international level with regard to the crime of genocide. It is therefore, to use Schabas' words, 'unfortunate' and probably even 'unintended' that conspiracy to commit genocide is not part of Article 6 of the ICC Statute.⁵⁵⁸ Conspiracy as an inchoate crime is further impossible to fit into the group-complicity concept of the ICC Statute in Article 25(3)(d). Possible alternatives in the ICC Statute are perpetration by means.

⁵⁵⁵ ICTY, *Prosecutor v. Slobodan Milošević*, Indictment ('Bosnia Herzegovina'), Case No. IT-01-51-I, para. 6.

⁵⁵⁶ *Musema* Judgement, para. 193.

⁵⁵⁷ Schabas (2000) pp. 264-266.

⁵⁵⁸ Schabas (1998), p. 413.

The collateral common purpose concept not only fulfils a function in prosecuting and convicting the mastermind(s) behind system-criminality, it also serves to capture those participating in 'mob violence'. Mob violence can be described as 'situations of disorder where multiple offenders act out a common purpose, where each of them commit offences against the victim, but where it is unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate'.⁵⁵⁹ Direct participation in the commission of the crime is not required, being present at the time when the crime is committed may suffice to generate responsibility, as long as one intentionally assists the commission of the crime(s). One can even be far removed from the scene of the crime and incur liability for it nevertheless. When the crime is a foreseen and accepted consequence of a previously drawn up criminal plan (e.g. to commit ethnic cleansing) the person participating in that plan, is also responsible for the crime. It is the latter type of group crime that impelled the Appeals Chamber in the *Tadić* case to draw up the common purpose doctrine.

As early as Nuremberg the need for a concept of 'mob violence responsibility' was felt. One of the arguments put forward by the French representative arguing in favour of collective responsibility was that collective crime, as displayed at the village of Lidice where nearly all of the inhabitants were massacred by units of a German Division leaving no witnesses and making it almost impossible to prove what part each individual played in the atrocities, could only be fought on the basis of group responsibility. 'Mob violence' has also prompted national legislators to adopt group responsibility concepts. These notions have often been devised alongside general (substantive) participation concepts, and apply in situations of collective crime where general criminal law concepts do not adequately generate criminal responsibility, if only because of evidentiary problems.

ICC

As to the ICC, 'collateral liability' cannot fit the group-complicity concept of Article 25(3)(d) of the Statute. The *dolus eventualis* standard of collateral liability falls short of the mental standard required by Article 30 of the ICC Statute and applicable in the context of Article 25 of the ICC Statute.

Like institutionalised membership responsibility, the joint criminal enterprise or the collateral common purpose concept puts pressure on the concept of *individual* criminal responsibility. Let us consider the example of A and B who are part of a group involved in mob violence. When participant A, who did not originally plan the commission of a crime committed by B, is held criminally responsible for it as a foreseeable consequence, criminal responsibility exceeds his intended contribution. B's crime generates *collective* criminal responsibility for A. On the other hand, when the 'collateral crime' can be qualified as a foreseeable consequence of the common criminal plan in which A voluntarily and willingly participated, the element of personal fault is respected. B's crime generated *individual* criminal respon-

⁵⁵⁹ *Tadić* Appeal Judgement, para. 205.

sibility for A. In tracing back the crime to the common plan, a court should indicate the factors that lead to the finding that A was aware that B's actions could lead to crimes and that he nevertheless willingly accepted that risk. At the ICTY this has not always been the case. The Tribunal has refrained from clarifying how Tadić and Krstić had *dolus eventualis* with regard to the subsequent crimes.⁵⁶⁰ This is worrying, to say the least. The Tribunal should have given insight into how it established criminal responsibility in these cases.

A further broadening of common purpose liability could certainly qualify as collective responsibility. At this point we should turn to the rather disquieting findings of the ICTY Trial Chamber in *Krnjelac* on the common plan or design.⁵⁶¹ The Trial Chamber is of the view that a common plan need not have been reached at any time before the crime is committed, that it can be an unspoken understanding between two or more persons, and that it can be inferred from all the circumstances.⁵⁶² This way it marginalises the element of 'plan' and 'planning'. The joint criminal enterprise concept may turn into a type of collective responsibility. Presence at the scene of the crime of mob violence, or acting in furtherance of what has been termed a common plan, may suffice in attributing responsibility for participating as a co-perpetrator in a joint criminal enterprise. Such an understanding of the common plan element in joint criminal enterprise should be faulted. Allowing the inference of *mens rea* from mere objective factors such as presence and behaviour is problematic, particularly with regard to a participation concept such as joint criminal enterprise. After all, where the *actus reus* does not require any active involvement in the crimes and is defined as a 'form of assistance in, or contribution to, the execution of the common plan or purpose' leaving it very vague and potentially broad, the personal culpability element might be at danger.⁵⁶³ Feinberg's requirements of solidarity within the group, and a high degree of control over the conduct of those whose conduct generates collective responsibility may be helpful in restricting this type of liability and make it stay within acceptable limits of criminal responsibility.

Assessment

System-criminality generates system-responsibility and leads to the broadening of certain participation modes to the extent that these concepts border on collective responsibility. This results in a balancing exercise between criminal law principles and humanitarian aims, which in the end should be settled in favour of criminal law principles. Attributing responsibility through inference from objective factors such as function in a system and presence at the scene of the crime, coupled with a reduced significance of the 'plan element' might send the concept of individual responsibility straight back to where it came from, and leave us with: collective responsibility. It is therefore essential to guard the principle of personal culpability with regard to the above-discussed membership responsibility concepts, which qualify as *extended* or *special participation* concepts. Indeed, as the ICTY Appeals Chamber ruled:

⁵⁶⁰ For instance, *Tadić* Appeal Judgement, paras. 178-184; *Krstić* Judgement, para. 635.

⁵⁶¹ *Krnjelac*, Judgement, para. 80.

⁵⁶² *Ibidem*.

⁵⁶³ *Tadić* Appeal Judgement, para. 227(iii).

[t]he basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability'.⁵⁶⁴

The best way to understand the insertion of special participation modes in international criminal law is to look at municipal criminal law. The 'collective trend' in national criminal law also set in as a reaction to collective criminality. Broad participation concepts, often distinguished from general participation modes, can be found in special legislation on drug criminality, terrorism and 'public welfare offences' and qualify as special participation modes alongside general participation modes.

When we would regard international criminal law as 'special legislation' rather than a general system of criminal law, the collective trend in international criminal law would give us no reason for disquiet. This would, however, be too far-fetched. General criminal law concepts such as joint perpetration (first common purpose liability) and aiding and abetting are also part of international criminal law and have a role to fulfil. This is especially true with regard to 'ordinary' war crimes; responsibility should be based on the general participation concepts. It is with regard to large-scale crime, often connoting crimes against humanity and genocide that these special participation concepts should be wielded. The 'collective trend' does not and should not extend to general participation modes. It is for this reason that criminal responsibility in international criminal law should be evaluated on two fronts: first, guard the special concepts so that they do not transgress the already closely approached limit of collective responsibility, and, secondly so as not to let general participation modes expand too much. Mirroring the latter to national counterparts in general criminal law rather than to special group concepts, can help to prevent such an expansion.

In this context the findings of the ICTY on 'ordering' has caused concern. A *dolus eventualis* standard was established for ordering crimes. The Trial Chamber extended the criminal liability of General Blaskić even to crimes he did not order. They were regarded as having been accepted by him as likely consequences of his order.⁵⁶⁵ Although in this particular case the facts may have justified the finding,⁵⁶⁶ *dolus eventualis* as the *mens rea* of ordering should not be accepted off-hand. On a case by case basis the *ad hoc* Tribunals should consider whether this understanding of ordering is appropriate. It might be that a special concept such as joint criminal enterprise is better suited and that the participation mode of ordering should not be moulded as to have the same extended scope as the latter. Strictly speaking, the ICC Statute does not allow for this interpretation of ordering. The fact that it does not provide for special group responsibility concepts might, however, force the Court to adopt a broad understanding of the general participation modes listed in Article 25 of its Statute. It may even apply the *Blaskić* understanding of 'ordering' as customary international law. It would then keep with a 'tradition' that originated in (post-) Nuremberg and was continued by the ICTY of devising broad participation concepts

⁵⁶⁴ *Tadić* Appeal Judgement, para. 186.

⁵⁶⁵ *Blaskić* Judgement, paras. 588-592.

⁵⁶⁶ See also Chapter 2 para. 7.

on a customary law rather than a codified legal basis. This is all pure speculation, but the ICC system, which on close scrutiny represents predominantly 'general criminal law', carries the potential of broadening its general participation concepts to deal with system-criminality. This is a process that should be closely watched and opposed when it results in an overall and unregulated broadening of criminal law concepts. Instead, the ICC should cautiously incorporate the special participation concepts created in ICTY jurisprudence.

Superior responsibility, perpetration by means, instigation

System-criminality not only suggests crime committed by collectives, it also connotes an *auctor intellectualis*, a mastermind inducing the collective. This can be an individual or a select group of people who orchestrate mass-crime. Masterminds can be found on different levels in the political and administrative hierarchy. On the highest level it concerns the true *auctor intellectualis*, on mid-level or lower positions it can be military and non-military superiors and/or instigators. International criminal law provides for various legal concepts to attribute criminal responsibility to these persons.

The classic one is superior responsibility. From a military concept it has grown into a full-blooded head of criminal responsibility in international law. It has been applied in a wide variety of situations and to various types of superiors causing it at times to lose its legitimacy as a concept of individual criminal responsibility. In particular with regard to political superiors, where a less strictly controlled relationship exists between a superior and his 'subordinates' than in military circles, the concept runs the risk of being interpreted broadly to the extent of vicarious or maybe even strict liability. Recent jurisprudence at the *ad hoc* Tribunals, however, has emphasised the concept's individual nature.⁵⁶⁷ The ICC Statute identifies it as a crime of omission that can be 'committed' negligently. The negligent commander or superior does not readily fit the picture of an instigator or mastermind, although he might well actively condone subordinate acts and this way qualify as a silent supporter. His responsibility then evolves into individual rather than superior responsibility. When a superior's inaction encourages his subordinates in continuing to commit crimes, the silent superior becomes part of the collective by aiding and abetting. His rank will, however, result in a heavier penalty. To qualify him as an instigator, as the one who takes the initiative, would, however be unrealistic. Accordingly, superior responsibility is not the most appropriate concept to prosecute or even convict military and political superiors. This has already been recognised at the ICTY where joint criminal enterprise has become its alternate. The application of the latter concept is welcomed, if only to allow superior responsibility to have its own place in war crimes law. What the general participation modes are *vis-à-vis* the mob violence type of joint criminal enterprise, is superior responsibility *vis-à-vis* the conspiracy-complicity joint criminal enterprise. We should therefore guard its borders, especially as the broad knowledge standard of 'should have known' in Article 28 of the ICC Statute could give rise to a wide interpretation.

