THE DILEMMA OF SUPERIOR RESPONSIBILITY AND ITS IMPLICATIONS IN INTERNATIONAL CRIMINAL LAW (ICL) AND ISLAMIC LAW: A COMPARATIVE STUDY

By

NOSHEEN QAYYUM

REGISTRATION NO: 67-SF/PHDLAW/F14

Faculty of *Sharī'ah* and Law

INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD

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Supervisor:

Prof. Dr. Muhammad Munir

AUTHOR'S DECLARATION

I Nosheen Qayyum, nominee for the award of the Ph.D. degree, hereby affirm that this thesis has been done according to the rules and regulations of International Islamic University, Islamabad. It has not been presented to any other institution for the bestowal of any degree or diploma. Except where mentioned otherwise, the work done in this research work represents my own views.

SIGNED: ..... DATE: .....

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ABSTRACT

This thesis examines the accountability of superiors for international crimes committed by their subordinates in International Criminal Law (ICL) and Islamic law, focusing on hierarchical responsibility. It explores how international legal frameworks address the prosecution of senior leaders for crimes planned at the leadership level but executed by subordinates. Chapter I explains the challenges in prosecuting senior leaders for crimes committed by their subordinates and how different international criminal justice mechanisms have stretched doctrines not originally designed for this purpose to attribute them principal liability. Chapter II affirms that in the absence of a unified definition, certain 'core crimes' can be classified as international crimes and while analysing modes of participation in crimes across domestic and international legal systems, it illustrates the shift from a unitary model of perpetration to the one which differentiates physical perpetrators from the superiors, covering post-WWII proceedings, ad hoc tribunals, and the ICC. Chapter III focuses on the doctrine of command responsibility, tracing its origins, evolution, and role in assigning principal or secondary liability to superiors. Chapter IV explores the Joint Criminal Enterprise (JCE) doctrine, analysing its constituent components, its impact on superior liability, and associated criticisms. Chapter V investigates the 'Control Theory of Perpetration', particularly co-perpetration and indirect co-perpetration, and highlights its limitations.

While looking into the subject matter from an Islamic legal perspective, Chapter VI examines the responsibilities of Muslim political and military leaders, and explores the convergence between the Islamic law of armed conflict especially the responsibilities of superiors, and International Humanitarian Law (IHL). Chapters VII and VIII analyse the subject matter from the perspective of Islamic criminal law, emphasising that both

Muslim leaders and combatants are liable for their own actions. The chapters draw parallels between Islamic criminal law and ICL, particularly in addressing systematic crimes. Chapter IX discusses indirect co-perpetration in Islamic law, focusing on the use of subordinates by superiors to commit crimes, suggesting that Muslim rulers address this issue in line with *'maqāsid al-sharī'ah'* and *'siyāsah al-sharī'ah'*.

Given the important role of the superiors in the planning of international crimes, the thesis proposes the inclusion of 'conspiracy' as a mode of liability in the Rome Statute, aligning international law, national legislation, and Islamic law to ensure comprehensive accountability for senior leaders in international crimes.

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LIST OF ABBREVIATIONS

AP I	Additional Protocol I to the Geneva Conventions
DRC	Democratic Republic of Congo
FNI	*Front des Nationalistes et Intégrationniste en Ituri*
FPLC	*Patriotique Pour La Liberation Du Congo*
FRPI	*Forces de Resistence Patriotique en Ituri*
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal, Nuremberg
IMTFE	International Military Tribunal for the Far East
JCE	Joint Criminal Enterprise
RS	Rome Statute
UPC	*Union des Patriots Congolais*
WW I	World War I
WW II	World War II

CHAPTER I

INTRODUCTION TO THE TOPIC

1.1 Introduction

International crimes subsume the category of collective violence.[1] Most commonly, international criminals collectively get involved in crimes like waging aggressive war; destroying groups based on their ethnicity, religion, nation, or race; systematically targeting civilians, or violating the rights of protected persons accorded under the four Geneva Conventions of 1949.[2] The collective nature of international crimes leads certain writers to believe that individual offences do not exist in the field of International Criminal Justice.[3] This peculiar feature of international crimes was also recognised by the Yugoslavian tribunal, which expressly stated that "most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality; these crimes are often carried out by groups of individuals acting in pursuit of a common criminal design."[4]

The essence of international crimes is that they are usually planned, instigated, aided, or abetted by hierarchic superiors and are actually carried out either by low-level soldiers, members of irregular forces or by those belonging to private military

[1] Athanasios. Chouliaras, ″A Strategic Choice: The State Policy Requirement in Core International Crimes″, *Leiden Journal of International law* 28 (2015): 968. The term ‘collective’ refers to ‘any aggregate of two or more individuals`. Donelson R. Forsyth, *Group Dynamics* (Belmont, CA: Wadsworth, Cengage Learning, 2010), 13.

[2] Ibid, 56-57.

[3] Jens David Ohlin, ″Organisational Criminality″ in *Pluralism in International Criminal law*, eds. Elies Van Sliedregt and Sergey Vasiliev (UK: Oxford University Press, 2014), 116.

[4] *Prosecutor v. Tadić*, (Appeals Chamber Judgement), para 191.

companies, policemen, etc.[5] There are two distinct yet interconnected levels of involvement in criminal activities: the senior level and the execution level. It is crucial to link these levels, as it is the low-level individuals who are ultimately held accountable for the actual crimes. For senior defendants who may not have directly participated in the violence, crimes are either attributed to them or their liability is derived from that of the direct perpetrator through theories of 'derivative liability', such as aiding and abetting. Regardless of how responsibility is assigned, it is vital to establish a connection between those who have encouraged, allowed, or tolerated the crimes and those who have committed them physically.[6]

From the criminological point of view, it is difficult to charge senior leaders as 'direct perpetrators', as they are usually distant from the place of the occurrence of the crimes and thus lack the element of *actus reus*.[7] The application of ordinary forms of participation such as ordering, or instigating the crime appears to be unsatisfactory in these cases as these modes does not take into account the inherent gravity of the crimes and thus diminishes the magnitude of the role played by the orchestrators of these crimes. On the other hand, the law of complicity makes the leaders accomplice to the crime and thereby assigns secondary responsibility to them.[8] Thus, the distance between the superiors who mobilises masses towards large scale atrocities and those

[5] Lachezar. Dimitrov Yanev, *Theories of Co-perpetration in International Criminal law* (Tilburg University, 2016), 7-8. (Yanev, *Theories of Co-perpetration in International Criminal law* hereinafter).

[6] Sliedregt, E. Van, "The Curious Case of International Criminal Liability" *Journal of International Criminal Justice, 10 (5): 5.*

[7] Manacorda and Meloni, ″Indirect Perpetration versus Joint Criminal Enterprise ″: 159-178, supra note 7.

[8] Ibid., 161-2.

who physically commit these crimes makes it hard to disentangle the issue of criminal responsibility.[9]

As a matter of fact, both the international courts and tribunals lack express provisions in their statutes assigning principal liability to hierarchic superiors who indirectly make contributions by making direct perpetrators as mere instruments. Thus, instead of relying on conventional modes of liability i.e., as planners, instigators, aiders and abettors efforts have been made to expand the scope of perpetration in the statutes of the *ad hoc* tribunals and the International Criminal Court (ICC henceforth) and include non-physical perpetrators within its ambit, who though distant from the place of occurrence of the crimes substantially participates in the execution of international crimes. In this regard, both the *ad hoc* tribunals and the ICC relied on the doctrines of "Joint Criminal Enterprise" (JCE henceforth), and the "Control Theory of Perpetration", respectively apart from the doctrine of "Command Responsibility" which is a liability for omission and has been expressly incorporated in their statutes. The study shows that the reliance on unfamiliar modes of attribution by the judges of international legal institutions leads to fragmented decisions and diverse scholarly opinions. It further shows that the inherent weaknesses of these doctrines casts doubt about their efficacy at the international level.

The study also shows that 'indirect co-perpetration' is a new phenomenon that is not clearly regulated by the Qur'ān or the *Sunnah*; it rather comes under the doctrine of '*siyāsah'* according to which Muslim ruler is empowered to sign international treaties dealing with the matter and is also bound to fulfill the resultant obligations in

[9] Cassandra Steer, *Translating Guilt: Identifying leadership liability for mass atrocity crimes* (Netherlands: T. M. C Asser Press, 2017), 9.

this regard. It therefore suggests that instead of relying on domestic modes of perpetration, the RS of the ICC should incorporate "conspiracy" into its statute, which is not only based on customary international law but also in consonant with the domestic laws of many countries and is also compatible with Islamic law.

1.2 Structure of Study

The study employs the inclusive term "superiors" to encompass both the military and political leaders, (both in Islamic law as well as in ICL) as appeared in the Rome Statute (RS henceforth) of the ICC. Article 28 of the RS assigns criminal liability to both 'military' and 'non-military' superiors for crimes committed by their subordinates that took place under their effective authority and command.

This thesis consists of ten chapters, excluding the first one. Chapter two addresses the issue of a lack of a unanimous definition of international crimes, and clarifies that acts that meet the criteria set forth by various academics for "core crimes" can unequivocally be classified as International Crimes. The chapter also delves into the different modes of participation in a crime, both in the context of domestic and ICL. Further, the chapter provides a comprehensive analysis of the paradigm shift in ICL, which moved from a "unitary mode of perpetration" to a "differentiation model" across three distinct phases; post-World War II (WWII henceforth) proceedings, the jurisprudence of the *ad hoc* tribunals and the ICC.

Chapter three briefly outlines the fundamental goals and objectives of ICL before examining the doctrine of "command responsibility". This is the earliest doctrine addressing superior responsibility and is also expressly embodied in the statutes of international legal institutions. The chapter traces the origin and evolution of the doctrine at an international level and explains that the nature of the doctrine has been a

subject of debate. Specifically, whether it imposes principal liability on the superior by holding them accountable for the underlying offenses committed by their subordinates or assigns secondary responsibility by making them responsible for the failure to control their crimes. Additionally, the chapter highlights that there is need for clarification of article 28 of the RS in this respect.

Chapter Four focuses on the doctrine of "Joint Criminal Enterprise" (JCE), as applied by the ICTY in the *Tadić* case. The chapter analyses the characteristics of the doctrine, its components, and whether or not it established the principal liability of the superior as expounded by the Tribunal. Additionally, the chapter provides an extensive analysis of the criticisms directed towards the doctrine of JCE.

Chapter Five primarily examines the "Control Theory of Perpetration", a concept derived from German law and currently employed by the ICC. The chapter extensively explores the ideas of 'co-perpetration' and 'indirect co-perpetration' grounded on the control theory, along with the shortcomings of the doctrine.

Chapter Six explores the general responsibility of both political and military superiors to uphold their duties per the limits set by Allah Almighty. It also highlights the role of the Holy Prophet (PBUH) as the commander-in-chief of the Muslim army, emphasizing the important ethical standards he established during warfare, which align with the principles of International Humanitarian Law (IHL).

Chapter Seven examines the concept of criminal accountability for superiors within the Islamic legal framework, emphasizing that superiors are held accountable before the law just like ordinary citizens. The chapter further asserts that, as a general

principle, no individual—whether a superior or an ordinary citizen—can be held criminally responsible for the actions of another. Ordinary citizens, however, are obliged to refuse to comply with illegal orders from superiors. Nevertheless, in cases of egregious crimes such as murder, both the instigator and the perpetrator of the crime are liable to punishment.

Chapter Eight presents a general framework of Islamic criminal law, highlighting its distinct categorization of crimes and corresponding punishments. It emphasizes that, while the division of crimes may differ, the fundamental objective of Islamic law—upholding justice and maintaining authority over individuals who violate its rules—is consistent with the aims of international criminal law (ICL). The chapter further demonstrates that not only are the modes of perpetration of crimes similar in both legal systems, but their approaches to addressing crimes committed systematically by a group of individuals also align. Both systems treat individuals who participate in systematic crimes against civilian populations as principal offenders, regardless of the specific role played by each offender.

Chapter Nine examines the concept of “indirect co-perpetration”, specifically the use of foot soldiers as instruments by superiors to commit crimes, from an Islamic law perspective. It posits that this is a relatively new phenomenon not explicitly addressed in the Qur'an or the Sunnah. The chapter further suggests that Muslim rulers must address this issue in a manner that aligns with the best interests of the Muslim community, considering the broader ethical and legal principles of Islamic governance. Finally, Chapter Ten offers a summary of the preceding chapters, along with concluding recommendations.

1.3 Literature Review

The criminal liability of superiors for the crimes perpetrated by his subordinates from the Islamic law perspective has been a neglected issue and the author could not come across any prolific piece of writing in this regard. Certainly, some eminent contemporary writers like Bassiouni, Baderin, and Malekein have done a lot of work in which they have analysed the principles of Islamic criminal law in comparison with ICL. However, none of them addressed the issue of "imputed criminal liability" of hierarchic superiors from the standpoint of Islamic law. For the purpose of understanding the Islamic aspects of the issue, the author besides relying on classical books of *fiqh, hādīth* and *sīrah* also resorted to the articles written by contemporary writers. For the analysis of "modes of liability" adopted by the ICL, the author relied on foreign material including books, articles, statutes, commentaries, and law reports etc.

