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ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Международная уголовная ответственность индивида

Ивана Хрдличкова

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

Individual Criminal Responsibility in International Law

Ivana Hrdličková

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The present publication contains the text of lectures by Ivana Hrdličková on the topic “Individual Criminal Responsibility in International Law”, delivered by her within the frames of the Summer School on Public International Law 2019.

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Летняя Школа по международному публичному праву 2019 года
Summer School on Public International Law of 2019

Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

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В 2019 году состоялась вторая Летняя Школа. Специальные курсы были посвящены теме «Ответственность в международном праве». Их прочитали Джеймс Катека («Ответственность государств»), Мигель де Серпа Суареш («Ответственность международных организаций»), Ивана Хрдличкова («Международная уголовная ответственность индивида»), Джон Дугард («Дипломатическая защита»), Алина Мирон («Контрмеры и санкции»). Общий курс международного публичного права прочёл Туллио Тревес.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного совета Летней Школы: Р. А. Колодкину, С. М. Пунжину, Л. А. Скотникову, Б. Р. Тузмухамедову — и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

Dear friends,

The International and Comparative Law Research Center continues publication of lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning, working, or aspiring to work in the sphere of international law, with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of the general and special courses under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

The second Summer School was held in 2019. The Special Courses were devoted to the topic "Responsibility in International Law". The courses were delivered by James Kateka ("Responsibility of States"), Miguel de Serpa Soares ("Responsibility of International Organizations"), Ivana Hrdličková ("Individual Criminal Responsibility in International Law"), John Dugard ("Diplomatic Protection"), and Alina Miron ("Countermeasures and Sanctions"). The General Course on Public International Law was delivered by Tullio Treves.

The International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Board — Roman Kolodkin, Sergey Punzhin, Leonid Skotnikov, and Bakhtiyar Tuzmukhamedov — as well as others who helped implement the project, including Gazprombank (JSC) for their financial support.


THE
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Ивана Хрдличкова

Ивана Хрдличкова является председательствующим судьёй в Апелляционной палате и Председателем Специального трибунала по Ливану. Её судейская карьера началась в 1990 году, она рассматривала как гражданские, так и уголовные дела. Кроме того, Ивана Хрдличкова специализируется на Шариатском праве и особенно на правах человека и исламском финансировании в международном и исламском праве. Она также специализируется на развитии верховенства права в постреволюционных обществах. Ивана Хрдличкова принимает участие в работе международных групп по обучению судей и юристов в сфере международного публичного права, международного уголовного права, а также по вопросам верховенства права и независимой судебной системы.

Ivana Hrdličková

Ivana Hrdličková is the Presiding Judge of the Appeals Chamber and President of the Special Tribunal for Lebanon. She began her career as a Judge in 1990 and has been presiding over both civil and criminal cases. Judge Hrdličková also specializes in Islamic Shari'a, with a focus on human rights and Islamic finance in international and Islamic law. She is further specialized in the development of the rule of law in post-revolution societies. Judge Hrdličková is also a member of international teams to train judges and lawyers in international public law, international criminal law, rule of law and independence of the judiciary.

The course on "Individual Criminal Responsibility in International Law",[1] in the Summer School on Public International Law, will be composed of five lectures and a seminar which will give the students the possibility to engage with the notions and issues discussed throughout the lectures.

The lectures, as well as the seminar, present different views of international law academics, commentators, and practitioners, summarize the current state of jurisprudence and do not intend to express any personal view of the author or any personal preference.

The five lectures and the seminar will feature the following topics:

Lecture 1	"Individual Criminal Responsibility in International Law: Historical Origins and Main Concepts"
Lecture 2	"Modes of Liability in International Criminal Law"
Lecture 3	"Main Forms of International Criminal Liability: Joint Criminal Enterprise and Command/Superior Responsibility"
Lecture 4	"Grounds for Excluding International Criminal Responsibility"
Lecture 5	"Future Challenges: Individual Criminal Responsibility and Technology, Corporate Criminal Liability for International Crimes"
Seminar	"Case Study and Debate: The ICTY *Martić* Case"

[1] I would like to extend my sincere gratitude and appreciation to Ms Elena Chiara Bisagni for her invaluable assistance and contribution with the research and preparation, and to Ms Cecile Ouba and Mr Alessandro Faina for their editorial review.

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LECTURE 1:

Individual Criminal Responsibility in International Law: Historical Origins and Main Concepts

Introduction

Lecture 1 is composed of two parts — an introduction to the fundaments of international criminal law (ICL) and an overview of the historical origins and main concepts of individual criminal responsibility under international law.

The purpose of Part I is to briefly review the basic notions of ICL before discussing the main subject of the course, i.e. international criminal responsibility.

To this end, Part I begins with a definition of ICL (paragraph 1) and its two "substantive" and "procedural" components (paragraph 3) and is followed by an overview of the interplay between ICL and other branches of public international law (paragraph 2). Sources and aims of ICL will also be addressed (paragraphs 4 and 5). The general notion of material and mental elements of the crime (paragraph 6) will provide the basis to understand the essence and features of the six international crimes currently recognized under international law: war crimes, crimes against humanity, genocide, aggression, torture, and terrorism (paragraph 7); as well as the modes of participation in international crimes (paragraph 8). To conclude, Part I presents an overview of prosecutions before international and hybrid courts and tribunals (paragraph 9).

Part II focuses on individual criminal responsibility under international law.

After analyzing the origins of the concept (paragraph 1), the relationship between the *collective* nature of international crimes

and the need to apportion *individual* criminal responsibility will be discussed (paragraph 2), as well as the connected subject of the interplay between State responsibility and individual responsibility (paragraph 3). Part II will conclude with a presentation of the "objective" and "subjective" criteria for the attribution of individual criminal responsibility, under international criminal law.

Part I. Introduction to the Fundaments of International Criminal Law

Definition on International Criminal Law

One possible definition of international criminal law would characterize it as a body of rules designed, on the one hand, to proscribe conducts which amount to international crimes, i.e. war crimes, crimes against humanity, genocide, aggression, torture, and terrorism, and, on the other hand, to hold those responsible for such acts criminally liable.

Though certainly descriptive, the above definition does not entirely capture the complex nature of this branch of international law, its fragmentation, the plethora of interpretations provided by different international criminal justice institutions, the tension between ICL and other branches of international law. Other, more conceptual, definitions of ICL may offer a different perspective to comprehend the scope of ICL, while at the same time including elements of complexity.

The following definitions have been suggested in the effort to grasp the spirit of ICL, being it the nature of the crimes, the emanation from international and hybrid courts and tribunals or the juxtaposition with other bodies of law, depending on the views.

A substantive stance has suggested defining ICL as the law dealing with crimes of such gravity to be of concern to the

international community as a whole, i.e. crimes that threaten international interest and fundamental values.[2]

Another approach, aimed at emphasizing the fragmentation of ICL in a number of international tribunals (each operating under its own founding documents), links ICL to the very existence of different international criminal justice institutions and describes it as comprising of the international crimes identified in each Statute, as well as principles and procedures developed therein.

Another definition of ICL results from the comparison between ICL and the traditional notion of international law, which typically governs rights and responsibilities of States. In contrast with the classical idea of international law, ICL is a body of law paradigmatically concerned with prohibitions addressed to *individuals*. Such aim — to ascertain responsibility of individuals, not States — has been identified as one of the key features of ICL, which distinguishes it from other branches of international law.

All the above definitions have the merit to capture important aspects of ICL. In addition, it is important to bear in mind that ICL is a comparatively new branch of international law, a hybrid one heavily relying on domestic criminal law, and a fragmented one, as the different international and hybrid courts and tribunals operate in a horizontal, decentralized environment with no official modes of coordination.

Interplay Between International Criminal Law and Other Branches of Public International Law

ICL is considered as a branch of public international law (PIL) and, as such, relates to other areas of international law, in particular international human rights law (IHRL), international humanitarian

[2] MC Bassiouni, "The Sources and Content of International Criminal Law: A Theoretical Framework" in MC Bassiouni (ed) *International Criminal Law, vol. I: Crimes* (2nd edn, Transnational Publishers 1999) 98.

law (IHL), i.e. the law applicable during armed conflicts, and the law relating to State responsibility.

ICL shares similar objectives with IHRL and IHL, which explains why ICL has drawn heavily upon those areas of law, particularly to define the elements of international crimes, contained in the founding documents of international and hybrid courts and tribunals.

Conversely, the interplay with the law relating to State responsibility may be seen as problematic, as debates may arise when both bodies of law apply. Some conducts may indeed give rise to both individual criminal responsibility and State responsibility (for instance, in case the perpetrator of an international crime is a State's agent),[3] as we shall see in more details in paragraph 3 of Part II, below.

Further, as anticipated, ICL is characterized by its fragmentation in a myriad of international courts and tribunals, and by its hybrid nature as many concepts of ICL have been transposed from domestic law. The fact that ICL is still considered as a relatively new branch of international law also means that it is an area of law in constant evolution.

International Criminal Law as a Still Relatively New Branch of PIL

ICL has only recently emerged and developed. What is more, the expansion of ICL at a breath-taking pace in the last 25 years has taken place in haphazard and unsystematic ways, drawing from multiple sources, and departing from the traditional understandings of both criminal law and PIL, classically centered on inter-States

[3] In the ICTY *Furundžija case*, the criminal act of torturing performed by a State official (Anto Furundžija) was deemed as having resulted in both individual criminal responsibility and State responsibility — *Prosecutor v Furundžija* (Judgement) ICTY-95-17/1-T, T Ch (10 December 1998) 142.

relations, grounded on an absolute conception of State sovereignty, and dominated by a strict division between the international and domestic domains.

The fact that ICL has not yet constituted itself as a fully coherent body of norms leaves practitioners in this field with wide margins of discretion to interpret the founding documents of the different international criminal justice institutions. This also holds for the interpretation of norms regarding the criminal liability of individuals.

International Criminal Law as a Hybrid Branch of PIL

ICL has a hybrid nature, drawing from both the international and the domestic legal domains. On the one hand, the definitions of international crimes are mainly determined by international law, particularly the regimes of IHL and IHRL. On the other hand, the doctrines of international criminal liability are mainly borrowed from domestic criminal law, particularly from the common law and civil law traditions.

The specific relationship between international law and criminal law puts ICL practitioners in challenging situations, caught between the expectation of reducing impunity for international crimes and the need that persons accused of crimes be prosecuted and judged fairly (*inter alia,* that are punished only in proportion of their own guilt and not to serve other goals).

The wide array of interpretations possible to reconcile the tenseness between international law and criminal law explains that the different international criminal justice institutions have offered varied legal responses to this challenge, in the forms of more or less expansive doctrines, including in regards to criminal liability.

International Criminal Law as a Fragmented Branch of PIL

Adding to this already complex interpretation process of ICL norms is yet another factor that pertains to the multiple

decision-makers in this field. In ICL, the interpretation process is a fragmented — as opposed to a unitary or centralized — one. This results from the fact that there are several decision-making sub-regimes, constituted by each of the international and hybrid criminal courts and tribunals that operates under its own founding documents and interprets ICL norms according to the specificities of its legal framework.

Hence, some institutions apply mainly customary ICL, while others are bound by relatively detailed treaties (e.g. the International Criminal Court). Some apply exclusively international law, while others apply both international law and domestic law and, for this reason, are called "internationalized tribunal" (such as, for example, the Special Tribunal for Lebanon, which applies both International and Lebanese criminal law). All these variations are likely to affect to some extent the interpretation of rules and principles regarding the punishable forms of participation in international crimes.

Components of International Criminal Law: Substantive and Procedural Criminal Law

ICL comprises two limbs, the first one is **substantive** criminal law, which has been defined as "the set of rules indicating what acts are prohibited, with the consequence that their authors are criminally accountable for their commission, these rules also set out the subjective elements required for such acts to be regarded as criminalized".[4] Hence, substantive ICL describes the conducts constituting international crimes — so-called material elements of the crime — as well as the subjective (or mental) elements required on the part of the perpetrators to be held criminally liable. It also includes modes of liability and grounds for excluding criminal responsibility.

Each of the international and hybrid tribunals operates under its own legal texts, thus, with respect to substantive law,

[4] A Cassese, *International Criminal Law* (3rd edn, Oxford University Press 2013) 3.

primarily under their respective Statutes, such as: the Rome Statute of the International Criminal Court (ICC), the Statutes of the two *Ad Hoc* Tribunals — i.e. the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) — the Statute of the Special Court for Sierra Leone (SCSL), the Statute of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Statute of the Special Tribunal for Lebanon (STL), the Statute of the Kosovo Specialist Chambers (KSC).

It is important to note that some national systems have endowed themselves with jurisdiction to prosecute international crimes, in the effort to implement their obligations under the Rome Statute "to exercise [their] criminal jurisdiction over those responsible for international crimes".[5] Among those States, Canada passed the "Crimes Against Humanity and War Crimes Act" in 2000, Germany introduced the "Code of Crimes against International Law" in 2002, regulating crimes against (public) international law, and the UK the "International Criminal Court Act" in 2001. France amended its Code of Criminal Procedure to incorporate the Rome Statute and extend the jurisdiction of French courts to include genocide, crimes against humanity, and war crimes in 2010. In the same vein, the Dutch "International Crimes Act" of 2003 allows Dutch courts to exercise universal jurisdiction over genocide, crimes against humanity, war crimes, torture, and enforced disappearances, along the line of the ICC.

The second limb of ICL is international **procedural** criminal law (or international procedural law), a set of rules regulating international criminal proceedings before international and internationalized courts and tribunals.

[5] See Preamble of the Rome Statute, which states that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", and that the International Criminal Court is intended "to be complementary to national criminal jurisdictions".

International criminal procedure has been defined as "the specialized body of international law that governs the conduct of criminal proceedings, including matters of both procedure and evidence, in the context of international legal order. […] [ICL] can be seen as being adjectival to substantive international criminal law […] [and] could be applied to enforce any set of substantive penal provisions […]".[6]

As for substantive criminal law, each international and hybrid tribunal utilizes its own set of norms, laid down mainly in the Rules of Procedure and Evidence (RPEs), which are established and amended by judges at plenaries, except for the ICC where the power to amend and adopt the rules is bestowed upon the Assembly of State Parties (ASP). The RPEs are complemented by other internal documents regulating, for instance, court proceedings, protection of witnesses, conduct of counsel before the court, or the granting of legal aid to indigent persons appearing before the Court.

The RPEs of the various international and hybrid tribunals blend elements from different legal traditions — although sharing a common base, they present differences depending, *inter alia,* on whether the procedure presents more "inquisitorial" features, following the civil law approach, or whether they privileged the common law "adversarial" or "accusatorial" model.

Sources of International Criminal Law

ICL is a subset of PIL and thus relies on the same sources of law to draw upon its relevant rules. An enumeration of the relevant sources can be found in Article 38(1) (a)-(d) of the Statute of the International Court of Justice (ICJ) which lists as primary sources treaty law, customary law and general principles of law; and as secondary sources — or subsidiary means of determining the

[6] G Sluiter et al, *International Criminal Procedure: Principles and Rules* (1st edn, Oxford University Press, 2013) 13.

law — judicial decisions and the writings of the most qualified publicists.

Among treaty law sources of ICL are the 1907 Hague Regulations, the 1946 Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the 1949 Geneva Conventions and their Additional Protocols (which also constitute the main source of IHL), the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol thereto (CAT), the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[7]

The drafters of the Statutes of the *Ad Hoc* Tribunals and the Rome Statute have relied on the above legal documents to define the crimes falling under their jurisdiction; and in particular, the ICTY Statute in Articles: 2 ("Grave breaches of the Geneva Conventions"), 3 ("Violations of the laws or customs of war"), 4 ("Genocide"), 5 ("Crimes against humanity"); the ICTR Statute Articles 2 ("Genocide"), 3 ("Crimes against humanity"), 4 ("Violations of Article 3 Common to the Geneva Conventions 61 and of Additional Protocol II"); the ICC Statute Articles 6 ("Genocide"), 7 ("Crimes against humanity"), 8 ("War crimes").

In regards to customary international law — which, as known, derives from the practice of States accompanied by the belief that such practice is required by, or in accordance with the law (so called *opinio juris*) — it is worth noting that laws reflecting customs of ICL have often been incorporated in written instruments, such as

[7] A list of international legal instruments and sources of ICL can be found in the "UN International Law Handbook — Collection of Instruments" available in open sources.

treaties or UN General Assembly and Security Council Resolutions, or recognized as existent by International Court decisions. Such acknowledgment, in written legal instruments, has contributed to loosening the state of uncertainty attached to customs of ICL.

The use of customary international law to establish rules of ICL has been condemned for being too vague to found criminal liability, and has also been discussed concerning the principle of legality (or *nullum crimen sine lege)*.

As for "general principles of law", it is advised to intend "the general concepts and legal institutions common to all the major legal systems of the world".[8]

Aims and Justification of International Criminal Law

Aims and justifications for punishment under ICL have often been described as partially different from domestic prosecutions, probably because of the nature of international crimes and the postulated wider goals which are claimed for international prosecutions.

In general, when discussing the purpose of punishment in criminal law, the main distinction that one could see lies between the forward-looking approach, which considers the benefit of prosecution mainly in terms of deterrence and rehabilitation, and the approach focused on the crime itself (so-called deontological) which can hold retribution as the very aim of punishment.

Retribution, Deterrence, Rehabilitation, Incapacitation

While the special focus of retribution seems to be on the perpetrator — on the necessity to punish her/him, and on a decision if she/he *deserves* the punishment — deterrence and rehabilitation consider the broader societal impact and overall advantages of

[8] *Furundžija* Trial Judgement, see note 3 *supra*, para. 178.

prosecutions for the community as a whole. An additional purpose of prosecutions under the forward-looking stance can be seen in incapacitation, which might seek to prevent the commission of further crimes on the part of the (jailed) offender.

All these aims may be seen in ICL as well. To cite just a few examples, the ICTY in *Aleksovski* stated that the two main aims of the Tribunal's prosecutions are both deterrence and retribution, and further explained the reasons behind the retributive purpose by contrast with the simple vengeance:

> [Retribution] is not to be understood as fulfilling a desire of revenge but as duly expressing the outrage of the international community at these crimes.[9]

Along the same line, the ICTY held in *Nikolić*,

> [...] within the context of international criminal justice, retribution is understood as a clear statement by the international community that crimes will be punished and impunity will not prevail.[10]

In the same judgment, the Trial Chamber also recognized the relevance of the principle of rehabilitation of the offenders, as well as deterrence:

> The Trial Chamber finds that the purposes of punishment recognized under the jurisprudence of the Tribunal are retribution, deterrence and rehabilitation.[11]

The acknowledgment of the principle of deterrence may be inferred also by Paragraph 5 of the Preamble of the ICC Statute which holds that the State parties are:

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[9] *Prosecutor v Aleksovski,* (Judgement) ICTY-95-14/1-A, A Ch (24 March 2000), para. 185.
[10] *Prosecutor v M Nicolić* (Judgement) ICTY-02-60/1-S, T Ch I (2 December 2003), para. 87.
[11] *Nicolić* Trial Judgement*, id.* at para. 85.

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.

Justice for the Victims, Truth-telling, Reconciliation, Education

The other broader goals which have been suggested for ICL include the pursuit of justice for the victims and truth for the purpose of "recording history", as well as transitional justice goals and educational purposes.

The particular structure of the proceedings in certain international and hybrid tribunals allows for the participation of victims. The right to participate is seen not only as an acknowledgment of the central role of the victims in international justice, it also may be seen as serving the purpose of vindicating their rights. A tendency to include victims into the criminal proceedings of international and hybrid courts and tribunals can be seen, for instance, at the ICC, STL, and KSC, where victims are permitted to participate in court proceedings under various procedural rules.

Another important (and ambitious) postulated goal of ICL may be seen in recording history. Given the gruesome nature of international crimes, the aim of reconstructing the events in which grave crimes unfolded may be seen as pivotal on the one hand, to record the facts for the sake of truth; and on the other hand, for the purpose of avoiding crimes of the same kind to reoccur in the future. However, critics have emphasized the concern that international trials may resolve in the political arena.

Along with justice for the victims and — potentially — truth-telling, the goal of facilitating post-conflict reconciliation has been recognized as one of the purposes of ICL.[12] Yet, similarly to the above skepticism toward the function of history-recording of

[12] A Cassese, "Reflections on International Criminal Justice" (1998) 61 The Modern Law Review 1, 6.

international tribunals, some commentators are not persuaded that international prosecutions would impact the peace process in the war zone.[13]

Finally, a side effect of work of the international prosecution — educative functions have been attributed to ICL; international prosecutions have been described, *inter alia*, as occasions to inform the general public on the magnitude of the international crimes with the ultimate goal of achieving general deterrence.

Introduction to the Notion of Material Elements and Mental Elements of the Crime

A brief introduction to the notion of material elements (*actus reus*) and mental elements (*mens rea*) of the crime is provided in this paragraph to enable the reader to comprehend the essence of the international crimes described in the following paragraphs, as well as their respective distinctive features and main differences. The subject-matter of material and mental elements of the crime will be discussed in more details in paragraph 4 of Part II, below.

Material elements are described in literature as the conducts which, once performed, may give rise to criminal responsibility, provided that the correspondent mental elements are present.[14] Such conducts are considered as either acts or omissions, depending on the description of the elements of the crime in the corresponding legal instruments. Further, the notion can either be interpreted in a narrow way, as to comprise only the *positive* definitional elements of a certain crime (i.e. the act, its consequences, and the attending circumstances) or in a broad sense, to cover the *negative* material

[13] A D'Amato, "Peace vs. Accountability in Bosnia" (1994) 88 The American Journal of International Law 500; I Ward, *Justice, Humanity and the New World Order* (1st edn, Routledge 2003) 131; JN Clark, "The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Hercegovina" (2009) 7 Journal of International Criminal Justice 463, 484.
[14] Art. 30(1) ICC St.

elements, which are the absence of justifications or other causes excluding criminal responsibility.[15]

Mens rea is described as the person's intention to commit a crime, and knowledge that one's action — or lack of action — would result in the commission of a crime. Intent and knowledge are necessary to ascertain criminal responsibility for international crimes. In some instances, a special intent (or *dolus specialis*) is requested on the part of the perpetrator to hold her/him responsible for certain international crimes. It is the case of the crime of genocide, whereby in addition to the volition of the underlying crime the perpetrator must have an extra purpose, i.e. the elimination of the group to which the victim belongs.[16]

International Crimes

International crimes have been described as the result of a set of cumulative elements, namely: 1) violations of rules of customary international law (whoever they are committed by and wherever committed) or treaty provisions (only if committed by a national, or in the territory of a contracting party, unless they are the codification of customary law, in which case they are binding upon everyone); 2) the violated rules are intended to protect values of the whole international community, and 3) a universal interest in prosecuting the crimes does exist.

Pursuant to the above criteria, the first international crimes to be recognized by the International Military Tribunal of Nuremberg (Nuremberg Tribunal) and International Military Tribunal for the Far East (Tokyo Tribunals)[17] in their statutory documents — were: crimes against peace, war crimes, and crimes against humanity.[18]

[15] E van Sliedregt, *Individual Criminal Responsibility in International Law* (1st edn, Oxford University Press 2012) 52.
[16] Art. 6 ICC St., Art. 4(2) ICTY St., Art. 2(2) ICTR St.; and Art. 4 ECCC St.
[17] The Nuremberg Tribunal and Tokyo Tribunal are often collectively referred to as "International Military Tribunals" (IMTs).
[18] Art. 6 of the IMT of Nuremberg, and Section II of the IMT of Tokyo.

War Crimes

War crimes are serious violations of customary or treaty rules of IHL, which give rise to individual criminal responsibility under international law. Despite the inextricable link between the two bodies of law, it is important to point out that IHL and the law on war crimes have different scope: IHL is addressed to States and aimed at setting minimum standards of humanity expected in armed conflicts (*inter alia*, protection of non-combatant, distinction at all times between combatants and civilians, restriction in the means and methods of warfare). The law on war crimes, by contrast, is addressed to individuals and aims at prosecuting and punishing those responsible for war crimes.

The landmark decision of the ICTY Appeals Chamber in *Tadić* explained that not every violation of IHL is *per se* a war crime and set important yardsticks to establish whether a violation is serious enough to amount to a war crime. The following criteria have been proposed by the ICTY Appeals Chamber for a violation of IHL to be considered as a war crime: 1) the crime must infringe a rule of IHL; 2) the rule in question must derive from customary law or applicable treaty law; 3) the infringement must be serious in that the violated rules must protect important values, and the breach entails grave consequences for the victims; and — importantly in regards to ICL — 4) the violation must entail individual criminal responsibility.[19]

Article 8(2) of the ICC Statute lists a large number of war crimes, including:

> (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

[19] The ICTY Statute addresses war crimes in Arts. 2 and 3, while the ICTR Statute in Art. 4.

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts […]

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause […]

[…]

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts […]

Crimes Against Humanity

Crimes against humanity are described as inhumane acts committed in the context of a widespread and systematic attack against the civilian population, independently of the existence of an armed conflict, or discriminatory grounds.