⁵⁶⁷ *Čelebići* Appeal Judgement. See also Chapter 4 para. 3(ii)(c) of this study.

Although the conspiracy-complicity participation type does not have a place in the ICC Statute, a *lacuna* will not be felt. The ICC Statute provides for perpetration by means in Article 25(3) (a) of the ICC Statute, which is the concept *par excellence* to frame the instigators on macro-level, mainly because it is not limited by the requirement of an innocent agent.

5. A MATURE AND EFFECTIVE SYSTEM?

From the above, a picture emerges of international criminal law that is still in the process of maturation, but has made major progress ever since its conception at Nuremberg. We can agree, however, with Eser that the Rome Statute – as the most recent codified product of international criminal law – ‘is not yet in the same development stage and shape as are most national criminal codifications’.⁵⁶⁸ Relying on the premise that the development of international criminal law occurs along similar lines as national criminal law but is at different stages, one could state that an important step in catching up on national criminal law has been made with the adoption of the ICC Statute. Despite the criticism set out above, the ICC Statute signifies important progress in comparison to former international criminal law drafts and provisions. This is particularly true with regard to the catalogue of defences in the ICC Statute, which has brought international criminal law closer to qualifying as a comprehensive system of criminal law.

Moreover, to allow a perpetrator of war crimes, crimes against humanity and genocide to resort to a defence marks a fundamental change in the philosophy of war crimes law, making it enter a new phase. The ‘result-oriented approach’⁵⁶⁹ of a more primitive system of criminal law has been largely replaced by a system of general criminal law that provides for defences excluding criminal responsibility. Not just the ICC provisions on general criminal law defences such as intoxication and mistake of fact, but particularly the typical war crimes defence of superior orders and the contested duress defence signifies this change. The farewell to the absolute liability approach and the granting of an excuse status to duress should therefore be strongly supported and welcomed as closer steps to a mature and sophisticated system of criminal law.

Largely but not completely, does this new ‘general’ approach replace the old one. Some of the defences in the ICC Statute have a very narrow scope and, as was already pointed out in the introduction to this study, still ‘suffer’ from the effect the abhorrent and systematic nature of the crimes has on the availability of a defence. The Rome Statute is not very generous in granting recourse to a defence. This high standard of averting criminal responsibility, correlates with the high threshold in attributing criminal responsibility. The strict mental standard of Article 30 of the ICC Statute precludes that recklessness and negligence – with a few exceptions – and

⁵⁶⁸ Eser in Cassese *et al.* (2002a), p. 774.

⁵⁶⁹ Eser in Cassese *et al.* (2002b), p. 946.

even *dolus eventualis* render an individual responsible for prohibited acts. The ICC system truly endorses *individual* criminal responsibility. On the whole it implements a high standard in both, attributing and averting criminal responsibility.

As was pointed out earlier, the ICC lacks certain tools to efficiently deal with mob violence.⁵⁷⁰ The *ad hoc* Tribunals, in particular the ICTY, have found these tools in customary international law. The ICC should do that too. Like the ICTY drew from Nuremberg law and processed it to acceptable criminal law standards, the ICC could process ICTY and ICTR jurisprudence in filling the gaps left in its Statute. The *ad hoc* Tribunals and the ICC complement each other. They constitute a promising mix. The ICC Statute shows a further sophistication of international criminal law with its comprehensive regulation of participation, its 'omission formulation' of superior responsibility, and a catalogue of defences. The *ad hoc* Tribunals on their part supply the tools for fighting system-criminality. Put together, they provide for a mature and effective international criminal law system. The ICC should integrate the jurisprudence of the *ad hoc* Tribunals as much as possible within its own system. This way it not only creates an effective and sophisticated criminal law system, but also a unified international criminal law. Bearing in mind its legal framework and negotiating history it may, however, be difficult for the Court to achieve these goals. A teleological rather than a grammatical approach to its Statutory provisions seems warranted.

6. FINAL COMMENT

At the end of this study we should return to the question posed in the introduction: do the nature of international crimes and the nature of the normative framework generate a concept of international individual criminal responsibility that deviates from individual criminal responsibility as it has taken shape in national criminal law systems? The answer to this question is: no, not fundamentally.

This has to do with the fact that, first of all, national criminal law has been increasingly equipped with special participation concepts, as national society has been confronted with collective crime. It moreover, provides for analogous concepts to hold criminally responsible those behind organised crime. Instigation and superior responsibility have equivalents in national criminal law. Secondly, the ICC Statute has given international criminal law more 'general traits'. The list of defences, and the differentiation in participation modes, shape the rather rigid and somewhat Spartan nature of international criminal law of the past into a more sophisticated criminal law system.

We thus witness a rapprochement between national and international law, on the special part by national law and on the general part by international criminal law. When we regard the systems of the ICC and the *ad hoc* Tribunals as complementary systems that together constitute international criminal law, we can conclude that in-

⁵⁷⁰ See Chapter 2 paras. 9(b) and 9(d), and 12, and Evaluation to part I.

ternational criminal law is catching up on its backlog *vis-à-vis* national criminal law faster than we may have realised.

A final word on moral responsibility. Moral responsibility plays an important role particularly in criminal law, where judgements are made in a context of moral views that live in society. Moral judgement can reflect competing interests and may change with views and beliefs in public opinion. It may vary with the interests at stake. When society is or has been threatened by collective force (terrorism, nazism, 'hooliganism') generating fear and abhorrence, moral responsibility is more likely to attach to collectives than in every day life, where the individual autonomous vision of human action is still predominant.

With regard to international tribunals and courts, adjudication has the purpose of retribution with the aim to subsequently result in reconciliation and peace in a certain region or with regard to a certain people. Such a criminal law process more than anything else has a function of setting an example, of catharsis, of 'never letting this happen again'. No doubt moral judgement plays an important role in these trials. Society's interest will often run parallel with the lego-political goal of retribution and reconciliation. This was the case in Nuremberg for instance, where legal judgement was influenced by the widely supported idea that the German people as a whole were morally responsible for the Nazi crimes. The equation of legal and moral responsibility is a risky undertaking, primarily because of the differences between the two types of responsibility but also because moral punishment is of a different nature than criminal punishment. Legal responsibility, when attached to moral guilt – which can be very broad as with the guilt of the German people – may constitute irrational legal judgements violating the principle of *individual* criminal responsibility. In the long run such judgements will lose their validity, as seen with the *Yamashita* and *Hirota* cases, and will eventually be exposed by the passage of time. Indeed, the history of war crimes law provides examples of a number of flawed judgements.

In an attempt to maintain the integrity and rationality of the legal process while at the same time leaving room for considerations of moral nature, individual criminal responsibility has an important role to play. The concept on the one hand serves to identify the major culprits of system-criminality, while on the other hand it provides the basis of a criminal trial, where a process of catharsis and reconciliation can take place, or at least begin. With such a moral context it is hardly surprising that broad concepts of individual responsibility are devised to convict those who were at the top of a hierarchy. At all times, however, criminal law principles should be respected. The notion of *collective* guilt is of moral significance and should not be translated into purely criminal law terms because criminal liability – also in international criminal law – should in the end be based on the premise 'no punishment without *personal* fault'.

SUMMARY

THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

This study explores the content and scope of the concept of individual criminal responsibility for violations of international humanitarian law, *i.e.* genocide, crimes against humanity and war crimes. The latter are referred to in the title of this study as 'violations of international humanitarian law', to express their origin: the laws and customs of war.

In determining whether a person's conduct can be qualified as criminal under law, one needs to establish that his or her act or omission can be traced back to a guilty mind and that it constitutes voluntary conduct that is blameworthy. Individual criminal responsibility turns on culpability and requires proof of *personal* guilt (i) relating to one's *own* conduct (ii). This is what distinguishes individual from collective responsibility. These 'parameters of culpability' underlie the process of attributing and averting criminal responsibility in most national criminal law systems. To qualify as a sophisticated criminal law system where the concept of *individual* criminal responsibility is respected and endorsed, international criminal law should also respect the parameters of culpability. The aim of this study is to examine whether the parameters of culpability underlie the concept of individual criminal responsibility in international criminal law. More specifically: do the nature of international crimes (system criminality) and the nature of the normative framework, being a meeting of different types of law and consisting of concepts derived from different legal cultures, generate a concept of individual criminal responsibility that deviates from individual criminal responsibility in national law?

Part I: Modes of Individual Responsibility

War criminality often connotes a plurality of offenders engaged in collective wrongdoing. This type of criminality is referred to in this study as 'system-criminality'. Almost by nature genocide, crimes against humanity, and war crimes occur on a mass-scale, or in the context of systematic violence. This explains why many of the convictions stemming from the Nuremberg Judgement and the subsequent proceedings were based on accomplice liability or criminal participation. Yet the concept of accomplice liability has shortcomings when applied to (certain categories of) war criminals. Those *behind* the scene of the crime, pulling the strings, do not easily fit the picture of accomplices who facilitate a crime as aiders and abettors. Moreover, the concept of accomplice liability fails to conclusively deal with all those involved in war crimes as part of the 'executive machinery', those *at* the scene of the crime. Bernays' theory of collective criminality, devised in Nuremberg, filled the gaps left by accomplice liability. On the basis of his theory, the IMT convicted the 'major war criminals' for the crime of conspiracy, while the lower and mid-level accused were convicted in subsequent proceedings for membership of a criminal organisa-

tion. In **Chapter 1** of this study Bernays' theory is closely examined, as well as the jurisprudence ensuing from it.