A "The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes" [10]

In this book, Olasolo has examined those modes of liability that specifically relate to the culpability of senior political and military leaders, employed by the international legal institutions. He has divided the book into five chapters. In the first chapter, he explains that since traditional modes of liability could not well explain the criminal culpability of senior leaders who physically commit the crimes, ICL has developed the already existing concepts of JCE and Control Over the Crime approach. In the second

[10] Hector Olasolo, *The criminal responsibility of senior political and military leaders as principals to international crimes* (North America: Hart Publishing, 2009).

chapter, he has analysed the customary status of both these doctrines and concludes that both the objective and subjective approaches never form part of customary international law. Chapter three conceptually deals with the notions of direct and indirect perpetration in ICL, their objective and subjective elements in the light of the case law of the *ad hoc* tribunals and the ICC. In chapter four, which is related to the concept of co-perpetration based on JCE, the writer after analysing three variants of the doctrine has discussed the problem of extension of traditional modes of liability to hierarchic superiors. In this regard, he opines that the ICTY case law by departing from the traditional concept of JCE and applying it at leadership level has formulated a *sui generis* version of indirect perpetration. The last chapter deals with the concept of co-perpetration and indirect perpetration grounded in joint control over the crime. In this chapter he has discussed both the concepts of 'co-perpetration' and 'indirect co-perpetration' on the basis of control exercised by the superior in the execution of the crime in the light of cases decided by the ICC. In view of the author, *Katánga & Ngudjôlo case* constitute the best example of 'indirect perpetration' which must be relied upon by international legal institutions in the future.

B "Bringing the Bosses to International Criminal Trials: The Problem With the ″Joint Criminal Enterprise″ and the ″Control Over the Crime Approach″ as a Better Alternative"[11]

[11]Juan-Pablo Pérez-León-Acevedo, ″Bringing the Bosses to International Criminal Trials: The Problems with the Joint Criminal Enterprise and the Control Over the Crime Approach as a Better Alternative″, *Pace International Law Review* 32 (2019): 1-55. (Pérez-León-Acevedo, ″Bringing the Bosses to International Criminal Trials" hereinafter).

The writer, Pérez-León-Acevedo asserts that since international crimes are committed by multiple actors ranging from senior government or private officials to low rank military personnel, it is necessary that criminal responsibility of all the actors must be determined individually according to the contribution made by them. The writer has analysed the doctrine of JCE and Control over the Crime approach, utilized by international and hybrid criminal tribunals.

The writer has discussed the notion of JCE which was adopted by the ICTY in the *Tadić* case in which the court introduced three variants of the doctrine, namely JCE I, JCE II and JCE III and was also applied by other international and hybrid tribunals like the International Criminal Tribunal for Rwanda (ICTR), the chamber of Special Court for Sierra Leone (SCSL), and the Extraordinary Chamber in the Courts of Cambodia (ECCC). The writer asserts that though the doctrine was originally meant to be applied to small-scale enterprises, its application was extended gradually to the high-ranking leaders. However, its application appeared to be quite problematic because it failed to lay down a consistent criterion to identify the liability of both the principal and accessories. Based on the will of the defendant, all members of the enterprise are dealt equally and thus it is difficult to differentiate between principal and accessorial liability. The jurisprudence of the ICTY is equally vague as it failed to uniformly determine the criminal responsibility of senior leaders. In a few cases, senior leaders were considered as principals while in a few other cases they were deemed accessories to the crime.

Comparatively, the control theory assigns principal responsibility to the hierarchic superiors in a more coherent way by expressly distinguishing between principal and accessorial liability, in view of the author. Article 25(3) (a) of the Rome Statute assigns principal liability to a person who either participates individually, or

jointly with another or through another person while the subsequent clauses of the same article (b-d) assign accessorial liability to the participants. Moreover, the concept of indirect perpetration derived from the control theory is flexible enough to deal with the liability of not only a single leader, but it also accounts for the culpability of several leaders who jointly act as co-perpetrators. Due to the above-mentioned reasons, the writer suggests that the theory of JCE must be abandoned in favour of control theory which most accurately assigns principal responsibility to the senior leaders in large-scale criminal organisations.

C "Command Responsibility and *Organisationsherrschaft*: Ways of Attributing International Crimes to The Most Responsible"[12]

The author, Ambos discusses three ways in which criminal responsibility can be attributed to superiors in organizations or enterprises: command responsibility, JCE, and the doctrine of *Organisationsherrschaft*. The author first examines the theoretical basis and practical implications of the command responsibility doctrine, which establishes both direct responsibility, i.e., responsibility for lack of supervision and indirect responsibility, i.e., the responsibility for the offenses perpetrated by the forces under his control. However, the author argues that both international courts and tribunals have contravened the principle of culpability by holding the commanders directly responsible for lack of supervision to control the crimes perpetrated by their subordinates. The author also analyses the Oric case and finds that the trial chamber violates the principle of legality by holding superiors directly responsible for all acts

[12] Kai Ambos, ″Command responsibility and *Organisationsherrschaft*: Ways of attributing crime to the 'most responsible'″ in *System criminality in international criminal law,* eds. Andre Nollkaemper & Harmen Van Der Wilt (UK: Cambridge University Press, 2019), 127-157. (Ambos, ″Command responsibility and *Organisationsherrschaft* hereinafter).

and omissions of their subordinates. The author opines that such a broad interpretation would turn a military commander into a quasi-policeman having an obligation to maintain public order in the area under his authority. Eventually, the states involved in different conflicts would be reluctant to include the doctrine in their military laws and doctrines.

The author then analyses the doctrine of JCE in comparison with command responsibility and contends that though the two doctrines are fundamentally different since the former is a liability for omission while later requires a positive contribution to an act, they can be applied simultaneously in cases of macro-criminality where crimes are committed over distinct periods and in different locations, if the defendant holds a high place in the hierarchical structure of the criminal apparatuses.

The writer then examines the theory of control/domination of the act which is based on the concept of hierarchical control or domination of the act. This theory presupposes that the 'man in the background' controls the 'direct perpetrators' and automatic compliance with orders through immediate replaceability of the direct perpetrators is crucial. However, the author argues that the interchangeability criteria do not convincingly explain the doctrine from an empirical perspective. For instance, where a task has been assigned to a specialist, it cannot be presumed that a specialist could be easily replaced. Similarly, it cannot be presumed to dominate all those who directly execute the order. Moreover, the theory also failed to explain up to which level one can assume that the man in the background controls the organisation. The author further notes that only a limited number of persons possess the requisite authority to replace the immediate perpetrator, i.e., those leaders who hold high positions in the criminal organisation. Since the men in the background are far away from the crime

scene, they are considered as indirect perpetrators or even accessories. The author suggests that the theory can be best explained from normative perspective, according to which the criminal masterminds are considered as the main perpetrators while all those who execute these crimes are mere accessories.

D "The End of Modes of Liability"[13]

In this article, Stewart asserts that ICL should abandon principal and accessory distinction because in a vast number of cases decided by international courts and tribunals, both of them have been dealt with equally. He argues that to make the principal and accessory distinction, ICL relied on the doctrines of Superior Responsibility and JCE, both of which have violated many rudimentary rules of criminal law. Additionally, the ICL recently relied on a German doctrine that is also ill-defined and violates the principle of legality. He also asserts that none of these doctrines satisfy the physical elements of a crime, and thus, fail to take into account the contribution made by an accomplice. In his opinion, the role of accomplice, in some circumstances could be more crucial in the perpetration of the core crimes. To support his viewpoint, he gives examples of those corporations which supply weapons and banks which provide financial support etc., whose role has not been acknowledged in ICL. According to him, once the veil of distinction between principal and accessory liability is lifted, the role played by them will also be taken into consideration.

The author being an advocate of the unitary approach argues that the adoption of the approach at the international level would make it possible to convict all those who substantially contribute in the execution of the crime. This approach could also be

[13] James G. Stewart, ″The End of Modes of Liability″, *Leiden Journal of International law* 25 (2012): 165-219. (Stewart, ″The End of Modes of Liability″ hereinafter).

utilised by national courts that are prosecuting international crimes within their own jurisdiction. Ultimately, the author asserts that a unitary theory of perpetration could more effectively maintain and promote the 'principle of culpability' as the standard for international criminal responsibility.

E "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development Of International Criminal Law"[14]

In this article, Danner and Martinez argue that ICL has developed through the convergence of three legal traditions namely, domestic criminal law, human rights law and transitional justice. However, this amalgamation often leads to the application of contradictory rules. For instance, the focus of criminal law is on individual wrongdoing while human rights law is largely victim-cantered and eventually it caused confusion regarding the true dimension of criminal law i.e., whether it should be victim-oriented or it should be defendant-centred. On the other hand, transitional justice aims to examine the crimes of a predecessor government using various mechanisms including criminal trials, truth and justice commissions, amnesty, or reparations etc. In a transitional context, criminal trials are often used as a vehicle for unfolding historical events and at times other mechanisms like amnesties are preferred over criminal trials which greatly affect the liability theories of ICL.

The writers then analyse the doctrine of JCE and the command responsibility doctrine and after analysing the evolution of these doctrines in the context of ICL, they

[14] Allison Marsten Danner & Jenny S. Martinez, ″Guilty associations: Joint criminal enterprise, Command responsibility, and the development of international criminal law″. https://www.law.berkeley.edu/files/fall04_Martinez.pdf (Last Assessed, June 2021). (Danner & Martinez, ″Guilty associations: Joint criminal enterprise, Command responsibility" hereinafter).

argue that both the doctrines need certain reforms. They assert that both these doctrines have the tendency to convert the individual blame into guilt by association and thereby diminish the efficacy of ICL. They further argue that the requisite doctrinal reforms can help to avoid this danger. Among the suggested reforms are that the relationship of a defendant in JCE must be defined precisely and that the prosecutors must also be required to prove the essential contribution made by each defendant to pursue a common criminal design. Moreover, certain forms of command responsibility doctrine and JCE, which require low *mens rea* should not be applied to special intent cases like genocide.

F *"Siyasah Shar'iyah* or the Policies of Islamic Government"[15]

Kamali has tried to respond to the criticism directed towards the doctrine of *Siyāsah* which is said to grant extensive discretionary powers to Muslim rulers and is a negation of the rule of law that prohibits arbitrary powers for rulers. These wide powers can also be reflected in *ta'zīr* crimes, where penalties are determined based on the personal *ijtihād* of a Muslim ruler. He refutes the claim that wide discretionary powers given to a Muslim ruler are susceptible to abuse by suggesting that judicial decisions must be uniform and, in this regard, relevant laws should be enacted to prevent potential abuse of discretionary powers. In the present era, the constitutions of almost all the Muslim states have restricted the scope of *siyāsah* by regulating the powers of all organs of the state. He concludes that despite these restrictions, *siyāsah* plays an important role in formulating policies vis-à-vis unprecedented situations.

[15] Mohamad Hashim Kamali, "*Siyasah Shar'iyah* or the Policies of Islamic Government", The American Journal of Islamic Social Sciences 6 (1989): 59-80. (Kamali, "*Siyasah Shar'iyah* or the Policies of Islamic Government" hereinafter).

G "Islamic Socio-Legal Norms and International Criminal Justice in Context: Advancing an 'Object and Purpose cum '*Maqasid* Approach" [16]

Baderin has attempted to evaluate the efficacy of 'Islamic socio-legal norms', encompassing social, moral, political and legal aspects in increasing the role of international criminal justice in Muslim countries. He contends that the object and purpose and *maqáṣid* are comparable normative principles of international law and Islamic law respectively. These principles can be used to reconcile the norms of both legal systems. The former being a principle of international law applies to the law of treaties to make sure that primary objectives of a treaty must be adhered to. *Maqáṣid* is also a normative principle of Islamic law utilised by classical Muslim jurists to gain a contextual understanding of both the Qur'ān and *Sunnah*. The purpose of the *maqāsid* principle is to ensure adherence to the *maqāsid* of *sharī'ah*, which is the welfare of humanity, thus making it more aligned with international norms. These shared aims demonstrate that an objective relationship can be established between the two legal systems.

The writer has examined the relationship between 'Islamic socio-legal' norms and different legal spheres including international humanitarian law (IHL), international human rights law (IHRL), and ICL. He argues that the relevant humanitarian law instruments demonstrate that the primary object of IHL is to minimise the atrocities of war by promoting legal and political cooperation at the international

[16] Mashood A. Baderin, "Islamic Socio-Legal Norms and International Criminal Justice in Context: Advancing an Object and Purpose' Cum *Maqāsid* Approach" in *Islam and International Criminal Law and Justice*, (Torkel Opsahl Academic EPublisher, 2018), 45-82. (Baderin, "Islamic Socio-Legal Norms and International Criminal Justice in Context hereinafter).

level. Similarly, Islamic law has a comparable objective as *maqáṣid* which aims at limiting the means and methods of warfare to minimise the horrors of warfare. Similarly, IHRL also aims to uphold the dignity of mankind, which is in line with the *maqáṣid* of the *Sharī'ah* that seeks to promote the welfare of all humans. The normative foundation of ICL is to bring to justice the violators of core crimes including war crimes, genocide, and crimes against humanity etc. These crimes are equally prohibited in Islamic law through its socio-legal norms regulating warfare and have been declared as amounting to *fasād* or mischief/corruption on earth.