Inhumane acts include murder and extermination (i.e. killings on a large scale); enslavement, imprisonment, and deportation; torture; multiple forms of sexual violence; persecution and apartheid; enforced disappearance.[20]

The jurisprudence of international and hybrid criminal courts and tribunal further elaborated on the elements of the crime, such as the ICTY in *Kunarac et al.*[21] and in *Nikolić*.[22]

Genocide

The UN General Assembly, in its Resolution 96(I),[23] has defined genocide as a "denial of the right of existence of entire human groups". The essence of the crime of genocide is the intention to destroy a group, whether national, ethnical, racial, or religious (i.e. the four categories, excluding beneficiaries, of the protection identified by the Genocide Convention).[24]

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[20] As defined in Art. 7 of the ICC Statute, Art. 5 of the ICTY Statute, Art. 3 of the ICTR Statute.

[21] *Prosecutor v Kunarac et al.* (Judgement) ICTY-96-23 & ICTY-96-23/1-A, A Ch. (12 June 2002), para. 82–101.

[22] *Prosecutor v Dragan Nikolić* (Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence) ICTY-94-2-R61, T Ch. (20 October 1995), paras. 6–23.

[23] UN General Assembly Res 96(I) (11 December 1946), titled "The Crime of Genocide".

[24] S Kim, *A Collective Theory of Genocidal Intent, vol. 7* (1st edn, T.M.C. Asser Press 2016), para. 139.

The material elements of the crime are listed in Article 2 of the Genocide Convention and include killing, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group.

The nature of genocide implies a collective dimension of the crime and a "genocidal plan". The ICC Statute, in Article 6, also includes a contextual element — that the conducts intended to destroy the group are performed in the context of a manifest pattern of similar conducts. The ICTY and ICTR Statutes' provisions on genocide are respectively Articles 4 and 2.

Aggression

The crime of aggression is a crime against international peace, which differs from the other international crimes.

> The ICC Statute defines the crimes of aggression at Article 8 *bis* (1) as:
>
> [T]he planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

"Acts of aggression" are acts of armed force directed against the sovereignty, territorial integrity, or political independence of a State, which constitute a manifest violation of the UN Charter and its purpose, namely:

> [T]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of

> acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[25]

Torture

The two objective elements of the crime of torture are described in Article 1 of the UN Convention against Torture and Other Cruel, Inhumane and Degrading Treatment and Punishment of 1984, known as CAT, as any act by which severe pain or suffering, physical or mental, is inflicted to a person; and, committed "by or at the instigation of or with the consent of a public official or other person acting in an official capacity".

The absolute prohibition of torture is stipulated both in treaty and customary law and is recognized as *jus cogens*, with the consequence that the prohibition provides for no exceptions or justifications, and is binding at all times, including in wartime and times of national emergencies.[26]

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[25] Art. 1 of the UN Charter.

[26] Evidence of its customary nature of the prohibition is provided through a range of international instruments, and resolutions of UN bodies, see, e.g., the evidence cited in JM Henckaerts & and L Doswald-Beck, *Customary International Humanitarian Law, vol. I: Rules* (1st edn, Cambridge University Press 2005) 315. See also ICRC Customary IHL Rule 90; 1975 UN "Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment"; UN General Assembly Res 3452, by consensus, Art. 3; UN Human Rights Committee, General Comment 24, "General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant", U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 8. Examples of international cases confirming the customary prohibition include: *Prosecutor v Furundžija* see note 3 *supra*, at 137; ICTY, *Prosecutor v Mucić et al.* (Judgement) ICTY-96-21-T, T Ch (16 November 1998), paras. 454 and 517; European Court of Human Rights (ECtHR) *Al-Adsani v UK*, [2001] ECHR 35763/97, 61.

Although the crime is the subject of an international suppression convention, there is not yet international criminal jurisdiction for the crime.

Terrorism

The different interpretations on the nature of terrorism make it difficult to provide a legal characterization of the crime of terrorism.

No definition common to all countries was reached or established. Nevertheless, various Resolutions of the UN Security Council dealt with a possible definition.

IHL prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population" in Article 51(2) of the 1977 Additional Protocol I to the GCs.

The prohibition of "acts of terrorism" can also be found in the Statutes of two international criminal tribunals: ICTR, in Article 4(d) of its Statute, and SCSL, Article 3(d) of its Statute.

The jurisprudence of the ICTY includes examples of acts being prosecuted under the label of a war crime, as the *Galić* case.[27]

The Special Tribunal for Lebanon is the first, and to date only, internationalized Tribunal to deal with crimes of terrorism as an autonomous crime. The STL jurisdiction mandates the Tribunal to investigate and prosecute the 14 February 2005 attack which killed 22 individuals, including the former Lebanese Prime Minister Rafik Hariri, and injured 226 others (and other potentially connected terroristic attacks).

The STL Appeals Chamber, in its landmark ruling of 2011 (an *in abstracto* decision — the Appeals Chamber was not seized of the

[27] In the *Galić* case, the accused Stanislav Galić was convicted of acts of violence the primary purpose of which was to spread terror among the civilian population, as set forth in Art. 51 of Additional Protocol I to the Geneva conventions of 1949. See *Prosecutor v Galić* (Judgement) ICTY-98-29-A, A Ch (30 November 2006).

facts of a concrete yet) held that a notion of terrorism has developed under customary international law.

Modes of Participation in International Crimes

When discussing the forms of participation in international crimes, international jurisprudence and literature advised that international crimes are mostly the result of criminal conducts committed by groups of individuals often directed by a mastermind.

In ICL, the paradigmatic offender is thus the person who is suspected of committing the crime at a high level, or, to use the words of the UN Security Council "the most senior leaders suspected of being most responsible" (for the commission of international crimes).[28]

Although crucial, establishing the mode of participation of each single participant in international crimes and the graduation of culpability has proven complicated, *inter alia,* because of the difficulties in collecting evidence on the exact participation of members of the group. As a consequence, some modes of participation — and liability — fit to cover the criminal liability of all participants in a common plan has been specifically elaborated by ICL, and do not necessarily find an equivalent in domestic jurisdictions.

Modes of participation and liability will be discussed in Lecture 2, therefore we will here limit ourselves to listing the main modes of participation in international crimes, as set forth in Article 7 of the ICTY Statute, Article 6 of the ICTR Statute, Article 25 of the ICC Statute, Article 6 of the SCSL Statute, Article 29 of the law on the Establishment of the ECCC, Article 3 of the STL Statute, and Article 16 of the KSC Statute:

[28] UN Security Council Resolution No 1534 (2004).

- Perpetration and co-perpetration
- Indirect perpetration and perpetration through another person
- Indirect co-perpetration
- Joint criminal responsibility (JCE)
- Aiding and abetting
- Ordering
- Instigating, soliciting, inducing and inciting
- Planning
- Attempt
- Conspiracy

International Prosecutions: Overview of International and Hybrid Courts and Tribunals

The investigation and prosecution of international crimes can be traced back to the International Military Tribunals of Nuremberg and for the Far East (IMTs), and continue with the International Criminal Tribunals for the former Yugoslavia and for Rwanda — which have now ceded their functions to the International Residual Mechanism for Criminal Tribunals (IRMCT) — the International Criminal Court, and a number of internationalized Courts and Tribunals such as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, the Extraordinary African Chambers and, the most recently established, the Kosovo Specialist Chambers.

In addition, as mentioned above, some national systems such as Canada, Germany, the UK, and others have endowed

themselves with jurisdiction to prosecute international crimes, in the effort to implement their obligations under the Rome Statute.

After the IMTs, the *Ad Hoc* Tribunals were established in the 1990s by UN Security Council Resolutions, and later the hybrid tribunals (SCSL, ECCC, STL) and the treaty-based ICC (Rome Statute). Each tribunal has set up its substantive law in their respective Statutes (definition of crimes, jurisdiction, modes of liability), while the procedural law is guided by the Rules of procedure and evidence — documents adopted following different procedures.

The organs of the international criminal judicial institutions are organized in a similar way, in a tripartite structure which comprises of the Chambers, the Office of the Prosecutor, and the Registry.[29] While the office of the Prosecutor is in charge of the criminal investigation and prosecution of the cases, Judges decide cases based on evidence and arguments presented by the parties, and the Registry, under the authority of the President, is responsible for the administration and the servicing of the Tribunal.[30]

Courts and tribunals have their own procedures providing for the different phases of the trial. However, despite the differences,[31] a common structure of the proceedings made up of the following stages can be observed at the *Ad Hoc* Tribunals, ICC, SCSL, STL, KSC:

- **Investigation**: the Prosecutor seeks to collect evidence proving the individual criminal liability of the person under investigation.

[29] The STL also includes an independent Defense Office, as a separate organ.
[30] Arts. 11–17 of the IRMCT Statute, Part IV of the ICC Statute, Arts. 11–17 of the SCSL Statute, Section II of the STL Statute and Chapter V of the KSC Statute.
[31] For instance, the role of the pre-trial judge/Chamber particularly differs in the different tribunals.

- **Indictment**: where convinced to have enough evidence for a "*prima facie case*", the Prosecutor may submit an indictment for confirmation. It is important to note that the Prosecutor is the only actor in the proceedings who may initiate a trial by submitting an indictment.

- **Confirmation** (or withdrawal) of the indictment: the Pre-Trial Judge or Pre-Trial Chamber is tasked with reviewing the indictment and has the power to frame the charges. In particular, in relation to each charge, the Pre-trial Judge or Pre-Trial Chamber may confirm, dismiss, amend the indictment or request further evidence or investigation to the Prosecutor.

- **Pre-trial proceedings**: the phase following the confirmation of the indictment is designed to prepare for the trial. During this phase, important moments are the first appearance of the accused and plea (e.g. guilty plea), and the disclosure of evidence.

- **Trial**: once ready for trial, the case is transferred to the Trial Chamber. The sequence of actions during trial proceedings is the following: opening statements, presentation of evidence, closing arguments, deliberations, and judgement.

- **Appeals proceedings**: the process of appeal is limited to correct errors of law invalidating the decision and errors of facts resulting in a miscarriage of justice (certain tribunals include procedural errors). Specifics of the appellate procedure are set up in the statutory documents and Rules of procedure and evidence of each tribunal.

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Part II. The Principle of Individual Criminal Responsibility Under International Law: Historical Origins and Main Concepts

The Principle of Individual Criminal Responsibility: A Recent Concept

The principle of individual criminal responsibility has only started to emerge as a concept under international law in the last century. In the course of the criminal proceedings before the IMT of Nuremberg, after the Second World War in 1945, the notion was affirmed for the first time.

At the IMT of Nuremberg, it was famously held:

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced.[32]

Following the proceedings in Nuremberg, the validity and tenure of the principle have no longer been interrogated. It has been since included in a range of international legal instruments including the 1948 UN Convention on Genocide, the 1949 four Geneva Conventions, the 1984 UN Convention Against Torture, and all the International Law Commission's Draft Codes on International Criminal Law.

The principle of individual criminal responsibility is embedded in the Statutes of international and internationalized courts and tribunals and can be found in Article 25 of the ICC Statute, Article 7 of the IRMCT Statute, Article 3 of STL Statute, Article 6 of the SCSL Statute, Article 29 of the ECCC Statute, Article 16 of the Law of the KSC, and Article 46B of the Malabo Protocol (Annex) of the African Court of Justice and Human and People's rights (African Court).

[32] *Trial of the Major War Criminals before the International Military Tribunal*, vol. I (Nürnberg 1947), 223.

Albeit framed in different ways, the concept of individual criminal responsibility present in the Statutes of the different international and hybrid judicial institutions provides that a person who commits a crime within the jurisdiction of the Tribunal or Court — by participating in one of the forms envisaged in the Statutes — shall be held individually responsible for the crime, and consequently liable for punishment.

The Collective Nature of International Crimes and Individual Responsibility

International crimes are almost invariably the expression of collective criminality. As recalled, in the context of ICL, the criminal activities that the law is mostly interested in at the current time are mainly the international crimes of genocide, crimes against humanity, war crimes, and aggression, as well as other categories of crimes such as torture and terrorism-related crimes.

Compared to the common crimes known to domestic legal systems, such crimes with an international character or dimension are generally characterized by the special gravity with which they infringe upon human dignity or common interests like peace and human security, as well as by the massive or systematic manner in which they are perpetrated.

As the current literature and the jurisprudence of tribunals show, crimes of this magnitude and gravity often occur through abuse of political and military structures or may be rendered possible by a potential absence of effective State institutions able to protect citizens from external and internal threats. It was demonstrated in various cases that the responsibility for this kind of criminality was in particular cases widely shared among several persons that perform different complementary roles and functions — from early planning to preparation and execution of the crimes, and including acts undertaken after the perpetration of the crimes.

Arguably, one of the main challenges faced by ICL in ascribing responsibility for the participation in such crimes may result from the apprehension between the collective nature of the crimes and the approach of the criminal law, which seeks to determine guilt and to determine criminal liability in an individualized fashion. An example may be the crime of genocide, which is a collective crime and as such needs proof of collective intent, manifested in the overall genocidal plan; however, such a collective intent shall be complemented, for each accused, by the proof of the individual intent.[33]

Hence, although individuals participating in international crimes may be part of wide and pervasive criminal systems, ICL has been able to punish particular individuals, as set up in the statutory documents of the existing tribunals. In practice, this issue raises several questions of fact and law for the criminalization of the different forms of contribution to and participation in the crimes prohibited by ICL.

The Complex Interplay Between State Responsibility and Individual Responsibility

International crimes are not always the expression of *any* collective criminality; rather, the organized nature of the crime and the massive participation in the commission suggest sometimes State involvement. The planification, instigation, ordering, and commission can indeed emanate from State-level decisions, and international crimes can be carried out in pursuance of government policies.

[33] R Cryer et al, *An Introduction to International Law and Procedure* (3rd edn, Cambridge University Press 2014), 209. See also W Schabas, "Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide" (2005) 18 Leiden Journal of International Law 871; P Webb, "Binocular Vision: State Responsibility and Individual Criminal Responsibility for Genocide" in L van den Herik and C Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (1st edn, Martinus Nijhoff Publishers 2012).

When such situation occurs, and thus violations of international law in specific cases may *also* be attributed to States (in addition to individuals), international crimes may theoretically give rise to both forms of responsibility: State and individual criminal responsibility.

As recognized by the ICTY, in *Furundžija*, an act of an individual (a State official engaging in torture, in that case) may well result both in individual criminal responsibility and State responsibility.[34]

Article 58 of the 2001 International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA) provides that the provisions on State responsibility are "without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State". Along the same line, Article 25(4) of the ICC Statute stipulates that "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law".

The above international legal instruments recognize State responsibility and individual criminal responsibility as distinct, though parallel, areas of international law, yet they do not provide guidance as to how overlaps and contradictions may be resolved. Therefore, it has been left to international courts to interpret the interplay between the two regimes of responsibility.

State Responsibility and Individual Criminal Responsibility and the Crime of Genocide

The crime of genocide can hypothetically result in both responsibility of States and criminal liability of individuals — as was demonstrated by the ICJ in the *Bosnia Genocide* case.[35]

[34] *Furundžija* case, see note 3 *supra.*

[35] *Bosnia Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro*) (Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide) [2007] ICJ Rep 43, para. 155.

The ICJ argued in the decision that the undertaking, on the part of the State, to prevent genocide, necessarily implies the prohibition of the commission of genocide by the State itself, and concluded that the prohibition under Article III (namely genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide) shall also apply to States, not only to individuals. Additionally, Articles IV, V, VI, and VII (imposing obligations on State parties to punish the perpetrators of acts listed in Article III) were interpreted as entailing, besides the individual criminal responsibility of the perpetrator, *also* State responsibility for the failure to prosecute such acts.

The interplay between State responsibility and international individual criminal responsibility has been demonstrated in the *Bosnia Genocide* case, where the Court was called to answer the pivotal question whether — as a matter of principle — there could be a finding of genocide *by a State*, absent a prior conviction of an *individual* for genocide.[36]

The ICJ embraced an approach to explain the interaction between State and individuals' responsibility: it argued that a State may have committed genocide even though the leaders responsible for it may have not been brought to trial, due to practical reasons (e.g. they are absconding from justice) or political reasons (e.g. they are still in control of the State apparatus, or granted protection by the military) and, consequently, concluded that the ICJ was in the position to make a finding of State responsibility even in the absence of conviction of individuals.

[36] It is worth recalling the then overlap between the *Bosnia Genocide* case before the ICJ, and ICTY cases dealing with the events in Srebrenica: at the time the ICJ was confronted with the decisive question, the ICTY had not yet entered any conviction (of individuals) for genocide.

Criteria for the Attribution of Individual Criminal Responsibility: Mental and Material Elements

It is a general principle of criminal law that a person may not be convicted of a crime unless proved both that i) she/he has engaged in a certain conduct or caused a certain event which is forbidden by criminal law, *and* ii) she/he has a defined state of mind in relation to the conduct performed or the event caused.[37]

The two parameters measuring the subjective or mental elements (*mens rea,* in the Anglo-American terminology) and the objective or material elements (*actus reus*) are crucial to establish whether — and to what extent — a person can be held responsible for certain events.

What is central in the assessment is whether the agent has committed acts which match the description of certain international crimes *with* the prescribed state of mind. Following the Latin maxim "*actus non facit reum, nisi mens sit rea*" ("an act does not make a person guilty of a crime unless her/his mind is also guilty"), a person cannot indeed be found criminally liable unless that person acted *with* the prescribed state of mind.

Mental Element

When discussing the subjective element possessed by the author of a (potentially criminal) act, the main distinction in civil law systems is usually between *dolus*, or intention, and *culpa* or negligence.

Dolus

Dolus may take various forms and corresponding fault degrees. In its highest manifestation of "full intent" (or *dolus directus* in the first degree, according to the civil law legal classification), *dolus*

[37] R O'Keefe, *International Criminal Law* (1st edn, Oxford University Press 2015) 168.

comprises both the knowledge — of the consequence of an act — and, the willingness to (nonetheless) commit it.

An example of crimes committed with full intent is that of general Stanislav Galić, who was sentenced by the ICTY to life imprisonment for his participation in the campaign of sniping and shelling against civilians in Sarajevo, from September 1992 to August 1994.[38] He was convicted of acts of violence, committed to spreading terror among the civilian population, (pursuant to Article 51 of Additional Protocol I to GCs), murder and inhumane acts (pursuant to Article 5 of the ICTY Statute). It was proven at trial that the widespread attacks against the civilian population of Sarajevo, which lasted nearly two years, occurred at the will of the corps' commander Galić, and that he carried out the criminal conduct with the primary aim of spreading terror among the civilian population of Sarajevo.

In the second degree of *dolus* (*dolus directus* in the second degree) the focus is on the cognitive element, instead of the volitional element: the author does not want the consequences of an act (e.g. killing) and yet i) she/he is *certain* that such consequences may follow from her/his action, (e.g. bombing of a building), and ii) though she/he does not wish their occurrence, nevertheless accepts such consequences as inevitable and thus *intends* such (collateral) consequences.

The third fault degree — called *dolus eventualis* — is similar to the second degree of *dolus* in that it centers to the cognitive element, however, it differs in the level of foresight of the consequences of an action: while in the second degree, a person acts regardless of the consequences that *would* certainly occur, in the third degree a person acts regardless on the consequences that *might* occur.

[38] *Galić* Appeal, see note 27 *supra*.

Culpa

The distinctive character of *culpa* is not the "volition" of an act (and its consequences), but rather the negligence which characterizes the act. A skilled car driver who runs into a pedestrian while getting distracted by waving to a friend who is walking on the sidewalk will cause the death of the pedestrian with *culpa,* not willingly.

The divide between *dolus* and *culpa* is the volitional element, which must provide guidance in less clear-cut situations where it is questionable whether the author acted with *dolus eventualis* or conscious (advertent) negligence (i.e. the highest degree of *culpa*).

Comparing the two different mental elements may be useful to understand the subtle yet fundamental difference between the two states of mind, which entails different criminal liabilities: while by acting with *dolus eventualis* a person is aware of the consequences — and somehow accepts the possibility of their occurrence — when acting with conscious negligence, the person i) did not deliberately expose herself/himself to the risk that consequences might occur, and ii) thought the consequences would not occur. Additionally — and importantly — had she/he anticipated that consequences might occur, she/he would have acted differently.

A further, more lenient degree of *culpa* is the unconscious (inadvertent) negligence which lacks both the volitional and cognitive elements and denotes the state of mind of a person that had not even realized the occurrence of consequences of her/his act.

In some **common law** systems, *mens rea* (literally "guilty mind") covers four fault situations: intention or recklessness as to a specific consequence, and knowledge of, or recklessness as to, a specific circumstance.

Recklessness has been described as entailing a mental state less culpable than intention as the defining character is the

conscious risk-taking (as opposed to the intent and knowledge of a certain criminal conduct and consequences). Negligence is considered as the least culpable mental state as it lies in the failure to behave as a prudent person would (in accordance with an objective test of reasonableness) and thus entails an *unaware* acceptance of the risk.

The notion of mental elements of the crime has been transposed in ICL and is embedded in the Statutes of international and internationalized courts and tribunals. While the ICC Statute has a specific provision dedicated to the mental elements (Article 30), the *Ad Hoc* Tribunals and other tribunals describe the required mental element in the provisions concerned with each international crime.

Material Element

At least two interpretations of the concept of a material element have been put forward: pursuant to a limited reading, material elements of the crime are only the positive elements contained in a certain provision describing a crime — namely, acts, circumstances and consequences.[39]

In accordance with a broader view, the notion also covers *negative* material elements, such as the absence of grounds to exclude criminal responsibility, be it excuses or justifications to the (virtually criminal) conduct.

The material elements of the crime against humanity of persecution, as envisioned in Article 7 of the ICC Statute,[40] are:

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[39] E van Sliedregt, op. cit. at note 15 *supra*.

[40] "1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: […]
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; […]

(i) acts of persecution, i.e. "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity";

(ii) such acts shall be committed as "part of a widespread or systematic attack", i.e. involving the multiple commission of acts "pursuant to or in furtherance of a State or organizational policy to commit such attack";

(iii) such acts shall be directed against "any civilian population";

(iv) in particular, the persecution shall be "against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender" or "other grounds that are universally recognized as impermissible under international law".

As a general categorization, crimes could be grouped into two general categories: "conduct" crimes, which proscribe and punish a conduct, and "results" crimes which proscribe and punish the consequences of certain acts.

Criminal conduct may additionally take the shape of actions or omissions. It is worth clarifying that not all omissions, which result in a (virtually) criminal consequence, give rise to criminal liability. Indeed, commission by omission presupposes three elements: 1) the occurrence of an event; 2) a legal obligation to act (to prevent the event from happening); and 3) a causal link between the inaction of the person and the occurrence of the event.[41]

2. For the purpose of paragraph 1:
(a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; […]
(g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; […]".

[41] E van Sliedregt, op. cit. at note 15 *supra*, at 55.

The jurisdiction of international and hybrid courts and tribunal encompasses both commission of international crimes — by actively performing a certain conduct — and omission (of certain conduct) which results in the realization of an international crime.

In spite of the fact that only a few statutory provisions dealing with superior responsibility expressly include omission as a mode of commission (Cfr. Article 8(2)(b)(xxv) of the ICC Statute, Article 6(3) of the ICTR Statute and Article 7 of the ICTY Statute), other provisions (proscribing certain criminal conducts) have been broadly interpreted as to include omission liability. For example, the ICTR Trial Chamber in the *Kambanda* Judgement stated that all the acts of genocide could be committed by omission. Along the same line, the ICTY Trial Chamber in the *Blaškić* Judgement maintained that "cruel treatment" can be committed by acts, as well as omissions.

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LECTURE 2:

Modes of Liability in International Criminal Law

Introduction

The idea of *participation* in international crimes implies that more than one person with potential criminal liability is involved in activities that are criminal by nature.

Compared to the common crimes, known to domestic legal systems, crimes with an international character or dimension are generally characterized by the special gravity with which they infringe upon human dignity or common interests like peace and human security, as well as by the massive or systematic manner in which they are perpetrated.

This lecture discusses the different forms of participation in international crimes, which may give rise to individual criminal liability.

An overview of the statutory provisions of international and hybrid tribunals describing the modes of participation in international crimes (paragraph 1) will be followed by a presentation of the two main models of attribution of criminal responsibility — *unitary* and *differentiated* model (paragraph 2).

An analysis will follow featuring the different modes of liability under international law: *inchoate* liability (sub-paragraph 3.1), which includes conspiracy, incitement, attempt and membership; *commission* liability (sub-paragraph 3.2) under which falls perpetration, indirect perpetration, co-perpetration, indirect co-perpetration, joint criminal enterprise and command/superior responsibility; finally, *accomplice* liability (sub-paragraph 3.3) which encompasses aiding and abetting, ordering, soliciting and inducing, as well as planning and preparing.

Forms of Commission in International Legal Instruments

The first modalities of commission of international crimes recognized by international legal instruments were direct *perpetration*, *participation* in the form of complicity, and *conspiracy* (to be intended as "planning").[42] The codification of individual criminal responsibility contained in the "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" (Nuremberg Principles), elaborated in 1950 by the International Law Commission (ILC), indeed provides for those three forms of commission.

According to the Nuremberg Principles, any person who i) *commits* a crime under international law (Principle I); ii) *participates* in a common plan or conspiracy (to commit an act which constitutes a crime against peace) (Principle VI(a)(ii); iii) is an *accomplish* in the commission of a crime against peace, a war crime, or a crime against humanity (Principle VII), is responsible and liable for punishment.