Alongside, or shortly after the enforcement of this theory, a process of codification of individual criminal responsibility took place. This process, described in the second half of Chapter 1, shows a differentiation in modes of individual criminal responsibility, culminating in Article 25(3) of the ICC Statute. The latter provision contains an exhaustive list of participation modes, covering every possible way in which a person can contribute to the commission of a crime.

This takes us into **Chapter 2** where the various modes of perpetration and participation listed in Article 25 of the ICC Statute are analysed and discussed, while mirrored with equivalents in national criminal law and the jurisprudence of the Tribunals of the Former Yugoslavia and Rwanda. The first part of Chapter 2 contains a 'general part', setting out the tools and terms that are used to analyse and describe individual criminal responsibility in international law. As such it pertains to the other parts of this study as well.

When analysing and comparing the ICC Statute with the Statutes and jurisprudence of the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda, one particular concept stands out: the common purpose or joint criminal enterprise concept. The ICTY, in relying on Bernays' collective criminality theory by way of post-Nuremberg case law and by applying the Anglo-American doctrine of common purpose, developed a theory of complicity in group-crime and a 'special participation concept' – joint criminal enterprise – that adds to the participation modes listed in Article 7(1) of its Statute. As with Bernays' theory, this special participation concept is used to construct liability of, on the one hand, war criminals at policy level and, on the other hand, of war criminals on the execution level. It is noteworthy that the joint criminal enterprise concept at the ICTY has become the concept *par excellence* on which to base the criminal responsibility of senior military and political figures for crimes planned by them but carried out by others. In this it has taken over a part of the role superior responsibility used to play. Joint criminal enterprise, also referred to in this study as 'collateral liability', generates liability for those crimes that while outside the original common design were nevertheless natural and foreseeable consequences of that common design/purpose. The concept further proved useful in tackling causality problems in cases of mob violence where it is not clear who *actually* (physically) committed the crime.

The comparison between national underpinnings and ICTY jurisprudence demonstrates that, although very broad, the concept of joint criminal enterprise does not constitute unprecedented law. Nevertheless, it borders on *collective* responsibility and should be closely examined to ensure that it does not violate the principle of *individual* criminal responsibility. The fact that the ICTY relies on joint criminal enterprise in its case law, as it is does not feature in its Statute, might warrant the conclusion that the concept fills a gap left by the participation modes listed in the ICTY Statute. It is doubtful whether the ICC equivalent of common purpose liability, encapsulated in Article 25 (3)(d) of the ICC Statute, can fill this gap, as it does not extend to the collateral type of common purpose liability. The *dolus eventualis* standard, which ensues from the foreseeability-risk test of 'collateral liability', does not 'fit' the ICC common purpose concept.

On the other hand, Article 25 of the ICC Statute offers a broader range of participation modes than the Statutes of the Yugoslavia and Rwanda Tribunals do. The provision marks the transition from a dual participation model (at the *ad hoc* Tribunals) to a differentiated participation model. The *ad hoc* Tribunals essentially provide for two types of offenders: the principal and the accomplice, while the ICC Statute recognises three types of *perpetrators*: the direct or physical perpetrator, the perpetrator by means (of an 'agent'), and the joint perpetrator. Moreover, it identifies two types of *participants*: instigators and aiders/abettors/facilitators. This differentiation should be welcomed as it allows for the qualification of various contributions to a crime already at the stage of attributing responsibility, doing away with the 'all or nothing' approach of accomplice liability. This is particularly relevant with regard to system criminality where contributions to the crime cover a wide scale: from mere facilitation to instigation as an *auctor intellectualis*.

Comparing Article 25 of the ICC Statute with, on the one hand, criminal participation at the *ad hoc* Tribunals and, on the other hand, national underpinnings, it appears that the ICC participation modes establish a relatively high threshold. This is mainly due to the strict *mens rea* requirement of Article 30 of the ICC Statute excluding *dolus eventualis*. However, the new concept of perpetration by means in Article 25(3)(a), which does not require an innocent agent, seems to compensate for this to a certain extent.

On balance, it can be said that the text, context and legal history of Article 25 of the ICC Statute enable the Court to establish a real *individual* threshold in attributing criminal responsibility. In this it honours principles of criminal law and it makes an important contribution to the development of international criminal law. Whether Article 25 of the ICC Statute provides the ICC with the sufficient means to deal with system criminality, is another matter. The fact that it does not have to its disposal the collateral common purpose concept as the *ad hoc* Tribunals do, may prove an impediment. In any event, for the future of international criminal law it is important that the ICC incorporates the jurisprudence of the *ad hoc* Tribunals as much as possible, particularly when it qualifies as customary international law. This to prevent a development of two diverging bodies of international criminal law: ICC criminal law and ICTY/ICTR criminal law. This way the concept of joint criminal enterprise could apply within the ICC system after all.

Part II: Superior Responsibility

Superior or command responsibility is the primary mechanism through which superiors can be held criminally responsible for crimes perpetrated by their subordinates. The concept is an important tool in punishing persons in superior positions for lack of control and/or supervision over those under their command or authority.

While the Leipzig court that tried the architects of the First World War, applied the concept in at least one of its cases, it was really the Second World War and its aftermath that generated the leading cases on superior responsibility. **Chapter 3** describes a few of these leading cases. Despite the fact that these cases constitute a disparate body of law, it is possible to distil from them three elements that underlie the concept of superior responsibility. The skeleton concept of superior responsibility consists of three elements: i) a *functional* element; a superior's position must en-

tail a duty to act, ii) a *cognitive* element; a superior must have known, or should have known of the crimes, and iii) an *operational* element; a superior must have failed to act. The differences between the cases described in Chapter 3 stem from a differing interpretation of the three elements, and from an imbalance in weighing these elements when attributing responsibility. In order to make the concept of superior responsibility a solid, sophisticated and coherent concept of criminal responsibility, the above-mentioned three elements should be seen as *cumulative* in application and *equal* in weight. This way, an unrealistic attribution of criminal responsibility by way of superior responsibility – as in the *Yamashita* and *Hirota* cases – can be avoided. In the *Pohl* and *Medical* cases, the concept of superior responsibility was extended to apply to non-military superiors. This way it developed from ‘command’ into ‘superior’ responsibility. The Tokyo Tribunal and the Kahan Commission endorsed this extension to non-military superiors by applying it to senior government officials such as ministers.

The *ad hoc* Tribunals developed the superior responsibility concept into a modern concept of individual criminal responsibility. This development is described and analysed in **Chapter 4**. The jurisprudence of the *ad hoc* Tribunals on superior responsibility has ‘put flesh’ on the three constituent skeleton elements, identified in early case law on superior responsibility. The most valuable contribution to the development of the concept of superior responsibility is the identification of ‘effective control’ as a requisite element of superior responsibility. This element enables superior responsibility to apply to *de iure* and *de facto* superiors, but only for those crimes that one actually (‘materially’) could have prevented, or punished. ‘Effective control’ broadens the scope of superior responsibility beyond formal command relationships. This way the *ad hoc* Tribunals, more in particular the ICTY, created a superior responsibility concept that is uniform in its underlying principles and broad in its application whilst retaining its specific characteristics. With the introduction of the concept of ‘effective control’ the ICTY delivered the tools for variance. It further respected the boundaries set by criminal law by requiring knowledge of the underlying crimes.

The ICC drafters are indebted to the *ad hoc* Tribunals for having developed the concept of superior responsibility into a true concept of *individual* criminal responsibility. However, while the *ad hoc* Tribunals affirmed the concept’s capacity to apply to a wide variety of cases and different superiors, the ICC provision on superior responsibility (Article 28 of the ICC Statute) is framed in two distinct standards, for military and non-military superiors. This is an unnecessary differentiation and denies the concept’s uniform nature. On this point, the ICC concept of superior responsibility must be regarded as flawed and a step back.

Article 28 of the ICC Statute is, however, a step forward by allowing superior responsibility to be identified as a crime of omission. A superior can be held criminally liable for a ‘failure to exercise control properly’. This has stopped the erosion of the concept of superior responsibility by, on the one hand, joint criminal enterprise and, on the other hand, complicity by omission. The fusion of accomplice liability and superior responsibility into the concept of complicity by omission, a process started at the *ad hoc* Tribunals, should be viewed as an unwelcome development as it may lead to *confusion*. It may result in an equation of superior responsi-

bility to accomplice liability, which would deny the nature of superior responsibility as a type of direct responsibility, where the superior is the principal, offender rather than an accomplice. Article 28 of the ICC Statute does away with this confusion and formulates superior responsibility as a crime of omission respecting its nature as a type of direct criminal responsibility.

The negligence standard of 'should have known' in Article 28(a) of the ICC Statute has the potential to broaden the concept beyond the borders set by the *ad hoc* Tribunals. It is up to the ICC and national courts not to let that happen. Now that the limits of the concept have been identified, it is time to guard its borders. The ICC will have to define a superior's 'duty to know'. It is submitted here that this should be done along the lines of, not only objective factors such as task and function, but also according to subjective factors, such as a superior's experience. In this it should draw from ICTY/R case law and prevent, as much as possible the formation of a separate ICC superior responsibility concept. Uniformity should be the device

In *Chapter 5* a survey of concepts analogous to superior responsibility (e.g. the responsibility of employers for crimes committed by their employees) serves to uncover the nature of superior responsibility. These analogous concepts all reflect the functional, cognitive, and operational aspects relevant in establishing liability. Not all, however, grant equal weight to these aspects, and this is where they deviate from superior responsibility. The comparison with concepts, such as political responsibility, demonstrates how the one-sided reliance on the functional element and the duty-aspect of superior responsibility broadens the scope of superior responsibility. It appears that prosecuting superiors at policy or government level might be better based on joint criminal enterprise, or another conspiracy-complicity type of criminal participation, than on superior responsibility. The French 'tainted blood' case and the Dutch Srebrenica matter illustrate the veracity of this statement, as does the Tokyo Judgement, where superior responsibility was presented in the disguise of cabinet responsibility, and understood in collective terms, discrediting the concept's peculiar features and endangering its nature as individual criminal responsibility.