Baderin also explains the social, moral, political, and legal dimensions of International criminal justice in comparison to Islamic socio-legal norms. When discussing the social dimensions, he argues that states must promote non-territorial common bonds of humanity like equality of mankind, human respect, and social cohesion etc. in their societies. He argues that Islamic social norms can effectively advance the social aims of international criminal justice because *maqāsid* rejects any interpretation of *sharī'ah* that leads to enmity and/or discrimination etc.

When discussing the moral dimensions of international criminal justice, Baderin asserts that as compared to domestic law, the role played by moral values is much higher in the field of International Criminal Justice. The preamble of the statute of the ICC clearly recognises that the core crimes are morally not justified since these crimes are deemed to be a threat to the peace and security of humanity. This moral justification is also consistent with the *maqāsid* as embodied in the Qur'ān which obligates Muslims to help those who seek assistance (4:75) and the saying of the Prophet which requires Muslims to avoid causing harm to others or "let there be no harm and no reciprocation

of harm". According to him, these injunctions support the moral dimensions of International criminal justice.

Regarding the political dimension, Baderin argues that International criminal justice operates effectively through the political co-operation of states as recognised in the preamble of the ICC statute. This is consistent with the *maqāsid* which emphases that Muslim states should co-operate with other states on the basis of equity, justice, and solidarity, etc.

The writer discusses the legal dimension of international criminal justice, which entails the application of its principles through proper legal institutions. The writer asserts that since Islamic law also emphasis that the principles of justice, fairness, and due process must be observed by their legal institutions, it demonstrates that these principles are compatible with international standards.

1.4 Methodology

In this study, a doctrinal and legal reasoning research methodology is employed to explore the legal principles of superior responsibility in both international criminal law (ICL) and Islamic law. The doctrinal approach involves analysing primary legal sources, including statutes, case law, and regulations, to clarify and synthesize key legal concepts. Legal reasoning is applied to assess judicial decisions, particularly of the ICTY and ICC, interpret legislative texts, and suggest reforms, focusing on the evolution and application of legal doctrines. Additionally, a comparative methodology is used to contrast the treatment of superior responsibility in ICL and Islamic law. The study draws on foundational Islamic texts such as the Qur'ān and Sunnah, classical *fiqh*

literature (particularly the Hanafī school), and modern scholarly works to examine Islamic perspectives.

By combining doctrinal analysis with comparative research, this study offers a comprehensive exploration of superior responsibility in both legal systems, focusing on the challenge of assigning principal liability to superiors in cases of 'indirect co-perpetration'.

1.5 Scope of the Research

The study highlights a lacuna in both the ICL and Islamic law when it comes to determining the "modes of liability" that assigns primary responsibility to high-ranking individuals for the crimes perpetrated by their subordinates. Therefore, the research is limited to the study of alternative modes of liability, including the notion of Joint Criminal Enterprise (JCE) and the Control theory of perpetration, in addition to the doctrine of command responsibility, which is included in the statutes of the ICTY and the ICC. Furthermore, the study may cover various interconnected topics, including the nature of international crime, its constitutive elements, the individuals who commit such crimes, and the principal accessory distinction in ICL.

From an Islamic law perspective, the research suggests that "indirect co-perpetration" does not fall under the category of either *hudūd* or *ta'zīr* crimes. Instead, it comes under the concept of *siyāsah*. Before delving into this issue under the policy of *siyāsah,* this research will elaborate upon some related matters such as the notion of crime, its classification, components, individual criminal liability, collective criminal liability, and the liability of superiors who either participate in a crime or order others to commit one. These topics will be briefly elaborated upon.

1.6 Framing of Issues

The study seeks to address the following issues:

1. What is the core principle of the doctrine of Command Responsibility? Does it assign principal liability to the commander or secondary liability?
2. What does Joint Criminal Enterprise (JCE) under Article 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) entail? Does it establish liability as a principal or as secondary?
3. How did the court establish the concept of “indirect co-perpetration” in the Katanga and *Ngudjolo* cases by analysing the perpetrator's “control over the organization”? What are the limitations of the "control over the crime" approach as utilized by the International Criminal Court (ICC)?
4. How does Islamic law approach systematic crimes? Does it differentiate between principal and accessory roles in the context of such crimes? Additionally, does Islamic law take a subjective or objective approach to addressing group criminality?
5. How does Islamic law respond to the emerging concept of '” indirect co-perpetration”? If it does not, what authority does a Muslim ruler possess under *siyāsah al-sharī'ah* to address this issue?

CHAPTER II

CRIME AND MODES OF PARTICIPATION IN CRIME IN INTERNATIONAL CRIMINAL LAW (ICL)

Introduction

The term "international crime" has been a contentious issue since its inception. Despite the wealth of information available on the topic, a unanimous definition of international crimes or the acts constituting these crimes has not been agreed upon by the writers of international law. International crimes, like domestic crimes, consist of both the objective element, i.e., (the *actus reus* or guilty act), and the subjective element, i.e., (the *mens rea* or mental element) which must exist simultaneously during the execution of the crime. Indeed, the charter of the International Military Tribunal, Nuremberg (IMT) did not make any express reference to the existence of both these elements, however, the law regulating the components of *actus reus* and *mens rea* evolved significantly in the cases decided by the *ad hoc* tribunals and later by the ICC, which extended its application to non-physical perpetrators as well. Based on that distinction, the *ad hoc* tribunals (both the ICTY and the ICTR) not only differentiated between the liability of a principal and accessory but they also used that distinction to mitigate the sentence of the accused. Comparatively, the ambit of Article 25 of the RS is still controversial and there is a difference of opinion on whether or not it creates a hierarchy of offenses.

2.1 The Nature of International Crimes

Broadly speaking, any act that leads to the violation of social norms protected by a state is a crime.[17] Technically, it is a violation of a legal rule that leads to the punishment of the violator in the form of a fine, imprisonment, forfeiture, or a combination of the three.[18] Hence, a crime is a violation of a legal obligation, it could be negative, i.e., the commission of a prohibited act, or positive, i.e., omission to perform a legal duty.[19]

The fundamental problem associated with international crimes is that the rules of ICL regulating these crimes are quite ambiguous.[20] Though, international crimes have been considered the earliest subject of ICL resulting in the prosecution of the alleged violators of international norms both at national and international levels,[21] ICL still lacks a unified terminology and the writers use different nomenclatures like transnational crimes, state crimes, core crimes, genocide, crimes against humanity, and war crimes - all referring to the same phenomenon.[22] Some writers suggest that there must be a unified term so that these crimes could be described more precisely and in this regard Scheffer suggests that the most accurate term is 'atrocity crimes'.[23]

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[17] Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis* (Springer-Verlag Berlin Heidelberg, 2014), 69. (Marchuk, The Fundamental Concept of Crime in ICL hereinafter).

[18] Roger 0'Keefe, *International Criminal law* (UK: 0xford University Press, 2015), 48. (0'Keefe, *International Criminal law* hereinafter).

[19] Ibid., 49.

[20] Edoardo Greppi,"The Evolution of Individual Criminal Responsibility Under International Law", *International Review of Red Cross* 81(1999): 531.

[21] Ibid., 119.

[22] Miren 0driozola-Gurrutxaga, "Criminology of Atrocity Crimes from a Macro-, Meso- and Micro-Level Perspective", *International e-Journal of Criminal Science* 9 (2015). http://www.ehu.es/inecs (last assessed: 0ctober 28, 2020).

[23] David Scheffer, "Genocide and Atrocity Crimes", *Genocide Studies and Prevention* 1 (2006): 229-250.

On the other hand, a unanimous definition of "international crimes" has also not been adopted by the scholars of international law, nor have they agreed upon the criterion based on which the acts amounting to international crimes can be ascertained. In this regard, O Keefe observes that there does not exist a common understanding or common definition of the concept.[24] The underlying reason is that ICL lacks a codified criminal code that could identify actions or commissions amounting to international crime. Since the sources of ICL consist of different instruments, it is quite difficult to accurately trace the rudimentary elements of a specific crime. Though crimes like war crimes, crimes against humanity, genocide, etc. have been the subject matters of both the *ad hoc* tribunals and the ICC, these formulations have no general application and are only relevant concerning the jurisdiction of the concerned court or tribunal.[25] The problem is identified by Bassiouni in the following words:

> The writings of scholars are uncertain, if not tenuous, as to what they deem to be the criteria justifying the establishment of crimes under international law. Moreover, there is a great deal of confusion in the writings of scholars as to what constitutes an international crime, and how these crimes should be referred to. Thus, the literature contains various undefined terms, such as: crimes under international law, international crimes, international crimes *largo sensu*, international crimes *stricto sensu*, transnational crimes, international delicts, *juscogen* crimes, *jus cogens* international crimes, and even a further subdivision of international crimes referred to as "core crimes," meaning genocide, crimes against humanity, and war crimes. "[26]

[24] O Keefe, *International Criminal Law*, 47, supra note 18.

[25] Ciara Damgard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Springer-Verlag Berlin Heidelberg, 2008), 57-58. (Damgard, *Individual Criminal Responsibility* hereinafter).

[26] M. Cheriff Bassiouni, *Introduction to International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 2014), 142. (Bassiouni, *Introduction to ICL* hereinafter).

2.2 Theories Explaining the Nature of International Crimes:

Malum in se and Malum Prohibitum

Two theories are commonly utilised to elucidate the essence of an international crime, which shall be briefly examined:

A. Evil Nature of the Offense (*Malum In Se)*

B. Prohibited Evil (*Malum Prohibitum)*

A- Evil Nature of the Offence/*Malum in se*

This notion is derived from the Latin concept of *malum in se* (wrong in itself) and the core idea behind this concept is that an international crime is an inherently wrongful conduct, without being enshrined in a treaty provision. Hence, these crimes have not been embodied in a statute, as the gravity of these crimes enables all states to bring to trial the alleged violators thereof, irrespective of their nationality and the place of occurrence of those crimes.[27] This theory has been subject to severe criticism and there prevails an opinion that the heinous nature of an act should not be the sole criterion for it to be considered an international offense; though it might be considered a secondary standard.[28]

B- Prohibition Evil/ *Malum Prohibitum*

This theory postulates that international crimes are those actions that are directly criminalised by international law, encompassing the violation of both treaty law and

[27] Carsten Stahn, *A Critical Introduction to International Criminal Law* (UK: Cambridge University Press, 2019), 19. (Stahn, *A Critical Introduction to ICL* hereinafter).

[28] Ilias Bantekas and Susan Nash, *International Criminal Law* (Cavendish Publishing, 2003), 4-5. (Bantekas and Nash, *International Criminal Law* hereinafter).

customary international law, regardless of whether such acts are prohibited by domestic laws. [29] Most scholars of ICL adhere to this view. For instance, Schwarzenberger characterises international crimes as "offences provided for under international law irrespective of whether they are prohibited (and, in fact, permitted) under domestic law."[30] Similarly, Cryer and his co-authors define International crime as "an offense which is created by international law itself, without requiring the intervention of domestic law".[31] Bantekas and Nash have defined it as any act that entails criminal liability of the defendant, which originates from treaty and custom.[32] According to O Keef international crime is "an offense defined by customary or (general) international law which gives rise to the individual criminal responsibility of the perpetrator under customary international law itself."[33] He further asserts that this is the single defining feature common to all offenses deserving the label 'international crime'.[34]

Heller has termed it as a 'Direct Criminalisation Thesis' (DCT), which posits that some acts are deemed to be universally criminal since they are directly criminalised by the law of nations, regardless of whether these crimes are also outlawed by domestic laws. He rejects this theory, as being inconsistent with international law and conversely,

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[29] Stahn, *A Critical Introduction to ICL,* 20, Supra note 27.

[30] Georg Schwarzenberger, "The Problem of an International Criminal Law", *Current Legal Problems* 3 (1950): 263-96.

[31] Robert Cryer, et al., *An Introduction to International Criminal law and Procedure* (UK: Cambridge University Press, 2010), 8.

[32] Bantekas and Nash, *ICL*, 4. Supra note 13.

[33] O'Keefe, *International Criminal Law,* 120, Supra note 18.