The Nuremberg Principles read as follows:

Principle I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

[42] E van Sliedregt, op. cit. at note 15 *supra*, at 110. It should be borne in mind that *conspiracy* is an ambiguous term which can either be used to indicate "planning" (as a mode of liability) or — following the Anglo-American tradition — "an inchoate crime". This latter case can be found in the Genocide Convention, in Art. III "conspiracy to commit genocide", which is indeed shaped as an inchoate crime.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill- treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners

of war, of 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:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII

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

The 1949 Geneva Conventions (GCs) and Additional Protocols stipulate that State Parties must endeavor to punish persons who *committed* or *ordered to be committed* crimes tantamount to grave breaches of International Humanitarian Law (IHL).

The Torture Convention is unequivocal in providing, in Article 4(1), that acts of torture can either be performed by direct physical *commission* or through complicity/*participation*.

A much more detailed description, including a wider array of modalities of commission, is contained in the statutes of international and hybrid courts and tribunals.

The statutes of ICTY and ICTR mention five types of criminal conduct, namely 1) *planning*; 2) *instigating*; 3) *ordering*; 4) *committing*; 5) otherwise *aiding and abetting* in the planning, preparation or execution (of a crime referred to in Articles 2 to 5 of the statute).

Almost identical provisions are encompassed in the statutes of the SCSL, ECCC, and KSC.[43]

The statute of STL, in Article 3, provides individual responsibility for those who "*[c]ommitted*, *participated* as accomplice, *organized* or *directed* others to commit" (crime set forth in Article 2 of the Statute) and those who "*[c]ontributed* in any other way to the commission of the crime [...] by a group of persons acting with a common purpose"" [emphasis added].

The ICC presents an elaborated description of the forms of commission, as it distinguishes between — on the one hand — principal liability, only envisioned for the commission of the crime (either physical or intellectual commission); and — on the other hand — the "contribution to a crime" which may take several different forms.

Article 25(3) of the ICC Statutes provides:

> "[...] 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;

[43] Art. 6 SCSL St.; Art. 29 of the Law on the Establishment of the ECCC; Art. 16 of the Law of KSC.

(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". [emphasis added].

Attributing Criminal Responsibility: Unitary Versus Differentiated Model

As discussed in Lecture 1, it has often been demonstrated that several persons take part, through distinct roles and functions, in crimes with an international character or dimension. But how should the different forms of contribution to and participation in international crimes be ascertained in terms of blameworthiness (guilt) and punishment (sentence)?

In this respect, ICL has so far hesitated between two main legal approaches termed the "unitary" — or unitarian — model and the "differential" — or differentiated — model. These models derive from a systematization of domestic approaches to perpetration.

Unitary Participation Model

The unitary participation model in its strong version assumes that every person who contributes to the carrying out of a crime, in whatever way and degree, is a perpetrator without distinguishing between different types of authors and accomplices.[44]

In its light version, the model considers that all participants to a crime are either perpetrators or accomplices. This vision of perpetratorship is predicated on the idea that whoever contributes a cause to the commission of a crime must be treated as an author of this crime.

This model has been adopted in countries such as Austria, Denmark, and Italy for example.

The IMTs and *Ad Hoc* Tribunals such as ICTY/ICTR are viewed (though not without controversy for the IMTs) as representatives of this model.

Differential Participation Model

The differential participation model draws distinctions between (principal) "perpetratorship", narrowly understood, and (secondary) "participation". However, the line to be drawn between the two

[44] A Eser, "Individual Criminal Responsibility" in A Cassese, P Gaeta and JRWD Jones (eds) *The Rome Statute of the International Criminal Court: a commentary, vol. 1* (1st edn, Oxford University Press 2002), 781. On unitary participation model, see also in A Cassese, P Gaeta and JRWD Jones (eds) *The Rome Statute of the International Criminal Court: a commentary, vol. 1* (1st edn, Oxford University Press 2002); E van Sliedregt, op. cit. at note 15 *supra*, at 65; and S. Finnin, *Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court* (Martinus Nijhoff Publishers 2012) 12.

categories usually varies from one legal system, or framework, to another.[45]

The differential participation model has been adopted by the majority of the European countries, such as France, Germany, Spain, and Switzerland and, although with certain peculiarities, by systems of the common law traditions, i.e. the United States and United Kingdom.

Such an understanding of perpetratorship assumes that — except for the case of truly equal cooperation of various persons in the execution of a crime — the contributions made by different actors can be so different that it would be unfair to treat all persons involved in the same way.[46]

For this reason, the notion of "perpetrator" is here limited to persons who either stand in the centre of the commission of a crime or who steer it by means of predominant influence, while other parties to the crime are treated as (mere) "participants".

Depending on the legal system, the two groups may be further differentiated by distinguishing, for instance, within the "perpetratorship" category between solitary perpetrator, co-perpetrator, and intermediate perpetrator; and within the "participation" category between solicitor/instigator and aider/abettor.

Unlike the unitary model — according to which each contributor to the crime is individually liable for his or her conduct — in the differential model the responsibility of accessories depends on the principal act. With respect to punishment, under this model, a differentiated treatment generally occurs by providing, for instance, that aider and abettor can expect a mitigated sentence.

[45] Eser, *id.* at 782. On differential participation model, see also — E van Sliedregt, op. cit. at note 15 *supra*, at 65; and Finnin, *ibid.*
[46] Eser, *ibid*.

It is not contested that, with respect to liability, the ICC is considered as a representative of this model (as shown by Article 25(3) of the ICC Statute). The matter is not so clear for sentencing, as Article 77 of the ICC Statute implies that the range of punishment is the same regardless of the mode of participation. Additionally, rule 145(1) of the ICC Rules of Procedure and Evidence (RPE) provides that — in determining the sentence — the judges shall consider the "degree of participation", a notion which, arguably, may at times overlap with the mode or form of participation.

Main Modes of Liability in International Criminal Law

International individual criminal responsibility may, as distinguished in the literature, be triggered by a number of criminal acts which may i) precede the concrete perpetration of a crime, giving rise to *inchoate* liability; ii) constitute the perpetration of the crime, for which the perpetrator responds for *commission* liability, or iii) assist in the commission of the crime, thus resulting in *accomplice* liability.

Each of the three groups encompasses an array of different conducts as we shall see in the following paragraphs.

Another important distinction within the modes of liability shall be drawn. Some of the modes of liability, labelled "classic" or "general" — present in most statutes of international and hybrid courts and tribunals — derive from domestic jurisdictions, and thus find equivalents in national criminal codes. This categorization includes perpetration (and its variations), instigation (which, arguably, comprises of ordering, soliciting, and inducing), planning, aiding, and abetting).

Conversely, other modes of liability are specific to ICL — hence, the elaboration of the notions is mainly the result of international criminal judicial institutions' practice. To this group we ascribe "leadership" modalities and Joint Criminal Enterprise (JCE), but also, "crime-specific" modalities.

Inchoate Liability

There are instances where an international crime may not have been completed but nevertheless an offence of a different kind has been committed, because of the actions or agreements in preparation of the commission of the crime. These offences are known as *inchoate* — also called "incomplete" — crimes, which trigger inchoate liability.

Conspiracy

As an inchoate crime, conspiracy is described as the agreement to commit a crime, regardless of whether the crime agreed upon is further committed.[47]

Historically, the IMTs envisioned the crime of conspiracy with exclusive reference to the crimes against peace (not war crimes and crimes against humanity). The Nuremberg IMT interpreted it narrowly, requiring that the conspiracy be "clearly outlined" and temporarily not too far from the distinct and subsequent moments of decision and action.

Conspiracy is criminalized under ICL where it aims at committing genocide, as provided by the Genocide Convention, in Article 3(b), and is included in Articles 4(3)(b) and 2(3)(b) of the Statutes of ICTY and ICTR respectively.[48]

It is said that the conspirator to commit genocide must have the *dolus specialis* of the genocide. Indeed, "criminal responsibility for conspiracy to commit genocide requires the specific intent required for the commission of genocide, namely the intent to destroy one of the specified groups in whole or in part".[49]

[47] R Cryer, op. cit. at note 33 *supra,* 380.
[48] *Id,* 381.
[49] R O'Keefe, op. cit. at note 37 *supra*, 197.

Incitement (as an Inchoate Crime)

Incitement is considered as an inchoate crime only with respect to the crime of genocide.[50]

An example of the jurisprudence on the subject-matter is the so-called ICTR's *Media* case (*Nahimana et al)*,[51] which saw the prosecution of three individuals alleged to have been the masterminds behind a media campaign to desensitize the Hutu population and incite them to murder the Tutsi population in Rwanda in 1994 (two of them were prominent members of a popular radio station, while a third was the editor of a widely read newsletter).

For the assessment of inchoate liability, the ICTR Appeals Chamber regarded as central the purpose and context of the communication issued. As for the requirement that the incitement must be "public", it was held that the crime requires a "call for criminal action to a number of individuals in a public place or to member of the general public at large by such means as the mass media".

The ICTR clarified the requirement that the incitement must be "direct" in the *Akayesu* and *Media* case, by spelling out the following principles:[52]

(i) incitement must be determined in light of the "cultural" and "linguistic" context, which may suggest when a certain speech is perceived by the audience as direct and when it is not;

[50] R O'Keefe, *id,* 199: "Since direct and public incitement to commit genocide is an inchoate offence, it is complete once the acts constituting the incitement are over. It does not extend forward in time to the completion of any act of genocide incited by it. Direct and public incitement to commit genocide, being an inchoate offence, by definition grounds responsibility in and of itself, without the need for any element of causation".

[51] *Prosecutor v Nahimana et al*., ICTR-99-52.

[52] *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T, T Ch (2 September 1998) para. 557; *Prosecutor v Nahimana et al*. (Judgement) ICTR-99-52-A, A Ch, (28 November 2007) paras. 693, 703.

(ii) direct incitement may well be **implicit**;

(iii) the incitement must be **directed** at committing genocide, not just hate speech.

According to this case, the *mens rea* of the person inciting genocide must be the "intent to directly prompt or provoke another to commit genocide" which implies that "the person who is inciting to commit genocide must have himself the specific intent to commit genocide [...]".[53]

Attempt

Many national jurisdictions criminalize the attempt to commit a crime, which often occurs when a person has an intent to commit a crime *and* takes a substantial step toward completing the crime, *but* for circumstances independent of the person's intention, the envisioned crime does not occur.[54]

The ICC criminalizes attempt to commit international crimes in Article 25(3)(f) of the Rome Statute, which reads as follows:

> 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.

Attempt — but only to commit genocide — is also criminalized by the Genocide Convention, and by the ICTY (Article 7(1)) and ICTR (Article 6(1)) Statutes, the latter through the "planning" modalities.

[53] *Nahimana et al*. (Judgement) ICTR-99-52-T, T Ch I (3 December 2003) para.1012.
[54] For a comparative overview on "attempt", see E van Sliedregt, op. cit. at note 15 *supra*, at 147.

Membership

In a number of pronouncements, the ICTY has maintained that criminal liability does not accrue from the membership in a criminal group *per se*.[55]

Historically, such form of liability was envisioned by the IMTs Charter, Article 10, which criminalized the membership to a criminal organization, defined as any "group or organization declared criminal by the Tribunal".

Although no defendant was ever charged with membership alone (as the IMTs gave restrictive interpretation of the Charter's criminal membership provisions), many were convicted of criminal membership in connection with other charges.

Commission Liability

When discussing commission liability, it is important to bear in mind that in the statutory provisions of international and hybrid courts and tribunals, as well as in ICL jurisprudence, the term "commission" is used both in a narrow and a broad sense.

In a narrow sense, commission is synonymous with perpetration, which only includes the physical perpetration of a crime, either by an individual or jointly with others, and the perpetration through a third (innocent) person which serves as a mere instrument to commit the crime whose responsibility rests with the "primary actor".

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[55] In the *Milutinović* case, the Appeals judges held: "Criminal liability pursuant to a joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter. The Prosecution in the present case made that point clear when it said that Ojdanic was being charged *not for his membership in a joint criminal enterprise but for his part in carrying it out*". (emphasis added) — *Prosecutor v Milutinović et al.* (Decision on Dragoljub Ojdanić's motion challenging jurisdiction — Joint Criminal Enterprise) ICTY-99-37-AR72, A Ch (21 May 2003), para. 26. See also *Prosecutor v Brđanin* (Judgement) ICTY-99-36-T, T Ch (1 September 2004), para. 263.

The term "commission" has also been used in a broader sense, to refer not only to direct/physical perpetration, co-perpetration and indirect perpetration of an international crime — including by way of omission — but also, to the *participation* to an international crime, *inter alia,* through the participation in a common plan (pursuant to the doctrine of Joint Criminal Enterprise)[56] and through command/superior responsibility.[57]

Perpetration

Perpetration equals "commission" in its narrow sense of physical commission of a crime and "culpable omission of an act that was mandated by a rule of criminal law".[58]

Provisions of the *Ad Hoc* Tribunals, ICC, SCSL, ECCC, STL, and KSC all provide liability of any person who *committed* and international crime.

The ICTR adopted a broader approach to commission, by holding (with reference to the crime of genocide) that "'direct and physical perpetration' need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime".[59]

On such premises, the ICTR concluded that the conducts of an accused who personally directed the Hutu and Tutsi refugees to separate — hence enabling the killings (conducted by others) — as well as the actions of a priest who oversaw the bulldozing of a church hosting refugees in it, amounted to "*committing*" genocide. The ICTR was criticized for relying on loose arguments to broaden the traditional notion of commission. In particular, the tribunal based its conclusions on the fact that the acts of the accused could not be adequately described by any other modes of liability than

[56] *Prosecutor v Tadić* (Appeal Judgement) ICTY-94-1-A, A Ch (15 July 1999), para. 188.
[57] *Prosecutor v Lubanga* (Arrest Warrant) ICC-01/04-01/06, 10 February 2006.
[58] *Tadić* Appeal Judgement, para. 188.
[59] *Prosecutor v Seromba* (Judgement) ICTR-2001-66-A, A Ch (12 March 2008), para. 161.

"committing" as they were "as much an integral part of the genocide as were the killings [of the Tutsi refugees]".[60]

The fact that the notion of commission also includes that of omission, not explicitly mentioned in the relevant statutory provisions, has been mentioned by the jurisprudence of the ICTY in the *Tadić* case, in which it held that the "commission" of a crime primarily refers to 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".

The ICTY mentioned in the *Čelebići* and *Orić* cases, among others, that individual criminal responsibility of superiors for failure to prevent or repress the crimes committed by subordinates exists under customary international law, when i) there exists a legal obligation to act[61] and ii) the omission had a "concrete influence" on the crime.[62]

Indirect Perpetration

Many domestic systems, of both common law and civil law, envision the possibility of criminal acts being committed through an "innocent agent" by an indirect perpetrator, who is in control of the will of the unwitting person. The notion is so widely accepted that Black's Law Dictionary defines "perpetration" as "the act of committing a crime either with his own hands, or by some means or instruments or *through some innocent agent*" [emphasis added]. The agent — innocent because incapable of understanding the nature of her/his action (e.g. because he/she is a child, mentally unfit,

[60] *Seromba* Appeal Judgement, *ibid.*

[61] In the *Čelebići* case, it was held "criminal responsibility for omissions is incurred only where there exists a legal obligation to act", see *Prosecutor v Delalić et al.* (Judgement) ICTY-96-21-T, T Ch (16 November 1998), paras. 334; 343.

[62] In *Orić*, it was maintained that "[a]t a minimum, the *actus reus* of commission by omission requires an elevated degree of 'concrete influence'", see *Prosecutor v Orić* (Judgement) ICTY-03-68-A, A Ch (3 July 2008), para. 41. In the same vein, see *Prosecutor v Blaškić* (Judgement) ICTY-95-14-A, A Ch (29 July 2004), para. 664.

or acting under duress) — is not culpable of the crime, for which liability rests exclusively with the indirect perpetrator.

Indirect perpetration has been also recognized under ICL. While the *Ad Hoc* Tribunals did not explicitly list indirect perpetration as a mode of liability, a provision to that effect can be found in Article 25(3)(a) of the ICC 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.

That additional form of liability (sometimes called "vertical" perpetration) stems from a German doctrine,[63] which considers forms of perpetration occurring in the context of an organization. The idea is that the perpetrator is the "mastermind" of an operation who controls those directly committing the crime.

According to the literature, in order to attribute criminal responsibility to the "mastermind", she/he must be in control of the organization which must be hierarchically structured, and functioning in a way that orders given by the mastermind are carried out by subordinates nearly automatically. Subordinates, in turn, can be held criminally liable only if — in addition to the volition of the underlying crimes — they are aware of the nature and purpose of the organization and their role in it.

Co-perpetration

Co-perpetration connotes full cooperation in a crime by two or more persons.

[63] C Roxin, "Crimes as Part of Organized Power Structures" (2011) 9 Journal of International Criminal Justice 193.

As explained by one commentator, the concept is originally rooted in the idea that:

> when the sum of the co-ordinated individual contributions of a plurality of persons results in the realization of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.[64]

Whereas co-perpetratorship is recognized as a distinct ground of liability in most civil law systems, it does not seem that an exact equivalent in common law systems exists.[65] Anglo-American systems are seen to provide for a "complicity law" whereby the perpetrator is *the* one who committed the *actus reus*, while the other agent/s are (mere) accomplice/s whose responsibility is derivative and limited. Nonetheless, something similar to co-perpetratorship, as intended in civil law systems, is captured by the concept of "joint enterprise" or "common purpose" in Anglo-American systems.

The *Ad Hoc* Tribunals seem not to have relied on the notion of co-perpetratorship, and even rejected its affirmation in the *Stakić* case, where the Appeals Chamber held:

> [T]he Trial Chamber erred in conducting its analysis of the responsibility of the Appellant within the framework of "co-perpetratorship". This mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers. By way of contrast, joint criminal enterprise is a mode of liability which

[64] K Ambos, "Article 25: Individual Criminal Responsibility" in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, C. H. Beck, Hart, Nomos 2008) 479.
[65] E van Sliedregt, op. cit. at note 15 *supra*, 96.

> is "firmly established in customary international law" and is routinely applied in the Tribunal's jurisprudence.[66]

It should be borne in mind that, while never embraced by the *Ad Hoc* Tribunals, the notion of co-perpetration nevertheless finds many similarities and overlaps with the concept of Joint Criminal Enterprise (JCE), heavily relied upon by the ICTY and ICTR, as we shall see in Lecture 3.

On co-perpetratorship, the ICC has taken a different stance. Co-perpetration is recognized as a mode of liability under Article 25(3)(a), as perpetration "jointly with another".

In spite of the fact that the basis and parameters of the notion still remain contentious, co-perpetration has formed the basis of the ICC's first conviction, in the *Lubanga* case. In the *Lubanga* Confirmation Decision, co-perpetration was analyzed by the Pre-Trial Chamber (PTC) in the context of the "control over the crime theory" to assess whether the co-perpetrator — along with others — had control over the offence by reason of "the essential contribution" assigned to them.[67]

The PTC clarified that a co-perpetrator does not necessarily have to perform her/his acts at the execution stage of the crime, as later further elaborated in the *Katanga* case.

The Trial Chamber in *Lubanga* pinpointed the main requirements for co-perpetratorship as follows:

> (i) […] an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events;

[66] *Prosecutor v Stakić* (Judgement) ICTY-97-24-A, A Ch (22 March 2006), para. 62.
[67] *Prosecutor v Lubanga Dyilo* (Decision on the Confirmation of Charges) ICC-01/04-01/06, P-T Ch I (29 January 2007), para. 322.

(ii) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime;

(iii) the accused meant to [commit the crime at issue] or he was aware that by implementing the common plan these consequences "will occur in the ordinary course of events";

(iv) the accused was aware that he provided an essential contribution to the implementation of the common plan [...].[68]

Indirect Co-perpetration

Indirect co-perpetration or "commission jointly through another person", can be found in the ICC Statute. For this reason, it has been described as a creature of the ICC Statute, as such valid solely to adjudicate cases before the court.[69]

In a number of cases (including *Lubanga*)[70], the ICC has set out the objective and subjective elements of indirect co-perpetration as follows:

(i) the suspect must be part of a **common plan** or an agreement with one or more persons;

(ii) the suspect and the other co-perpetrator(s) must carry out **essential contributions** in a coordinated manner which result in the fulfilment of the material elements of the crime;

(iii) the suspect must have **control over the organization;**

(iv) the organization must consist of an **organized and hierarchal apparatus of power**;

[68] *Prosecutor v Lubanga Dyilo* (Judgement) ICC-01/04-01/06, T Ch I (14 March 2012) para.1018.
[69] *Prosecutor v Ngudjolo Chui* (Judgement) ICC-01/04-02/12, T Ch II (18 December 2012), Concurring Opinion of Judge Christine Van den Wyngaert, paras. 58–64.
[70] *Prosecutor v Lubanga* (Decision on the Confirmation of Charges) ICC-01/04-01/06-803-tEN, P-T Ch I (29 January 2007), paras. 343–367.

(v) the execution of the crimes must be secured by almost automatic **compliance with the orders** issued by the suspect;

(vi) the suspect must satisfy the subjective elements of the crimes;

(vii) the suspect and the other co-perpetrators must be mutually **aware and accept** that **implementing the common plan will result** in the fulfilment of the material elements of the crimes; and

(viii) the suspect must be **aware of the factual circumstances enabling him to exercise joint control** over the commission of the crime through another person(s).

It ought to be mentioned that the customary nature of this type of liability has been strongly questioned and rejected on a number of occasions, including by the ICTY and STL.[71]

Joint Criminal Enterprise

The concept of joint criminal enterprise (JCE) has been described by the ICTY as stemming from international customary law.

Given the relevance of this mode of liability in the jurisprudence, particularly in ICTY decisions, and the great reliance on its concepts to adjudicate international crimes with a collective dimension, the topic will be the subject of separate discussion in Lecture 3.

We will here limit ourselves to introduce the *actus reus* common to all three classes of JCE identified under customary international law, as giving rise to international criminal liability.

The liability for the participation in a joint criminal enterprise lies on three key material elements, namely: i) a **plurality** of persons;

[71] *Prosecutor v Ayyash et al.* (Interlocutory Decision on the Applicable Law) STL-11-01/I, A Ch (16 February 2011), para. 256.

ii) the **participation** of such plurality of persons in iii) the design of a **common plan** for the purpose of committing international crimes.

In Lecture 3 we shall see, *inter alia,* how the three types of JCE differ from each other and which mental elements characterize them.

Command/Superior Responsibility

Command responsibility is a doctrine specific to ICL, which similarly to JCE, does not have an equivalent principle of liability at the domestic level.

Command responsibility is described as an omission mode of individual criminal liability — the commander or superior is responsible for crimes committed by her/his subordinates which are the result of her/his failure to prevent or repress the commission of such crimes.

Due to the fundamental importance and central role played by this mode of liability under ICL, the topic will be the subject of separate discussion in Lecture 3.

Accomplice Liability

Aiding and Abetting

A definition of aiding and abetting was for example introduced in the ICTR *Akayesu* case, where the Trial Chamber — after clarifying that the two concepts are different (though generally used in tandem) — defined aiding as "giving assistance to someone" and abetting as "facilitating the commission of an act by being sympathetic thereto". The ICTR Trial Chamber explained that, as consequence of the fact that aiding and abetting entail different acts, either one of them alone is sufficient to render the perpetrator criminally liable.

A well-known precedent of conviction for aiding and abetting under ICL dates back to the Nuremberg IMT *Zyklon-B* case, in which two German industrialists were convicted for supplying poison gas to Nazi concentration camps.

As far as the *Ad Hoc* Tribunals are concerned, the requirements for aiding and abetting have been elaborated by the ICTY in the *Tadić* case, and thereafter consistently applied at both ICTY and ICTR. A comprehensive definition of the *actus reus* of aiding and abetting is contained in the *Simić* Appeal judgement:

> [T]he *actus reus* of aiding and abetting consists of acts directed to assist, encourage or lend moral support to the perpetration of a certain specific crime, and which have a substantial effect upon the perpetration of the crime. It is not required that a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime be shown, or that such conduct served as a condition precedent to the commission of the crime. The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and the location at which the *actus reus* takes place may be removed from the location of the principal crime.[72]

The requirement that the conduct must be "directed" toward aiding and abetting the relevant crime has been subject to much debate as in the *Perišić* case the ICTY — departing from its previous approach — requested proof that the accused's acts were "*specifically* directed" toward aiding and abetting the relevant crime.[73]

The SCSL distanced itself from the ICTY, and in the *Taylor* case maintained that there was no customary international law supporting the interpretation that "specific direction" was needed.

[72] *Prosecutor v Simić et al.* (Judgement) ICTY-95-9-A, A Ch (28 November 2006), para. 85.
[73] *Prosecutor v Perišić* (Judgement) ICTY-04-81-A, A Ch (28 February 2013), paras. 38–40.

Accordingly, the SCSL concluded that no such requirement does exist under ICL:

> There is nothing in the Statute to indicate that — specific direction is an element of the *actus reus* of aiding and abetting liability. In the Perišić Appeal Judgment, the ICTY Appeals Chamber held that —specific direction|| must be proved beyond a reasonable doubt in order to establish the *actus reus* of aiding and abetting liability. The issue raised in respect of — specific direction|| then is whether it is an element of the *actus reus* of aiding and abetting liability under customary international law prevailing during the Indictment Period in this case.
>
> The Appeals Chamber has independently reviewed the post-Second World War jurisprudence, and is satisfied that those cases did not require an *actus reus* element of — specific direction|| in addition to proof that the accused 's acts and conduct had a substantial effect on the commission of the crimes. Similarly, the Appeals Chamber has examined the ILC Draft Code of Crimes and state practice, and is satisfied that they do not require such an element.[74]

The ICTY returned to its previous position — to only require that acts be *directed* to aid and abet the underlying crime — in 2014 with the Appeals Chamber judgement in the *Šainović* case.[75] Along the line of the SCSL *Taylor* case, the ICTY held that the conclusions of *Perišić* were unequivocally wrong as the "*specific* direction" requirement is not part of customary ICL.