The second half of Chapter 5 examines superior responsibility concepts encapsulated in national (war crimes) law and military manuals. The overview of national superior responsibility concepts shows how the concept has been 'interpreted' in national terms and that superior responsibility has the ability to take different formes, ranging from 'active' criminal participation (for ordering crimes) to 'passive' accomplice liability (complicity by omission) to a separate crime of negligence. Some of the above-discussed national laws implementing the ICC Statute incorporate superior responsibility as a crime of omission. This may be seen as evidence that with Article 28 of the ICC Statute, the final form of the concept seems to have been identified; the concept of superior responsibility is a *genuine* crime of omission.

Part III: Defences

A third of this study covers an analysis of defences in international criminal law. This would not have been the case had this book been written a decade ago. The incorporation of a catalogue of defences in international criminal law is a relatively recent phenomenon. The discussion on defences in war crimes law was for many

years solely concerned with the defence of superior orders. In recent years, however, it has expanded to other grounds for excluding criminal responsibility. Since the ICTY ruling in the case of *Erdemović* the defence of duress has received an increasing amount of attention, as did the defence of mistake after a NATO bomb had hit the Chinese embassy in Belgrade during the Kosovo conflict. Despite lively debates in literature and academia, practice at international courts and tribunals has shown that there is a reluctance to allow the resort to a defence. This reluctance was shared by some of the founding fathers of the ICC Statute. Nevertheless, the Rome Statute contains a catalogue of defences in Articles 31–33. This way the ICC makes up for the imbalance that exist(ed) in the criminal law systems of Nuremberg, Tokyo and the Tribunals for the Former Yugoslavia and Rwanda. A study on the concept of individual criminal responsibility can therefore not disregard this ‘averting-side’ of criminal responsibility. This would equally lead to an imbalance.

Chapter 6 deals with Article 31 of the ICC Statute, comprising the defences of mental incapacity, intoxication, self-defence, duress, and ‘other’, non-statutory defences. The first part of Chapter 6 contains a ‘general part’ and deals with a few central issues, such as the distinction between justifications and excuses, the ‘reasonable man standard’ and ‘Garantenstellung’, and the concept of *culpa in causa*. This part has a similar function as the ‘general part’ of Chapter 2 and pertains to the defences discussed in Chapter 7 as well. The defences listed in Article 31 of the ICC Statute all have a different nature and pedigree, which accounts for a differing format in analysing them. As in Chapter 2 with regard to the participation modes listed in Article 25 of the ICC Statute, the defences are described and evaluated by looking at the ICC drafting history, the national legal concepts behind them (if available), the text and wording of each provision, and the jurisprudence of the Tribunals of the Former Yugoslavia and Rwanda and various national courts and tribunals.

Article 31 ICC Statute is a curious mix of Anglo-American and civil law concepts, the traces of which are still clearly visible in the provision. The prime example of such a mix is Article 31(1)(d) encapsulating the defence of duress. Duress in Article 31(1)(d) is further of interest as it marks an important debut in international law. Although accepted as a mitigating circumstance, it was never awarded the status of complete defence, neither in Nuremberg, nor at the ICTY in the *Erdemović* case. The fact that it is now listed as a complete defence in the Rome Statute may be regarded as an important breakthrough.

The recognition of self-defence as an autonomous criminal law defence in Article 31(1)(c) of the ICC Statute is also noteworthy. The fundamental flaw of this provision is that its unclear wording might be interpreted as allowing for a plea of military necessity. The clause ‘the person acts reasonably to defend (...) property which is essential for accomplishing a military mission’ might be taken to constitute a blank and open-ended allowance for a plea of military necessity, which would be a violation of the laws of war. This should, however, not cloud the Court’s vision and judgement in including this very important defence, which in the end is an inherent right of every human being.

A recurring theme in the above-discussed defences is the distinction between justification and excuse. It is submitted that, although Article 31 itself does not provide for it, the Court should draw that distinction, if only to be able to interpret the provi-

sion in all its complexities. A distinction between wrongdoing in the sense of wrongfulness of the act, and culpability in the sense of blameworthiness of the actor, enables the Court to strike the balance between on the one hand, principles of fairness in the individual case, and on the other, the wider context of criminal-policy arguments and contribution to a process of reconciliation

Chapter 7 examines Article 32 and 33 of the ICC Statute, which encapsulate the defence of mistake (fact and law) and the defence of superior orders, respectively. Both can be usefully discussed in one and the same chapter. After all, the defence of superior orders is a *sui generis* defence of mistake of law. The acceptance of the defence of mistake in Article 32 of the ICC Statute heralds a breakthrough to a more comprehensive understanding of culpability. It is evidence of the existence of 'some sort of moral blameworthiness' that needs to be covered by a defence of mistake and where mere lack of *mens rea* won't do. However, with the inclusion of a defence of mistake the ICC Statute creates expectations that on a closer look it cannot fulfil; there are many situations where the defence will not avail. On the other hand, we must be aware of the fact that many national legal systems do not provide for the defence of mistake in their own criminal laws. This is particularly true with regard to *error juris*.

As to the inclusion of superior orders in Article 33 of the ICC Statute, this constitutes a break from the Nuremberg and *ad hoc* Tribunals. The ICC Statute codifies on the international level what was already widely accepted in national legal systems: the defence of superior orders may exclude criminal responsibility as long as the person did not know that the order was unlawful, and the order was not manifestly unlawful (conditional liability approach). The exclusion of the superior orders defence (absolute liability approach) was the last noticeable convulsion of the Nuremberg legacy in modern war crimes law. Despite its constrained wording and its unnecessary second paragraph, Article 33 should be warmly welcomed as its acceptance is a definite break from the result-oriented approach of the Nuremberg and Tokyo Tribunals, and to a certain extent, that of the *ad hoc* Tribunals. The ICC Statute allows for the development of a more comprehensive and general system of criminal law. And as the ICC claims to be a *criminal court* and not a (military) *tribunal*, it is only logical that its list of defences contains that of superior orders.

The catalogue of defences listed in Article 31-33 of the ICC Statute is in comparison to previous international criminal law drafts and provisions an improvement and sets the ICC Statute apart from its predecessors. The inclusion of defences such as self-defence, duress and superior orders seems to bring us closer to our goal: developing a mature and sophisticated system of international criminal law. To achieve that goal rather sooner than later, and to make the ICC system of defences an *effective* system of defences, the author submits that the ICC make three distinctions. First, the Court should have an open eye for the underlying 'cultural differences' and take as point of departure the distinction between justifications and excuses. Secondly, in considering pleas put forward by an accused, the Court should distinguish between a person's public and private capacity. Thirdly, and this relates to the second point, the distinction between international and criminal law defences should be clearly maintained, this to prevent an irrational limitation of the resort to a defence. This is particularly true with regard to the defence of self-defence as an au-

tonomous criminal law defence and inherent right of every human being. By making these distinctions the Court will be able to maintain a clear vision of the matter before it. This is essential, as it is especially in the field of defences that the two legal systems – international law and criminal law – come together, and where cultural differences between the two main legal cultures – Anglo-American law and civil law – most evidently surface.

Evaluation

From this study, a picture emerges of international criminal law that is still in the process of maturation but that has made major progress ever since its conception at Nuremberg. Relying on the premise that the development of international criminal law occurs along similar lines as national criminal law but that it is at different stages, one could state that an important step in catching up on national criminal law has been made with the adoption of the ICC Statute. Despite the criticism set out in this study, the ICC Statute signifies important progress in comparison to former international criminal law drafts and provisions. This is particularly true with regard to the catalogue of defences in the ICC Statute, which has brought international criminal law closer to qualifying as a comprehensive system of criminal law. Moreover, to allow a perpetrator of war crimes, crimes against humanity and genocide to resort to a defence marks a fundamental change in the philosophy of war crimes law, making it enter a new phase. Not just the ICC provisions on ‘general’ criminal law defences, such as intoxication and mistake of fact, but particularly the typical war crimes defence of superior orders and the contested duress defence signify this change.

As said earlier, the Rome Statute is not very generous in granting recourse to a defence. This high standard of averting criminal responsibility correlates with the high threshold in attributing criminal responsibility. The strict mental standard of Article 30 of the ICC Statute precludes that recklessness and negligence – with a few exceptions – and even *dolus eventualis* render an individual responsible for prohibited acts. The ICC Statute truly endorses *individual* criminal responsibility. On the whole it implements a high standard in both, attributing and averting criminal responsibility.

The ICC might find that it lacks certain tools to efficiently deal with mob violence. The *ad hoc* Tribunals, in particular the ICTY, have found these tools in customary international law and have devised a special participation concept (joint criminal enterprise) to fill the gap left by its Statute on this point. The ICC should do that too. Like the ICTY drew from Nuremberg law and processed it to acceptable criminal law standards, the ICC could incorporate ICTY and ICTR jurisprudence in filling the gaps left in its Statute. The *ad hoc* Tribunals and the ICC complement each other. They constitute a promising mix. The ICC Statute shows a further sophistication of international criminal law with its comprehensive regulation of participation, its ‘omission formulation’ of superior responsibility, and a catalogue of defences. The *ad hoc* Tribunals on their part supply the tools for dealing with system-criminality. Put together, they provide for a mature, but also *effective* international criminal law system. The ICC should integrate the jurisprudence of the *ad hoc* Tribunals as much as possible within its own system. This way it not only creates an

effective criminal law system, but also a unified international criminal law. Bearing in mind its legal framework and negotiating history it may, however, be difficult for the Court to achieve these goals. A teleological rather than a grammatical approach to its statutory provisions seems therefore warranted.

At the end of this study we return to the question posed in the introduction: do the nature of international crimes and the international nature of the normative framework generate a concept of individual criminal responsibility that deviates from individual criminal responsibility as it has taken shape in national criminal law systems? The answer to this question is: no, not fundamentally. This has to do with the fact that, first of all, national criminal law is also equipped with special participation concepts to fight collective crime (terrorism, 'war on drugs'). In other words, common purpose and joint criminal enterprise have equivalents at the national level. The same can be said of instigation and superior responsibility. Secondly, the ICC Statute has given international criminal law more 'general traits'. The list of defences, and the differentiation in participation modes, shape the rather rigid and somewhat Spartan nature of international criminal law of the past into a more sophisticated criminal law system.

We thus witness a rapprochement between national and international criminal law, on the special part by national law and on the general part by international criminal law. Regarding the systems of the ICC and the *ad hoc* Tribunals as complementary systems, that together constitute international criminal law, we can conclude that international criminal law is catching up on its backlog *vis-à-vis* national criminal law faster than we may have realised.