[34] Ibid. Conversely, Wise, defines international crime as a "conduct which an international agreement specifically requires states to subject to prosecution and punishment". He further states that this definition is different from the traditional concept of "offenses against the law of nations" since it necessitates that the obligation must be embodied in a treaty provision. According to this view, the acts prohibited by customary international law would not be deemed as international crimes since the duty to prosecute has not been embodied in a treaty provision. Edward M. Wise, "International Crimes and Domestic Criminal Law" *Depaul Law Review* 38 (1989): 933-34.

he advocates what he calls the "National Criminalisation Thesis" (NCT) which suggests that the universality of a crime does not necessarily depend on international law; some crimes like murder qualify as universal crimes since every state is inclined to proscribe them:

> [N]early all scholars share a common understanding of what makes an international crime; namely that it involves an act that international law deems universally criminal. The international law requirement is what distinguishes an international crime from a domestic crime: although some acts that qualify as domestic crimes are universally criminal-murder, for example-their universality derives not from international law, but from the fact that every state in the world has independently decided to criminalize them.[35]

Most writers consider international crime as an act prohibited by international law, encompassing violation of both customary and treaty law, and this perspective has significant implications. For instance, in the event of a breach of international norms special international tribunals can be established to prosecute these crimes, and states can claim universal jurisdiction over alleged violations of international norms even if those violations occurred beyond their territorial jurisdiction. Furthermore, this feature distinguishes international crimes like war crimes, crimes against humanity, or genocide from domestic crimes like homicide, rape, or assault, etc. [36]

Since ICL still lacks a unanimous approach towards international crimes, scholars have laid down a few characteristics that, when met, elevates the status of a particular behaviour to an international crime. According to Taulbee, an act becomes

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[35] Kevin Jon Heller, "What is an International crime (A Revisionist History)", *Harvard International Law Journal*, 58 (2017): 354-55. (Heller, "What is an International Crime?" hereinafter); Chehtman in disagreement with Heller asserts that existing international law does not support the NCT. For details see Alejandro Chehtman, "A Theory of International Crimes: Conceptual and Normative Issues" in *The Oxford Handbook of International Criminal Law*, forthcoming, 7-8. https://ssrn.com/abstract=3082869 (last assessed: October 28, 2020).

[36]Alexander K. A Greenwalt, "What is an International Crime?". https://ssrn.com/abstract=3773734 (last assessed: September 2, 2020).

an international crime when it satisfies a threefold set of criteria: the act in question must pose a threat to international peace and security by harming either internationally protected persons or their fundamental interests; the act must exhibit a level of brutality that is sufficient to outrage the conscience of humanity; and the act in question must encompass actions that have an impact on the entire international community.[37]

Werle has identified three cumulative conditions, the fulfilment of which makes an offense an international crime: Firstly; there must be an infringement of a norm of the law of nations. Secondly; the violator of those norms must be subject to punishment whether or not it has been integrated into domestic law. Thirdly; the violation of the norm must make the violator individually criminally responsible.[38]

Bassiouni, on the other hand has identified ten peculiarities which if found in any act prohibited by an international convention qualify that act as an international crime, thereby requiring the alleged war criminal to be prosecuted in a specifically created criminal tribunal or the matter should be referred to international jurisdiction for adjudication.[39] On the basis of these features, he has recognised twenty-seven international crimes, a few among these are aggression, genocide, war crimes, crimes against humanity, apartheid, and piracy etc. [40] Apart from these crimes, there are many other crimes regarding which debate still persists whether or not these amount to

[37] James Larry Taulbee, *International Crime and Punishment: A Guide to the Issues-Contemporary Military, Strategic, and Security Issues* (ABC-CLIO, 2009), 27.
[38] G. Werle, *Principles of International Criminal Law* (Hague: T.M.C Asser Press, 2009), 29.
[39] Bassiouni, *Introduction to ICL,* 143, Supra note 26.
[40] Ibid., 144-145.

international crimes. Among these are piracy, slavery, apartheid, terrorism, and human trafficking, to mention a few.[41]

International crimes are characterised by their systematic nature and are often supported by state or state-like entities, or other organised networks, and are directed against thousands of victims.[42] Tallgren writes in this regard "instead of being exceptional acts of cruelty by exceptionally bad people, international crimes are typically perpetrated by unexceptional people often acting under the authority of a state, or more loosely, in accordance with the political objectives of a state or other entity."[43]

Notwithstanding the disagreement mentioned above, there is consensus among scholars of ICL that some crimes are considered as 'core crimes',[44] and include war crimes, crimes against humanity, genocide and aggression.[45] According to Luban, there is generally no agreed name for these categories of crimes; to some these are the 'great crimes' since they represent brutal acts committed by people against each other, while to some others these are 'atrocious acts' that becomes the concern of international community due to their awfulness causing the death of hundreds or thousands of people. These crimes could also be declared as "tribunal crimes" because both the IMT and IMTFE had been granted power to try all those who were alleged to be involved in those crimes. These crimes have also been the subject matter of the ICTY and ICTR,

[41] Alexander K.A. Greenawalt, "The Pluralism of International Criminal law", *Indiana Law Journal* 86 (2011): 1084.

[42] Stahn, *A Critical Introduction to ICL*, 23, Supra note 27.

[43] Immi Tallgren, ″The Sensibility and Sense of International criminal law″ *European Journal of International law* 13 (2002): 575.

[44] Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press, 2001), 111.

[45] Damgard, *Individual Criminal Responsibility*, 60, Supra note 25.

the Special Courts of Sierra Leone (SCSL henceforth), the Extraordinary Chambers in the Courts of Cambodia (ECCC henceforth), the *ad hoc* court for East Timor, and the ICC. However, it is not a precise term, since states are also empowered to enact laws at the domestic level to punish the violators of these crimes. According to him, since these crimes originated in international law under the auspices of international legal institutions, the most suitable term for these four crimes is "pure international crimes".[46]

These crimes have been declared as "the most serious crimes of concern to the international community as a whole"[47] and are directly proscribed by international law incurring individual criminal responsibility of the defendant, rather than merely obliging states to suppress the occurrence of these crimes. These crimes represent collective crimes, because they are committed by individuals, military and paramilitary organisations, or state officials in pursuit of a common plan or policy.[48] Apart from states, non-state entities have also appeared as actors which commence, authorise, disregard or are otherwise involved in these crimes and thus lay down the foundation

[46] David Luban, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law". https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1069&context=fwps_paper (last assessed: October 28, 2020).

[47] Article 5 (1) of the Statute Of ICC. "The Statute itself does not designate these crimes as core crimes; rather the term arose during discussions on subject matter at the Rome Conference, was picked up by the literature, and is now widely accepted. Textbooks, course outlines for teaching, and commentaries regularly simply *state* that the crimes in the Rome Statute are the 'core crimes". Christine Schwöbel-Patel, *The Oxford Handbook of International Criminal law*, eds. Kevin Jon Heller, et al., (UK: Oxford University Press, 2020), 768-769.

[48] Antonio Cassese, ″The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise″, *Journal of International Criminal Justice* 5 (2007): 110.

of collectively perpetrating crimes like genocide, crimes against humanity and war crimes.[49]

In the case of aggression and genocide, it cannot be presumed that individuals can perpetrate these crimes independently without the support of state machinery. An immense number of international accords consider the crime of aggression as an inter-state crime perpetrated by a group of individuals having control over the state apparatus.[50] Similarly, most genocides of the present era have been carried out either by states or state-like entities. Moreover, the mass killing of national, religious, ethnic or racial groups requires proper planning which is beyond the capacity of individuals.[51]

In contrast to other crimes, war crimes are unique in the sense that they are sporadic acts of violence that can be committed individually. However, due to the organised nature of war, even an isolated act can have international implications. As Nollkaemper writes "war crime distinguishes itself from individual ordinary crimes by its organised nature, and more often than not war crimes will have the systematic element as required by the definition of system criminality."[52] While international courts and tribunals have traditionally focused on large-scale atrocities, the ICC is

[49] Jann K. Kleffner, *The Collective Accountability of Organised Armed Groups for System Crimes in System Criminality in International Law*, eds. Andre Nollkaemper and Harmen Van der Wilt (Cambridge University Press, 2009), 239.

[50] Gerry Simpson, ″Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law″ in *System Criminality in International Law*, eds. Andre Nollkaemper and Harmen van der Wilt (UK: Cambridge University Press, 2009), 89.

[51] Ibid.

[52] Andre Nollkaemper, ″Systematic Effects of International Responsibility for International Crimes″, *Santra Clara Journal of International Law* 8 (2010): 317.

empowered to prosecute war crimes that are committed in furtherance of a common criminal plan or policy.[53]

Since the core crimes fulfil the criteria laid down by different academicians, for the purpose of the present research, these crimes will be referred to as international crimes.

2.3 Perpetrators of International Crimes

As discussed in the previous section, an international crime refers to large-scale atrocities involving thousands of perpetrators. However, all these perpetrators do not necessarily physically commit those crimes; a few among them are involved in the planning of these crimes and are considered "intellectual authors" or "conspiring perpetrators". Thus, international crimes include both physical perpetrators who are either mid-level or low-level actors and are called 'hands-on criminals' and non-physical perpetrators who are referred to as 'criminals behind the desk'.[54] Non-physical perpetrators usually belong to the leadership level and are most commonly involved in the planning of these crimes, instead of physically committing them.[55] Apart from heads of state, these could also include heads of a specific organisation like the army, or police, or heads of other criminal organisations like those that provide secret services or terrorist organisations.[56]

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[53] Rome Statute, article 8 (1).

[54] Mikaela Heikkila, *Coping with International Atrocities through Criminal Law: A Study into the Typical Features of International Criminality and the Reflection of those Traits in International Criminal Law* (Finland: Abo Akademi University Press, 2013), 28. (Heikkila, *Coping with International Atrocities* hereinafter).

[55] Ibid.

[56] For details See Alette Smeulers, "Perpetrators of International Crimes: Towards a Typology, 244-245.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383085 (last assessed: October 20, 2020).

The issue of ascertaining the status of a person as a superior in the context of international crime is a complex issue. With the exception of the highest and lowest levels of perpetrators, most perpetrators of international crimes have both superiors above them and subordinates below them. For instance, if a person is chief of a prison guard, he can be superior to other prison guards and will nonetheless be considered a low-level perpetrator in relation to the political superior. In ICL, the hierarchical division of different actors makes it difficult to establish a connection among the participants in the milieu of collective crimes. It is hard to connect the high-level actors having a decisive influence in the perpetration of the crime to the physical actors, though it is equally problematic to label the low-level actors as having an equal share in the accomplishment of the criminal goals of the highest authorities.[57]

2.4 Structure of an International Crime: *Actus Reus and Mens Rea*

It is a well-founded norm of criminal law that a person cannot be inculpated for mere evil thoughts unless he is indulged in the perpetration of an illegal act. Different kinds of proscribed behaviours are associated with different crimes. In a few cases, an act or omission is sufficient to establish the occurrence of the crime without the need to prove that the crime was the outcome of the act of the defendant. These are called "conduct crimes" and its examples include perjury, rape, etc. On the other hand, some crimes are "result crimes" like murder, and criminal damage, that cause death by negligent driving, etc., in these crimes it must be established that the proscribed act occurred due to the defendant's act.[58] That is the *actus reus* or external element of the offense. Apart from

[57] Ibid., 29.
[58] David Ormerod, et al., *Ormerod's Criminal Law* (UK: Oxford University Press, 2015), 26.

actus reus, the prosecution also needs to establish that the accused/defendant had a specific state of mind regarding the occurrence of the impugned acts which is referred to as *mens rea* or mental element of the crime. The presumption that a person cannot be held liable for his or her act unless the prescribed *mens rea* corresponds to the proscribed behaviour, i.e., *actus reus* has been embodied in a Latin maxim *"actus non facit reum nisi mens sit rea"* (an act does not make a man guilty unless his mind is also guilty).[59]

Thus, two fundamental elements of a crime must necessarily exist including both the *actus reus*, i.e., a physical act that caused the occurrence of the crime, and *mens rea*, i.e., the criminal intention or fault.[60] A*ctus reus* encompasses objective elements of the crime, like commission of a proscribed act, its consequences, connection between the act of the defendant and its repercussions, while in certain situations, it also includes a peculiar state of affairs attached to the subject or object of the crime, like the minimum age of the victim, etc. The mental element (*mens rea*) refers to the culpable state of mind of the accused and includes cognitive elements (knowledge), volitional elements (intent), and awareness of the risk or negligence involved therein.[61]

In order to ascertain the criminal culpability of the accused, it is necessary that both these elements must exist simultaneously; the defendant must possess the required *mens rea* at the time of occurrence of the offense. Thus, *mens rea* after the commission

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[59] Ibid.

[60] Courtney Klein, "Guilty Act, Guilty Mind: establishing Actus Reus and Mens Rea in Situations of Conspiracy and Accessory", 1-2. https://www.researchgate.net/publication/261026128_Guilty_Act_Guilty_Mind_establishing_Actus_Reus_and_Mens_Rea_in_situations_of_conspiracy_and_accessory (last assessed: October 28, 2020).