In regards to the *mens rea* that must assist the aider and abettor, the following criteria have been spelt out in the *Simić et al.* Appeal judgement:[76]

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[74] *Prosecutor v Taylor* (Judgement) SCSL-03-01-A, A Ch (26 September 2013) paras. 473–474.
[75] *Prosecutor v Šainović* (Judgement) ICTY-05-87-A, A Ch (23 January 2014) paras. 1617–1650.
[76] *Simić* case, see note 72 *supra.*

(i) the aider and abettor must have **knowledge** (note: not the purpose) that the acts by her/him performed assist in the commission of the specific crime of the principal perpetrator;

(ii) the aider and abettor must be **aware of the essential elements of the underlying crime**, which is to be ultimately committed by the principal.

(iii) it is **not necessary** for the aider and abettor to **know** either **the precise crime** that was intended or the one that was, in the event, committed. If she/he is aware that one of a number of crimes will probably be committed — and one of those crimes is in fact committed — it possible to conclude that he has intended to facilitate the commission of that crime, and is this guilty as an aider and abettor.

The ICC set the requirements for aiding and abetting under Article 25(3)(c) of the ICC Statute, which held criminally liable those who "[f]or 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".

The incipit of Article 25(3)(c) — which contains the proviso "*for the purpose*" — seems to suggest that the ICC requests a higher mental element compared to the ICTY, i.e. intent rather than mere knowledge.[77]

Albeit not explicitly mentioned, the requirement of "substantial" contribution to the crime, on the part of the aider and abettor, has been constantly maintained by the ICC.[78]

[77] R O'Keefe, op. cit. at note 37 *supra*, at 192. See *Prosecutor v Mbarushimana* (Decision on the Confirmation of Charges) ICC-01/04-01/10-465-Red, P-T Ch I (16 December 2011), paras. 274, 281, and 289.
[78] *Mbarushimana* case, *id*. para. 280.

Ordering

Ordering is a mode of liability specific to ICL, which implies a superior-subordinate relationship and — within such a context — envisions the situation of a person in a position of power who abuses his authority to convince her/his subordinates to commit a crime.[79]

Under ICL, it has not often been questioned that the person giving orders shall be held responsible for crimes committed in furtherance of her/his orders. Rather, in the past, doubts arose as to whether *also* the direct perpetrator shall be held criminally liable. The question has constantly been answered in the positive since the Nuremberg IMT where — despite the emphasis on those occupying higher positions and thus ordering — the defense of superior's order was never accepted; hence subordinates' acts were deemed tantamount to international crimes as were those of their superiors.

One contentious issue, that divided commentators' opinion, is whether the situation of a subordinate executing orders (resulting in the commission of an international crime) may fall under the mode of liability of indirect perpetration, or "perpetration through an innocent agent".[80] Yet, the statutes of international and hybrid courts are all clear in providing for "ordering" as a separate and distinct mode of liability.

In the ICC *Katanga* case, the PTC dealt with the relationship between ordering and indirect perpetration and concluded that the two are different in that ordering entails that "[t]he highest authority does not merely order the commission of a crime, but through his control over the organization, essentially decides whether and how the crime would be committed".[81]

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[79] *Akayesu* case, see note 52 *supra*, para. 483; *Prosecutor v Blaškić* (Judgment) ICTY-95-14-T, T Ch I (3 March 2000) para. 601.

[80] K Ambos, "Article 25: Individual Criminal Responsibility" in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, C. H. Beck, Hart, Nomos 2008) 480 and 491.

[81] *Prosecutor v Katanga et al.* (Decision on the Confirmation of Charges) ICC-01/04-01/07, P-T Ch I (30 September 2008), para. 518.

The elements of ordering have been identified by the *Ad Hoc* Tribunals as:

> (i) the existence of a **superior/subordinate relationship**, which need *not* be a legal or formalized one — what matters is the existence of "some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order".[82]
>
> The ICTR, in the *Gacumbitsi* case, further elaborated on the nature of the superior/subordinate relationship and clarified that the difference with superior responsibility lies in that the latter entails a relationship characterized by "effective control", while ordering requires merely the "authority to order, a more subjective criterion that depends on the circumstances and the perception of the listener".[83]
>
> (ii) the proof that an **order was transmitted**; such a proof can be inferred by circumstantial evidence, e.g. it can be concluded that an order to attack a certain village was issued in case multiple and similar attacks against that village took place simultaneously.
>
> (iii) the mental element corresponding to **"[t]he awareness of the substantial likelihood** that a crime will be committed in the execution of that order [...] Ordering with such awareness has to be regarded as accepting the crime".[84] The *mens rea* of *dolus eventualis* thus suffice for ordering, and implies that the accused's criminal liability also extends to those crimes that — although not directedly ordered — have been accepted as likely consequences.

[82] *Prosecutor v Semanza* (Judgement) ICTR-97-20-A, A Ch (20 May 2005), para. 361; *Prosecutor v Kordić and Čerkez* (Judgement) ICTY-95-14/2-T, Tr Ch III (26 February 2001), para. 388.
[83] *Prosecutor v Gacumbitsi* (Judgment) ICTR-2001-64-A, A Ch 7 July 2006, para.182.
[84] *Blaškić* Appeal, see note 62 *supra*, para. 42.

Instigation

Instigation has been characterized by the ICTY and ICTR, respectively, as acts "prompting" or "urging or encouraging" another to commit a crime.

While the term "instigation" is used in the Statutes of the *Ad Hoc* Tribunals and SCSL, it does not appear in the ICC Statute, where the same notion is thought to be captured by the different terms "soliciting" and "inducing".[85]

In the ICTY *Blaškić* case, the Trial Chamber pinpointed the essential elements of instigation as follows:

> (i) the instigator must have **caused the other person to commit** the crime — the instigator's acts must have been a "substantially contributing factor", though it is not necessary that the instigation amounts to a *conditio sine qua non*. Additionally, the instigation does need to be the only cause of the material element of the crime. Finally, there is no requirement that the idea or plan to commit the crime originated from the instigator.
>
> (ii) the instigation can take **different forms** — it can either be expressed or implied, and can either entail acts or omissions.
>
> (iii) the *mens rea* of the instigator must be that of a person that "directly or indirectly intended the crime in question be committed". As later held in the *Orić* case, ***dolus eventualis* does suffice** as the mind of the instigator (merely) requires acceptance of the risk that the crime will more likely than not follow.

Soliciting and Inducing

Soliciting and inducing is provided for in Article 25(3)(b) of the ICC Statute, which states that a person shall be criminally responsible and liable for punishment for a crime if she/he "[o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted".

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[85] G Werle, *Principle of International Criminal Law* (2nd edn, TMC Asser Press 2009), 125.

Inducing — defined by Black's Law Dictionary as "to bring on or about, to affect, cause, to influence an act or course of conduct, led by persuasion or reasoning, incite by motives, prevail on" — seems to be a more general term which also encompasses soliciting, which in turn is characterized by Black's Law Dictionary as "asking, enticing, urgent request".

Planning and Preparing

Many domestic jurisdictions criminalize the acts of planning and preparing the commission of a crime without requiring that the planned crime is in fact perpetrated.

The first affirmation under ICL, that planning and preparing were to be considered crimes *per se*, can be found in the Charters of the IMTs, referred to the crime of aggression (Articles 6(e) and 5(e) of Nuremberg and Tokyo Charter, respectively).

Next, while the *Ad Hoc* Tribunals and the SCSL do not provide for the punishment of the (mere) acts of planning the commission of a crime, Articles 7(1) and 6(1) of the ICTY and ICTR Statutes, respectively, and Article 6(1) of the SCSL Statute (which reproduces *verbatim* the correspondent provisions of the *Ad Hoc* Tribunals' statutes) do criminalize persons who "aided and abetted in the planning, preparation or execution of an international crime".

A number of judgments of both ICTY *(Kordić and Čerkez*,[86] *Blaškić*[87]*)* and ICTR[88] embraced the interpretation — now settled before international Tribunals[89] — that for "planning and

[86] *Prosecutor v Kordić and Čerkez* (Judgement) ICTY-95-14/2-A, A Ch (17 December 2004), para. 26. The ICTY Appeals Chamber held that "the *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes *that are later perpetrated*" (emphasis added).
[87] *Blaškić* Trial, see note 79 *supra*, para. 278 — the Trial Chamber held that "a person other than the person who planned [...] must have acted in furtherance of a plan or order".
[88] *Akayesu*, see note 52 *supra*, para. 480.
[89] *Taylor* Judgment, see note 74 *supra*, para. 494.

preparing" to be criminalized, the (planned) offence must have occurred.

On the basis of such an interpretation, the *actus reus* of the crime of planning and preparing lies in plotting a statutory crime *insofar as* the planned crime is subsequently perpetrated. Furthermore, the person responsible for designing the primary crime can be held responsible (once the crime has been perpetrated), only if her/his contribution has been "substantial".[90]

Regarding the *mens rea* for planning, it has been deemed to correspond to that of "a person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan".[91]

Turning to the Statute of the ICC, no provisions mirroring the *Ad Hoc* Tribunals and SCSL articles criminalize the conducts of planning and preparing international crimes, with the exception of planning a crime of aggression.[92]

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[90] *Boškoški and Tarčuloski* (Judgement) ICTY-04-82-A, A Ch (19 May 2010), para. 154; see also *Taylor* Judgment, *ibid*.
[91] *Kordić and Čerkez, id* Appeal Judgement, para. 31.
[92] Note that the ICC Statute reproduces *verbatim* the language of the IMTs' Arts. 6(e) and 5(e) of Nuremberg and Tokyo, respectively.

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LECTURE 3:

Main Forms of International Criminal Liability: Joint Criminal Enterprise and Command/ Superior Responsibility

Introduction

Common purpose liability, known as "Joint Criminal Enterprise" (JCE), and command/superior responsibility are regarded as international law construct, without exact equivalent in national systems.

Given the extensive jurisprudence on the matter under ICL, both topics are subject to a separate discussion in this Lecture.

Part I of this Lecture deals with liability under JCE. First, the notion of JCE will be explained, as defined by the jurisprudence, and the three types of JCE presented (paragraph 1); an overview of the origins in international customary law, as traced back by the ICTY, will follow (paragraph 2).

JCE will be mainly discussed through the lens of ICTY cases, as the ICTY is the tribunal which most heavily relied upon this form of liability (paragraph 3). A brief section on the application of the model will conclude Part I (paragraph 4).

Part II addresses superior/commander responsibility which was defined by the jurisprudence as arising out of the failure of commanders or superiors to "prevent" or "punish" the commission of international crimes by their subordinates.

Part II will begin with a discussion of the notion of superior/ commander responsibility and a historical overview (paragraph 1) and will then feature case law dealing with the matter, before

the ICTY (paragraph 2), the ICC and other international courts (paragraph 3).

Part I. Joint Criminal Enterprise

Definition

The term Joint Criminal Enterprise (JCE) has been formulated by the ICTY to indicate "common purpose liability". The concept was relied upon by the *Ad Hoc* Tribunals, starting with the leading case *Tadić*. Some other international and hybrid courts have also made use of the theory, albeit to a limited extent.

The essence of liability under JCE has been described as the existence of a common plan, devised by a plurality of persons, with the aim of committing international crimes. Hence "the key to joint commission is the 'common plan design or purpose'".[93]

A problem with international crimes perpetrated by a group of individuals is, in fact, the gathering of evidence to assess the exact level of participation of each member, and their type of contribution. As a result, it often proves to be quite difficult to pinpoint the culpability of the participants to the criminal enterprise.[94]

It was said that JCE represents a mode of liability fit to cover the criminal liability of all participants, *irrespective* of each specific role played in the commission of the crime (which,

[93] G Werle & F Jessberger, *Principles of International Criminal Law* (3 rd edn., Oxford University Press 2014) 201.
[94] A Cassese, "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise" in A Cassese et al (eds), *International Criminal Law* (1st edn, Routledge 2015) 340.

will of course matter in sentencing, i.e. when determining the punishment).[95]

The literature emphasises that the centrality of the common plan requirement could also be seen as serving, *inter alia*, the purpose of compensating for the possible lack of physical involvement of (some of) the members of the criminal enterprise and enables to hold them liable at the same level as the physical perpetrators.[96]

In regards to the "plan", it was held in ICTY *Tadić* case that the plan, design or purpose need not have been previously arranged or formulated as it may "materialize extemporaneously and be inferred from the fact that a plurality of persons act in unison to put into effect a joint criminal enterprise".[97]

Three classes of JCE have been identified by the ICTY.

What differs in the three categories is not the material element, which — as clarified by the ICTY Appeals judges in the *Tadić* case — is always made up of the following elements:

> (i) A **plurality of persons**. They need not be organized in a military, political or administrative structure […]

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[95] In the *Blagojević and Jokić* case, the trial judges spelt out that "*Regardless of the role each played in its commission, all of the participants in the enterprise are guilty of the same crime*" [Emphasis added], See *Prosecutor v. Blagojević and Jokić,* (Judgement) ICTY-02-60-T, T Ch I (17 January 2005), para. 702. In note (2160), the Trial Chamber "recalls that the sentence imposed on each member of the joint criminal enterprise will reflect the gravity of the offence and criminal conduct of that accused in relation to the commission of that offence"; and also refers to other judgments which hold the same principle, namely *Vasiljević* Trial Judgement ICTY-98-32-T (29 November 2002) para. 67, affirmed on appeal, *Vasiljević* Appeal Judgement, ICTY-98-32-A (25 February 2004), para. 111, *Aleksovski* Appeal, see note 9 *supra*, para. 182 and *Čelebići* Appeal Judgement, para. 731; *Prosecutor v Jelisić* (Judgement) ICTY-95-10-A, A Ch (5 July 2001) para. 101.

[96] E van Sliedregt, see op. cit. at note 15 *supra*, 133.

[97] *Tadić* Appeal, see note 56 *supra*, para. 227.

> (ii) The **existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute**. […]
>
> (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 (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.[98]

Rather, the mental element distinguishes the different types of JCE.[99]

The first type of liability (JCE I) has been defined as similar to co-perpetration, as all the participants in the common design possess the same criminal intent to commit the crime and, importantly, either all or *just* some of them actually commit the crime "with intent". In JCE I, liability is triggered by the common intentional purpose.

To be held criminally liable under the second type of JCE (JCE II) — also known as the "concentration camp" model — the personal knowledge of the system of ill-treatment is required, together with the intent to further such a system. Liability for this category of JCE has been described as attached to the participation in an "institutionalized" common plan.

The third class of liability (JCE III) was characterized as an incidental form of liability, based on foresight and voluntary assumption of the risk.

[98] *Tadić* Appeal, *ibid*.
[99] A Cassese, *The Proper Limits of Individual Responsibility,* op. cit. at note 94 *supra,* 340.

Origins in History

The IMTs of Nuremberg and Tokyo relied on forms of common purpose liability to deal with war crimes committed by "group criminality" during the Second World War.

The Charters of both IMTs envisioned criminal liability for those who participated in a "common plan or conspiracy to commit any of the [...] crimes" providing that they shall be held "responsible for all acts performed by any person in execution of such a plan".

On the basis of that form of common purpose liability — which entails on the part of the accused a conscious contribution to the plan in *some way* — concentration camp personnel were, for instance, convicted. The underlying idea was that *all* persons who contributed to the war machine, with a real bearing, had to be considered liable.

Given that the criterion adopted — having knowingly contributed "in some way" — was quite loose, all defendants were regarded as equal participants in the crime, and no distinction was drawn between perpetrators and accessories.

The Appeals Chamber's findings in *Tadić* — that international customary law contemplates liability for the three classes of JCE above described — stem from the review of a number of cases which, as was argued, would demonstrate that state practice and *opinio juris* are sufficient to prove the guilt of the accused pursuant to JCE liability.

To reach its conclusions, the Appeals Chamber relied on several World War II trials and cases brought before Italian courts after the fall of fascism.

It is important to note that the ICTY was criticized, both by academics and subsequent judicial decisions, for having based its construction of liability for JCE on a too small number of cases, and on national cases (the cases adjudicated by Italian courts) which

applied domestic principles of liability, and as such, were said to be irrelevant under ICL. The jurisprudence is only summarized in this paper, without any expression of support or disagreement of the concept.

To get an understanding of how the Appeals Chamber possibly proceeded in tracing the existence of JCE liability back to past cases, it may be useful to read a few passages of the judgement of the *Tadić's* Appeals Chamber:[100]

> 195. Many post-World War II cases concerning war crimes proceed upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group." […]
>
> 197. With regard to this category, [JCE I] reference can be made to the Georg Otto Sandrock et al. case (also known as the Almelo Trial). There a British court found that three Germans who had killed a British prisoner of war were guilty under the doctrine of "common enterprise" […] Similarly, in the Hoelzer et al. case, brought before a Canadian military court, in his summing up the Judge Advocate spoke of a "common enterprise" with regard to the murder of a Canadian prisoner of war by three Germans, […]
>
> 198. Another instance of co-perpetratorship of this nature is provided by the case of Jepsen and others. A British court had to pronounce upon the responsibility of Jepsen (one of several accused) for the deaths of concentration camp internees who, in the few weeks leading up to the capitulation of Germany in 1945, were in transit to another concentration camp […]
>
> 202. The second distinct category of cases [JCE II] is in many respects similar to that set forth above, and embraces the

[100] *Tadić* Appeal, see note 56 *supra*.

so-called "concentration camp" cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan. Cases illustrative of this category are Dachau Concentration Camp. […]

204. The third category [JCE III] concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. […]

205. The case-law in this category has concerned first of all cases of mob violence, that is, 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. Cases illustrative of this category are Essen Lynching and Borkum Island. […]

214. Mention must now be made of some cases brought before Italian courts after World War II concerning war crimes committed either by civilians or by military personnel belonging to the armed forces of the so-called "Repubblica Sociale Italiana" ("RSI"), a de facto government under German control established by the Fascist leadership in central and northern Italy, following the declaration of war by Italy against Germany on 13 October 1943. After the war several persons were brought to trial for crimes committed between 1943 and 1945 against prisoners of war, Italian partisans or members of the Italian army fighting against the Germans and the RSI. Some of these trials concerned the question of criminal culpability for acts

perpetrated by groups of persons where only one member of the group had actually committed the crime.

Application of the JCE Doctrine in ICTY Case Law

JCE at Execution Level: The Early Furundžija Case and the Tadić Case

In the *Furundžija* and *Tadić* cases, the doctrine on JCE was applied to small-scale enterprises and relatively small group criminality.

As we shall see later on, the ICTY broadened the scope of JCE, both in terms of time (in which the crimes were alleged to have been committed) and geographical space (in which the relevant events took place). The effect was to establish liability of large enterprise, to which senior military officers and political leaders participate.

Furundžija Case

The ICTY relied upon the concept of JCE for the first time in one of its early cases. In *Furundžija,*[101] it was concluded that the accused took part in a common plan to commit crimes as co-perpetrator, thus qualifying his lability under JCE I.

It may be useful to outline the main accusations that were brought against the accused Anto Furundžija for the events which unfolded in 1993, in the Lašva Valley (Bosnia and Herzegovina).

Anto Furundžija was the local commander of a unit of the Croatian Defense Council, in the Vitez municipality in central Bosnia and Herzegovina.

In the course of an interrogation to a Muslim woman and a Croatian soldier (friend of the woman) conducted by Anto

[101] *Prosecutor v Furundžija* (Judgement) ICTY-95-17/1-A, A Ch (21 July 2000).

> Furundžija, it was found that he did not take action to stop multiple attacks performed in his presence, by one of his soldiers against the woman — who was repeatedly raped in front of a group of soldiers, beaten with batons, and threatened to be cut out her private parts — as well as, by other of his subordinates, against the Croatian soldier, who was beaten and forced to watch the sexual attacks against his friend. The torture, including rape, was perpetrated with the purpose of extracting information/confessions from the Muslim woman and her Croatian friend.
>
> Anto Furundžija was found guilty of torture as a co-perpetrator for his failure to stop or curtail the attacks against the Muslim woman and the Croatian soldier by his subordinate soldiers. Additionally — though it was concluded that he did not personally rape the Muslim woman — his presence and continued interrogation of her encouraged his soldier to carry on the sexual violence and substantially contributed to the criminal acts committed by the soldier. Anto Furundžija was thus also found to be an aider and abettor of outrages upon personal dignity, including rape.

The Appeals Chamber characterized the responsibility of Furundžija for the torture (including rape) as co-perpetrator under the common intentional purpose liability as it was held that he participated in a co-perpetration involving a group of persons (i.e. Furundžija and his subordinates) pursuing a common design to commit crimes (i.e., inflicting torture for the purpose of obtaining information). The judges argued that such a responsibility was triggered by the participation of Furundžija in an "integral part of the torture and partake of the purpose behind the torture".

A distinction was drawn between the responsibility of Furundžija for participating in the JCE to commit torture, on the one hand, and for aiding and abetting the outrages upon personal dignity, on the other hand. It was maintained that, for the latter

form of liability to be proven, it suffices to assist "in some way which has the substantial effect on the perpetration of the crime and with knowledge that torture is taking place".

Tadić Case

In the landmark *Tadić* case,[102] the Appeals Chamber made a comprehensive construction of the concept of JCE based on the existence of three types of JCE found in customary law, and spelled out the material and mental elements which make up JCE liability.

The common purpose liability concepts (and particularly JCE III liability) was utilized to hold Duško Tadić responsible for the killing of five men — though he did not himself materially perpetrated the crime — because of his participation in a common plan, and because the deaths were considered natural and foreseeable consequences of the plan.

An understanding of the events which led to the incrimination of *Duško Tadić* may be useful.

> At the time of the events of 1993 which unfolded in the surrounding of the city of Prijedor (Bosnia and Herzegovina), Duško Tadić was President of the Local Board of the Serb Democratic Party in Kozarac (Bosnia and Herzegovina).
>
> During the attack on Kozarac and surrounding areas, Duško Tadić participated in the collection and forced transfer of civilians to detention camps as part of a campaign of ethnical cleansing of the region that Tadić, together with others, had designed.
>
> As part of a group of Serbs, he beat one victim until he was unconscious and stabbed another one. On a different occasion he killed two Muslim policemen in Kozarac. Further, he

[102] *Prosecutor v D Tadić* (Judgement) ICTY-94-1-A, A Ch (15 July 1999).

participated in the killings of five men in a village of Jaskici, near Prijedor.

For his crimes he was convicted for willful killing and causing great suffering or serious injury to body or health, as well as torture or inhuman treatment.

Insofar as liability under JCE III is concerned, the focus of the attention of the judges was to the conviction for the killing of five men in the village of Jaskici. As anticipated, Tadić was held responsible for the deaths of the men, as those deaths were considered a natural and foreseeable consequence to the ethnical cleansing of Prijedor to which Tadić had agreed upon.

The Appeals Chamber characterized Tadić's liability as "committing" under Article 7(1) of the ICTY Statute — as no express provision on JCE was encompassed in the Statute — and did so by relying on customary international law, and arguing that such an interpretation was also consonant with the object and purpose of the Statute and the "inherent characteristic of crimes committed in warlike situations".

The Appeals Chamber went further to demonstrate that three distinct classes of liability under the overarching concept of JCE could be found in precedents. The array of precedent case law would manifest consistent (and sufficient) state practice and *opinio juris* to conclude that JCE — in its three manifestations — was a well-established doctrine of liability under ICL.

In particular, Tadić was convicted under the category of JCE III, i.e. incidental liability. The cases (*Essen Lynching* and *Borkum Island*) cited in support of the existence of customary law, underpinning incidental liability, involved small-scale mob violence situations.

The review of *Essen Lynching* and *Borkum Island* cases showed that — despite the fact that in neither case it could be proven which of the accused gave the fatal blow to the prisoners — all of the

participants to the group mob were held responsible (*even though* not all accused intended the killings) because of their participation in the criminal design of ill-treatment of prisoners which could (foreseeably) lead to their killings.

The Appeals Chamber also reviewed a number of Italian cases dealing with war crimes and, from them, inferred as a mental element "an attenuated form of intent (*dolus eventualis*) or [...] a high degree of carelessness (*culpa*)".

In the *Tadić* case, the judges compared JCE to aiding and abetting and reached the following conclusions:

> (i) Tadić could not be considered *just* an aider and abettor for the killings in Jaskici, as the *accessory* liability, established as a consequence of the characterization of his actions as aiding and abetting, would understate the degree of his criminal responsibility (notably, the ICTY took here the unusual stance to set a hierarchy of forms of liability by holding that liability for JCE is more severe than that for aiding and abetting);
>
> (ii) while the aider and abettor carry out acts that are *specifically directed* to assist, encourage or lend moral support to the perpetration of the underlying crime; for the participant in a JCE to be held liable it is *sufficient* to "somehow" contribute to furthering the common plan or purpose. The deficiency of the material element of the JCE is balanced by the highest level of culpability required, which lies in the participation of the accused (who possibly did not materially perpetrate the crime) in the design and implementation of the common criminal plan;
>
> (iii) with aiding and abetting the principal perpetrator may not even know about the contribution of the accessory aider and abettor; whereas, such a scenario is not conceivable in the JCE, where all participants to the common plan have knowledge of the contribution of the others.