NEDERLANDSE SAMENVATTING

DE INDIVIDUELE STRAFRECHTELIJKE AANSPRAKELIJKHEID VOOR SCHENDINGEN VAN HUMANITAIR OORLOGSRECHT

Deze studie bevat een onderzoek naar de inhoud en reikwijdte van individuele strafrechtelijke aansprakelijkheid voor schendingen van humanitair oorlogsrecht, *i.e.* genocide, misdrijven tegen de mensheid en oorlogsmisdrijven. Laatstgenoemde misdrijven worden in de titel van dit boek aangeduid als 'schendingen van humanitair oorlogsrecht' om te wijzen op de oorsprong van deze misdrijven: de wetten en gebruiken van de oorlog.

Om een persoon 'schuldig' te achten, dient het betreffende handelen of nalaten te worden herleid tot een schuldbestanddeel (opzet of schuld) en dient aangetoond te worden dat het vrijwillig en wederrechtelijk gedrag betrof. Individuele strafrechtelijke aansprakelijkheid draait om schuld en verwijtbaarheid en verlangt in een gerechtelijke procedure bewijs van *persoonlijke* schuld (i), met betrekking tot het *eigen* gedrag (ii). Hiermee onderscheidt individuele strafrechtelijke aansprakelijkheid zich van collectieve aansprakelijkheid. Deze 'parameters van schuld en verwijtbaarheid' liggen ten grondslag aan het proces van toerekening en uitsluiten van strafrechtelijke aansprakelijkheid in de meeste nationale strafrechtstelsels. Teneinde (het materiële) internationaal strafrecht te kunnen kwalificeren als een ontwikkeld strafrechtssysteem, waar het beginsel van individuele strafrechtelijke aansprakelijkheid wordt gerespecteerd en onderschreven, dient ook het internationale strafrecht deze parameters te respecteren. Deze studie heeft als doel te onderzoeken of dat inderdaad het geval is. Meer specifiek luidt de onderzoeksvraag: genereert de aard van internationale misdrijven (systeem criminaliteit) en de aard van het normatieve kader, dat een treffen is van verschillende rechtsgebieden en dat bestaat uit concepten afkomstig uit verschillende rechtsculturen, een begrip van individuele strafrechtelijke aansprakelijkheid dat afwijkt van individuele strafrechtelijke aansprakelijkheid zoals dat heeft vorm gekregen in het nationale recht?

Deel 1: Vormen van individuele aansprakelijkheid

Internationale misdrijven impliceren vaak meerdaderschap en collectief wangedrag. Dit type criminaliteit wordt in deze studie aangeduid als 'systeem criminaliteit'. Genocide, misdrijven tegen de mensheid en oorlogsmisdrijven worden bijna altijd op massale schaal, dan wel in de context van systematisch geweld, gepleegd. Om die reden zijn veroordelingen in Neurenberg en in de daaropvolgende internationale processen gebaseerd op strafrechtelijke deelneming, met name het Anglo-Amerikaanse model van 'accomplice liability'. Dit deelnemingsmodel vertoont echter gebreken bij de toepassing op (bepaalde categorieën) oorlogsmisdadigers. Degenen die

achter de schermen, aan de touwtjes trekken, passen niet goed in de rol van deelnemers die behulpzaam zijn bij het plegen van een oorlogsmisdrijf als 'aider' of 'abet-tor'. Voorts bleek in het verleden dat strafrechtelijke deelneming te kort schoot als aansprakelijkheidsgrond voor het – in meer of mindere mate georganiseerde – uitvoerend apparaat, degenen op het strijdtoneel. Bernays' theorie van collectieve criminaliteit, ontworpen in Neurenberg, vulde deze leemten. Met behulp van zijn theorie veroordeelde het IMT in Neurenberg de 'major war criminals' voor samen-spanning (conspiracy), terwijl de aangeklaagden van lager rang in de daaropvolgende processen werden veroordeeld voor lidmaatschap van een criminele organisatie. In **Hoofdstuk 1** van deze studie wordt de theorie van Bernays en de vonnissen die daaruit voortvloeiden nader onderzocht.

Tegelijkertijd, of kort na de implementatie van Bernays' theorie in de praktijk, vond er op internationaal niveau een proces van codificatie plaats van het begrip individuele strafrechtelijke aansprakelijkheid. Dit proces, dat beschreven is in de tweede helft van hoofdstuk 1, vertoont een differentiatie naar verschillende vormen van individuele strafrechtelijke aansprakelijkheid en culmineert tenslotte in Artikel 25(3) van het ICC Statuut dat diverse vormen van daderschap en een uitputtende deelnemingsregeling bevat waarbij nagenoeg elke mogelijke bijdrage aan een misdrijf juridisch gedekt is.

Dit brengt ons in **Hoofdstuk 2** waar de verschillende vormen van daderschap en deelneming van Artikel 25 van het ICC Statuut worden besproken en geanalyseerd. Hierbij wordt een vergelijking gemaakt met gelijksoortige concepten in nationaal strafrecht en equivalenten in de rechtspraak van de Joegoslavië en Rwanda Tribuna-len. Het eerste deel van hoofdstuk 2 bestaat uit een 'algemeen deel' waarin bepaalde sleutelbegrippen worden besproken, zoals *mens rea* en *actus reus*, en verschillende deelnemingsmodellen aan bod komen. Als zodanig is dit gedeelte ook van toepas-sing op de andere hoofdstukken van deze studie.

Bij de analyse van het ICC Statuut en de bespreking van de jurisprudentie van de *ad hoc* Tribuna-len, met name het Joegoslavië Tribunaal, stuiten we op de 'common purpose' leer. Deze leer, die afkomstig is uit het Anglo-Amerikaanse recht, vormt de achtergrond van een specifieke vorm van deelneming aan groepsriminaliteit. Door zich enerzijds, via jurisprudentie uit het post-Neurenberg tijdperk, te baseren op Bernays' theorie van collectieve criminaliteit, en anderzijds de Anglo-Amerikaanse doctrine van 'common purpose' toe te passen, ontwikkelde het Joegoslavië Tribu-naal in zijn rechtspraak het concept 'common purpose liability' ook wel 'joint crimi-nal enterprise' genoemd. Op deze manier breidde het Tribunaal het deelnemingsmo-del, zoals het is neergelegd in Artikel 7(1) van het Statuut, uit met een speciale deelnemingsvorm. Evenals Bernays' theorie wordt deze speciale deelnemingsvorm gebruikt om aansprakelijkheid te construeren van, enerzijds oorlogsmisdadigers op het politieke beslissingsniveau en, anderzijds oorlogsmisdadigers op het uitvoerings-niveau. Het is opmerkelijk dat de deelnemingsvorm 'joint criminal enterprise' in de jurisprudentie van het Joegoslavië Tribunaal geworden is tot het concept bij uitstek om aansprakelijkheid te construeren van hoge militaire en politieke functionarissen. Op deze manier heeft de deelnemingsvorm 'joint criminal enterprise' voor een deel de rol van 'superior responsibility' overgenomen. 'Joint criminal enterprise', ook wel aangeduid in deze studie als 'collateral liability', genereert strafrechtelijke aan-

sprakelijkheid voor die misdrijven die, hoewel ze buiten het oorspronkelijke plan liggen niettemin een natuurlijk en voorzienbaar gevolg daarvan zijn. De deelnemingsvorm wordt voorts toegepast op situaties van gezamenlijke geweldpleging ('mob violence') waar het niet duidelijk is wie daadwerkelijk (fysiek) het misdrijf pleegde.

De vergelijking tussen nationaal strafrecht en de jurisprudentie van het Joegoslavië Tribunaal toont aan dat, ofschoon 'joint criminal enterprise' een ruim begrip is, de deelnemingsvorm equivalenten heeft op nationaal niveau. Het begrip lijkt te grenzen aan *collectieve* aansprakelijkheid en dient nauwlettend in de gaten te worden gehouden teneinde te voorkomen dat toepassing ervan een schending van het beginsel van *individuele* strafrechtelijke aansprakelijkheid met zich mee brengt. Uit het feit dat het Joegoslavië Tribunaal een deelnemingsvorm als 'joint criminal enterprise' construeert in zijn rechtspraak, blijkt dat het deelnemingsmodel van Artikel 7(1) van het Statuut niet voldoet in de strijd tegen systeem criminaliteit. Het is maar de vraag of de ICC equivalent van 'common purpose', welke te vinden is in Artikel 25(3)(d) van het ICC Statuut, voldoet. Deze deelnemingsvorm strekt zich immers niet uit over de 'collateral' variant van deelneming aan groepsriminaliteit. Het schuldbestanddeel *dolus eventualis*, dat besloten ligt in het vereiste van 'voorzienbaarheid gevolg', past niet in de deelnemingsvormen zoals neergelegd in Artikel 25 van het ICC Statuut.

Hier staat tegenover dat Artikel 25 van het ICC Statuut een breder scala aan deelnemingsvormen biedt dan de Statuten van de *ad hoc* Tribunalen. Het artikel markeert de overgang van een duaal deelnemingsmodel (bij de *ad hoc* Tribunalen) naar een gedifferentieerd deelnemingsmodel. Terwijl de *ad hoc* Tribunalen in wezen slechts twee soorten strafrechtelijk aansprakelijke personen kennen: daders ('principals')¹ en deelnemers ('accomplices'),² onderscheidt het ICC drie soorten daders: de onmiddellijke dader, de middellijke dader/doen pleger en de medepleger. Daarnaast maakt het ICC Statuut een onderscheid tussen twee soorten deelnemers: de uitlokker en de medeplichtige. Deze differentiatie dient te worden verwelkomd, aangezien het reeds in het stadium van toerekening (en niet pas bij de strafoplegging) een kwalificatie van deelnemingsvormen mogelijk maakt en omdat, hiermee afstand wordt genomen van de 'alles of niets' benadering van het (duale) Anglo-Amerikaanse deelnemingsmodel. Dit past beter bij systeem criminaliteit waar het aandeel in een misdrijf uiteenlopende vormen kan aannemen: van een enkele voorbereidingshandeling tot het uitlokken van misdrijven als *auctor intellectualis*.