[61] Stahn, *A Critical Introduction to ICL*, 22, Supra note 27.

of the offense does not attach criminal liability to the accused.[62] It is also essential that *mens rea* should correspond with each component of the *actus reus* and is usually expressed as the 'principle of correspondence'. For example, if a person caused injury to another person, the *mens rea* should be an intention to cause injury. The central thought is that a person can be considered accountable for intended harms only or for those consequences that he or she desires to bring about.[63]

However, it is not necessary that both the elements of '*actus reus'* and '*mens rea'* must necessarily exist in every crime; certain crimes like strict liability crimes can be committed without *mens rea*. Moreover, these two prerequisites vary from one crime to another. For instance, if there is an attempt to perpetrate a particular crime, it is necessary to establish that the accused desired to carry out the full act whereas in other crimes like criminal damage, it is enough to establish recklessness on the part of the accused.[64]

2.4.1 *Actus Reus* and *Mens Rea* of Non-Physical Perpetrators in ICL

Since '*actus reus'* and '*mens rea'* are the constitutive components of a crime by which criminal liability of the accused is determined, both the international courts and tribunals have expanded the scope of both these elements by including non-physical perpetrators within their ambit. Below we shall briefly discuss these elements, especially their gradual development in the framework of international crimes.

[62] Christopher M. V. Clarkson, *Understanding Criminal Law* (London: Sweet & Maxwell, 2005), 13-14.

[63] Ibid., 15.

[64] Ibid., 16.

A-The Element of *Actus Reus*

The law regulating the component of *actus reus* proved to be quite ambiguous in the charter of IMT. The general provisions relating to 'participation' were only incorporated in the definition of the crime against peace:

> Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the fore-going."[65]

Regarding war crimes and crimes against humanity, the charter only enumerated those acts which could qualify as these crimes, without expressly providing for the relevant form of participation necessary to give rise to criminal culpability. It defined war crimes in the following words:

> War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to Wave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.[66]

Crimes against humanity were defined as:

> Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, orpersecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation ofthe domestic law of the country where perpetrated.[67]

[65] Article 6 (a) of the Charter of IMT.
[66] Article 6 (b) of the Charter of IMT
[67] Article 6 (c) of the Charter of IMT.

Comparatively, the provisions of the statute of ICTY are more precise and detailed. According to article 7 of the statute of ICTY, which actually talks about individual criminal responsibility, participation in a crime refers to planning, instigating, aiding and abetting. It states that "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime… shall be individually responsible for the crime". [68]

The statute was, silent about non-physical perpetrators who though far away from the place of occurrence of international crimes yet, perform an influential role in the occurrence of these crimes. The problem arose in *Tadić* case where the tribunal found it difficult to assign criminal responsibility to the defendant who was accused to be involved in the assassination of five men in the absence of an evidence suggesting that he was physically involved in killing either of them. In order to reach its findings, the court needed to answer whether criminal liability could be attached to a participant of a group for those crimes which are perpetrated by other members in furtherance of a common criminal plan.[69] While trying to reach the conclusion, the Appeals Chamber clearly recognised that the general presumption is that just like domestic criminal laws, ICL adheres to the rule of 'personal culpability', which postulates that no one can be blamed for a crime in which he did not personally participate. This principle is expressly recognised in article 7 (1) of the statute of the ICTY, which enumerates five categories of crimes giving rise to personal criminal culpability.[70] The Appeals Chamber further elaborated the scope of the said article by expressly providing that though first and

[68] Articles 7 & 6 of the Charters of the ICTY and the ICTR, respectively.
[69] *The Prosecutor v. Dusko Tadic*, (The Appeals Chamber Judgement), para 185.
[70] Ibid., para 186.

foremost it covers physical perpetrators, these crimes could also occur where a person participates in a group crime who act together to accomplish agreed criminal goals.[71] It also laid down that the interpretation of the statute according to its object or purpose suggests that the responsibility arising out pursuant to article 7 (1) of the statute not only talks about those offenders who satisfy the material elements of the enumerated crimes but it also extends to all those who participate by way of ordering, instigating, or planning etc.[72]

Similarly, the ICTR Appeals Chamber in *Seromba* case interpreted the scope of 'commission' which appeared in article 6 (1) of the statute regarding those crimes which are perpetrated by plurality of individuals like genocide as amounting to 'direct participation'.[73]

B-The Element of *Mens Rea*

The charter of IMT did not expressly mention the component of *mens rea* necessary to attribute criminal responsibility to an accused nor was it defined in its statute. Thus, apart from *actus reus*, it appeared to be quite challenging to assign *mens rea* to non-physical perpetrators, i.e., to the intellectual authors or conspiring perpetrators of international crimes. In *Tadic* case, the Appeals Chamber expanded the scope of *mens rea* by propounding that the appellant shared the intention by furthering the common criminal purpose to forcefully eliminate non-Serb population from the Prijedor region. The court further held it was foreseeable, that in the pursuit of the common criminal

[71] Ibid., para 188.
[72] Ibid., para 189.
[73] *Prosecutor v Athanase Seromba*, (The Appeals Chamber Judgement), para 161.

plan, non-Serbs might be killed but he nonetheless took the risk.[74] It defined *mens rea* as "a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk (*dolus eventualis*)".[75]

The scope of *mens rea* was elaborated by the ICTY Trial Chamber in *Blaskic* case to include both guilty intention and recklessness.[76] The Trial Chamber in *Brdanin* case further explained that criminal culpability also arises where the crime in question is only a possible consequence of the implementation of the agreed plan, and the defendant knowingly took part in the execution of those crimes.[77]

The 'possibility standard' was upheld in *Karadžić* case, in which the court laid down that the JCE III *mens rea* standard does not presuppose that a deviatory crime might possibly take place; however, it does suggest that the likelihood of the occurrence of a crime is adequately substantial to be predicted by the defendant.[78] The 'possibility standard' was also adopted in a number of cases; such as the *Vasiljević*,[79] *Brdanin,*[80] *Blaskic*,[81] *Martic*[82] and *Krnojelac*[83] have all endorsed that

[74] Ibid., para 232.
[75] Ibid., para 220.
[76] *The Prosecutor v. Tihomir Blaskic*, (The Trial Chamber judgement), para 152.
[77] *Prosecutor v. Radoslav Brdanin*, (The Trial Chamber II Judgement), para. 265.
[78] *Prosecutor v. Radovan Karadz˘ic´*, (Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability), pares. 18–19.
[79] *Prosecutor v. Mitar Vasiljević*, (The Appeals Chamber Judgement), para. 101. (*Vasiljević* Appeals Judgement hereinafter).
[80] *Prosecutor v. Radoslav Brđanin*, (The Appeals Chamber Judgement), para 411. (*Brđanin* Appeal Judgement hereinafter).
[81] Prosecutor v. *Tihomir Blaškić*, (The Appeals Chamber Judgement), para. 33. (*Blaškić* Appeal Judgement hereinafter).
[82] *Prosecutor v. Milan Martić*, (The Appeals Chamber Judgement), para. 168.
[83] *Prosecutor v. Milorad Krnojelac*, (The Appeals Chamber Judgement), para. 32. (Krnojelac Appeal Judgement hereinafter).

liability arises even in those cases where the actor knows that the occurrence of a crime is only a possible consequence of the implementation of the agreed plan.

As far as the statute of ICC is concerned, it expressly provides that a person becomes liable for those crimes which are enumerated in its statute, if that person commits those crimes intentionally and knowingly. Article 30 of the RS reads, "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge".[84] The statute further explains the elements of 'intent' and 'knowledge' by providing that intention with reference to 'conduct' refers to getting engaged in the conduct and with reference to cause means that the person desired to bring about the consequences or he/she knows that it will take place in the ordinary circumstances. The term 'knowledge' refers to awareness that the desired consequences will occur in the usual circumstances.[85]

Article 28 of the RS lays down two distinct degrees of criminal responsibility of both the military and civilian superiors. If a military commander personally commits a crime, general rules of *mens rea* are applicable. As far as the criminal liability of a superior for the crimes perpetrated by his subordinates is concerned, article 28 (i) of the RS makes the commander liable for all those crimes regarding which he has actual knowledge, i.e. he is aware, or constructive knowledge, i.e. he should be aware that his subordinates either perpetrated or were about to perpetrate the crimes but he did not

[84] Article 30 (1) of the Statute of the ICC.
[85] Articles 30 (2) & (3) of the ICC Statute.

take necessary steps to stop the occurrence of those crimes.[86] The 'should have known' standard was further clarified by the Pre-Trial Chamber in *Bemba* case as including 'negligent' responsibility.[87] However, the superior must not necessarily share intention with the principal perpetrator; mere knowledge or failure to acquire knowledge is enough to make the commander liable for the crimes perpetrated by his/her subordinates.[88]

As opposed to the military commanders, the standard of *mens rea* for civilian superiors is quite low. Article 28 of the RS makes the superior liable only for those crimes regarding which he/she has actual knowledge that his/her subordinates were involved in atrocious acts, but he/she disregarded that information and did not take necessary measures to stop them from doing so.[89]

2.5 Principal Accessory Distinction in Domestic Legal Systems and ICL

It is not challenging to attribute criminal responsibility to an individual when he physically perpetrates a crime nor is it problematic to assign criminal liability to multiple perpetrator who materially carry out objective elements of the crime. Physical actors or hands-on criminals are generally considered as perpetrators or principals.[90] However, where a crime is perpetrated by plurality of individuals and their participation

[86] Article 28 (i) (a) of the ICC Statute.
[87] Article 28 of the ICC Statute.
[88] Otto Triffterer, "Article 28: Responsibility of Commanders and other Superiors" in Triffterer/Ambos, *The Rome Statute of the International Criminal Court: A Commentary,* Third Edition (C. H. Beck. Hart, Nomas),1099.
[89] Article 28 (b) (i) of the Statute of ICC.
[90] Heikkilä, *Coping with International Atrocity through Criminal law,* 176, Supra note 54.

varies from giving advice to actually executing the crime, it largely affects the criminal responsibility of the people involved therein. Unlike the physical actors, all those who participate by way of counselling, soliciting, providing assistance, or giving advise are *complicitous* in the acts of the perpetrator and are called accessories or secondary party to the crime.[91] Before analysing principal accessory distinction both in domestic legal systems and ICL, we shall briefly explain the distinction between the two:

A principal is that person whose action is considered as the most direct cause of the *actus reus* of the offense,[92] while all those who participate by way of giving advice, or otherwise aid or abet in the perpetration of the crime in question are called accessories.[93] According to Horder, if an individual satisfies the definitional elements of a crime he is considered as principal to the crime, while anyone who aids, abets, counsels or procures the principal is known as an accomplice or secondary party. However, this does not mean that if two or more people act together to perpetrate a crime, one must be principal and the others accessories; two or more people can become co-principals if they satisfy all the constituent elements of the crime.[94] The difference between principal and accessory either makes a person directly liable or derivatively liable for the crime. Thus, the liability of a principal is established independently and he is considered as directly liable for the crime whereas the liability of an accessory is derivative as it depends on the liability of the principal.[95] Unlike vicarious liability that

[91] George P. Fletcher, *Basic Concepts of Criminal law* (New York: Oxford University Press, 1998), 188. (Fletcher, *Basic Concepts of Criminal law* hereinafter).

[92] Michael Allen, *Criminal Law* (UK: Oxford University Press, 2015), 241.

[93] Ibid.

[94] Jeremy Horder, *Ashworth's Principles of Criminal law* (UK: Oxford University Press, 2019), 455.

[95] Olasolo, *The Criminal Responsibility of Senior Political and Military Leaders*, 14, supra note 10.

arises due to a special relationship existing between the parties, an accessory can only become liable if he/she makes an essential contribution in the perpetration of the crime.[96]

2.5.1 Principal Accessory Distinction in Domestic Legal Systems: Unitary *Vs* Differential Participation Model

If two or more people are involved in the perpetration of a crime, the domestic criminal laws either opts for the 'unitary perpetrator model' according to which both the principal and the accessory are treated equally or the 'differential participation model' which differentiates between the principal and accessory and assigns criminal liability by taking into consideration the role played by each one of them. Below we shall briefly discuss these two models:

A. The Unitary / Monistic Model

The unitary/monistic model of perpetration presupposes that every person who participates in a crime intentionally and with knowledge is considered as principal and is independently liable for the crime. This model does not differentiate between the liability of the principal and accessory and rather treats them equally, irrespective of the contribution made by each of them in the perpetration of the offense.[97] The elements of causation, *mens rea,* justification and excuse are evaluated on the basis of contribution made by each participant who is thus convicted for the crime proper.[98] For

[96] Sanford H. Kadish, "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine" *California Law Review* 73 (1985): 337.

[97] Lachezar Đ. Yanev, *Theories of co-perpetration in International Criminal law* (Leiden: Brill Nijhoff, 2008), 9-10.