It is important to point out that the characterization of JCE III as "committing" was questioned and later judgments openly distanced themselves from the findings of the Appeals Chamber in *Tadić* and criticized the concept.

JCE at the Leadership Level: Brđanin Case and Krajišnik Case

JCE liability, at first applied to adjudicate small-scale enterprises, evolved over time into a broad doctrine utilized to prove the existence of large enterprises, and hold their participants responsible — leading political figures and high-ranking military officials.

JCE at the leadership level has been characterized by a wider scope both in terms of geography (for instance, in several cases, it covered all territories of the Bosnian-Serb Republic) and time.

Examples of criminal liability for participation in large enterprises at the leadership level include the cases of *Krajišnik, Brđanin, Martić*, and *Šainović et al.*

With the evolution to a mode of liability applied to large enterprises, many requirements of JCE liability became more fluid.[103] For instance, the agreement to participate in the common plan could be inferred from all circumstances surrounding the commission of the crime.[104]

The presence of the members of the JCE at the time and place of physical perpetration of the offences was not deemed necessary.[105]

It was held that, despite the fact that the plan must involve the commission of a crime, the contribution of a participant to a

[103] E van Sliedregt, op. cit. at note 15 *supra*, 136–141.
[104] *Vasiljević* Appeal, see note 95 *supra*, para. 109; *Stakić* Appeal, see note 66 *supra*, para. 64. At the ICTR, see *Prosecutor v Ntakirutimana et al*. (Judgement) ICTR-96-10-A and ICTR-96-17-A, A Ch (13 December 2004) para. 466.
[105] *Prosecutor v Kvočka et al.* (Judgement) ICTY-98-30/1-A, A Ch (28 February 2005), para. 276.

JCE could be non-criminal, and yet give rise to criminal liability insofar as her/his acts contribute to achieving the common criminal objective.[106]

A common plan, was said, can be "fluid" in that crimes originally not included in the design of the plan may be later on added, and the members of the JCE shall respond for them as well, as long as the members of the JCE were aware of the additional crimes being committed but nevertheless did nothing to stop the perpetration.[107]

Brđanin Case[108]

Radoslav Brđanin was alleged to have taken part in JCE I, where all participants belonged to the leadership level (i.e. were members of the Serbian Democratic Party, amongst whom, Karadžić), members of the army of the Republika Srpška and members of paramilitary forces.

According to the prosecutor's construction, the purpose of the JCE was the implementation of a "strategic plan" to create a separate Bosnian State in the autonomous region of Krajina, from which non-Serbs would be removed. The accomplishment of the objectives of such a strategic plan would be pursued through the commission of crimes against humanity and war crimes.

Brđanin was found guilty of a series of crimes (*inter alia*, willful killing, torture, deportation; inhumane acts, persecutions), yet he was found liable not under JCE, but as an aider and abettor.

Despite the characterization of *Brđanin*'s responsibility as an aider and abettor, the Appeals Chambers made the

[106] *Prosecutor v Krajišnik* (Judgement) ICTY-00-39-A, A Ch (17 March 2009), para. 218.
[107] *Prosecutor v Krajišnik* (Judgement) ICTY-00-39-T, T Ch (27 September 2006), para. 1098.
[108] *Prosecutor v Brđanin* (Judgement) ICTY-99-36-T, T Ch (1 September 2004) and (Judgement) ICTY-99-36-A, A Ch (3 April 2007).

following findings concerning liability under JCE in its ruling:

(i) The appeal judges (overturning the finding of the Trial Chamber) found that the principal perpetrator need *not* be a member of the JCE, for the actual members of the JCE to be held accountable of the crime (perpetrated by the former). What matters is whether the crime carried out by the non-member forms part of the common purpose of the JCE *and* the perpetrator can be linked to at least one member of the JCE. Further, with respect to JCE III, the Appeals Chamber maintained that liability of the accused A (member of JCE) could be triggered when accused B (another member of JCE) used non-members to carry out crimes *insofar as* accused B has the requisite intent, *and* as long as it was foreseeable for accused A that such a crime might be perpetrated by another member of JCE (through non-member perpetrators), and, in spite of that, accused A willingly took the risk.

(ii) In contrast with the Trial Chamber judges' conclusion, the Appeals Chamber found that the additional requirement of the agreement (said by the lower judges to be necessary and yet missing in the case at hand) was not necessary. What suffices is the proof of a shared *mens rea*.

(iii) In terms of *mens rea*, it was held that JCE III is governed by principles of derivative liability that do not require proof of full intent, as a lower fault degree on the part of the participants would in fact suffice.

(iv) The appeals judges maintained that the tribunal's jurisprudence, in line with Second World War jurisprudence, did not support the assertion that JCE only applies to small-scale enterprise. Liability under JCE may in fact subsist regardless of the scope of the plan, which can either be narrow or broad.

Krajišnik Case

In the *Krajišnik* case,[109] it was held that a JCE existed throughout the territories of the Bosnian-Serb Republic, and a centrally-based core component of the group included Krajišnik, Karadžić, and other Bosnian-Serb leaders.

The common plan of the JCE was to modify the ethnical composition of the territories of the Bosnian-Serb Republic, by drastically reducing the proportion of Bosnian Muslims and Bosnian Croats through expulsion by way of deportation and forced transfer. To achieve its objective, the JCE escalated its means over time and started to perpetrate crimes of persecution, as well as murder and extermination on a vast-scale.

The ICTY Appeals Chamber concluded that Momčilo Krajišnik's participation in the JCE lied in his contribution to the establishment of the political structures that were instrumental to the commission of the crimes.

Together with the other participants to the JCE, *Krajišnik* planned and set in motion the mass detention and expulsion of civilians. He knew that, while expulsions were carried out, crimes against humanity would be committed; nevertheless, he intended to accomplish the plan's objective (to expel the Muslim and Croat populations) and did not intervene to stop the crimes.

Therefore, he was found guilty of commission of the crimes of persecution on political, racial or religious grounds, deportation and inhumane acts for the forced transfer of civilians, *through* his participation in a JCE.

The Trial Chamber described a number of principles on liability under JCE:

[109] *Prosecutor v Krajišnik* (Judgement) ICTY-00-39-T, T Ch (27 September 2006), and (Judgement) ICTY-00-39-A, A Ch (17 March 2009).

(i) The circumstance that one or more principal perpetrators were not aware of the JCE — or did not share the common objective — does not preclude a finding that the JCE committed crimes *through* those principal perpetrators. For the responsibility of JCE members to arise, it is sufficient that the perpetrator(s)' conducts were procured by (one or more) members of the JCE in the implementation of the common objective.

(ii) The members of the JCE are responsible for the expansion of the original plan — as to include the commission of additional crimes — when it is proven that they were informed of the new types of crimes committed, with the *aim* of implementing the original plan, and — nevertheless — they took no effective measures to prevent the occurrence of such crimes, and persisted in the implementation of the common objective. With their (in) actions, the members of the JCE showed that they intended the expansion of means and shall thus be held responsible for the additional crimes committed for the purpose of achieving the common objective.

JCE Doctrine in ICC and Other International Tribunals' Statutes and Case Law

The theory of JCE has, to date, had a limited influence in the practice of other international and hybrid courts and tribunals.

Article 25(3)(d) of the ICC Statute regulates the mode of liability as follows:

(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;

The mental element was described to be found in the first part of the provision, which stipulates that participants must have a "common purpose", that it is to say, they must have intent. In addition, the acts committed shall either be made with the mental element of "intention" to further the criminal activity or with the *mens rea* of "knowledge" of the intention of the group.[110]

The material element set by the ICC reportedly lies in the existence of an "agreement or common plan among two or more persons", which must involve "an element of criminality", although it "does not need to be specifically directed at the commission of a crime".[111] The contribution can either take the form of material assistance or moral assistance.[112]

In the *Katanga* case, the court maintained that the contribution made to the commission or attempted commission of a crime by a group acting with a common purpose must be "significant", i.e. "of a nature to influence the commission of the crime", explaining that conduct that had no effect or impact on the commission of the crime could consequently not be considered sufficient and to constitute a contribution in the sense of Article 25(3)(c) of the Statute.[113]

Despite the above, the judges held that the commission of the crime need not depend or be conditional upon the contribution. The

[110] A Cassese, *The Proper Limits of Individual Responsibility,* op. cit. at note 94 *supra* at 355.
[111] *Prosecutor v Mbarushimana*, (Decision on the Confirmation of Charges) ICC-01/04-01/10-465-Red, P-T Ch I (16 December 2011), para. 271.
[112] *Prosecutor v Katanga* (Judgment) ICC-01/04-01/07, T Ch II (7 March 2014), para. 1635.
[113] *Katanga*, *id*, paras. 1620 and 1632.

contribution can thus be considered significant if it has an influence on the occurrence of the crime, the manner of its commission, or both.[114]

The ICTR applied the theory of JCE in several judgements, including *Ntakirutimana et al.*,[115] *Kayishema et al.*,[116] *Rwamakuba*,[117] and *Simba.*[118]

The SCSL, whose Statute is modelled on that of the *Ad Hoc* Tribunals, and which was inspired by the jurisprudence of the ICTY, embraced the doctrine of JCE in its judgments.

Part II. Command/Superior Responsibility

Definition and Historical Overview

Command or superior responsibility is seen as an inculpatory doctrine specific to ICL which postulates liability for individuals in the position of leadership for the criminal conducts of their underlings.

As JCE, it is notably an international law construct which does not find an equivalent general principle of liability in national systems.[119]

This type of liability is described as a failure of commanders or superiors to "prevent" or "punish" the commission of international crimes by their subordinates. It should be noted from the outset

[114] *Katanga*, *id*, para. 1633.
[115] *Prosecutor v Ntakirutimana et al.* (Judgement) ICTR-96-10-T, T Ch (21 February 2003).
[116] *Prosecutor v Kayishema et al.* (Judgement) ICTR-95-1-A, A Ch (1 June 2001).
[117] *Prosecutor v Rwamakuba* (Decision on Appeal regarding Joint Criminal Enterprise) ICTR-98-44-A72.4, A Ch (22 October 2004).
[118] *Prosecutor v Simba* (Judgement) ICTR-2001-76-A, A Ch (27 November 2007).
[119] G Mettraux*, The Law of Command Responsibility* (1st edn, Oxford University Press 2009) 43 et seq.

that the nature of this type of command/superior responsibility is subject to debate among ICL practitioners.[120]

Command/Superior responsibility is the primary instrument to hold commanders (i.e. military leaders) and superiors (non-military leaders, i.e. political and civilian leaders) accountable for their failure to prevent or punish international crimes committed by subordinates.

As an articulation of military practice, command responsibility has ancient origin. In the military sphere, the responsibility of military commanders stems from their failure to properly discharge their duties, including exerting control on their subordinates.[121]

The conceptualization as a liability principle appeared for the first time in the writings of the philosopher Hugo Grotius, in his *De Iure Belli ac Pacis* of 1625. Grotius maintained the existence of a general principle of law which imposes a superior who knows of a crime to act in order to prevent it, and concluded that, in case the superior fails to do so, "he himself commits a crime".[122]

It was after the Second World War that the theory of command responsibility has been developed and applied in international courts. The landmark case, which marks the recognition of command responsibility as an inculpatory doctrine, is *Yamashita* before the IMT Tokyo (1945).

Yamashita was a military commander in the Japanese Army whose troops, stationing in the Philippines, were alleged to be responsible for killing, torturing and raping civilians. Yamashita was found by a US military commission criminally liable for

[120] For an overview, see E van Sliedregt, op. cit. at note 15 *supra*, at 195; R Cryer et al, op. cit. at note 33 *supra*, at 393.
[121] MR Damaška, "The Shadow Side of Command Responsibility" (2001) 49 American Journal of Comparative Law 469.
[122] H Grotius, *De Iure Belli ac Pacis* (1625).

having failed to perform his duties to control his subordinates, which resulted in permitting his subordinates to perpetrate war crimes.

The first time that command responsibility was included in a legal document was in 1977, in the Additional Protocol I to the Geneva Conventions — Articles 86[123] and 87.[124]

Liability attached to command responsibility was envisioned in most statutes of international and hybrid courts and tribunals, as, for example, Article 7(3) of the ICTY Statute and Article 6(3) of the ICTR Statute; Article 6(3) of the SCSL Statute; Article 29 of the ECCC Statute.

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[123] Art. 86 — 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.

[124] Art. 87 — Duty of commanders

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 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.

The ICTY in the *Čelebići* case[125] issued the first extensively reasoned decision on command responsibility after the cases adjudicated before the IMTs.

The following paragraphs will describe the evolution of the theory through the ICTY case law.

Command/Superior Responsibility in ICTY Case Law

Three different classes of cases addressing command/superior responsibility can be identified along the development of the notion in the ICTY jurisprudence: the early cases, concerning the responsibility of the commander for crimes committed in detention camps, inaugurated by the *Čelebići* ruling, which traced command responsibility back to customary law.

The second group of cases, representing an evolution of the early cases, dealt with "successor superior responsibility", and emerged with the *Hadžihasanović* case.[126]

The third class of cases — the most recent one — has broadened the scope of command responsibility by loosening the command-superior relationship. The main cases are *Blagojević*[127] and *Orić*.[128]

The Čelebići Case: Command Responsibility Under Customary Law

The *Čelebići* case *(Prosecutor v Mucić et al.)* deals with international crimes committed in the Čelebići detention camp in 1992. Among the others, the commander of the camp Zdravko Mucić was found guilty for crimes committed by his subordinates (Delić and Landzo) by virtue of his role as *de facto* commander of the

[125] *Mucić* Trial (*Čelebići* case), see note 61 *supra*.
[126] *Prosecutor v Hadžihasanović and Kubura* (Judgement) ICTY-01-47-A, A Ch (22 April 2008).
[127] *Prosecutor v Blagojević and Jokić* (Judgement) ICTY-02-60-A, A Ch (9 May 2007).
[128] *Orić* Appeal, see note 62 *supra*.

camp. The notion of command responsibility, and its constitutive elements, were traced back to customary law.

The main facts of the case may be described as follows:

> The Čelebići prison camp was established by Bosnian Muslim and Bosnian Croat forces in mid-1992 and located in central Bosnia and Herzegovina. The Serb population detained at the Čelebići prison camp was subject to killing, torture, sexual assaults, beatings, and other cruel and inhuman treatment.
>
> Delić and Landžo, in their respective positions as a deputy commander and a guard at the camp, were found guilty — on the basis of individual criminal responsibility — of being personally responsible for their direct participation in the crimes committed against detainees, such as, *inter alia*, willful killings and causing great suffering or serious injury; torture; inhuman treatment amounting to grave breaches of the Geneva Conventions.
>
> Mucić, as the *de facto* commander of the camp, was found guilty for crimes committed by his subordinates, on the basis of superior criminal responsibility (Article 7(3) of the Statute of the Tribunal).

The Trial Chamber in *Čelebići* spelled out the three requirements that should be met to give rise to command responsibility under customary law.

The three elements which need to be proven have been described by judges as:

> (i) the existence of a **superior-subordinate relationship**;
>
> (ii) the mental element — that the **superior knew or had reason to know** that the subordinate was about to commit, or had committed, a crime;

> (iii) the **failure**, on the part of the superior, to take the necessary and reasonable measures **to prevent** the violation of international criminal law **or to punish** the perpetrator thereof.[129]

Superior-Subordinate Relationship

The existence of a superior-subordinate relationship has been described as established through the "effective control test".

Effective control has been defined as the "*material* ability to prevent or punish criminal conduct" [emphasis added] by someone who "by virtue of his position, [is] senior in some sort of formal or informal hierarchy to the perpetrator".[130]

Mental Element

The mental element has been described by the Trial Chamber in the *Čelebići* case as follows:

> A superior may possess the *mens rea* for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Articles 2 through 5 of the Statute, or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.[131]

The responsibility of superiors was described in the *Čelebići* case as arising only if either one of the described states of mind

[129] *Mucić* case (*Čelebići* case), see note 61 *supra*, para. 344.
[130] *Prosecutor v Mucić et al.* (Judgement) ICTY-96-21-A, A Ch (20 February 2001), paras. 256, 303. See also G Mettraux, see op. cit. at note 119 *supra,* Chapter 9.
[131] *Mucić* case (*Čelebići* case), see note 61 *supra*, para. 383.

is present: the superior had "actual knowledge", or "had reason to know" that certain offences were committed, or about to be committed.

The Trial Chamber in the *Čelebići* case said that, to establish the "actual knowledge", direct proof is not needed, circumstantial evidence may suffice, including the number, type and scope of illegal acts, as well as the time during which the illegal acts occurred; whether the occurrence of the acts is widespread; the *modus operandi* of a similar illegal act; the location of the commander at the time of the crimes.

As for the "had reason to know" standard, the Trial Chamber explained again that the criterion merely requires proof that the accused had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates. As the Trial Chamber further clarified, in this case, such information does not need to provide specific details about unlawful acts committed or about to be committed by subordinates.

Failure to Take Measures Either to Prevent or Punish

It was said by judges in the *Čelebići* case that superiors can be held criminally liable for their failure to take measures to address criminal acts of their subordinates in two distinct set of circumstances: either before the commission of the crime — *in order to* prevent such commission or after the commission — *in order* to punish the material perpetrators.

The two types of liability are separate as one is attached to a pre-crime scenario, whereby the commander/superior *knew* or had reason to know and nonetheless failed to act, i.e. prevent; and the other one is attached to a post-crime scenario, whereby the commander/superior did not know of crimes being committed but — *once informed* — failed to act, i.e. punish those responsible.

Measures to Prevent

In subsequent judgements, the ICTY elaborated on the scope of the measures that a commander is meant to take, provided that he has knowledge or foresight that a crime is to be committed.

Different measures have been described as expected from commanders, depending first and foremost on the nature of the control exercised on the subordinates. Therefore, the assessment shall be conducted on a case-by-case basis.

The ICTY Trial Chamber in *Orić* spelled out a number of guiding principles to assess whether a commander/superior failed to take the necessary measures:

> (i) the kind and extent of measures to be taken **depend on the degree of effective control** over the conduct of subordinates at the time a superior is expected to act;
>
> (ii) a superior must undertake **all measures** which are **necessary and reasonable** to prevent subordinates from planning, preparing or executing the prospective crime;
>
> (iii) the more grievous and/or imminent the potential crimes of subordinates appear to be, **the more attentive and quicker** the superior is expected to react;
>
> (iv) since a superior is only bound to undertake what appears appropriate under the given conditions, he or she is "**not obliged to do the impossible**".

Measures to Punish

According to the jurisprudence, the duty to punish is triggered (only) by the reasonable and substantiated suspect, on the part of the commander, that a crime has been perpetrated. In order to establish the facts with a sufficient degree of certainty, a commander/superior seems to have an obligation to investigate.

As decided by the ICTY Trial Chamber in *Orić*, "[s]ince the duty to punish aims at preventing future crimes of subordinates, a superior's responsibility may also arise from his or her failure to create or sustain, amongst the persons under his or her control, an environment of discipline and respect for the law".[132]

The Hadžihasanović Case: Successor Superior Responsibility

The key issue in the *Hadžihasanović* case was determining whether criminal liability for failure to punish crimes under the doctrine of superior responsibility also arises for "successor superior", i.e. for superiors that were *not* in effective control at the time of the commission of the crimes (because they only subsequently took up their role), and nevertheless once assumed control and informed of the crimes, failed to punish the perpetrators.

As we shall see, as a result of the ruling in the *Hadžihasanović* case, the ICTY limited the scope of command responsibility as it concluded that it did not extend to successor superiors.

> As far as successor superior responsibility is concerned, the relevant facts of the case revolve around the assumption of the function of military commander (i.e. Commander of the 7th Muslim Mountain Brigade of the Army of Bosnia and Herzegovina (ABiH)) by Amir Kubura on 1 April 1992.
>
> In the course of 1992–1994, ABiH forces allegedly plundered and destroyed Bosnian Croat and Bosnian Serb property with no military justification.
>
> Crimes were committed not only after Kubura started exercising effective control on his subordinates, but also before he took up the role of commander.

[132] *Prosecutor v Orić* (Judgement) ICTY-03-68-T, T Ch (30 June 2006), para. 336.

> The question before the ICTY Chambers was whether Kubura could be considered criminally liable for his failure to punish his subordinates who perpetrated crimes *before* he took over as commander.

On the issue of the liability of successor superiors, the Appeals Chamber was divided and, in the end, reached the conclusion in this particular case that for criminal liability to arise, the relationship superior-subordinates shall exist *at the time of the offence*, for both cases of pre-crime responsibility for failure to prevent *and* post-crime responsibility for failure to punish.

It should be noted that the decision was not supported by the minority of the Appeals Chamber on the ground, *inter alia,* that it reached conclusions contrary to Article 86(2) of the Additional Protocol I which — was argued — envisions a general obligation for superiors in possession of information, to punish the perpetrators, without requiring "temporal coincidence" to the effect that successor superiors are exempted from their obligation *because* were not in control at the time of the perpetration.

Further, it was held that criminal responsibility of the superior shall be regarded as a separate form of responsibility — for omission, for not having punished — distinct from that of the perpetrator (for having committed the crime). As such, liability stems from the breach of the duty to act, which is triggered *when* the superior enters in possession of information indicating the commission of crimes. The circumstance that the offence occurred *before* the superior started exercising effective control on the perpetrators, shall not have a bearing in establishing superior responsibility, according to the reading of the minority.[133]

[133] *Prosecutor v Hadžihasanović et al.* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility**)** ICTY-01-47-AR72, A Ch (16 July 2003), Separate and Partially Dissenting Opinion of Judge David Hunt, para. 9.

The Blagojević and Orić Cases: Broadening the Scope of Command Responsibility

While the *Hadžhiasanović* case, to some extent, limited the scope of command responsibility, the *Blagojević* and *Orić* cases arguably broadened it, to the effect of opening up to liability based on *multiple* superior responsibility.

The effect of broadening the scope of command responsibility was obtained through the expansion of the notion of commission (in *Blagojević)* and the loosening of the superior-subordinate relationship (in *Orić*).

Given the centrality of the *Orić* case in the development of ICTY jurisprudence on command responsibility, a brief overview of the events may be useful to understand the Trial Chamber's findings on *multiple* superior responsibility:

> Naser Orić was the Senior Commander of Bosnian Muslim forces in municipalities in eastern Bosnia and Herzegovina, including Srebrenica, from 1992 until the fall of the Srebrenica enclave in 1995. By virtue of his position and authority as Commander, Naser Orić demonstrated both *de jure* and *de facto* command and control in military matters and exercised effective control over his subordinates.
>
> The Trial Chamber examined, *inter alia,* Naser Orić's criminal responsibility for his subordinates' acts in respect of four attacks, where Bosnian Muslim fighters and civilians committed acts of wanton destruction not justified by military necessity. However, no evidence was found to identify those perpetrators, who remained "anonymous".
>
> While the Trial Chamber found that Naser Orić exercised effective control over his own subordinates, i.e. the fighting group from Potočari (a village near Srebrenica), it did not find enough evidence that Naser Orić in fact exercised effective

control over the various groups of fighters who participated in the four attacks. Such groups of fighters were not found to be part of an organized army with a fully functioning command structure, they were just local groups relatively independent and voluntary. In addition to those groups of fighters, a "mass of uncontrollable civilians" was found to be present at every attack.

The Trial Chamber concluded that in respect of all four attacks, Naser Orić could not be held criminally responsible for his subordinates' acts of wanton destruction of cities, towns, or villages.

The Interpretation of "Commission"

In the *Blagojević* case, it was held that "commission" under Article 7(3) of the ICTY Statute — i.e. commission of a crime by a perpetrator linked to a superior by a superior-subordinate relationship, for which crime the superior can be held liable — shall encompass all modes of participation listed under Article 7(1) of the ICTY Statute.

The conviction of Orić by the Trial Chamber — for the failure of his subordinate Krdzić to prevent murders and cruel treatment in Srebrenica — was described as to militate in favour of the possibility to establishing "superior responsibility for superior responsibility", which means the possibility to establish liability on the basis of *multiple* superior responsibility.

The Appeals Chamber later overturned the conviction of Orić, yet *not* on ground that "superior responsibility for superior responsibility" was inconceivable. On the contrary, the appellate judges recognized the abstract possibility of a remote link between the superior A and the perpetrator Z (with multiple intermediary subordinates in between).

In the judges' view, what matters is exclusively the effective control of the superior A, which manifests itself in his material ability

to prevent the crimes or punish the perpetrator Z (irrespective of the existence of intermediary subordinates).

The Link Superior-Subordinate

In the *Orić* case, it was maintained that the direct perpetrator does *not* need to be a subordinate of the superior.

According to the Trial Chamber's Judgement, what is needed is that the "relevant *subordinates*, by their own act of omission, be criminally responsible for the acts and omissions of the direct *perpetrators*" [emphasis added].

To understand the introduction of the distinction between "relevant subordinates" and "direct perpetrator", the facts of the *Orić* case should be recalled. Orić was accused of crimes committed by "anonymous" persons (the direct perpetrators of the above passage of the Trial Judgement) *because* the criminal acts of those anonymous perpetrator triggered responsibility of Orić *actual* subordinates.

The criminal liability of Orić subordinates — stemming from their failure to prevent/punish actions committed by anonymous perpetrators — would have given rise (in the prosecutor's construction) to Orić liability because he exercised effective control over his subordinates.

Although the judgement was reversed in appeal, the novel interpretation of the relationship superior-subordinates-material perpetrator was not put into question.