Bij de vergelijking van Artikel 25 van het ICC Statuut met strafrechtelijke deelneming bij enerzijds de *ad hoc* Tribunalen en anderzijds nationale strafrechtssystemen, blijkt dat het deelnemingsmodel van het ICC de lat van strafrechtelijke aansprakelijkheid hoog legt. De beperkte reikwijdte van het subjectief bestanddeel van

¹ Dader is degene die, in een Nederlandse terminologie uitgedrukt, een delictsomschrijving vervult door een fysiek handelen of door een nalaten waar handelen plicht is. Dader is daarnaast degenen die deelneemt aan een 'joint criminal enterprise'.

² Dit begrip correspondeert ruwweg met de Nederlandse indeling van '(mede-)plegers' en 'medeplichtigen'.

Artikel 30 van het ICC Statuut dat van toepassing is op Artikel 25, is daar debet aan.

Alles welbeschouwd, kan gezegd worden dat de tekst, context en ‘wetsgeschiedenis’ van Artikel 25 van het ICC Statuut, het ICC de gelegenheid bieden een echte *individuele* grens te trekken bij het toekennen van strafrechtelijke aansprakelijkheid. Hiermee worden de beginselen van het strafrecht in ere gehouden en draagt het ICC in aanzienlijke mate bij aan de ontwikkeling van het internationaal strafrecht. Of Artikel 25 van het ICC Statuut de middelen biedt om afdoende te reageren op systeem criminaliteit is een andere kwestie. Het feit dat het ICC niet beschikt over de speciale ‘collateral’ deelnemingsvorm zoals de *ad hoc* Tribunalen deze kent, zou een gemis kunnen zijn. Hoe het ook zij, voor de toekomst van het internationaal strafrecht is het van belang dat het ICC de jurisprudentie van de *ad hoc* Tribunalen zo veel mogelijk overneemt en integreert in zijn eigen strafrechtsspraak, vooral wanneer deze rechtspraak de status van internationaal gewoonterecht heeft bereikt. Te allen tijde dient te worden voorkomen dat er twee soorten internationaal strafrecht ontstaan: ICC strafrecht en ICTY/ICTR strafrecht. Via een integratie van ICTY/R jurisprudentie door het ICC kan de ‘joint criminal enterprise’ wellicht binnen de grenzen van het ICC systeem gebracht worden.

Deel II: ‘Superior responsibility’

‘Superior’ of ‘command responsibility’, oftewel strafbaar leidinggeven, is het concept bij uitstek om de leidinggevende verantwoordelijk te houden voor misdrijven gepleegd door ondergeschikten. Het is dé manier om personen in leidinggevende posities te bestraffen voor het gebrek aan controle en/of toezicht over degenen onder hun bevel of gezag.

Terwijl het Hof van Leipzig, dat de instigatoren van de Eerste Wereldoorlog be-rechte, ‘superior responsibility’ in ten minste één van de rechtszaken toepaste, was het vooral de Tweede Wereldoorlog en de nasleep daarvan dat belangrijke rechtspraak genereerde met betrekking tot ‘superior responsibility’. Deze uitspraken worden in *Hoofdstuk 3* besproken. Ondanks het feit dat deze uitspraken ongelijksoortig en verre van uniform zijn, is het mogelijk een drietal gemeenschappelijke elementen te destilleren welke als het ware het geraamte van het begrip ‘superior responsibility’ vormen. Het begrip bestaat uit de volgende onderdelen: i) een *functioneel* element; de leidinggevende moet een positie hebben bekleed waaruit de plicht tot voorkómen van misdrijven voortvloeit, ii) een *cognitief* element; de leidinggevende moet hebben geweten, of had moeten weten dat zulke misdrijven op handen waren en iii) een *operationeel* element: de leidinggevende moet hebben nagelaten de misdrijven te voorkomen. De verschillen in de rechtspraak zoals besproken in Hoofdstuk 3 zijn te verklaren als, enerzijds, het gevolg van een verschillende interpretatie van deze drie elementen en, anderzijds, als het gevolg van een ongelijke waardering van deze elementen. Teneinde ‘superior responsibility’ tot een solide en coherent concept te maken, dienen de bovengenoemde drie elementen *cumulatief* te worden toegepast en van *gelijke* waarde te worden geacht. Op deze manier, kan een onrealistische vaststelling van ‘superior responsibility’ – zoals in de *Yamashita* en *Hirota* zaken – worden voorkomen. In de *Pohl* en *Medical* zaken, werd ‘superior responsibility’ ook op niet-militaire meerderen toegepast. Op deze

manier ontwikkelde het begrip zich van 'command' naar 'superior responsibility'. Het Tokyo Tribunaal en de Kahan Commissie bevestigden deze uitbreiding en hebben hoge regeringsfunctionarissen, zoals ministers en premiers, strafrechtelijke aansprakelijk gesteld op basis van 'superior responsibility'.

De *ad hoc* Tribunalen ontwikkelden het 'superior responsibility' begrip tot een volwaardige vorm van individuele strafrechtelijke aansprakelijkheid. Deze ontwikkeling is beschreven en geanalyseerd in **Hoofdstuk 4**. De jurisprudentie van de *ad hoc* Tribunalen heeft het geraamte van de drie constitutieve elementen van 'superior responsibility' 'vlees' gegeven. De meest waardevolle bijdrage aan de ontwikkeling van het 'superior responsibility' begrip is de identificatie van het element 'effectieve controle'. Met dit element kan 'superior responsibility' toegepast worden op niet alleen militaire en niet-militaire meerderen, maar – meer precies – op zowel *de facto* als *de iure* meerderen, en slechts voor die misdrijven die men daadwerkelijk heeft kunnen voorkomen, dan wel bestraffen. Op deze manier hebben de *ad hoc* Tribunalen, met name het ICTY, een 'superior responsibility' begrip gecreëerd dat uniform is in de drie onderliggende elementen en variabel in het toepassingsbereik. Tegelijkertijd blijft het specifieke karakter van deze aansprakelijkheidsgrond behouden. Voorts blijft de aard van 'superior responsibility' als vorm van individuele strafrechtelijke aansprakelijkheid behouden nu de jurisprudentie van de *ad hoc* Tribunalen het cognitieve element zo interpreteert dat wetenschap van de misdrijven gepleegd door de ondergeschikten aangetoond dient te worden.

Terwijl de *ad hoc* Tribunalen de aard van 'superior responsibility' als 'variabele' vorm van strafrechtelijke aansprakelijkheid, hebben bevestigd en ontwikkeld, is het artikel dat 'superior responsibility' regelt in het ICC Statuut (Artikel 28 van het ICC Statuut) vervat in twee verschillende normen, voor militaire en niet-militaire meerderen. Dit is een onnodige differentiatie en miskent de uniforme aard van dit begrip. Op dit punt dient het 'superior responsibility' begrip van het ICC Statuut als gebrekkig en een stap terug te worden beschouwd.

Artikel 28 van het ICC Statuut moet echter als een stap vooruit worden beschouwd op een ander punt: het formuleert 'superior responsibility' als een omissiedelict. Op grond van dit artikel kan een meerdere strafrechtelijke aansprakelijk gesteld worden voor het 'nalaten behoorlijk controle uit te oefenen'. Dit heeft de erosie van het begrip 'superior responsibility' door enerzijds 'joint criminal enterprise' en anderzijds strafrechtelijke deelneming door nalaten, gestopt. Het samengaan van strafrechtelijke deelneming en 'superior responsibility' in een vorm van strafrechtelijke deelneming door nalaten, is een ontwikkeling die kan worden gevonden in de jurisprudentie van de *ad hoc* Tribunalen. Deze ontwikkeling dient kritisch te worden gevolgd aangezien het kan leiden tot misverstanden. Het zou immers een vereenzelviging van 'superior responsibility' met strafrechtelijke deelneming tot gevolg kunnen hebben, hetgeen de aard van 'superior responsibility' als een vorm van *daderschap* zou miskennen. Artikel 28 van het ICC Statuut maakt nu een einde aan deze potentiële verwarring door 'superior responsibility' als een omissiedelict te formuleren.

De formulering van het wetenschapsvereiste in Artikel 28 van het ICC Statuut – 'should have known' – veronderstelt het subjectief bestanddeel 'schuld' ('negligence'). Hiermee wordt de gelegenheid geschapen voor het ICC om de grenzen van 'su-

perior responsibility' ruimer te trekken dan de *ad hoc* Tribunalen tot nu toe hebben gedaan. Het is aan het ICC en de nationale gerechten om dat niet te laten gebeuren. De grenzen van het begrip zijn verkend en geïdentificeerd in de rechtspraak van de *ad hoc* Tribunalen en het is zaak om deze grenzen te bewaken. Het ICC zal de plicht van een meerdere om zich zo goed mogelijk te (laten) informeren over het gedrag van ondergeschikten moeten afbakenen. Dit dient het ICC niet alleen te doen aan de hand van objectieve factoren, zoals de taak en functieomschrijving van een meerdere, maar ook aan de hand van subjectieve factoren, zoals zijn of haar ervaring. Bij deze vaststelling dient het ICC zich zoveel mogelijk te baseren op de rechtspraak van het ICTY en ICTR, dit om de vorming van een afzonderlijk ICC 'superior responsibility' begrip te voorkomen. Uniformiteit dient ook hier het devies te zijn.

In **Hoofdstuk 5** wordt een overzicht gegeven van analoge 'superior responsibility' concepten. Dit dient om het begrip 'superior responsibility' nader te definiëren en te onderscheiden van gelijksoortige concepten. De analoge begrippen bestaan allen uit een functioneel, cognitief en operationeel element. Echter, niet al deze begrippen kennen deze elementen gelijke waarde toe. Hiermee wijken ze af van 'superior responsibility'. De vergelijking met een concept als ministeriële verantwoordelijkheid laat voorts zien dat een eenzijdige nadruk op het functionele element en de daarmee samenhangende plicht, de grenzen van aansprakelijkheid aanzienlijk veruimt. Hieruit volgt dat het vervolgen van meerderen op politiek niveau beter kan worden geconstrueerd aan de hand van de deelnemingsvorm 'joint criminal enterprise'. Dit om te voorkomen dat 'superior responsibility' verward wordt met ministeriële verantwoordelijkheid. De Franse affaire rondom het HIV-besmette bloed en de Srebrenica zaak in Nederland illustreren de juistheid van deze stelling. Eerder bleek dit ook uit het vonnis van het Tokyo Tribunaal, waar 'superior responsibility' als een vorm van collectieve ministeriële verantwoordelijkheid werd gepresenteerd, waarmee de eigenheid van het begrip en de aard van het concept als individuele strafrechtelijke aansprakelijkheid werden miskend.