[98] Elies Van. Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford Univesity Press, 2012) 66. (Sliedregt, *Individual Criminal Responsibility* hereinafter).

example, according to the German Criminal Code a person incurs criminal liability irrespective of the fact that he commits the crimes independently or through another person. It lays down "whoever commits an offense themselves or through another person incurs a penalty as an offender." [99] Similarly, the California Criminal Code also treats all the participants of a crime as principals whether they commit it independently or through another person. According to article 31 of the California Criminal Code "all persons concerned in the commission of a crime… whether they directly commit the act constituting the offense, or aid and abet in its commission… are principals in any crime so committed."[100]

B. The Differential Participation Model

The 'differential participation model' makes a distinction between all those who directly take part in the crime as compared to those who merely aid or abet and thereby make a secondary contribution to the crime in question. Thus, where the offense has been committed jointly by a plurality of individuals, all those people who directly perpetrated the crime are punished for the crime proper as compared to those who merely aid and abet; their liability does not exist independently and is actually derived from that of the principal.[101] The idea underlying this concept is that everyone must be held accountable according to his/her contribution to the crime.[102] Many legal systems of the world abide by this system and explicitly mark a clear distinction between principals to the crime, i.e., those who directly contribute in the perpetration of the

[99] Section 25 of "The German Criminal Code.
[100] Section 31 of "The California Criminal Code".
[101] Sliedregt, *Individual Criminal Responsibility,* 55, supra note 98.
[102] Fletcher, *Basic Concepts of Criminal Law,* 191. Supra note 91.

crime and accessories, i.e., all those whose participation is secondary to the crime. For example, according to Spanish law, "all those persons who commit the crime either individually or jointly, or make an essential contribution to the commission of the crime without which the crime would not have been committed are considered as principals″,[103] while all those who contribute in any other form in the perpetration of the crime are called accessories.[104] Since the contribution made by the accessory is low as compared to the principal, he is subject to a lower punishment as mentioned in Article 63 which reads "accessories of a consummated or attempted crime shall be sentenced to a lower degree of punishment to that set by law for the principals of the same offense".[105]

A few legal systems in the world recognise distinction between principal and accessory to the crime, but for the purpose of punishment they treat them both equally. For instance, English law, despite clearly recognising the distinction between principal and accessory, subjects them both to the same punishment.[106] Section 8 of the Accessories and Abettors Act, 1861 as amended by the criminal law act provides that a person who aids or abets the commission of a chargeable offense is liable to be prosecuted as a principal offender. Similarly, the French criminal code differentiates between the principal and accessory, for the purpose of punishment it deals both of them equally.[107] The code clearly recognises that accomplices are punishable as direct

[103] Article 28 of ″The Spanish Criminal Code″.

[104] Ibid, article 29.

[105] Ibid., article 63.

[106] Jeremy Horder, *Ashworth's Principles of Criminal Law* (UK: Oxford University Press, 2019), 456.

[107] According to articles 121-4, of the French penal Code ″The perpetrator of an offence is the person who (1) commits the criminally prohibited act; (2) attempts to commit a felony or, in the cases provided for by Statute, a misdemeanour. ″ According to Article 121-7 ″The accomplice to a felony or a

perpetrators.[108] Since the principle of mitigation of sentence has not been recognised by both the English law and French law, punishment of accessory could be mitigated through judicial discretion.[109]

2.5.2 Principal Accessory Distinction in ICL: From a Monistic to a Differentiated System

Below we shall discuss the principal/accessory distinction in ICL with reference to three different phases:

A- Principal Accessory distinction during post World War II proceedings.

B- Principal Accessory distinction in the jurisprudence of the two *ad hoc* tribunals: ICTY and ICTR.

C-Principal Accessory distinction within the legal framework of the ICC Statute.

A. Principal Accessory Distinction During Post World War II Proceedings

During post-WWII proceedings, both the judges and the prosecutors instead of using the common terminologies of principal and accessory preferred to use the terms like getting engaged in a criminal organisation or following an agreed criminal plan and thereby negated the normative difference between the direct and indirect perpetrators

misdemeanour is the person who knowingly, by aiding and abetting, facilitates its preparation or commission. Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice″

[108] Article 121-6 of ″The French Penal Code″.

[109] Hector Olasolo, "Developments in the Distinction between Principal and Accessorial Liability under International Criminal Law in Light of the First Case Law of the International Criminal Court" in *The Emerging Principle of International Criminal Court*, eds. Carsten Stahn and Goran Sluiter (Martinuss Nijhoff Publishers, 2008), 341-342. (Olasolo, "Developments in the Distinction between Principal and Accessorial Liability" hereinafter).

of international crimes.[110] The guiding principle in the equal treatment was that any assistance provided in the execution of the crime was supposed to be considered as criminal participation.[111]

For instance, in *US v. Josef Altstötter, et al.*, an American military tribunal held that "the person who persuades another to commit murder, the person who furnishes lethal weapon to facilitate the perpetration of the crime, and the person who pulls the trigger are all principals or accessories to the crime".[112]

Similarly, in the trial of *InWagner* and Six Others, where all the accused (except Grunér who was accused of having committed intentional murder were indicted with complicity, the tribunal treated them all equally for the purpose of punishment and in this regard it relied on articles 59 and 60 of French Penal code which provided equal punishment to both the principal and accessory.[113] The practice of international tribunals to treat both the principal and accessory equally prompted some commentators to assert that during the post WW II proceedings, these tribunals relied on the 'unitary model of perpetration'.[114]

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[110] Elies Van Sliedregt, "Perpetration and Participation in Article 25(3) of the Statute of the International Criminal Court" in *The Law and Practice of the International Criminal Court*, ed. C. Stahn (Oxford: Oxford University Press, 2015), 5.

[111] Gerhard Werle "Individual Criminal Responsibility in Article 25 ICC Statute", *Journal of International Criminal Justice* 5 (2007): 955 (Werle "Individual Criminal Responsibility in Article 25 ICC Statute" hereinafter).

[112] *Law Report of Trials of War Criminals: Selected and prepared by the United Nations War Crimes Commission*, Vol. XV (London: The United Nations War Crimes Commission by His Majesty's Stationary Office, 1949), 53. (Law Reports of War Criminals hereinafter).

[113] Ibid., 57.

[114] Albin Eser, "Individual Criminal Responsibility: Mental Elements-Mistake of Fact and Mistake of Law" in *The Rome Statute of the International Criminal Court: A Commentary,* eds. Antonio Cassese, Paola Gaeta and John R. W.D. Jones (Oxford: Oxford University Press, 2002), 784.

B. Principal Accessory Distinction in the Jurisprudence of the *Ad Hoc* Tribunal: The ICTY and the ICTR

Unlike the proceedings held after WW II, the statute of the *ad hoc* tribunals not only enumerated different modes of perpetration including planning, instigating, ordering, committing, aiding, and abetting a crime,[115] but it also recognised that distinction in a number of cases. The Appeals Chamber in the *Tadić* case recognised that the aider and abettor always assist the principal perpetrator.[116] In the *Kordić* case, the Trial Chamber I declared that article 7 (1) of the statute enumerates different forms of participation in a crime and may thus be considered as dividing liability between principal perpetrators and accomplices.[117] Similarly in the *Kcocka* case, the Trial Chamber held that if it is established that the participants of a criminal enterprise share a common intention, they reach the status of co-perpetrators.[118]

Apart from embracing principal accessory distinction, the *ad hoc* tribunals also recognised that distinction for lowering the sentence of the accused. For instance, the Appeals Chamber in the *Vasiljevic* case reduced the punishment of the accused from 20 to 15 years by expressly recognising that aiding and abetting warrant a minimum punishment as compared to the punishment of principal.[119] Similarly, in *Krstić*,[120]*Mrkšić*[121] and *Šljivančanin*,[122]*Kajelijeli* and in *Ndahimanacase* the tribunals

[115] See articles 7 (1) and 6 (1) of the ICTY and ICTR Statutes, respectively.
[116] *Tadic* Appeal Judgement, para. 229.
[117] *Prosecutor v Dario Kordic,* The Trial Chamber judgement para 373.
[118]*Prosecutor v Kcocka,* The Trial chamber judgement para 273.
[119] *Vasiljević* Appeals Judgement, para 1821 & 1822.
[120]*Prosecutor v. Radislav Krstić,* Appeal Chamber Judgment, para 268.
[121]*Prosecutor v Mrkšić and Šljivančanin,* Appeals Chamber Judgment para 407.
[122]*Prosecutor v. Juvénal Kajelijeli*, Judgment and Sentence, para 963.

confirmed less culpability of an aider and abettor.[123] The Appeals Chamber in *Ndindabahizicase* held:

> This principle requires, *inter* alia, that the sentence corresponds to the totality of guilt incurred by the convicted person. This totality of guilt is determined by the *actusreus* and the *mensrea* of the convicted person. The modes of liability may either augment (e.g., commission of the crime with direct intent) or lessen (e.g., aiding and abetting a crime with awareness that a crime will probably be committed) the gravity of the crime. Thus, the criminal liability of a convicted person has to be established unequivocally. [124]

C. Principal Accessory Distinction within the Legal Framework of the ICC Statute

As far as the statute of ICC is concerned, article 25 (3) mentions various modes of criminal participation including commission, ordering, aiding, abetting etc:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; [125]

Though article 25 of the RS expressly enumerates different modes of criminal participation in the context of international crimes, it does not clearly state that these

[123] *Prosecutor v, Grégoire Ndahimana,* (The Appeals Chamber Judgment), para 252.
[124] *Prosecutor v. Emmanuel Ndindabahizi,* (Judgement and Sentence), para 122.
[125] Article 25 of the Statute of ICC.

modes could play any role in aggravating or mitigating the sentence of the defendant.[126] However, article 78(1) of the RS generally requires that the gravity of the crime must be taken into account while imposing sentence to the accused and the rules of procedure and evidence similarly state that while indicting the accused, the court should *inter alia* take into consideration the level of contribution made by the accused.[127]

Article 25 (3) of the RS has been one of the contentious articles and there is difference of opinion whether it creates hierarchy of blameworthiness or not. Many commentators strongly believe that the said article by enumerating different modes of liability establishes a hierarchy of blameworthiness and thus adopts differentiated model of perpetration.[128] According to Ambos, article 25 of the RS by differentiating between different modes of perpetration, establishes various levels of criminal responsibility.[129] Burghardt, while elaborating the scope of article 25 (3) (a-d) states that it introduces four different levels of criminal responsibility; on the top level it introduces physical commission of the crime, on the second level it has introduced accessory liability in the form of instigating, ordering, etc., on third level it covers assistance and on fourth level it refers to the contribution to a group crime. He further explains that a fifth level has been introduced by Article 28 of the RS, where a superior

[126] Gerhard Werle & Borris Burghardt, "Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute", in *Pluralism in International Criminal Law*, eds. Elies van Sliedregt and Sargey Vasiliev (UK: Oxford University Press, 2014), 306. (Werle and Burghards, "Establishing Degree of Responsibility" hereinafter).

[127] Rule 145 (1) (c).

[128] S. Wirth, "Co-perpetration in the Lubanga Trial Judgment", *Journal of International Criminal Justice* 10 (2012): 978, Manacorda & C. Meloni, "Indirect Perpetration versus Joint Criminal Enterprise": 167, supra note 7.

[129] Kai Ambos, "Article 25-Individual criminal responsibility" in The Rome Statute of the International Criminal Court: A Commentary, eds. Otto Triffterer & Kai Ambos (C. H. Beck-Hart-Nomos, 2016), 984.

is considered as responsible for the offenses committed by his subordinates, provided that he failed to control the occurrence of those crimes.[130] Finnin opines that this article makes it possible to differentiate between the liability of the principals and accessories to the crime.[131] In view of Werle and Burghards, the word commission appearing in the article 25 of the statute must be understood as assigning principal liability, entails the highest degree of responsibility.[132] The ICC Trial Chamber in *Lubanga* case explicitly recognised that the "statute differentiates between the responsibility and liability of those persons who commit a crime [at Article 25(3) (a)] and those who are accessories to it [at Articles 25(3) (b) to (d)]". [133] According to Olasolo, this decision should be viewed as the final step in the process of differentiating between the liability of principal and accessory in ICL.[134]

Conversely, a few other commentators maintain the viewpoint that the said article does not create hierarchy of offenses. Among them is Sliedregt who asserts that "no hierarchy exists amongst the modes of liability in subparagraphs 3(b-d)."[135] According to Stephens, apparently various parts of Article 25(3) overlap each other which is an indication that the drafters did not intend to establish any such hierarchy.[136]

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[130] Boris Burghardt, "Modes of Participation and their Role in a General Concept of Crimes under International Law", in *The Review Conference and the Future of the International Criminal Court*, eds. Christoph Burchard, Otto Triffterer and Joachim Vogel (Alphen an den Rijn, 2010), 92.

[131] Sarah Finnin, *Elements of Accessorial modes of liability: Article 25 (3) (b) and (c) of the Rome Statute of International Criminal Court* (London-Boston: Martinus Nijhoff Publishers, 2012), 13.

132 Werle and Burghards, "Establishing Degree of Responsibility", 307. Supra note 126.

[133] *Prosecutor v Thomas Lubanga Dyilo*, (The Pre-Trial Chamber I Decision), para. 999.

[134] Olasolo, "Developments in the distinction between principal and accessorial liability in light of the first case-law of the ICC", 343. Supra note 109.

[135] Elies Van Sliedregt, "Perpetration and Participation in Article 25(3) of the Statute of the International Criminal Court "in *The Law and Practice of International Criminal Court*, ed. C. Stahn (Oxford University Press, 2015), 21

[136] Pamela J. Stephens, "Collective Criminality and Individual Responsibility: The Constraints of Interpretation", *Fordham International Law Journal* 37(2014): 544.