Hence, it was maintained that — for a superior to be held liable for crimes committed by anonymous perpetrators — the following elements sufficed in the *Orić* case:

(i) the material perpetrators shall be identified (at least) by their affiliation to a group/unit;

(ii) the superior must exercise an effective control over his subordinates;

(iii) the subordinates, in turn, must be legally responsible for the crimes committed by the material perpetrators.

Command/Superior Responsibility in ICC Case Law

The Statute of the ICC defines command responsibility as a "ground of criminal responsibility".

The provision of Article 28 "Responsibility of commanders and other superiors" is quite articulated:

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.

Notable differences between ICC and ICTY provisions and jurisprudence, clear at the first reading of ICC legal text, are:

(i) the provision of a fourth requirement to establish superior liability (in addition to the superior-subordinate relationship, *mens rea* and failure to take measures), i.e. *causation*;

(ii) the different liability established for the military commander and (non-military) superior.

The Fourth Element: Causation

According to the literature and jurisprudence, causation could logically apply only to the pre-crime scenario — to the superior's failure to act beforehand to avoid the commission of crimes. The causal link should thus establish what a superior could have prevented (i.e. which crimes he could have avoided), *had* he intervened.

In the *Bemba* case, the PTC held that the proof required to satisfy the causal link requirement to trigger command responsibility

is that the commander's omission had "increased the risk" of the commission of the crimes.

Liability for Military Commander and Non-Military Superior

Article 28 of the ICC Statute is composed of two parts: paragraph (a) which refers to the liability of military commanders and paragraph (b) addressing non-military superiors' liability.

While the standard set out by Article 28 for a civilian superior is "knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes", that for a military commander is "knew or, owing to the circumstances at the time, *should have known* that the forces were committing or about to commit such crimes" (emphasis added).

It has been questioned whether both the distinction and the higher *mens rea* set for civilian superiors are consistent with customary law.

In *Bemba,* the PTC recognized the possibility to use the indicators developed by the ICTY to meet the (more cumbersome) "should have known" criterion. The PTC stated that:

> The Chamber is mindful of the fact that the "had reason to know" criterion embodied in the statutes of the ICTR, ICTY and SCSL sets a different standard to the "should have known" standard under Article 28 (a) of the Statute. However, despite such a difference, which the Chamber does not deem necessary to address in the present decision, the criteria or indicia developed by the *Ad Hoc* Tribunals to meet the standard of "had reason to know" may also be useful when applying the "should have known" requirement. Moreover, the factors referred to above in relation to the determination of actual knowledge are also relevant in the Chamber's final assessment of whether a superior "should have known" of the

> commission of the crimes or the risk of their occurrence. In this respect, the suspect may be considered to have known, if inter alia, and depending on the circumstances of each case: (i) he had general information to put him on notice of crimes committed by subordinates or of the possibility of occurrence of the unlawful acts; and (ii) such available information was sufficient to justify further inquiry or investigation. The Chamber also believes that failure to punish past crimes committed by the same group of subordinates may be an indication of future risk.[134]

The Nature of Liability for Command/Superior Responsibility

The ICC Statute characterizes command responsibility as a form of liability for the underlying offences, as Article 28 suggests: "[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 [...]".

The ICTY has mainly supported a similar view.

However, the matter is not settled as different positions have been put forward along the line that command/superior responsibility should be treated as a different and separate type of responsibility.

As above mentioned, in several cases (*Halilović*, *Krnojelac* and, only the minority, in *Hadžhasanović* and *Orić*) the judges took the view that command responsibility is not a liability for the underlying offences but stems from a separate offence, i.e. the failure to carry out the superior's duty to exercise control.

[134] *Prosecutor v Bemba* (Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08, P-T Ch (15 June 2009), para. 434.

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LECTURE 4:

Grounds for Excluding International Criminal Responsibility

Introduction

"Grounds for excluding criminal responsibility" is the terminology used by the ICC Statute to indicate "defenses" or "justifications and excuses."

As we shall see, the subject of this lecture has played a marginal role in the practice of international and hybrid tribunals and Article 31 of the ICC Statute represents the first attempt to deal with the matter in a systematic way.

After sketching out the main differences between common law and civil law traditions *vis-à-vis* defenses (paragraph 1), the general content of Articles 31 "Grounds for excluding criminal responsibility" and 32 "Error of facts and law" will be presented (paragraph 2).

The analysis of each ground for excluding criminal responsibility will follow, namely: mental incapacity, intoxication, self-defense, duress, mistakes of law and fact.

We will also discuss the defense of superior orders, which has been raised more than any other (paragraph 4). A historical overview of the defense of superior orders across the past century and until the present days will be followed by an introduction to the two main approaches of "absolute" and "conditional" liability.

The lecture will conclude with a section on Immunity (paragraph 5).

Despite the fact that immunity is not a substantive defense excluding criminal responsibility but *just* a bar to prosecution, it

appears nevertheless interesting to briefly discuss the topic because of the affinity with defenses — as both have the practical effect of avoiding punishment — and because of the intersection and tension between ICL and the law of immunity.

Grounds for Excluding Criminal Responsibility in the ICC Statute

Preliminary Remarks

"Grounds for excluding criminal responsibility" are the term used in the ICC Statute to indicate what in common law systems is usually defined as "defenses" and in civil law systems is usually called "justifications" and "excuses" — being justifications conduct lawful *per se*, and excuses conduct which — albeit wrong — cannot be blamed on the agent.

On a more technical level, dealing with the subject is difficult because of the differences existing between common law and civil law concepts.

In common law systems, "defenses" are considered as an umbrella term which comprises both substantive and procedural bars to prosecution.

On the opposite side of the spectrum, in most civil law systems, there is a divide between substantive reasons for excluding responsibility and procedural bars to prosecution, which stems from the strict separation between substantive elements of the crime and procedural requirements for its prosecution.[135]

Additionally, as far as substantive grounds for excluding criminal responsibility are concerned, most civil law systems make a further distinction between "justifications", which postulate that conducts which contain the material elements of certain crimes

[135] See E van Sliedregt, op. cit. at note 15 *supra*, 215.

are, nonetheless, lawful, "given the circumstances" (e.g. reacting in self-defense); and "excuses", which remove the blameworthiness of certain acts (otherwise considered criminal) because the defendant ought not to be blamed for her/his actions in that particular context (e.g. because she/he act out of necessity). Notably, in this latter case, the conduct of the defendant is not lawful *per se*, as in the former case, but is *just* deemed not to be culpable.

According to the literature, the distinction between "justifications" and "excuses" seems to lie in the distinction between what is not wrong "at inception" (in the above example, the reaction in self-defense) and what (albeit wrong) cannot be blamed on the person, after consideration of all circumstances (in the above example, the person acting due to necessity).

Articles 31 and 32 of the ICC Statute

The first attempt to deal with the subject of defenses/justifications and excuses in a systematic way can be found in the ICC Statute, under Articles 31 "Grounds for excluding criminal responsibility" and 32 "Mistake of fact or mistake of law". Article 31 of the ICC Statute reads as follows:

> 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.

As mentioned above, the provisions were said to be the outcome of extensive negotiations between delegates at the Conference in Rome and, essentially, represent a compromise between common law and civil law traditions.

The flexibility left to the judges in assessing defenses is reiterated in Article 31(2) which provides "[T]he Court shall *determine the applicability* of the grounds for excluding criminal responsibility provided for in this Statute to the case before it" (emphasis added).

The grounds for excluding criminal responsibility listed in Article 31 of the ICC Statute are: mental incapacity, intoxication, self-defense, duress and necessity. Article 32 of the ICC Statute addresses mistakes of law and fact.

We will now discuss each ground for excluding criminal responsibility in turn.

Mental Incapacity

Article 31(1)(a) of the ICC Statute provides:

> [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
>
> […]

Often called in common law systems defense of insanity, this is the first codification of the principle of mental incapacity in international law.

A few general principles are embedded in Article 31(1)(a) of the ICC Statute.

Article 31(1)(a) of the ICC Statute describes three states of mind which exclude criminal liability, namely:

(i) when a person is unable to understand the very *nature* of her/his conduct;

(ii) when a person is incapable of understanding the *unlawfulness* of her/his conduct;

(iii) when a person, albeit capable of understanding the nature and unlawfulness of her/his conduct, is nonetheless unable to stop acting due to an "irresistible impulse" stemming from a mental disease.

International Case Law on Mental Incapacity

There are a few instances in legal history where the defense of mental incapacity was invoked.

The first recorded acknowledgment that such a defense exists in ICL was before the IMT of Nuremberg, where the judges denied the accused (Rudolf Hess) the possibility to rely on insanity defense as they concluded that there were no suggestions that the defendant was not "completely sane when the acts charged against him were committed".[136]

The ICTY addressed mental incapacity in the *Čelebići* case, where it clarified that the defense of diminished mental responsibility

[136] L Friedman (ed), *The Law of War: A Documentary History* (1st edn, Greenwood Publishing Group 1972) 971-972.

in Rule 67(A)(ii)(b) of the ICTY RPE was not a "defense" strictly speaking, as it did not eliminate criminal liability, but could only provide a mitigation in sentencing.

The Appeals Chamber in *Čelebići* further drew a distinction between, on the one hand, the ICC provision recognizing mental incapacity as a ground for excluding criminal responsibility, yet setting a high standard by requiring the destruction of the defendant's capacity; and, on the other hand, the ICTY which set a lower standard, but in the case of diminished mental responsibility only accorded a mitigation of sentence, as it did not recognize mental incapacity as a ground for excluding liability.

In case the defendant wants to rely on diminished mental responsibility, according to the ICTY Appeals Chamber in *Čelebići*, she/he must establish that condition on the base of a "balance of probabilities" test, i.e. the defendant must establish that "more probably than not such a condition existed at the relevant time".

Intoxication

Article 31(1)(b) of the ICC Statute provides:

> [A] person shall not be criminally responsible if, at the time of that person's conduct:
>
> […]
>
> (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;
>
> […]

Departing from the ICTY's position, the ICC Statute also provides a defense in case of *voluntary* intoxication, where the person did not realize she/he might be engaged in conducts prohibited by the Statute.

International Case Law on Intoxication

The defense of intoxication has played quite a limited role in ICL. However, past and present-day conflicts reveal that committing crimes under intoxication is not such a remote scenario.

During the Second World War, many of those forced to work in concentration camps were given intoxicants to enable them to commit war crimes while in a shadowed state of mind. In more recent years, intoxication has sadly become a matter of attention because of the employment of child soldiers, who are said to be often given drugs to alter their perception of reality and enable them to commit atrocities.

Before the ICTY, in only one case a defendant resort to the defense of intoxication (in the *Kvočka* case) and the Trial Chamber clarified that involuntary intoxication could, at best, act as a mitigating circumstance but never as a complete defense. In the same case, the judges considered voluntary intoxication as an aggravating circumstance.

Self-Defense

Article 31(1)(c) of the ICC Statute provides:

> [A] person shall not be criminally responsible if, at the time of that person's conduct:
>
> […]
>
> (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;
>
> […]

Before analyzing the provision, a preliminary remark seems useful to correctly define the scope of self-defense in the context of ICL.

Turning to Article 31(1)(c) of the ICC Statute, the provision envisions the possibility of committing virtually criminal acts, not only in order to assure (the person's/other persons') survival, but also, in case of war crime, to defend "property […] essential for the survival of the person […] or property which is essential for accomplishing a military mission". This expansion has been critically welcomed by many commentators, who fear this provision can open up to abuses.[137]

Two essential conditions shall be met for a successful defense of self-defense: the response shall be towards an "imminent and unlawful use of force" and the response shall be reasonable and proportionate.

International Case law on Self-Defense

Before the IMT of Nuremberg, self-defense was not considered as an autonomous ground for excluding criminal responsibility of individuals. Indeed, a notion akin to self-defense was framed in the *Krupp* case as necessity.

[137] A Cassese, "The Rome Statute of the International Criminal Court: Some Preliminary Reflections" (1999) 10 European Journal of International Law 144, 154–155.

Despite its absence in the case law of IMTs, a number of prosecutions following the Second World War recognized self-defense as a ground for excluding criminal liability (e.g. in the *Willi Tressmann and others* case).[138]

The *Ad Hoc* Tribunals did not envision self-defense in their Statutes. Nevertheless, in the *Kordić and Čerkez* case, the ICTY Trial Chamber stated that self-defense finds its origin in customary law. In particular, the judges recognized that "defenses", in general, form part of the general principles of ICL and that self-defense specifically is enshrined in most criminal codes and "may be regarded as constituting a rule of customary international law".[139]

Duress

Article 31(1)(d) of the ICC Statute provides:

> [A] person shall not be criminally responsible if, at the time of that person's conduct:
>
> […]
>
> (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

[138] British Military Court in Hamburg, 1–24 September 1947, UNWCC vol. XV, at 177.
[139] *Kordić and Čerkez* Trial, see note 82 *supra*, paras. 449, 451.

> (ii) Constituted by other circumstances beyond that person's control.
>
> […]

Not all conducts performed under alleged duress give rise to defense, but only conducts which comply with two requirements: i) are performed under an imminent threat beyond the control of the accused, and ii) constitute a reasonable and proportionate response.

In regards to the threat, it should be directed to life or limb and be imminent and real (not just believed as existent by the defendant).[140]

The circumstance that the threat must be outside the control of the person can be read as to exclude defense in case the individual has put herself/himself in a situation where coercion was likely to occur, with the aim of committing international crimes. An example has been identified in literature in that of a person who knowingly (and willingly) joined a criminal group notorious for its violence and actions aimed at perpetrating war crimes.[141]

In regards to the second element — that the conduct constitutes a necessary and reasonable reaction — it firstly presupposes answering whether a reasonable person would have given in to the threat, and committed the crime as a consequence.

It has been noted that a test similar (but not identical) to that of proportionality — used for self-defense — could be used for duress; in particular, to answer the question "whether a reasonable person would have given in to the threat". It has also been suggested that the test be tailored on a person with a level of experience/qualification similar to that of the defendant.[142]

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[140] G Werle and F Jessberger, op. cit. at note 93 *supra*, 241. See also R Cryer et al, op. cit. at note 33 *supra*, 407.
[141] R Cryer et al, *id*, 408.
[142] R Cryer et al, *ibid*.

International Case Law on Duress

The defense of duress was extensively discussed by the IMT of Nuremberg which, as a matter of principle, recognized that the "restriction of freedom of will or choice" could constitute a defense.

In a number of trials, the IMT was confronted with the question whether (on a general level) the duress caused by the Nazi regime was of such nature and intensity to left no choice but to act in accordance with orders; and (on a more specific level) to inquire whether in the particular case the defendant had actually been exposed to coercion.

In IMT's judgments, the "moral choice test" was introduced — according to the test, the defense for duress is applicable if no moral choice was in fact possible.

In the words of the IMT: "that a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense [...] The true test, which is found in varying degrees in the criminal law of most nations, is not existence of the order, but whether a moral choice was in fact possible".[143]

The Nuremberg jurisprudence shows that only a life-threatening danger or, alternatively, an imminent, real, and inevitable threat were considered valid causes of duress.

In the famous *IG Farben* case, it was held that the defendant could not rely on defense of duress when the defendant himself was responsible for the existence (or execution) of an order or plan to commit a crime. That is to say, that is not admissible that a person is a victim of coercion if she/he was "in charge" with respect to the events that led to the commission of an international crime. Similarly, in the *Krupp* case, it was denied the defense of duress to

[143] Comment to Nuremberg principle IV, in the *Report of the International Law Commission to the General Assembly*, in Yearbook of the International Law Commission, 1950, vol. II, para. 105.

an accused who had actively, and willingly, participated in criminal acts as it was held that "the will of the accused [was] not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates".

One additional principle was set by the IMT of Nuremberg, deciding the *Einsatzgruppen* case — that duress can never constitute a valid defense in case of mass killing of civilians.

As one critical voice at the time noted, despite the reality of the atrocities committed by the *Einsatzgruppen* (which were established with the sole purpose of liquidating all opposition to National Socialism by way of mass killings), the soldiers belonging to those groups were under a constant threat of counter martial and firing squad in case of refusal to carry out the order to kill civilians. Based on that reflection, the commentator questioned whether the Tribunal rightly applied the core principle of criminal law that a person shall be punished only "if he has acted with a guilty mind".[144]

A landmark case, dealing with duress, is the trial of *Eichmann* before the Israeli Supreme Court. Confronted with the defense of duress, pleaded by Eichmann, the judges, after elucidating that such a defense could never be invoked for war crimes and crimes against humanity, further argued that — even in case the defense was applicable — the accused should have demonstrated not only that the danger of his life was imminent and he was left with no choice but to comply with orders, but also that he committed criminal acts *in order to* save his life. On the latter requirement, the Court stressed that, far from perpetrating atrocities with the sole purpose of saving his life, Eichmann's actions demonstrated that he consistently executed his tasks with a firm belief in the ultimate goal of extermination.

The ICTY dealt with duress in the *Erdemović* case — the defendant participated in a mass killing in connection to the events

[144] *Einsatzgruppen* case, TWC, vol. IV, 465.

of Srebrenica; he invoked the defense of duress, claiming he had been forced to participate in the killings. The Appeals Chamber in reaching his conclusion (by majority) heavily relied on the Nuremberg jurisprudence. The judges concluded that, in spite of the fact that a defense of duress does exist in international law, it did not apply to cases of killing of civilians. In addition, in a much-contested passage of the judgement, it was held that customary international law did not envision defense of duress in case of war crimes and crimes against humanity.

In the end, the defense of duress was not considered in *Erdemović* as a complete defense, but as a circumstance mitigating punishment.

Mistakes of Law and Fact

Article 32 of the ICC Statute "Mistake of fact or mistake of law" provides:

> 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.

Regarding mistake of facts, the provision seems to be strict in establishing that it constitutes a valid defense only when it affects the *mens rea*.

International Case law on Mistake

In a number of prosecutions following the Second World War, the defense of mistake of fact and law was raised.

A famous example is the *Almelo* case, where the accused invoked a mistake of fact. The three defendants were charged, *inter alia,* for having killed a British prisoner of war, without trial. They were acquitted on the ground that they lacked the *mens rea* due to an error of fact — they mistakenly believed that they were carrying out a lawful execution when they killed the British prisoner. The judges accepted the defense that "the circumstances were such that a reasonable man might have believed that this officer [the victim] had been tried according to law, and that they were carrying out a proper judicial legal execution".

Another case is the *Scuttle U-Boats* case, in which the defense based on the mistake of law was addressed. The judges accepted the defense that the accused (a German officer) scuttled British submarines because he did not know that Germany had surrendered, and thus believed he was executing legitimate orders.

Coming to present days, the *Ad Hoc* Tribunals did not explicitly recognize mistake of fact and law in their Statute and the defense — based on lack of *mens rea* due to mistake — was never raised.

Before the ICC, the defense of ignorance of the law has been invoked in one case, to date. In the *Lubanga* case, the defendant claimed he did not know that enlisting child soldiers under the age of fifteen triggered criminal responsibility. The Trial Chamber did not accept the defense, as it held that there was substantial ground to believe that Lubanga was aware that he was committing criminal acts by recruiting child soldiers.

Superior Orders

Introduction

The defense of superior orders has been raised more than any other during war trials by soldiers pleading not guilty of committing

atrocities on the ground that they were obeying orders given by superiors.[145]

The dilemma of a soldier who found himself in between the duty to obey military orders to commit international crimes and the risk of punishment if he refused to perform that course of action is troublesome and disquieting. It can become a dramatic choice when the soldier is under the risk of being punished with his own life (note that, in such a case, superior orders are combined with duress).

Given the moral questions involved, and the serious consequences stemming from the defense of superior orders, it is not surprising that the subject has attracted great attention and produced debate and controversy among scholars since an early stage of ICL.

In the following paragraphs, a brief historical overview of the defense of superior orders across the past century and until the present days will be followed by an introduction to the two main approaches of "absolute" liability and "conditional" liability.

Paragraphs 2.4 will discuss Article 33 of the ICC Statute "Superior orders and prescription of law", which represents the first codification of the defense of superior orders in an international legal instrument.

To conclude, a selection of case law dealing with the defense of superior order is intended to give a better insight into the different positions taken by international tribunals, engaged with the challenge of ascertain the scope of this controversial defense.

[145] P Gaeta, "The Defence of Superior Orders: the Statute of the International Criminal Court versus Customary International Law" in A Cassese et al (eds) *International Criminal Law* (3rd edn, Roultledge 2015), 574.

Historical Overview

The evolution of the debate on superior orders reveals several phases.

Originally, and till approximately the beginning of the twentieth century, the predominant idea was that a subordinate was always exempted from criminal responsibility, for the reason that he was regarded as a mere instrument at the disposal of superiors. According to this doctrine, called "*respondeat superior*" theory, the superior is the one who must bear criminal responsibility for the acts of his underlings.[146]

The second stage, starting from the beginning of the twentieth century and lasting until after the First World War, sees the emergence of the idea that an order "protects" a soldier only if it is not manifestly unlawful. This approach has been termed "conditional liability".

The tendency changed, once again, with the Nuremberg prosecutions where a more radical stance was followed by the judges — that an order shall not free a soldier from responsibility but may be considered in mitigating the punishment. This position is called "absolute liability".

Coming to present days, while the ICTY has basically followed the position of IMT of Nuremberg, the ICC chose a different approach.

Conditional Liability and Absolute Liability

Before examining the provision on superior orders contained in the ICC Statute, it is worth discussing in some more details the two main approaches above mentioned: "absolute liability", followed by the ICTY, and "conditional liability", adopted by the ICC.

[146] L Oppenheim, *International Law, vol. II: War and Neutrality* (2nd edn, Longmans, Green and Company 1912) 264 et seq.

In general terms, while the conditional liability approach is mainly adopted by national systems, the absolute liability is predominant in international law, at least up until the ICC Statute.

The **absolute liability** approach, as we have seen, originated in Nuremberg, was taken up by the ICTY and — as far as national systems are concerned — is currently adopted by a few states, including the United Kingdom for example.

This approach considers that obedience to the order can *never* be a defense and can, at best, serve to mitigate the punishment. The underpinning is that a soldier is not just a mere instrument in the hand of a superior but a reasoning agent, able to discern if an order is illegal — and *therefore* not binding — and to make the choice not to carry out such an order. If he performs criminal acts, even though in compliance with superior orders, he is liable for punishment along with his superior.

The **conditional liability** approach has been adopted by the ICC and is currently followed by the majority of national legislations.

The conditional liability approach propounds an opposite view *vis-à-vis* the absolute liability approach — the plea of the superior order is, *as a general rule*, a complete defense save under two circumstances: 1) the subordinate knew, or should have known, that the order was illegal, or 2) the illegality of the order was manifest.

In addition, a subordinate can be acquitted — even if its actions fall under the above cases 1 and 2 — if he "honestly" and "in good faith" believed he *had* to obey the illegal orders.

Superior Orders in the ICC Statute

Article 33 of the ICC Statute "Superior orders and prescription of law" provides:

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.

The Three Cumulative Conditions

Regarding the obligation to obey, the person is supposed to be under a **legal obligation to obey** an order which must have existed at the time the subordinate committed the crime. The term "legal" refers to both national law and international law.

Regarding the **knowledge**, on the part of the accused, that the order was unlawful, the theory developed on the mistake of law defense shall be used to determine whether this condition is fulfilled. In case the person knew that the order was unlawful, she/he cannot invoke the defense of a superior order. However, any concrete decision will always depend on the determination of judges.

As for the circumstance that the **order must be not manifestly unlawful,** the person shall have made a *forgivable* error of judgement for the defense to be successfully invoked.

As for any test containing a subjective element, here the interpreter is also faced with the question of what could be considered "manifest". The knowledge of what is *manifestly* illegal in fact may differ from one person to the other, depending on training, experience, education.

Additionally, it has often been said that soldiers in the midst of the battlefield are not in the best position to discern what is manifestly illegal. On the other hand, this argument shall not serve as an excuse to commit atrocities with the cover of superior orders. In this regard, since the *Eichmann* case, there have been attempts to grab the essence of "manifestly unlawful orders" to circumscribe them. In the *Eichmann* case, the judges encapsulated the concept of "manifestly unlawful order" in the following evocative description "'manifestly unlawful order' should fly like a black flag above the order given [...] [n]ot formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only to the eyes of legal expert, but a flagrant and manifest breach of the law".

Subsequent judgements have described manifestly unlawful order as order "criminal on its face" or "so outrageous as to be manifestly unlawful".

Manifest Illegality of Genocide and Crimes Against Humanity

The final part of Article 33 envisions an absolute exclusion of the defense of a superior order in case of order to commit genocide and crimes against humanity, as those crimes are manifestly unlawful *per se*.

International Case Law on Superior Orders

Among the first international precedents of defense of superior orders[147] are the cases of *Llandovery Castle*[148] and *Dover Castle*[149] after the First World War, where it was held:

> The subordinate obeying such an order is liable to punishment if it was known to him that the order of the superior involved

[147] For an overview, E van Sliedregt, op. cit. at note 15 *supra,* 287 et seq.
[148] *Llandovery Castle* case, 16 July 1921, in 16(4) American Journal of International Law 708 (1922), 721–723.
[149] *Dover Castle* case*,* 4 June 1921, in 16(4) American Journal of International Law 708 (1922), 706–708.

> the infringement of civil or military law. […] It is certainly to be urged in favor 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 also the accused, to be without any doubt whatever against the law.