De tweede helft van Hoofdstuk 5 onderzoekt het begrip 'superior responsibility' zoals het is neergelegd in nationale wetgeving en militaire handleidingen. Het overzicht van nationale 'superior responsibility' concepten laat zien hoe het concept in nationaal recht is 'geïnterpreteerd' en welke verschillende vormen het kan aannemen: van uitlokking naar medeplichtigheid door nalaten, tot een afzonderlijk ommissiedelict. Het feit dat verschillende ICC implementatiewetgeving 'superior responsibility' als een ommissiedelict formuleren, kan worden gezien als bewijs van de stelling dat Artikel 28 van het ICC Statuut de ware aard van 'superior responsibility' identificeert en vaststelt: 'superior responsibility' is een ommissiedelict.

Deel III: Strafuitsluitingsgronden

Een derde van deze studie bestaat uit een analyse van strafuitsluitingsgronden in internationaal strafrecht. Dit was niet het geval geweest indien dit onderzoek een decennium geleden was uitgevoerd. Het opnemen van een aantal strafuitsluitingsgronden in internationaal strafrecht is een relatief recent fenomeen. De discussie over strafuitsluitingsgronden in het oorlogsstrafrecht beperkte zich vele jaren uitsluitend tot de strafuitsluitingsgrond van het handelen krachtens bevel ('superior or-

ders'). Recentelijk is deze discussie echter verruimd. Sinds het *Erdemović* vonnis van het Joegoslavië Tribunaal is er een groeiende aandacht voor psychische overmacht. Dit geldt dwaling sinds een NAVO bom de Chinese ambassade in Belgrado raakte gedurende het Kosovo conflict. De aandacht in de rechtspraktijk bleef echter lange tijd achter bij de discussie in de literatuur over strafuitsluitingsgronden. Men bleef zeer terughoudend in het toelaten van een beroep op een strafuitsluitingsgrond. Deze terughoudendheid werd gedeeld door enkele van de 'founding fathers' van het ICC Statuut. Desalniettemin bevat het Statuut van Rome een lijst strafuitsluitingsgronden in de artikelen 31-33 van het Statuut. Zo maakt het ICC een einde aan de onevenwichtigheid zoals die bestond in de internationale strafrechtssystemen van de Tribunalen van Neurenberg en Tokyo en de Joegoslavië en Rwanda Tribunalen. Een onderzoek naar individuele strafrechtelijke aansprakelijkheid in internationaal strafrecht kan deze kant van strafrechtelijk aansprakelijkheid niet veronachtzamen. Dit zou eveneens leiden tot onevenwichtigheid.

Hoofdstuk 6 bespreekt Artikel 31 van het ICC Statuut waarin achtereenvolgens zijn opgenomen: stoornis der geestvermogens ('mental incapacity'), intoxicatie ('intoxication'), noodweer ('self-defence'), psychische overmacht ('duress'), en 'andere' strafuitsluitingsgronden. Het eerste deel van hoofdstuk 6 bevat wederom een 'algemeen deel' en behandelt een aantal belangrijke kwesties, zoals het onderscheid tussen rechtvaardigings- en schulduitsluitingsgronden, de 'reasonable man standard', 'Garantenstellung' en de *culpa in causa* leer. Dit deel heeft een vergelijkbare functie als het algemeen deel van Hoofdstuk 2 en ziet eveneens op de strafuitsluitingsgronden besproken in hoofdstuk 7. De strafuitsluitingsgronden van Artikel 31 van het ICC Statuut verschillen naar aard en herkomst. Om deze reden worden ze niet volgens een uniform model besproken (hetgeen wel het geval is bij de bespreking van deelnemingsvormen in hoofdstuk 2). De strafuitsluitingsgronden van Artikel 31 worden beschreven en geanalyseerd aan de hand van de 'wetsgeschiedenis' en de tekst van het ICC Statuut, besproken in het licht van de jurisprudentie van de Joegoslavië en Rwanda Tribunalen en vergeleken met equivalenten op nationaal niveau.

Artikel 31 van het ICC Statuut is een opmerkelijke mix van Anglo-Amerikaans recht en continentaal recht. De sporen van deze twee rechtsculturen zijn nog zichtbaar in de formulering van de strafuitsluitingsgronden. Het beste voorbeeld hiervan is de formulering van psychische overmacht in Artikel 31(1)(d). Psychische overmacht is voorts noemenswaardig omdat het erkennen van deze strafuitsluitingsgrond een primeur is in internationaal strafrecht. Psychische overmacht gold reeds als 'strafverzachtende' omstandigheid, maar was op internationaal niveau nog nooit erkend als strafuitsluitingsgrond, noch in Neurenberg, noch in de *Erdemović* zaak bij het ICTY. Het feit dat het ICC dat nu wel doet kan als een belangrijke doorbraak worden gezien.

De erkenning van noodweer als een zelfstandige strafuitsluitingsgrond in Artikel 31(1)(c) van het ICC Statuut is eveneens nieuw. Het grote gebrek van deze bepaling is echter de onduidelijke formulering, omdat deze een beroep op militaire noodzaak lijkt toe te staan. De zinsnede 'the person acts reasonably to defend (...) property which is essential for accomplishing a military mission' kan worden opgevat als een carte-blanche voor een beroep op militaire noodzaak, hetgeen in strijd zou met het

oorlogsrecht. Het is te hopen dat deze gebrekkige formulering het ICC niet hindert in het toelaten van deze exceptie. Noodweer is immers een belangrijke strafuitsluitingsgrond; een inherent recht van elk individu.

Een terugkerend thema bij de bovengenoemde strafuitsluitingsgronden is het onderscheid tussen rechtvaardigings- en schulduitsluitingsgronden. Ook al voorziet Artikel 31 van het ICC Statuut niet in dit onderscheid, het ICC zou het toch moeten hanteren, alleen al om de diverse bepalingen in al hun complexiteit goed te kunnen begrijpen. Bovendien maakt een onderscheid tussen, enerzijds de onrechtmatigheid van het gedrag, en anderzijds de verwijtbaarheid van de dader, het mogelijk dat het ICC een balans treft tussen beginselen van rechtvaardigheid in het individuele geval en algemene overwegingen van politieke aard (generale preventie).

Hoofdstuk 7 bespreekt de Artikelen 32 en 33 van het ICC Statuut waarin respectievelijk dwaling en handelen krachtens bevel zijn geformuleerd. Beide kunnen goed in één hoofdstuk worden besproken daar handelen krachtens bevel een *sui generis* type dwaling is. De aanvaarding van de strafuitsluitingsgrond dwaling kan worden gezien als een doorbraak naar een meer volledig begrip van schuld. Het bewijst dat wordt ingezien dat de enkele afwezigheid van *mens rea* niet gelijkstaat aan afwezigheid van alle schuld en dat dwaling het ontbreken van een bepaald soort 'morele verwijtbaarheid' dekt. Desalniettemin wekt het ICC Statuut met deze strafuitsluitingsgrond verwachtingen die het bij nader inzien niet kan waarmaken; er zijn veel gevallen waar de strafuitsluitingsgrond geen toepassing vindt. Dat gezegd hebbende, moeten we niet uit het oog verliezen dat er veel nationale rechtstelsels zijn waar een beroep op dwaling eveneens slechts in een beperkt aantal gevallen mogelijk is. Dit geldt met name voor *error juris*.

Met betrekking tot de erkenning van de strafuitsluitingsgrond handelen krachtens bevel, neergelegd in Artikel 33 van het ICC Statuut, kan gezegd worden dat dit een breuk oplevert met het verleden. Het ICC Statuut codificeert datgene wat al geaccepteerd was op nationaal niveau: handelen krachtens bevel sluit het opleggen van straf uit zolang de ondergeschikte de onrechtmatige aard van het bevel niet kende en het bevel niet duidelijk onrechtmatig was (dit wordt ook wel de 'conditional liability approach' genoemd). De uitsluiting van een beroep op deze strafuitsluitingsgrond ('absolute liability approach') was de laatste stuiptrekking van de Neurenberg erfenis in hedendaags oorlogsstrafrecht. Ondanks de verwrongen formulering en het overbodige tweede lid, dient Artikel 33 van het ICC Statuut onthaald te worden als een definitieve breuk met de resultaatgerichte benadering van strafrechtspreek van de Tribunalen van Neurenberg en Tokyo en, in zekere mate, van de Joegoslavië en Rwanda Tribunalen. Het ICC Statuut brengt een meer volledig, commuun strafrechtssysteem op internationaal niveau dichterbij. Aangezien het beweert een *Strafhof* te zijn en niet een (militair) *Tribunaal*, is het niet meer dan logisch dat handelen krachtens bevel in het ICC Statuut is opgenomen als strafuitsluitingsgrond.

De strafuitsluitingsgronden opgenomen in de Artikelen 31-33 van het ICC Statuut zijn in vergelijking met eerdere ontwerp-Statuten en bepalingen een vooruitgang. De erkenning van noodweer, psychische overmacht en handelen krachtens bevel, als strafuitsluitingsgronden brengt ons dichterbij het doel: de ontwikkeling op internationaal niveau van een volwassen en verfijnd strafrechtssysteem. Om dat doel zo snel mogelijk te bereiken en om het ICC systeem van excepties goed te kunnen ef-

fectueren, dient het ICC een duidelijk onderscheid te maken tussen: allereerst rechtvaardigingsgronden en schulditsluitingsgronden, ten tweede tussen de publieke en private hoedanigheid van een persoon die een beroep doet op een strafuitsluitingsgrond. Ten derde, en dit hangt samen met het tweede punt, dient er een strikt onderscheid te zijn tussen strafuitsluitingsgronden afkomstig uit het internationale recht (bijv. 'self-defence', 'military necessity' en *tu quoque*) en strafuitsluitingsgronden afkomstig uit het strafrecht. Dit is vooral van belang met betrekking tot een beroep op 'self-defence' dat, indien geïnterpreteerd als een recht op zelfverdediging zoals dat geldt in het interstatelijke verkeer, kan leiden tot een miskennen van het beroep op strafrechtelijk noodweer. Het hanteren van deze onderscheidingen verheldert de complexe en gelaagde formulering van de strafuitsluitingsgronden in het ICC Statuut. Dit is essentieel, nu vooral op het terrein van de strafuitsluitingsgronden de twee rechtsgebieden (internationaal recht en strafrecht) samenkomen en de verschillen tussen de twee rechtsculturen (Anglo-Amerikaans en continentaal recht) op dit punt het duidelijkst aan de oppervlakte komen.