In his discordant opinion in *Lubanga* case, Fulford also opposed the idea that the said article establishes any kind of hierarchy. In this regard he asserted that there are no solid grounds to conclude that the gravity of ordering, soliciting or inducing a crime pursuant to article 25(3)(b) is less as compared to perpetrating a crime through another person by virtue of article 25 (3) (a), and these two notions apparently overlap each other.[137]

Similarly, the ICC Trial Chamber II in *Germain Katanga* case laid down that Article 25(3) does not establish hierarchy of offenses, nor does it allow that the sentence of an accused be mitigated according to the contribution made by him. It further laid down that article 25 of the RS simply recognise different types of illegal acts and thus the difference between the liability of the perpetrator and the accessory does not under any condition warrant hierarchy of blameworthiness.[138]

> Ultimately, the distinction between perpetrator of a crime and accessory to a crime inheres in the Statute but does not, nonetheless, entail a *hierarchy*, whether in respect of guilt or penalty. Each mode of liability has different characteristics and legal ramifications which reflect various forms of involvement in criminality. However, this does not necessarily signify that accused persons will be found less culpable or will incur a lesser penalty.[139]

In this regard, certain authors take a more extreme stance, proposing that ICL should altogether abandon the principal-accessory distinction. They argue that at times, the role of an accomplice is more pivotal, and this could only be fully considered if the distinction between principal and accessory is eliminated. [140]

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[137] Separate Opinion of Judge Fulford, para 8.
[138] *Prosecutor V. Germain Katanga,* (The Trial Chamber II Judgement), para 1386.
[139] Ibid., para 1387.
[140] For details see James G. Stewart, "The End of Mode of Liability' for International Crimes", *Leiden Journal of International law* 25 (2012): 165-219, supra note 13.

In view of the present author, the distinction between principal and accessory liability is in consonant with the principle of culpability which postulates that sentence should be inflicted according to the role played by each person. Thus, all the participants receive punishment according to the degree of their involvement in the crime,[141] because where multiple people participate in a crime, the degree of involvement of each participant will more probably be different leading to different consequences.[142] Unlike 'unitary systems' according to which every individual who contributed in any way in the commission of the impugned acts is qualified as a perpetrator irrespective of the degree of participation made by him/her, a person in differentiated model is charged according to his/her involvement in a crime. This distinction is also in line with the 'normative' or 'top-down' approach, which requires that all those individuals who play an influential role in the execution of the crime should be considered as principal perpetrators.[143]Accordingly, it extends the principal liability to those who mastermind international crimes and thus are considered as intellectual authors or conspiring perpetrators.[144] Moreover, it is also in conformity with the rule of fair labelling which postulates that an offender must be labelled according to the wrong done by him/her.[145]

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[141] Jeremy Horder, "Criminal Culpability: The possibility of a general theory", *Law and Philosophy* 12 (1993): 206; Paul K. Ryu, "Causation in Criminal law", *University of Pennsylvania Law Review* 106 (1958): 785; Eric Colvin, "Causation in Criminal law" *Bond Law Review* 1 (1989): 253.

[142] Darryl Robinson, "A justification of Command Responsibility", *Criminal Law Forum* 28 (2017): 656.

[143] Maja Munivrana Vajda, "Distinguishing Between Principals and Accessories at the ICC: Another assessment of Control Theory", 1048.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2673514 (last assessed: October 28, 2020).
https://hrcak.srce.hr/file/195804, (Last Assessed: October 28, 2020).

[144] Sliedregt, *Individual Criminal Responsibility*, 72, supra note 98.

[145]Gerhard Werle and Burghardt, "Establishing Degrees Responsibility", 305, supra note 126.

2.6 Conclusion

Unlike domestic crimes, international crimes are not sporadic acts of violence; instead, these are large scale atrocities involving hundreds and thousands of actors in which the role played by non-physical perpetrators is more crucial as compared to the physical actors. Since non-physical actors are not materially engaged in the perpetration of international crimes, they lack both the constitutive element of crimes, i.e. the '*actus reus'*, and the *mens rea.* It appears to be difficult to assign criminal responsibility to them according to the level of contribution made by them. Given the crucial role played by intellectual authors or conspiring perpetrators of international crimes, the contribution made by the *ad hoc* tribunals is quite significant which extended the scope of *actus reus* and *mens rea* to non-physical perpetrators as well. In this regard, the ICTY (also followed by the ICTR) interpreted the word 'commission' appearing in its statute to include non-physical perpetrators as well. Similarly, the scope of *mens* rea was extended to all the participants of a group for those crimes which are perpetrated in furtherance of a common criminal plan, notwithstanding the fact that any one among them had not intended to attain certain result, though he/she knew that the action of the group might lead to such consequences.

Another crucial development in this regard is that the *ad hoc* tribunals also expressly differentiated between the liability of both the principal and accessory in the context of international crimes. There are a vast majority of cases in which they reduced the punishment of the accused on the basis of the contribution made by them. In this regard, the tribunals deviated from the jurisprudence of the post-WWII proceedings where both the principal and accessory were treated equally. However, the scope of

article 25 (3) of the RS which enumerates different forms of participation is not yet clear. Their interpretation of the said article whether or not it creates hierarchy of offenses has been a contentious issue. Some commentators believe that by enumerating different modes of perpetration, article 25 (3) creates hierarchy of offenses, while many other writers oppose this interpretation.

CHAPTER III

MODES OF ATTRIBUTION OF CRIMINAL RESPONSIBILITY TO HIERARCHIC SUPERIORS IN INTERNATIONAL CRIMINAL LAW

Introduction

High-level perpetrators are the focus of attention of ICL and in this regard it has relied on the doctrines of Command Responsibility, the doctrine of JCE and the Control Theory of Perpetration. Among these doctrines, the doctrine of Command Responsibility which initially appeared in the writings of classical writers like *Sun Tzu* and Grotius was significantly developed by the International Military Tribunal, Nuremberg (IMT) & International Military Tribunal for the Far East (IMTFE) established after WWII, though none of these tribunals contained express provisions addressing the doctrine. Initially, it was incorporated in the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977and later it appeared in the statute of both the ICTY and the ICTR and the RS of the ICC. In this regard, article 7(3) of the ICTY statute and the parallel provision of article 28 of the RS deal with the criminal liability of superiors for their omission to control the wrongdoings of their subordinates. The exact scope of these articles is still controversial, and it is still unresolved whether a superior will be accountable for the underlying offenses perpetrated by his/her subordinates and thus gives rise to the principal liability or h/she

will be answerable for merely neglecting his/her duty to control their crimes and thereby makes the liability of the superior secondary.

3.1 The Aim of ICL to Prosecute "The Most Responsible"

ICL is more inclined to inculpate high-level leaders by considering them as the most responsible compared to low-level actors who are deemed to be prosecuted by national courts.[146] Significant attention was paid to establish leadership accountability, during WW II and in this regard, Justice Robert Jackson's remarks deserve special mention who recognised that the common sense requires that law should not only focus on petty crimes committed by ordinary individuals; it should also reach those who not only hold great power but also make 'deliberate and concerted use of it'.[147] The district court of Jerusalem also issued an important observation in this regard in which it clearly recognised that the criminal liability of a person who holds high position is greater than the one who use lethal instruments with his own hands:

> These crimes were committed in *enmasse*, not only in regard to the number of victims, but also in regard to the numbers of those who perpetrated the crime, and the extent to which any one of the many criminals were close to, or remote from, the actual killer of the victim, means nothing as far as the measure of his responsibility is concerned. On the contrary, in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command.[148]

Similarly, the main focus of the ICTY had also been to put on trial the most senior leaders believed to be the most responsible for crimes committed within the

[146] Paper on some policy issues before the Office of the Prosecutor, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1FA7C4C6-DE5F-42B7 8B2560AA962ED8B6/143594/030905_Policy_Paper.pdf, (last assessed September, 2003).

[147] Opening statement by Robert H. Jackson in the Trial of the Major War Criminals before the International Military Tribunal, 1947.

[148] *State of Israel v. Eichmann* (Judgement of District court of Jerusalem, 1961), para 197.

ICTY's jurisdiction.[149] The ICC trial chamber in *Katánga & Ngudjôlo* case also affirmed that in the context of international crimes, the "criminal responsibility of a person is believed to increase in *tandem* with a rise in hierarchy: the higher in rank or farther detached the mastermind is from the perpetrator, the greater that person's responsibility will be."[150]

3.2 Modes of Criminal Responsibility in ICL

Unlike domestic criminal laws, which always focus on individual perpetrators, ICL which deals with 'macro-criminality', takes into account the political, social, economic and cultural framework and the context of the crimes and thus concentrates beyond individual criminal responsibility. This broad approach is necessary for ICL because it aims to understand the bigger picture and goes beyond simply assigning individual responsibility. Additionally, the current ICL practice concentrates more on top or high-level perpetrators as opposed to mid or low-level perpetrators who falls under the domestic jurisdiction. To fully understand macro-criminality, it is necessary to focus on the top and investigate the criminal structure they represent. It is important to note that the system and individual level are not mutually exclusive, but rather complement each other. When analysing individual criminal responsibility, it is crucial to concentrate on the rules of imputation or attribution for the top perpetrators, such as the intellectual mastermind or the people running the criminal organisations responsible for the atrocities. This leads to the consideration of three forms of attribution: command

[149] The phrase 'most responsible' did not appear in the text of the statute of the ICTY; it rather appeared in Resolution No. 1534 adopted by the UN Security Council on 26 March, 2004.

[150] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Pre-Trial Chamber I Decision on Confirmation Decision), para. 503.

responsibility, joint criminal enterprise and control/domination of the act by virtue of a hierarchical organisation.[151]

Below here we will briefly explain the doctrine of command responsibility, the only mode of liability that is incorporated in the states of international institutions.

3.3 The Evolution of the Doctrine of Command Responsibility

Historically speaking, in 500 BC the responsibility of military commanders was discussed by Sún Tzú, in his landmark book *'The Art of War'.* He propounded "when troops flee, are insubordinate, distressed, collapse in disorder, or are routed, it is the fault of the general. None of these disorders can be attributed to natural causes."[152]

The criminal liability of superiors was also discussed by Hugo Grotius in his book *dejure belle ec pacis* which was published in 1625. In that book he clearly recognised culpability of a sovereign for the crimes perpetrated by his subjects when he deliberately abstains to control the occurrence of those crimes, notwithstanding the fact that he was empowered to do so.[153]

However, the notion of imputed criminal responsibility of a military commander was the first time incorporated in the Hague Conventions of 1907. Article 1 of the convention laid down that armed forces can only be accorded the status of lawful belligerents if *inter alia*, they satisfy the condition of being represented by a

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[151] Kai Ambos, "Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the 'Most Responsible'" in *System Criminality in International Law*, eds. Harmen van der Wilt, et.al., (UK: Cambridge University Press, 2009), 128-9.

[152] S. Tzu, *The Art of War* 125 (S. Griffith transl. 1963) as quoted in William H. Parks, "Command Responsibility for War Crimes", *Military Law Review* 62 (1973): 3. (Parks, "Command Responsibility for War Crimes" hereinafter).

[153] Hugo Grotius, *On the Law of War and Peace*, Translated from the Original Latin *'De Jure Belli ac Paci's* by A. C. Campbell (Kitchener: Batoche Books, 2001), 216.

person responsible for the acts of his subordinates.[154] The theory attracted considerable attention at the end of the WW II;[155] the tribunals created thereafter for the first time extended the scope of the doctrine to civilian superiors as well, by making them liable for ill-treatment of POWs. It was thus applied to government officials; military and naval officers having prisoners in their command and to all other officials who were either entrusted with the well-being of the prisoners or were having direct and immediate control of prisoners.[156]

The charters of both the tribunals (IMT & IMTFE) lacked express provisions regulating criminal responsibility of superiors, Apart from relying on Article 1 of the Hague Convention, both the tribunals relied on domestic laws of different countries. Some of the laws relied upon by the tribunals were the Chinese Law Concerning the trials of war criminals,[157] French Ordinance regarding the suppression of war crimes,[158] and Luxembourg's Law on the Repression of War Crimes.[159] Eventually, the doctrine was incorporated in the Additional Protocol I of 1977:

> 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.[160]

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[154] Annex to 1907 Hague Convention IV, Regulations Respecting the Laws and Customs of War on Land.

[155] Arthur Thomas O' Reilly, "Command Responsibility: A Call to Realign Doctrine with Principles", *American University International Law Review* 20 (2004): 74

[156] Judgement of International Military Tribunal for the Far East (IMTFE), November 4, 1948.

[157] Article 9 of "The Chinese Law Concerning the Trials of War Criminal, 1946″

[158] Article 4 of ″The French Ordinance dealing with the suppression of War Criminals, 1944″.

[159]Article 3 of ″The Luxembourg's Law on the Repression of War Crimes, 1947″.

[160] Article 86 of Additional Protocol I to the Geneva Convention, 1949.