A number of prosecutions before the IMTs of Nuremberg dealt with — and rejected — the defense of superior orders, under the strict absolute liability approach. Whether the shift from the conditional to the absolute approach mirrored a general shift in that direction on the part of the majority of states is highly questionable.

It has been suggested that the adoption of the strictest approach — absolute denial of the possibility to plead superior orders — stemmed from the magnitude and nature of the crimes committed during the Second World War, rather than from the unanimous tendency to reject the conditional liability rule.

In support of that, documents of the UN War Crimes Commission (established after the Second World War) acknowledged the principle of limited liability in case of superior orders and concluded that there was a general recognition among the nations that the plea of a superior order is 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".[150]

Nevertheless, both IMTs of Nuremberg and Tokyo were adamant in adopting an absolute approach towards defenses based on superior orders.

The divide between supports of opposite views remained after the IMTs concluded their functions. Hence, it was impossible

[150] *1948 History of the United Nations War Crimes Commission and the Development of the Laws of War* (UNWCC 1948) 98.

to reach an agreement on defense of superior orders both in the Genocide Convention, and in the Geneva Conventions and Additional Protocols.

The ICTY and ICTR Statutes followed the IMT's absolute liability approach and excluded that a superior order could *ever* constitute a full defense. The relevant provisions (Articles 7 and 6 of the ICTY and ICTR Statutes, respectively), in their last paragraphs, stipulate:

> 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.

Given such a strict approach, only one case before the ICTY addressed a superior order. In the *Erdemović* case, the defendant raised the defense of a superior order which was, in fact, a plea of duress, and was treated as such by the judges.

It is worth recalling that, in *Erdemović,* the judges took the opportunity to clarify the tribunal's position on the matter of superior orders. It was maintained that, although the tribunal does not provide for a full defense for a superior order, it may consider it as a mitigating factor, *especially* in consideration of the low rank of the accused (Erdemović was a soldier of the Bosnian Serb army). Furthermore, the judges pointed out that a plea of a superior order will never be successful if the accused carried out the order sharing the intent and objective behind it.

Bar to Prosecution: Immunity

Introduction

Immunity is *not* a substantive defense which excludes responsibility for the person's "virtually criminal" acts, it does not eliminate individual criminal responsibility.

Rather, immunity prevents from bringing proceedings against the alleged offender.[151]

The person who commits international crimes — while enjoying immunity from prosecution — *remains* criminally liable although her/his actions cannot be adjudicated before a court of law, either temporarily or permanently.

Immunity functions as a procedural bar to prosecution, based on the status and functions of the state officials concerned; it does not serve the purpose to eliminate culpability and blameworthiness for criminal acts committed by a person entitled to immunity.

As a procedural bar, immunities may be waived by the state concerned — if that happens, the alleged offender will respond to the accusations in court.

The Discussion

Having clarified that immunity is different from defense, it seems nevertheless interesting to briefly discuss the topic because of the affinity with defenses — as both have the effect of avoiding punishment — and because of the intersection and tension between ICL and the law of immunity.

In short, the contentious issue lies in that immunities have often had the effect of shielding persons bearing enormous criminal responsibility for international crimes from prosecution.

While commentators have argued that international priorities are shifting in favour of justice for international crimes, and ICL is gaining ground *vis-à-vis* the law of immunities, the interplay between the two areas of international law is still highly controversial.

[151] On immunity generally, see M Evans, *International Law* (5th edn, Oxford University Press 2018), Chapter 12.

On the one hand, the provision in Article 27 of the ICC Statute — which stipulates that immunity does not exempt an accused from criminal responsibility and does not bar the Court from exercising its jurisdiction over such a person — militates in favor of the reading that ICL is trying to supersede the law of immunity when international crimes are at stake.

It should not be forgotten that, along this line, the ICTY affirmed that no functional immunity (i.e. immunity of state's representative) could be enjoyed by persons accused of having committed genocide, crimes against humanity, and war crimes.[152]

To find a balance between the goals of immunity and the goals of international criminal justice, two main ways have been suggested: declaring that functional immunity shall not extend to cover international crimes (see the *Pinochet* case, below) and establishing international tribunals authorized to set aside personal immunity of heads of state (see the *Taylor* case, below).

Both methods have encountered opposition on the part of many states which, arguably, still consider the doctrine of immunity as predominant.

In the following paragraphs, two major cases dealing with immunity will be introduced — the case of Pinochet, adjudicated by a national Court (the British House of Lords), and the case of Taylor, before an international Tribunal (the SCSL).

Both cases are interesting because of the important findings of the judges on the point of law of the interplay between the law of immunity (and particularly, immunity of heads of States) and individual criminal responsibility for international crimes. Before presenting the two cases, the notion of functional and personal

[152] *Prosecutor v Blaškić* (Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997), ICTY-95-14, A Ch (29 October 1997), para. 41.

immunity will be introduced to get a better understanding of the scope of the discussions.

Functional and Personal Immunity

Functional immunity protects those acting on behalf of the state (thus a large class of individuals) *only* for conduct carried out in the discharge of their duty. The protection provided by the immunity lasts for as long as the person occupies the position as an official of the State *and* after she/he left such a post.

The rationale for functional immunity is protecting the sovereignty and equality of states which would be affected by allowing one state to pass judgements on the other states *by way* of prosecuting its officials.

Personal immunity is rooted in the necessity of facilitating international relations. It provides absolute protection from prosecution for *all* acts, i.e. those performed in private capacity and those performed in official capacity.

It is accorded to a small set of individuals — heads of state and heads of government, diplomats, and, more contentiously, ministers and other high representatives of the State.[153]

The Case of Pinochet Before British Courts

Augusto Pinochet was the head of State of Chile from 1973 until 1990. During such period of time, crimes against humanity were committed by state officials under the direction of the central government. Pinochet was charged with torture and conspiracy to commit torture by a Spanish court which issued a request for his extradition to the United Kingdom, where Pinochet was at the time the arrest warrant against him was issued by the Spanish authorities.

[153] P Gaeta, "Head of State Immunity as a Bar to Arrest" in RH Steinberg (ed), *Contemporary issues facing the International Criminal Court* (1st edn, Brill Nijhoff 2016) 84 et seq.; see also H Fox and P Webb, *The Law of State Immunity* (1st edn, Oxford University Press 2013) 544 et seq.

Pinochet applied to have the arrest warrant quashed on the ground that he enjoyed immunity as a former head of State. The British judges of the Divisional Court quashed the warrant as, they concluded, Pinochet was still entitled to functional immunity for acts performed as head of state, which were — in the judges' view — precisely the acts for which his arrest was sought.[154]

The House of Lords overturned the conclusions of the lower Divisional Court and accepted the arguments that immunity cannot cover serious international crimes, hence the immunity of the (former) head of state did not prevent extradition for torture. The underpinning of the reasoning was that the commission of international crimes cannot be regarded as "official functions" and, all the more so, cannot be "the function" of a head of state.[155]

Several differing interpretations of the legal basis for the decision were put forward by the House of Lords' judges in their separate opinions.

In addition to the above rationale that international crimes can never constitute official functions, it was held that acts which are *per se* criminal "could not rank for immunity purposes as performance of an official function".

On the interplay between ICL and the law of immunity, one of the judges affirmed that, where international crimes are concerned, the principle behind immunity, that one state cannot judge another, cannot prevail. Along the same line, it was maintained that obligations under customary law concerning cases of serious international law are "so strong to override any objection [...] on the ground of immunity", especially *ius cogens* crimes (such as torture) perpetrated on a large scale.

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[154] *Re Pinochet Ugarte* [1998] All ER (D) 629, QB.

[155] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No.3) [1999] 2 All ER 97, HL.

The Case of Taylor Before the SCSL

Charles Taylor was President of Liberia from 1997 until 2003. During his term in office, Taylor was accused of war crimes and crimes against humanity as a result of his involvement in the Sierra Leone Civil War.

In 2003, when he was still President of Liberia, the SCSL issued an arrest warrant against him. Taylor contended that he was entitled to absolute immunity as a sitting head of state and therefore the arrest could not be executed.

The SCSL issued a decision in 2004, maintaining that — as an international court — it was not barred from prosecuting serving the head of State. The Court drew from the arguments spelled out in the Pinochet sentence, to reach the conclusion that immunity is simply not applicable before international tribunals.[156]

It is worth recalling that the SCSL is not a fully-fledged international tribunal but a hybrid one. To infer its international nature, the SCSL resorted to the argument that the court was created by an agreement between the UN and Sierra Leone, which had imprinted an international character to the judicial institution.

The legal basis for the decision — that the international nature of the Court renders immunity inoperative before the court — was heavily criticized. In particular, the SCSL argument that the Court is not an organ of any State, and therefore there is no reason for immunity to be invoked, was said to miss the point of immunity. The immunity of the head of State has been described as having the purpose to protect international relations *in general*, by precluding *any* interference with a high representative of the State. According to this view, it should not be easily set aside by claiming that the Tribunal is not a State. However, one point made in the decision can

[156] *Prosecutor v Taylor* (Decision on Immunity from Jurisdiction) SCSL-2003-01-I, A Ch (31 May 2004), paras. 51–53.

counter (at least in part) the above argument — it was held that the collective nature of judgments rendered by international tribunals, together with their limited jurisdiction, would reduce "the potential destabilizing effect of unilateral judgment in this area".[157]

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[157] *Id*. para. 51.

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LECTURE 5:

Future Challenges: Individual Criminal Responsibility and Technology, Corporate Criminal Liability for International Crimes

Introduction

Lecture 5 features some new challenges that ICL legal practitioners could be facing in the coming years in relation to individual criminal responsibility.

Part I deals with the important questions that the use of technology poses when it comes to determining criminal liability for acts committed by autonomous drones (paragraph 1), as well as establishing individual criminal responsibility for cyberattacks (paragraph 2) and cyber-aggression.

The contentious issues stemming from the possible future use of autonomous weapons systems (at present not fully developed yet) — including the alleged accountability gap — will be analyzed. The application of the modes of liability of "direct responsibility" and "command responsibility" for commanders employing drones in the situation of armed conflicts will be explored.

Individual criminal responsibility for cyberattacks will also be tackled very briefly under the two angles of direct liability and command responsibility. In particular, three types of scenarios *vis-à-vis* command responsibility for cyberattacks will be presented: 1) cyber units integrated into the army; 2) anonymous hackers, *linked* to the commander's subordinates; and 3) anonymous hackers *not* linked to the army.

An introduction will present the relevant statutory provisions and case law (paragraph 1).

After sketching out the debate on (possible) corporate criminal liability (paragraph 2), a famous case of prosecution of business leaders, the *Farben* case, will be presented together with the connected *Zyklon-B* case (paragraph 3). To conclude, more recent pronouncements on individual criminal responsibility for business activities will shed some light on the ongoing attempts to hold individuals responsible for their business activities (paragraph 4).

Part I. Individual Criminal Responsibility and the Use of Technology

Individual Criminal Responsibility and Autonomous Drones

Definition

Unmanned aerial vehicles, commonly known as drones, are aircrafts without a human pilot on board. A drone is a component of an unmanned aircraft system, which includes the drone itself, a ground-based controller, and a system of communications between the two. The flight of a drone may operate with various degrees of autonomy: either under remote control by a human operator or autonomously by on-board computers.[158]

While they originated mostly in military applications, their use has expanded to civil purposes such as, *inter alia,* commercial, scientific, policing, and surveillance purposes.

According to the definition of the US Department of Defense, three different types of drones can be employed in the military field: "human-supervised", "semi-autonomous" and "autonomous"

[158] International Civil Aviation Organization, Circular n. 328 AN/190, *Unmanned Aircraft Systems (UAS).*

weapon systems.[159] While in the first two categories of "human-supervised" and "semi-autonomous" weapons systems, the control over the drones is retained by humans — either because they are designed to provide human operators with the ability to intervene and terminate engagements ("human-supervised"), or because they are intended to only engage individual targets or specific target groups that have been selected by a human operator ("semi-autonomous") — "autonomous" weapons systems, once activated, are no longer under human control.

Once launched, an autonomous weapon system could select and engage targets without further intervention by a human operator. Although it would still be possible for the operator to override operation of the weapon system, the fully autonomous weapon system could, in principle, select and engage targets without further human input after activation.

A very important caveat is needed at this point — at present, as far as we are aware, no weapon system possesses such capabilities to be considered as fully autonomous.

Autonomous weapons systems, also known as killer robots or lethal autonomous weapon systems,[160] have been said that one day might be able to "learn or adapt [their] functioning in response to changing circumstances in the environment in which [they are] deployed".[161] Through processors or artificial intelligence, they

[159] US Department of Defense, *Directive 3000.09: Autonomy in Weapon Systems*, 21 November 2012, <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/300009p.pdf>.

[160] To get a better understanding of the concerns surrounding the development of autonomous weapons systems, see the website of the campaign "*Stop Killer Robots*" <https://www.stopkillerrobots.org/>, supported by a coalition of non-governmental organizations (NGOs) working to ban fully autonomous weapons; see also Human Rights Watch, *Mind the Gap — The Lack of Accountability for Killer Robots*, April 2015 <https://www.hrw.org/report/2015/04/09/mind-gap/lack-accountability-killer-robots>.

[161] International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, October 2011, 39.

would "'decide[…]' how to respond" and through effectors they would "carry out those 'decisions'".[162]

Despite the fact that fully autonomous weapon systems do not yet seem to be a reality, they might be soon, as large investments have been made by a number of States to develop such technologies.

These autonomous weapons systems raise a number of fundamental questions *vis-à-vis* individual criminal responsibility. The heart of the matter lies in that robots of this kind — endowed with artificial intelligence — would possess the ability to select and engage their targets *without* human control. If this happen, how can individuals be held liable for criminal acts committed by machines which tantamount to international crimes?

This hypothetical and *in abstracto* accountability gap that *fully* autonomous systems might generate will be the focus of the following paragraphs.

The Discussion

As we know, crimes consist of two elements: a criminal act, i.e. the sum of the material elements proscribed by a norm of criminal law (*actus reus*), and a certain mental state, which must accompany the commission of criminal acts to establish criminal liability (*mens rea).*

It has been described that fully autonomous weapons could probably commit criminal acts, for example, directing attacks against civilians.

But, what about the mental element that shall necessarily accompany an action, for such an action to be considered culpable, and thus give rise to criminal liability?[163]

[162] UN Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/23/47 (9 April 2013), para. 39.

[163] For on overview of the problem of drones and responsibility from a legal, philosophical and sociotechnical perspective, see E Di Nucci and F Santoni de Sio, "Drones and Responsibility — Mapping the field" in E Di Nucci and F Santoni de Sio (eds), *Drones and Responsibility* (1st edn, Routledge 2016).

As machines — arguably lacking moral agency and independent intentionality, as well as culpability for their acts — how could fully autonomous weapons be regarded as possessing the mental state required to make these wrongful actions crimes?

If — unlike humans — robots could not be considered as legally responsible, where shall we look to find alternatives to establish criminal liability? Perhaps, to the programmer or the commander, or to someone else?

Yet, this line of reasoning begs the question — in terms of *mens rea*, is it even hypothetically possible to impose criminal punishment upon the programmer or commander who might not specifically intend, or even foresee, the robot's commission of wrongful acts?

It seems that there will hardly be a straightforward answer.

For example, we can foresee cases of future criminal acts committed by autonomous weapons systems, in the following hypothetical situation: an autonomous drone — programmed to elaborate data and adapt to changing circumstances — makes a wrong decision (for instance, firing at an unlawful target, e.g. a hospital), apparently without any direct input by human entities, besides the data originally implanted in the machine and, later on, combined by the robot to become "something new", "something" which triggered the commission of the virtually criminal conduct.

Intuitively, we would say that *someone* must be held responsible for criminal acts committed by autonomous drones, such as, in the above example, bombing a hospital. It is at least from the judgment of the Nuremberg Tribunal that the international community have indeed embraced the principle by which "Crimes against international law are committed by *men*, *not by abstract entities*, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" (emphasis added).

On the other hand, identifying exactly who to hold responsible, and how, is very challenging.

To solve this legal (and moral) conundrum, it has been suggested to look at the problem from two different perspectives: direct commission liability and the superior/command responsibility.[164] Those hypothetical scenarios have been described in the literature and those who are specifically interested in this issue are suggested to read the references listed below.

Application of the Theory on Modes of Liability to the Use of Autonomous Drones

It has been described that during armed conflict, two types of individual criminal responsibility may arise when combatants and/or their commanders violate provisions of HIL/ICL, to the effect of committing international crimes: direct responsibility and command responsibility.

In general terms, direct responsibility arises from an individual's acts or omissions which result in the violations of norms of IHL or ICL. The individual's conduct can take the form of commission, planning, ordering, aiding and abetting, or attempt.

In regards to "command" (or "superior") responsibility, we have seen that it emanates from the failure of military commanders (or civilian superiors) to perform their duty to prevent their subordinates from committing international crimes and/or the failure to fulfil the obligation to punish the perpetrators, who are under the commander's effective control.

Direct Responsibility for Commission

Two situations where individual criminal responsibilities for direct commission might accrue to a commander are foreseeable.

[164] D Saxon, "Autonomous Drones and Individual Criminal Responsibility" in E Di Nucci and F Santoni de Sio, *Drones and Responsibility,* op. cit. at note 163 *supra,* 26.

First, if a commander intentionally employs an autonomous drone in circumstances where the system's capabilities for IHL/ICL compliance are inadequate (e.g. one could hypothetically think that drones may be programmed to fire missiles in a densely populated urban area), it has been argued that the commander may hypothetically be found culpable for the commission of war crimes, perpetrated by the machines. [165]

Yet, proving the *mens rea* of the commander might nonetheless be challenging. One advantage of the sophisticated technology of autonomous weapons systems has been identified in that the systems can be designed to leave an electronic "footprint" of important decisions.[166]

The second, and much more complex scenario, arises when the field commander correctly selects and programs the autonomous drone (to only hit legal targets) and yet the weapon ends up breaching norms of IHL/ICL where, for instance, aims at killing civilians instead of combatants.[167] It is worth recalling that this could be technically possible where the entity is able to select and engage targets autonomously.

In this situation, if any criminal intent on the part of the commander is absent, how could he/she be found culpable and, therefore, criminally liable?

Indirect Command Responsibility

When crimes are committed by autonomous weapons systems, the theory of command responsibility may also be considered as appropriate if it would be possible to think to hold commanders accountable.

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[165] *Ibid*.

[166] M Sassoli, "Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified" (2014) 90 International Law Studies 308, 316, 338.

[167] D Saxon, op. cit. at note 164 *supra*, 27.

As we know, command responsibility holds the superior accountable for dereliction of duty, i.e. for omission on the part of the commander to either prevent or punish the perpetration of crimes by his/her underlings, provided that the commander exercises effective control on them.

Two sets of circumstances, under which a commander could be held liable for superior responsibility, have been envisaged: 1) if the commander knew, or had reason to know that his/her *subordinates* were misusing autonomous weapons to commit crimes and failed to prevent or punish them;[168] 2) if the *robots* themselves commit or had committed crimes.[169]

The first situation has been deemed not substantially different from any other case in which a subordinate perpetrates a crime, relying on certain technical means to commit it.

However, regarding the requirement of the superior's knowledge, it has been pointed out that the vast amount of data produced by the machines, and the fast processing speed, could make it difficult for a commander to get a clear understanding of the reality of the battle space. It has been noted that modern technology could sometimes lead to a paradoxical situation whereby the large amounts of data — meant to assist humans in making better reasoned and informed decisions — may in practice overwhelm the person making the decision, and thus actually increase the fog of war.[170]

Questions have been raised as to what may constitute sufficiently alarming information triggering the duty of further inquiry in case of robots?

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[168] For this hypothetical scenario, see D Saxon, op. cit. at note 164 *supra,* 31–34.
[169] For this hypothetical scenario, see the Report of Human Rights Watch, op. cit. at note 160 *supra*, 20 et seq.
[170] Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (1st edn, Cambridge University Press 2010) 139.

Robots are inherently different from humans, hence categories applying to humans appear not to fit machines. For example, in the case of humans, certain past conducts would suggest a predisposition to commit crimes.

Would the same hold through for machines? Would the knowledge of past unlawful acts committed by one robot provide notice of risk for commanders? If so, only for that particular robot, or for all robots of that model, or for all robots with similar programming?

Would knowledge of one type of past unlawful act be enough to trigger a notice of the risk of other similar types of unlawful acts? For example, would one past indiscriminate attack imply that the machine is *just* unable to distinguish targets, or would it imply that it is *also* unable to apply the principle of proportionality, the principle of necessity or all principles of IHL *vis-à-vis* the conduct of hostilities?

In general terms, would fully autonomous weapons be predictable enough to enable the commanders to assess whether there is, in fact, a situation that should put him/her on notice?

Individual Criminal Responsibility for Cyberattacks

Definitions

Among illegal cyber-operations — i.e. criminal activities taking place in the cyberspace — we can distinguish several different forms: cyberattacks, cyberwarfare, cybercrimes, cyberespionage, and cyberterrorism.

The distinctive element of **cyberattacks** is the potential to destroy the information network and, importantly, to produce effects *external* to the computer.

Cybercrime is a more lenient form of illegal cyber-operations. It is said to be perpetrated by private individuals and — though

it may well have a transnational dimension — national systems have jurisdiction to adjudicate cybercrimes under their criminal law.

Cyberespionage is characterized by a motivation to discover sensitive information rather than cause harm; it can be conducted by an individual or a group and the goal is normally pecuniary gain or strategic military advantage.

Cyberterrorism is intended to influence an audience or force a government, through threats and violence, to take a certain course of action. Cyberterrorists use the malicious tools available in cyberspace as weapons against cyber and real-world targets.

The Problem

Identifying the perpetrator(s) in case of cyberattacks may prove particularly challenging, *inter alia,* because of their diffuse and distributed nature, uncertainty surrounding the *locus delicti,* deployment of mechanisms (e.g. malware that mutates automatically) which makes identifications and attribution very complex.[171]

Direct Liability for Cyberattacks

Establishing criminal liability for **commission** is described in the literature as the simplest mode of criminal liability to prove as it suffices to demonstrate that the accused participated physically, or otherwise directly, in the commission of the crime, by performing acts or omissions with the relevant *mens rea*. However, in case of cyberattacks, the problem of identifying the attacker and proving his/her mental element can turn out to be very difficult. The individual in question may well have developed adaptive malware which learns how to mutate to avoid traceability,

[171] E van Sliedregt, "Command Responsibility and Cyberattacks" (2016) 21(3) Journal of Conflict & Security Law 505, 505 et seq.

to the effect that it might be very challenging to trace the attack back to the hacker.[172]

Command Responsibility for Cyberattacks

Three types of scenarios *vis-à-vis* command responsibility have been envisaged in the literature in case of cyberattacks leading to the commission of war crimes:[173] 1) where cyber-units are integrated into the army; 2) where the hackers remain anonymous *but* there is a link between the commander's subordinates and the hackers; 3) where the hackers are anonymous, and there is *no link* between the commander's subordinates and the hackers. Those who are specifically interested in this issue are suggested to read the references listed below.

Individual Criminal Responsibility for Cyber-Aggression

Crime of Aggression (Article 8 bis of the Rome Statute)

Article 8 *bis* of the Rome Statute defining the crime of aggression reads as follows:

> 1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
>
> 2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the

[172] D Saxon, "Violations of International Humanitarian Law by Non-State Actors during Cyberwarfare: Challenges for Investigations and Prosecutions" (2016) 21(3) Journal of Conflict & Security Law 555, 568-72 et seq.
[173] E van Sliedregt, op. cit. at 171 *supra*, 516 et seq.

United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The jurisdiction of the ICC for the crime of aggression has not been triggered yet. Therefore, any discussion on the particular point of cyber-aggression would be only speculative.

Advanced reading references are included below and recommended for reading.

The Discussion

The IMT of Nuremberg formulated the "shape of influence" criterion, by which the accused who have the power to influence the State policy were considered as members of the leadership circle. This interpretation has been deemed too broad by the Special Working Group on the Crime of Aggression (SWGCA), which concluded that too many state officials would fall under such description. It preferred, instead, the effective control paradigm for its potential to better determine the persons *effectively* occupying a leadership position.

Before the IMT of Nuremberg, economic and business leaders were defined as those with "high position in the financial, industrial or economic life" and, thanks to the "shape of influence" criterion, they were considered to belong to the leadership level.

In spite of the fact that it was clearly affirmed that business leaders made themselves parties to Hitler's plan of aggressive war (in the *IG Farben* and *Krupp* cases), the acquittal of all defendants demonstrates the difficulties to attach criminal liability to those not formally members of a (criminal) regime.

Leadership Clause and Modes of Liability

With respect to the crime of aggression, Article (25)3 *bis* stipulates that the modes of participation described in the same provision "shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State", that is to say that only those in the leadership circle may be called to respond for a crime of aggression.

References

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Part II. Corporate (Criminal) Liability for International Crimes

Introduction

The possibility of establishing criminal responsibility of corporations and corporate business leaders for international crimes is a recurrent theme in legal, political, and sociological debates.

While business leaders have stood trials before domestic and international criminal courts since the *IG Farben* prosecution following the Second World War, criminal responsibility for corporate entities has just started to emerge as a possibility at the international level, with the first-ever provision addressing corporate criminal liability recently laid down in the Statute of the African Court of Justice and Human Rights. Article 46C (1) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human rights (Malabo Protocol) stipulates:

> For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of the State.

With the sole exception of the African Court of Justice and Human Rights, no other international or hybrid tribunal is endowed with jurisdiction over legal persons.