Evaluatie

Deze studie beschrijft internationaal strafrecht als een systeem dat nog steeds in ontwikkeling is, maar dat grote stappen voorwaarts heeft gemaakt sinds het ontstaan in Neurenberg. Ervan uitgaand dat de ontwikkeling van internationaal strafrecht dezelfde fasen doorloopt als dat van nationaal strafrecht doch dat het een fase achterloopt, kan gezegd worden dat het een belangrijke inhaalslag heeft gemaakt sinds de aanvaarding van het ICC Statuut. Ondanks het feit dat er in deze studie kritiek wordt geuit op onderdelen van het ICC Statuut, betekent het Statuut in zijn geheel gezien een vooruitgang. Dit is vooral het geval met betrekking tot het stelsel van excepties. Dit brengt internationaal strafrecht een stap dichterbij het einddoel: het zijn van een volwaardig strafrechtssysteem. Het toelaten van een beroep op een strafuitsluitingsgrond getuigt van een verandering van filosofie waarmee het oorlogsstrafrecht een nieuwe fase betreedt. Niet slechts de aanvaarding op internationaal niveau van de meer commune strafuitsluitingsgronden intoxicatie en stoornis der geestvermogens, maar vooral de codificatie van de in het oorlogsstrafrecht controversiële strafuitsluitingsgronden handeling krachtens bevel en psychische overmacht markeert deze verandering.

Zoals reeds eerder opgemerkt, het Statuut van Rome is niet ruimhartig in het openstellen van een beroep op strafuitsluitingsgronden. Deze beperkte openstelling correleert met de restrictieve omlijning van strafrechtelijke aansprakelijkheid. De strikte schuldvorm van Artikel 30 van het Statuut sluit – op een enkele uitzondering na – uit dat handelen met bewuste en onbewuste schuld, ja zelfs *dolus eventualis* (voorwaardelijke opzet) strafrechtelijke aansprakelijkheid genereert. Het ICC Statuut legt de lat niet alleen hoog bij het toekennen van strafrechtelijke aansprakelijkheid, maar ook ten aanzien van het afweren van aansprakelijkheid.

Het ICC kan tot de ontdekking komen dat het bepaalde middelen mist om afdoende te reageren op systeem criminaliteit, met name 'mob violence'. Het ICTY heeft deze middelen gevonden in zijn rechtspraak en ontwikkelde een speciale deelnemingsvorm ('joint criminal enterprise'). Het ICC zou dat ook kunnen doen. Zoals

het ICTY zich baseerde op de rechtspraak van het Neurenberg Tribunaal, zo zou het ICC de rechtspraak van het ICTY en ICTR kunnen integreren in het ICC systeem om de gaten in het Statuut te vullen. De *ad hoc* Tribunalen en het ICC complementen elkaar en vormen een veelbelovende mix. Het ICC Statuut is een verfijning van het internationaal strafrecht door het gedifferentieerde deelnemingsmodel, de formulering van 'superior responsibility' als een omisdiedelict en het systeem van strafuitsluitingsgronden. De *ad hoc* Tribunalen op hun beurt beschikken over de juiste middelen om systeem criminaliteit te bestrijden. Tezamen vormen ze een volwaardig en tevens effectief internationaal strafrechtssysteem. De ICC dient de rechtspraak van de *ad hoc* Tribunalen dan ook zoveel mogelijk te integreren binnen het eigen rechtssysteem. Op deze manier creëert het niet alleen een effectief rechtssysteem, maar ook een uniform rechtssysteem. Het juridisch raamwerk indachtig en met de onderhandelingsgeschiedenis in het achterhoofd zal het echter moeilijk zijn voor het ICC om dat doel te bereiken. Een teleologische in plaats van een grammaticale benadering van de bepalingen in het Statuut lijkt derhalve raadzaam.

Aan het eind van deze studie keren we terug naar de vraag die in de inleiding is gesteld: genereert de aard van internationale misdrijven en de aard van het internationale normatieve kader een begrip van individuele strafrechtelijke aansprakelijkheid dat afwijkt van individuele strafrechtelijke aansprakelijkheid zoals dat heeft vorm gekregen in het nationale recht? Het antwoord op de vraag is: nee, niet essentieel. Dit heeft te maken met het feit dat, allereerst, nationaal strafrecht ook beschikt over speciale deelnemingsvormen om de strijd tegen collectieve criminaliteit (georganiseerde misdaad, terrorisme, 'war on drugs') aan te gaan. Inderdaad, 'common purpose' en 'joint criminal enterprise' hebben equivalenten op nationaal niveau. Dit geldt ook voor 'superior responsibility'. Ten tweede, het ICC Statuut heeft het internationaal strafrecht, en daarmee de strafrechtelijke aansprakelijkheid, een meer gemeenschappelijk gezicht gegeven. Het systeem van excepties en het gedifferentieerde deelnemingsmodel hebben het rigide en enigszins Spartaanse internationale strafrecht ontwikkeld tot een meer verfijnd strafrechtssysteem.

We zien dus een benadering tussen nationaal en internationaal strafrecht, enerzijds op het 'speciale' vlak, vanuit nationaal strafrecht, anderzijds op het commune vlak, vanuit het internationale strafrecht. Indien we de strafrechtssystemen van het ICC en de *ad hoc* Tribunalen als complementair beschouwen en in elkaar schuiven, dan kunnen we concluderen dat internationaal strafrecht bezig is de achterstand op nationaal strafrecht in te lopen en dat deze inhaalslag misschien wel sneller verloopt dan we tot nu toe vermoedden.

ANNEX

SELECTED PROVISIONS OF THE STATUTES OF THE ICTY, ICTR AND ICC

ICTY AND ICTR

Article 6 ICTR Statute and Article 7 ICTY Statute: individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires

ICC STATUTE

Article 21: Applicable law

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Article 25: Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 28: Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 30: Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31: Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
 - (a) The person 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;
 - (b) The 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;
 - (c) The person 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. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
 - (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court 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, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
 - (i) Made by other persons; or
 - (ii) Constituted by other circumstances beyond that person's control.
2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32: Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33: Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
 - (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
 - (b) The person did not know that the order was unlawful; and
 - (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

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Stellingen

behorende bij het proefschrift 'The Criminal Responsibility of Individuals for Violations of International Humanitarian Law' van Elies van Sliedregt

1. The provision on superior responsibility in the Dutch International Crimes Act better reflects the concept and nature of superior responsibility than its international equivalents. It recognises the two forms of superior responsibility - as a *sui generis* form of criminal participation and as a separate crime of omission - by putting them in separate subparagraphs. Moreover, it does not make an unjustified distinction between military and non-military superiors.
2. 'Dutch courage' and the recognition of human frailty in contrast to 'English heroism' explain why duress is a complete defence for murder in Dutch criminal law and not in English criminal law.
3. If, as Sir James Stephen observed 'The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite', we should not lose our head in passion but practice safe and responsible revenge, *i.e.* not derogate from the premise 'no punishment without *personal fault*' in prosecuting and trying war criminals. The *Hirota* and *Yamashita* precedents, in which criminal responsibility was expanded beyond that essential boundary of *individual* criminal responsibility, validate this warning.
4. Article 33 of the Statute of the International Criminal Court is a breakthrough in international war crimes law. The recognition of 'superior orders' as a complete defence for war crimes is a consequence of the reality that 'war crimes are committed by men, not by abstract legal entities' (Nuremberg Judgement), a conclusion that should have been drawn already 50 years ago.
5. The successful intervention by the present Tutsi-dominated Rwandan government to halt Carla del Ponte's investigation into crimes against humanity and war crimes (allegedly) committed by Tutsi during the 1994 genocide goes to show that more than 50 years after Nuremberg a tendency towards *victors'* justice, prompted by *victims'* policy at the United Nations, has not been overcome.
6. The ICC's real success would lie in its never trying a case.
7. Een heldere probleemstelling als startblok van het proefschrift is geen garantie voor een goed resultaat. Immers, 'Pas tegen sluitingstijd rijst het inzicht: was dit het, wat ik wilde zeggen?' (Nieuwenhuis, NTBR 2002/8).
8. De idee dat sommige juristen vakliteratuur verkiezen boven een goede roman is beangstigend.
9. Liefde op afstand is goed voor het proefschrift.

INVITATION

On Friday, September 19, at 2 PM, I shall defend my PhD thesis in public, which is entitled:

The Criminal Responsibility of Individuals for Violations of International Humanitarian Law

The defence will take place at the Auditorium of Tilburg University,
Warandelaan 2 in Tilburg.

You are cordially invited to be present at the ceremony and the reception afterwards.

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'Crimes against international law are committed by men, not by abstract legal entities.'

This famous quote from the Nuremberg Judgement has often been cited to substantiate the existence of the principle of individual criminal responsibility in international criminal law. The principle was affirmed in subsequent national proceedings and has been endorsed by the Tribunals for the former Yugoslavia and Rwanda, and the International Criminal Court.

The author examines the concept of individual criminal responsibility for violations of international humanitarian law, *i.e.* genocide, crimes against humanity and war crimes. Such crimes are very rarely committed by single individuals, but mostly by organizations or groups of cooperating persons. For a just determination of their guilt and responsibility, a fair assessment of the mutual relationships and cooperation forms of those individuals is indispensable. This book provides the framework for that assessment. It gives guidance to practitioners and scholars on how to understand and to apply international criminal law concepts such as 'common purpose', 'superior responsibility', 'duress' and the 'defence of superior orders'. It does so by bringing to light the roots of those concepts, which are hidden not only in earlier phases of development of international criminal law, but also in the domestic laws of various states.

The accessibility and usability of this book is enhanced by a comprehensive *Index*, a *Table of Cases* and a *List of Documents*.

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