Article 25(1) of the ICC Statute unequivocally declares that the ICC shall have jurisdiction over *natural* persons. An attempt was made during the negotiations of the Rome Statute to include criminal liability of legal persons. The text proposed by France reads as follows:

> Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person under this Statute. Charges

> may be filed by the Prosecutor against a juridical person, and the Court may render a judgement over a judicial person for the crime charged, if:
>
> (a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and
>
> (b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and
>
> (c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and
>
> (d) The natural person has been convicted of the crime charged.
>
> For the purpose of this Statute, "juridical person" means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organization registered, and acting under the national law of a State as a non-profit organization.

As anticipated, the provision was not adopted. Nevertheless, it still serves as a normative framework and important point of reference for discussion on the subject.

It is worth mentioning the STL decisions in the *Al Jadeed* S.A.L. *& Ms Al Khayat* and in the *Akhbar Beirut* S.A.L. *& Mr Al Amin* cases: the Appeals Chamber considered that in exercising its inherent jurisdiction to hold contempt proceedings it has the power to charge a legal person with contempt (the TV Station "Al Jadeed S.A.L" and

newspaper "Akhbar Beirut S.A.L." respectively). This was a first in the history of ICL.[174]

In the following paragraphs, after sketching out the debate on corporate criminal liability, the heavily discussed prosecution of business leaders, the *IG Farben* case, will be presented together with the connected *Zyklon-B* case. Other more recent pronouncements on individual criminal responsibility for business activities will shed some light on the ongoing (few) attempts to hold individuals responsible for their business activities.

The Discussion

Objections of principle and practical difficulties have so far impeded the introduction of criminal corporate liability in the statutes of international criminal judicial institutions.

Among the arguments against corporate liability, the traditional one lies in the notion of *personal* culpability, according to which "*societas delinquere non potest*", as legal persons possess "neither bodies to be punished, nor souls to be condemned".[175]

Pursuant to another, more modern, view, corporate criminal responsibility would represent a form of vicarious — collective — liability, with the (unwanted) effect of holding responsible *all* those having an interest in the corporation, like employees and stakeholders, who may be entirely innocent of the crimes charged.

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[174] *In the case against New T.V. S.A.L. and Karma Mohamed Tahsin Al Khayat* (Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings) STL-14-05/PT/AP/AR126.1, Appeals Panel (2 October 2014); *In the case against Akhbar Beirut* S.A.L. *and Ibrahim Mohamed Ali Al Amin* (Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings) STL-14-06/PT/AP/AR126.1, Appeals Panel (23 January 2015).

[175] As famously held by Edward Thurlow, 1st Baron Thurlow (in J Poynder, *Literary Extract: vol. 1* (1st edn, John Hatchard & Son 1844).

Other commentators warn against the risk that holding corporations responsible could lead to the result that no individuals are found guilty, *but* the abstract entity. Along a similar line, a critical argument highlights the danger that finding the legal persons responsible could lead to commoditization of moral values.

On the opposite side of the spectrum, there are commentators who have endeavored to demonstrate that in cases where business leaders have been convicted on charges of complicity in international crimes, the corporation itself could have qualified for criminal responsibility.

The general foundation of the above theory stems from the idea that corporations are separate entities and not just the sums of the single individuals working for them. The fact that the powers of decision, representation, and knowledge are diffused within a corporation would make it an autonomous entity, able to be held responsible for the consequences of its policy, irrespective of any determination of the blameworthiness of the individual employees.

On a more political level, it has been pointed out that because of the difficulties to link the corporation with atrocities — in particular in view of deficient knowledge — the responsibility of corporations for international crimes has been of marginal interest so far, both in national and international prosecutions. The purported accountability gap stemming from the fact that companies could easily evade (allegations of) complicity in international crimes would, according to this view, encourage companies to pursue lucrative collaboration with business partners, even when doubting their human rights records.

Another doctrine suggests that corporate criminal responsibility is only warranted if there is a correlation between the corporate agents' involvement in international crimes and the corporate policy. The legal basis of corporate criminal liability should thus

be the individual guilt for international crimes — in the form of complicity — of individual business leaders.

One commentator supporting the above theory, drawing upon the famous dictum of the Nuremberg Tribunal, has suggestively written that "[c]rimes against international law *can* be committed by abstract legal entities, provided that they act in tandem with men".[176]

The Origins of Individual Criminal Responsibility for Business Activity Under International Law

After the end of the Second World War, corporate business leaders stood trial before IMTs established by the Allied Forces on charges of complicity in crimes against peace, war crimes and crimes against humanity.

Leaders and executives of the corporations which collaborated with the Nazi Regime — and proved pivotal in sustaining the war efforts — were indicted for i) having provided weapons and raw materials instrumental to the aggressive war (*IG Farben* and *Krupp* cases); ii) having benefited from the illegal confiscations of private and public properties in the occupied countries (*IG Farben* and *Flick* cases);[177] iii) having delivered gas to the concentration camps (*Zyklon* B case); and iv) having exploited concentration camp prisoners and other forced laborers and treated them as slaves in their factories (cases of *Krupp*, *IG Farben*, and *Roechling*).

The factual findings of the judgments demonstrate the existence of a symbiotic relationship between big business activities, attracted by the huge profit pouring from the collaboration with the regime, and the Nazi regime.

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[176] H van der Wilt, "Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities" (2013) 4 Chinese Journal of International Law 43, 77.

[177] *U.S. v Friedrich Flick et al.* (*Flick* case), Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (TWC), vol. VI (Washington, DC: US Government Printing Office, 1949–1953).

Regarding the position of the accused who stood trial, in the *IG Farben* case, as well as in the connected *Flick* and *Zyklon-B* cases, top rank industrialists were involved.

It emerged as an uncontested fact that in the course of the Nazi era, those business leaders forged close ties with the regime. It is proven that their companies made immense profit precisely because they could benefit from spoliation policies and forced labor programs.

The IG Farben Case

The *IG Farben* trial is the first attempt to hold individuals accountable for their business activity under international criminal law.[178]

Although the defendants were eventually acquitted for lack of effective influence over the policy of aggression and lack of knowledge of Hitler's aggressive plan, nevertheless the judgement constitutes a milestone in legal history.

IG Farben was a conglomerate of interest representing leading German manufactures of chemical products. As mentioned, it is an undisputed fact that IG Farben profited from the policy of the Nazi regime during the Third Reich, by providing the regime with fuel, rubber, and explosives, essential to the war machinery.

The alliance between IG Farben and the Nazi Regime was very strong — the trial revealed that the infamous four-year economic plan elaborated by Göring (one of the top Nazi officials) was in fact conceived by the IG Farben. The "IG plan", meant to enable the German army to be ready for action, was also the cause of many war victims, concentration camp prisoners and forced laborers.

[178] *Trial of Carl Krauch and Twenty-Two Others* (*IG Farben* Trial), United States Military Tribunal, Nuremberg, 14th August 1947–29th July 1948, Law Reports of Trials of War Criminals (UNWCC), vol. X (His Majesty's Stationary Office 1949).

The capitulation of the Nazi Regime marked the end of IG Farben. Soon after the fall of the Reich and the establishment of the IMTs, the trial against IG Farben began.

The indictment indicated all members of the top management as accused persons.

IG Farben executives were described by the prosecutor as "generals in grey suits", who had used IG Farben to commit heinous criminal acts. On the other hand, the defendants described themselves as *just* businessmen, who lived and worked under a regime that had forced them to participate in crimes which they were not even aware of and thus definitely not culpable for.

Of the 23 accused, 13 were convicted but none of them for having taken part in a war of aggression — i.e. for the participation in the planning, preparation, initiating, and waging of wars of aggression and invasions of other countries. They were in the end convicted for war crimes and crimes against humanity, relating to the plundering and spoliation of foreign property and participation in the slave labor program.

While acknowledging the existence of a criminal system conducted by the regime, in which IG Farben had a prominent role and made a substantive contribution to the war of aggression, the judges were faced with the question of whether — in such a context — the *individuals* accused were *also* responsible for this under criminal law.

It is interesting to read the relevant passage of the judgement:

> It is appropriate here to mention that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term "Farben" as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But *corporations act through individuals*

> and, under the conception of personal individual guilt to which previous reference has been made, the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it. Responsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant's membership in the Vorstand [emphasis added].[179]

The key element of criminal responsibility — namely the perpetrator's knowledge of the circumstances of the case — turned out to be very difficult to prove. The proof that the accused knew about the aggressive plans of the Nazi leadership (as only "insiders" could have) was never established. The lack of such proof led to the acquittal of all the accused on the count of having participated in the crimes of aggression.

As for IG's participation in the "slave labor program" of the Third Reich and in the holocaust — which includes the supply of the toxic gas Zyklon B, the involvement in medical experiments on prisoners, and the use of forced labor — the Tribunal was not convinced that the accused really knew about the criminal purpose for which the toxic gas supplied was used, nor about the criminal methods of the camp doctors.

Regarding the use of forced labor, the accused argued that they had acted out of "necessity" and that, on this basis, they had to be acquitted. The judges concluded that, indeed, the participation of the accused in the slave labor program was to be excused as the defendants were left with "no moral choice".

The IG Farben trial could have triggered a new theory on corporate liability for international criminal law, instead, it has

[179] *IG Farben* Trial, *ibid*, 678.

remained an attempt to highlight the responsibility of industry and business through the instruments of international criminal law.

The Zyklon-B Case

The *Zyklon-B* case had a very different outcome.[180] The defendants were charged with one count of war crime for having supplied poison gas used for the extermination of prisoners interned in concentration camps "well knowing that the said gas was to be so used". Two of the three accused were found guilty.

The selling of materials used as a tool to commit international crimes — coupled with the knowledge of the part of the accused — was deemed sufficient to establish the international criminal liability of the defendant. The *Zyklon-B* case still represents a paradigmatic case of complicity of big business activity in international crimes.

At the trial, strong incriminating evidence was presented against the three defendants (Bruno Tesch, Joachim Drosihn, and Karl Weinbacher) and especially against the owner of the company, Bruno Tesch.

All three defendants denied that they had knowledge of the purposes of the delivered gas, and argued that the potential use for legitimate purposes would have decreased the chance of the defendants' awareness of the crimes.

Regarding the assessment of the defendants' *mens rea*, the judges considered a number of circumstances including the position occupied by the accused in the company, the respective level of authorities and their control over the business activities.

While evaluating the position of the owner, Tesch, the judges concluded that the evidence had shown that he undoubtfully knew

[180] Trial of Bruno Tesch and Two Others (Zyklon-B Case), British Military Court, Hamburg, 1–8 March 1946, Law Reports of Trials of War Criminals (UNWCC), vol. I (His Majesty's Stationary Office, 1949).

every little thing about his business. With respect to Weinbacher, i.e. the second in command in the company, the evidence demonstrated that he shared a similar level of knowledge and authority with the owner.

Conversely, the factual findings showed that the third defendant, Drosihn, had a more subordinate technical position, and particularly he was not in a position to influence or prevent the transport of gas to Auschwitz and he was thus eventually acquitted.

The following paragraphs present more recent attempts along the same line of the post Second World War prosecutions to hold business leaders accountable for complicity in international crimes.

Prosecutions at the National Level

Two relatively recent court decisions issued at the national level, both by the District Court of The Hague in the Netherlands, deal with the criminal liability of individuals for their business activity.

In the *van Anraat* case, the District Court of The Hague tried the Dutch businessman Frans van Anraat for having delivered to Saddam Hussein's Iraqi regime during the 1980s more than 1,100 tons of the chemical thiodiglycol, which — in such a huge quantity — could only have served as an ingredient to produce mustard gas. Mustard gas had been deployed by the Iraqi Armed Forces in the war against the Kurds in Northern Iraq.[181]

Van Anraat was convicted for aiding and abetting war crimes but acquitted of the charge of complicity in genocide as there was no sufficient proof that, at the time of the delivery of the gas, he had actual knowledge of Saddam Hussein's special intent to destroy the Kurdish population.

[181] District Court of The Hague (23 December 2005) LJN: AU8685; Court of Appeal of The Hague (9 May 2007) LJN: BA4676, ILDC 753 (NL 2007).

It is interesting to analyze on which basis he was convicted for complicity in war crimes. The Appeals Court concluded that Van Anraat knew that his deliveries of gas were meant for the Iraqi regime and could serve as a precursor for the manufacture of chemical weapons. Evidence of his knowledge was found in the circumstance that he had tried to conceal both the nature of his merchandise and its destination. Moreover, the vast quantities in which the commodity was supplied was said to have rendered highly unlikely that the defendant did not foresee its final purpose.

The second case before the Court of The Hague is the *van Kouwenhoven* case.[182]

Guus van Kouwenhoven was a businessman holding a key position as the largest foreign investor company in Liberia, the core business of which was timber logging. Van Kouwenhoven was accused of having been involved in war crimes perpetrated by the government of former President Charles Taylor, rebels and militias, by selling arms to Liberia in exchange for logging rights. Moreover, Van Kouwenhoven was accused of having breached the UN embargo imposed on Liberia and being involved in violence against the civilian population through his security staff (who was said to have been recruited from militias).

While he was found guilty for the breach of the UN embargo, Van Kouwenhoven was acquitted with regard to the (co-)perpetration of war crimes, committed in a non-international armed conflict. Despite the ample evidence of many serious violations of Common Article 3 of the Geneva Conventions, the judges were not convinced that the defendant was actually involved, or had knowledge of those crimes. Additionally, it was held that the (mere) supply of weapons to Charles Taylor did not as such imply/prove complicity in war crimes, as those weapons could have also been used for purposes other than perpetrating international crimes.

[182] District Court of The Hague (7 June 2006) LJN: AY5160; Court of Appeal of The Hague (10 March 2008) LJN: BC7373; Supreme Court (20 April 2010) LJN: BK8132.

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SEMINAR:

Case Study and Debate: The ICTY *Martić* Case

Introduction

The Seminar is an occasion for the students to engage with some of the notions and issues discussed throughout the five lectures.

The main focus of the seminar will be on modes of liability — and particularly Joint Criminal Enterprise (JCE) and aiding and abetting — taking as a starting point the ICTY case of Martić, which dealt with crimes committed in the so-called "Serbian Autonomous District (SAO) Krajina" and the so-called "Republic of Serbian Krajina" (RSK) between 1991 and 1995.

The class will be divided into two groups and the seminar will be composed of two parts.

In Part I, students will discuss under which conditions the acts of Martić could give rise to **responsibility under JCE I.**

In particular, group A will take up the role of the "prosecutor" and will be given a number of questions to answer. By answering the questions, group A shall be able to build the prosecutor's case with the aim to maintain Martić's liability under JCE I.

Group B will play the part of the "defense", thus questioning Martić's liability under JCE I as well as arguing for his responsibility under a different mode of liability.

In Part II, students will discuss whether **liability under the two modes of JCE III and aiding and abetting** could accrue for Martić's conduct.

Roles will be reversed — group B will take up the role of the "prosecutor" and will argue that Martić is liable under JCE III and for aiding and abetting, while Group A, the "defense", will advocate against it.

A general debate with questions and comments of the students will follow the working groups

Overview of the *Martić* Case

In the period of 1991–1995, Martić held various leadership positions, such as President, Minister of Defense, Minister of Internal Affairs, in the SAO Krajina, and the RSK.

Martić was convicted of crimes against humanity (such as, inter alia, persecutions on political, racial and religious grounds, murder, imprisonment, torture, inhumane acts) and war crimes (such as, *inter alia,* indiscriminate attacks on civilians, wanton destruction of villages and institutions dedicated to education or religion) for his active participation in a JCE whose purpose was to forcibly displace the Croat and other non-Serb population from the SAO Krajina and the RSK.

It was established at trial that Martić was aware that the non-Serb population was being driven out as a result of the coercive atmosphere in the SAO Krajina and the RSK, and that widespread and systematic armed attacks were carried out against the Croat and other non-Serb populations, but he deliberately refrained from intervening against perpetrators who committed crimes against the non-Serb population.

Facts of the *Martić* Case Relevant for the Discussion

Three sets of facts relevant for the discussion will be presented below:

i) the participation of Martić in a JCE in relation to the SAO Krajina and the RSK;

ii) Martić's responsibilities and roles in the SAO Krajina and the RSK;

iii) Crimes committed by the *Milicija Krajine,* under the control of Martić and/or by JNA under the control of Ratko Mladić, another member of the JCE.

The Participation of Martić in a JCE

A JCE came into existence before 1 August 1991 and continued until at least August 1995. Besides Milan Martić, it included Slobodan Milošević, Milan Babić, Ratko Mladić and other members of the Yugoslav People's Army, the army of the Republika Srpska, the Serb Territorial Defense of Croatia, Bosnia and Herzegovina, Serbia and Montenegro, local and Serbian police forces, including the State Security Service of the Republic of Serbia, and Serb police forces of the SAO Krajina and the Republic of Serbian Krajina (RSK), commonly referred to as "Martić's Police", "Martićevci", "SAO Krajina Police" or "SAO Krajina Milicija".[183]

The purpose of the JCE was to unite Serb areas in Croatia and in the Republic of Bosnia and Herzegovina with Serbia in order to establish a unified Serb territory, with the ultimate goal of establishing an ethnically Serb territory through the displacement of the Croat and other non-Serb populations. The implementation of the political objective to establish a unified Serb territory in these circumstances necessitated the forcible removal of the Croat and other non-Serb populations from the SAO Krajina and RSK.

The plan was implemented through widespread and systematic armed attacks on predominantly Croat and other non-Serb areas and through the commission of acts of violence and intimidation.

[183] From the "Information sheet" published by the ICTY.

Martić's Responsibilities and Roles in the SAO Krajina

The ICTY Trial Chamber's general findings regarding Martić's responsibilities and roles in the SAO Krajina and RSK Governments are as follows: [184]

> 176. The Trial Chamber further established that on 29 May 1991, Babić became the President of the newly constituted SAO Krajina government. He appointed Martić as Minister of Defense. On the same day, the Assembly of the SAO Krajina established "special purpose police units" named *Milicija Krajine*, [...] the *Milicija Krajine* units defended the territorial integrity of the SAO Krajina, secured vital facilities, infiltrated sabotage groups, and could be used in military operations. The *Milicija Krajine* was established within the MUP,[185] but was at first put under the authority of the Ministry of Defense — this was at the insistence of Martić himself, who did not want to lose his control over the special police units. [...]
>
> 177. According to the Trial Chamber, as Minister of Defense of the SAO Krajina government from 29 May 1991 to 27 June 1991, Martić held authority over the *Milicia Krajine*. On 27 June, he was then appointed Minister of Interior. The Trial Judgement established that, even before 29 May and after 27 June, however, Martić exercised control over the *Milicia Krajine*. This was conceded by Martić himself. The Trial Chamber relied on evidence that the "leader" of the *Milicija Krajine* would be accountable to the Minister of the Interior, *i.e.*, Martić. On 30 November 1991, the SAO Krajina adopted its own Law on Defense, whereby the TO was "part of the unified armed forces of the [SFRY]" and the President of the SAO Krajina led "the armed forces in times of peace and in times of war". Martić was

[184] *Prosecutor v Martić* (Judgment) ICTY-95-11-A, A Ch (8 October 2008).
[185] "MUP": Ministry of Internal Affairs of the SAO Krajin.

also the Minister of the Interior in the new government formed on 26 February 1992.

178. The Trial Chamber established that, after 1 August 1991, the *Milicija Krajine* units and the TO[186] were combined into the "armed forces" of the SAO Krajina. On 8 August 1991, Martić was appointed Deputy Commander of the TO, in which position he remained until 30 September 1991. He continued to serve as Minister of the Interior while he was TO Deputy Commander […].

179. The Trial Chamber found that, as Minister of the Interior, Martić "exercised absolute authority over the MUP", with the power to intervene and punish perpetrators who committed crimes against the non-Serb population. He was kept informed about military activities during the fall of 1991 and maintained "excellent communications" with the units subordinated to the MUP. His authority over the armed forces in the SAO Krajina during this period was established by the Trial Chamber, based on evidence that included testimony from several witnesses that Martić was *de jure* and *de facto* in control of the SAO Krajina and RSK police from 1991 through 1993.

180. With respect to JNA[187] forces active in the region, the Trial Chamber found that the JNA was under the control of a number of the members of the JCE, in particular Ratko Mladić, the Commander of the 9th Corps of the JNA, and General Blagoje Adžić, JNA Chief of the General Staff […] The Trial Chamber further found that the SFRY Federal Secretariat of National Defense of the JNA had made unit and personnel changes within the SAO Krajina armed forces, and that the former cooperated with the latter in joint operations.

[186] "TO": Serb Territorial Defense of Croatia.
[187] "JNA": Yugoslav People's Army.

Crimes Committed by the Milicija Krajine and JNA

183. The Trial Chamber found that the *Milicija Krajine* was responsible for the murder of 41 persons detained in the fire station in Hrvatska Dubica on 20 October 1991 and the murder of nine civilians in Bruška on 21 December 1991. The Trial Chamber also found that the *Milicija Krajine* or units of the JNA or TO, or a combination thereof intentionally killed nine people in Cerovljani in September and October 1991 and intentionally killed seven civilians in Baćin sometime after mid-October 1991 and another group of 21 civilians from Baćin around October 1991. The Trial Chamber found that all the elements of persecution as a crime against humanity (Count 1), murder as crime against humanity (Count 3) and murder as a violation of the laws and customs of war (Count 4) had been established in relation to these killings […].

184. The Trial Chamber found that the *Milicija Krajine* or units of the JNA or TO, or a combination thereof took part in the looting of Croat houses in Hrvatska Dubica from mid-September 1991 and that the elements of plunder of public or private property as a violation of the laws and customs of war (Count 14) had been established in relation to these acts […].

185. […] The Trial Chamber concluded that, as of the summer of 1991, the Ministry of Justice of the SAO Krajina ran the detention facility and that the beatings, mistreatment, and torture of the detainees were conducted by members of the MUP (referred to as "Martić's police" and wearing blue uniforms), by the *Milicija Krajine*, and by persons in camouflage uniforms. It also concluded that the leadership had permitted civilians and Serb detainees to beat and mistreat the non-Serb detainees. The Trial Chamber found that the elements for the crimes of imprisonment as a crime against humanity (Count 5), torture as a crime against humanity (Count 6), inhumane acts as a crime against humanity (Count 7), torture as a violation of

the laws or customs of war (Count 8), and cruel treatment as a violation of the laws or customs of war (Count 9) had been perpetrated against detainees at the JNA 9th Corps barracks in Knin and the old hospital in Knin [...].

Working Group

Part I — Liability Under JCE I

The following questions will be submitted to Group A, which will take up the role of the prosecutor.

The questions shall guide Group A to build the prosecutor's case that Martić is to be held responsible for the actions of the *Milicija Krajine* under the JCE I mode of liability.

On the basis of the same questions, Group B shall be able to raise arguments aiming at 1) questioning Martić's liability under JCE I (e.g. the alleged common plan is too broadly defined); 2) arguing for the lack of responsibility of Martić for the crimes perpetrated by the *Milicija Krajine* under JCE I; 3) asserting Martić's liability under a different mode of liability.

◊ **Question 1**

Under which circumstances could the crimes committed by the *Milicija Krajine* be blamed on Martić, specifically under the JCE I mode of liability?

◊ **Question 2**

Which are the material elements and the mental elements which need to be established in order to prove Martić's liability under JCE I?

◊ **Question 3**

To what extent does the plan that Martić, Milosevic and other participants in the JCE elaborated need to be explicit and detailed?

◊ **Question 4**

In case the crimes committed by the *Milicija Krajine* constitute an expansion of the plan, *not* originally planned, would Martić be nonetheless responsible under JCE I?

◊ **Question 5**

Does the circumstance that Martić did not materially perpetrate the crime eliminate his responsibility under JCE I?

Also, the circumstance that, at the time of the perpetration of the crimes by the *Milicija Krajine*, Martić was not in the proximity of the places where the crimes took place, does have any bearing on Martić's responsibility under JCE I?

◊ **Question 6**

Even assuming that Martić was *just* a politician holding a high-level post, and — though participating in the design of the common criminal crime — his specific contribution was non-criminal, would this exempt him from criminal liability under JCE I?

Part II — Liability Under JCE III or Aiding and Abetting

The following questions will be submitted to Group B, which will take up the role of the prosecutor.

As for the above, the questions shall guide Group B to build the Prosecutor's case, this time to prove Martić's hypothetical liability under the JCE III mode of liability, or for aiding and abetting.

Group A shall raise counterarguments aiming at 1) questioning the Prosecutor's arguments; 2) arguing for the lack of responsibility of Martić under JCE III; 3) asserting Martić's liability under a different mode of liability.

Questions on JCE III

◊ **Question 1**

Assuming that the crimes committed by the JNA (i.e. a militia under the control of Ratko Mladić, another member of the JCE) were not part of the plan, under which conditions Martić could nevertheless be held liable under the JCE III mode of liability?

Which material elements and *mens rea* shall be proven to hold Martić liable under JCE III?

◊ **Question 2**

In case crimes originally not planned were committed by perpetrators who do not belong to the JCE (e.g. by militias other than those under the control of members of the JCE such as the JNA led by Mladić), could Martić nonetheless be held liable? Why and under which conditions?

Questions on Aiding and Abetting

◊ **Question 1**

In which case could have Martić been considered an aider and abettor — what should have been his contribution?

◊ **Question 2**

Which *mens rea* should have Martić possessed to be held liable as an aider and abettor?

◊ **Question 3**

Where does the difference between aiding and abetting a crime and participating in a JCE lie?

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