Later on, the doctrine also found place in the statutes of the *ad hoc* tribunals (ICTY and ICTR), as well as in the in the RS of the ICC which shall be discussed later in this chapter.

3.4 The Nature of the Doctrine of Command Responsibility

The precise application of the doctrine of command responsibility is a topic of debate. It remains unclear whether a commander is accountable for the wrongdoings committed by his subordinates or whether he/she will be merely liable for failing to prevent those crimes. In the following discussion, we will explore the nature of the doctrine from three different phases; firstly, the application of the doctrine during the post WWII proceedings, Secondly, the application of the doctrine by the *ad hoc* tribunals, thirdly; the application of the doctrine under the statute of the ICC.

3.4.1 The Doctrine of Command Responsibility as Applied During WWII Proceedings

During most of the proceedings held after WWII, commanders were deemed to be liable for the underlying offenses perpetrated by their subordinates. Below we shall briefly discuss some of the well-known cases.

A. Yamashita Case

The most controversial case that arose during post-WW II proceedings had been the trial of *Tomoyúki Yamashita*, who was a Commanding General officer of the Imperial Japanese Army operating in Philippine Islands. The charge against him was that he could not control the crimes of his forces who committed atrocious acts against the

'people of the United States and its allies and dependencies, especially the Philippines'.[161]

Yamashita was found guilty for the atrocious acts perpetrated by his subordinates, notwithstanding the fact that the prosecution could not establish that he had either directly given the orders to commit those crimes or he knew that the forces acting under his command were perpetrating those crimes and he abstained to control their occurrence by preventing them from doing so.[162] The only evidence presented by the prosecution against him was that the crimes had been committed on extensive scale which suggested that they must had either been approved or secretly ordered by the defendant.[163] He was given death sentence by the US Military Commission which was also validated by the US Supreme Court. In its judgement, the Commission clearly recognised the accountability of a commander in those situations where he failed to control the widespread atrocities perpetrated by his troops, unlike those situations where a soldier individually commits crimes like murder or rape.[164]

B. The High Command Case

The *High Command* case was related to the trial of *Wilhelm von Leeb* and thirteen other defendants who were former high-ranking officers in the German Armed and Naval Forces, and officers holding position of authority in the German High Command (OKW).[165] The tribunal made the following observation regarding the criminal

[161] Trial of General Tomoyuki Yamashita, *Law Reports of War Criminals,* 4: 1-2.
[162] Ibid., 28.
[163] Ibid., 34.
[164] Ibid., 35.
[165] Trial of *Wilhelm Von Leeb and Thirteen others, Law Reports of War Criminals,* 9:1-2.

culpability of military commanders for offenses other than those ordered by them in which it clearly recognised that the liability of a military commander is not unlimited:

> …it must be recognised that the responsibility of commanders of occupied territories is not unlimited. It is fixed according to the customs of war, international agreements, fundamental principles of humanity, and the authority of the commander which has been delegated to him by his own government. ..[166]

Unlike *Yamashita* case, the tribunal refused to apply the strict liability standard and expressly recognised that a commander cannot be presumed to be informed of all the military operations of his subordinates. In order to make him liable for the crimes of his underlings, it is necessary to prove that there was a personal dereliction of the duty amounting to criminal negligence:

> Military subordination is a comprehensive bur not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means co-extensive. Modern war such as the last war, entails a large measure of de-centralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed….. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.[167]

C. The Hostage Case

In the *Hostages case*, the defendants who were all high-level German officials were held to be liable for the murder of millions of civilians by the troops acting under their

[166] Ibid., 75.
[167] *Law Reports of Trials of War Criminals,* 76: 12.

supervision.[168] The US tribunal charged them as being principals and accessories involved in the extermination of millions of people who belonged to the occupied territories of Albania, Yugoslavia, Norway and Greece by using German armed forces acting under their supervision.[169] The tribunal expressly recognised that the highest military commanders are duty-bound to keep peace and security and to stop the occurrence of crimes in the occupied territories.[170] The tribunal further provided that the commanding officer could not deny the knowledge of the occurrence of events within the area under his control. It laid down that "an army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters; they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein".[171]

Unlike the *high Command case*, the tribunal laid down that awareness of the commander regarding the happening of unlawful acts committed by his troops could be deduced from a variety of incidents that occurred during the event. Thus, the judges inferred it from the 'discipline' and 'communication system' of the German army:[172]

> The German Wehrmacht was a well-equipped, well trained and well-disciplined army … The evidence shows they were led by competent commanders who had mail, telegraph, telephone, radio, and courier service for the handling of communications. Reports were made daily, sometimes morning and evening …

[168] Ibid., 34:8.
[169] Ibid.
[170] Ibid., 69-70.
[171] Ibid.
[172] Kate Neilson, "Ending Impunity: Bringing Superiors of Private Military and Security Company Personnel to Justice", *New Zealand Yearbook of International Law* 9 (2011): 131; Park, "Command Responsibility for War Crimes", 59, supra note 152.

In both the *High Command case* and the *Hostage case*, the commanders were held liable for the offenses perpetrated by their subordinates. The responsibility of superiors thus emerged as a type of liability that arises for the underlying offenses perpetrated by their subordinates and not as a liability for omission.[173]

3.4.2 The Doctrine of Command Responsibility as Applied by the *Ad Hoc* Tribunals

The responsibility of a commander could be either direct, i.e., where he/she actively participates in the perpetration of crimes by ordering, instigating, planning, aiding or abetting etc. In that situation, the commander and the person who executes the order, both are dealt with pursuant to article 7 (1) of the statute of ICTY. The superior who orders his/her subordinates to perpetrate a crime, is considered as a direct perpetrator since he/she is physically involved in the perpetration of heinous acts.[174] The second type, i.e. indirect responsibility arises out of his/her culpable omission to control the crimes of his/her subordinates,[175] and involves those cases where a superior tolerates the occurrence of the crimes by abstaining to take necessary measures to stop the happening of those events or penalise the alleged violators thereof. It has been dealt with by article 7 (3) of the statute of the ICTY which expressly provides that

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[173] Micaela Frulli, ″Exploring the Applicability of Command Responsibility to Private Military Contractors″, *Journal of Conflict and Security Law* 15 (2010): 442. (Frulli, ″Applicability of Command Responsibility to Private Military Contractors″ hereinafter).

[174] *Prosecutor v Dario Kardic & Mario Cerkez,* (The Trial Chamber Judgement), Case No. IT-95-14/2-T, 26 February 2001, Para 367. (*Kardic & Cerkez* Trial Chamber Judgement, hereinafter).

[175] *Kardic & Cerkez* Trial Chamber Judgement, para 367.
The duty to control the crimes of subordinates has been incorporated in article 87 of Additional Protocol I, which obliges the military commanders to prevent the violations of the rules of IHL and to punish the perpetrators thereof. It reads as follows: ″Duty of commanders ″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.″

perpetration of those crimes enumerated in articles 2-5 by a subordinate does not absolve the superiors from criminal liability, provided he knew or had reason to know that his subordinates either perpetrated or were about to perpetrate those crimes and he abstained to stop the occurrence of those crimes by preventing them from doing so or by punishing the perpetrators thereof. The liability of a superior arising out pursuant to article 7 (3) of the statute requires the existence of three elements; firstly, there must exist 'superior-subordinate relationship'; secondly, the superior either 'knew' or 'had reason to know' that his underlings either perpetrated or were about to perpetrate those crimes and thirdly, the superior failed to take necessary steps to stop the occurrence of those crimes or to punish the perpetrators thereof.[176]

The exact scope of the said article appeared to be quite controversial; it has been a matter of debate whether it makes a commander liable for merely omitting to fulfil his obligation to control the crimes of his subordinates or it makes him/her liable for the underlying offenses perpetrated by his/her underlings. In view of some of the writers, since the tribunals are only empowered to try crimes like war crimes, crimes against humanity, and genocide etc. a commander can only be held accountable for the crimes perpetrated by his/her underlings, i.e., for the crimes coming within the jurisdiction of the tribunal.[177] Robbinson opines that the command responsibility has not been mentioned among the definitions of international crimes mentioned in articles 2,3,4 and 5 of the statute; it rather appears in article 7 of the statute which is related to individual criminal responsibility and mentions different forms of liability including

[176] Celibici Trial Chamber Judgement, para 128; *Prosecutor v. Kordć*, (The Appeals Chamber Judgement), Case No IT-95-14/2-A, 17 December 2004, para 839.

[177] Darryl Robinson, "The identity crisis of International Criminal Law", *Leiden Journal of International Law*, 21 (2008): 952.

planning, instigating, ordering, and abetting etc. Thus, it suggests that the responsibility of a commander has been recognised as a mode of liability and not as a separate crime.[178] Spinwell in this regard argues that if these articles are construed as allowing conviction based on the substantive offense of the dereliction of the duty, instead of relying on the underlying offenses of war crimes, crimes against humanity, and genocide etc. it will diminish the role played by the commander and will eventually lead to a lessen form of sentence.[179] Moreover, the commander will remain strictly linked to the underlying offense because his/her culpability will be determined according to the magnitude of the subordinate's crime.[180]

The earlier cases decided by the ICTY shows that superiors were deemed to be liable for the principal crimes perpetrated by their subordinates. In *Aleksovski* case the tribunal recognised the culpability of a superior for the offenses committed by his/her subordinates, provided he/she could not control the occurrence of those crimes or penalise the perpetrators thereof.[181]Similarly, the Appeals Chamber in *Celibici* case treated the criminal culpability of both the superior and his/her subordinates equally by clearly recognising that both are individually liable with regard to the impugned acts.

> A commander may be held criminally liable in respect of the acts of his subordinates in violation of Articles 2 to 5 of the Statute. Both the subordinates and the commander are individually responsible in relation to the impugned

[178] Darryl Robinson, ″How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution, *Melbourne Journal of International Law*, 13 (2012): 32.

[179] A. J. Sepinwall, "Failures to Punish: Command Responsibility in Domestic and International Law" *Michigan Journal of International Law* 30 (2009): 269.

[180] Miles Jackson," Command Responsibility": 412. https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781108678957.015 (last assessed: January 20, 2021).

[181]*Prosecutor v.Zlatko Aleksovski*, (The Trial Chamber Judgement), para. 67.

> acts. The commander would be tried for failure to act in which he did not directly participate.[182]

On the other hand, other writers interpret article 7 (3) as a liability of a commander for neglecting to perform his/her obligation to control the occurrence of the crimes by the troops under his/her control. According to Meloni, the culpability of a superior arising out under article 7 (3) presupposes the omission to perform his/her duty and must not be considered as a mode of liability for the principal crimes of his/her subordinates.[183] In this regard, Damaska opines that making a commander liable for those crimes of his/her subordinates regarding which he negligently failed to acquire information is tantamount to transforming negligent omission into intentional criminality. Thus, a superior who has not even approved the wrongdoings of his/her subordinates, is blamed just like an intentional perpetrator. [184]

In *Halilovic* case, the ICTY departed from its earlier position and clearly recognised that the liability of a commander pursuant to article 7 (3) of the statute is a liability for omission. It further stated that the phrase 'for the acts of his subordinates' generally appearing in the case law of the tribunal, does not suggest that the commander share same responsibility with his/her underlings who physically perpetrated those crimes, instead it means that since the subordinates perpetrated the crimes, the commander should be held liable due to his/her failure to stop the occurrence of those crimes.[185]

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[182] Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, (The Appeals Chamber Judgement), para 225.

[183] Meloni, "Command Responsibility": 626, supra note 6.

[184] Mirjan Damaska, "The Shadow Side of Command Responsibility", *The American Journal of Comparative Law* 49 (2001): 463-64.

[185] *Prosecutor v Sefer Halilovic*, (The Trial Chamber Judgement), para 54.

Since the *Halilovic* case, command/superior responsibility had been perceived as a distinct offence of omission. In *Hadzihasanovic*, the trial chamber endorsed the decision of the Trial Chamber in *Halilovic* case and laid down that command responsibility under Article 7(3) of the Statute is the corollary of a commander's obligation to act, this responsibility is for an omission to prevent or punish crimes committed by his/her subordinates".[186] The Chamber further observed:

> the *sui generis* nature of command responsibility under Article7(3) of the Statute may justify the fact that the sentencing scale applied to those Accused convicted solely on the basis of Article7(1) of the Statute, or cumulatively under Articles 7(1) and 7(3), is not applied to those convicted solely under Article 7(3), in cases where nothing would allow that responsibility to be assimilated or linked to individual responsibility under Article7(1).[187]

In the same case, in the Interlocutory Appeal on Jurisdiction, Judge Shahab ud deen, in a partially dissenting opinion, held that article 7(3) ICTY Statute has not been drafted to consider the commander a party to the crimes perpetrated by the forces under his control.[188] Similarly, in *Oric* case, the accused was held liable for dereliction of his duty to control the crimes of his subordinates. According to the tribunal, the superior does not share criminal liability with the subordinates who are indulged in atrocious acts by virtue of article 7 (1) of the statute, and that the superior is rather indicted for his/her failure to control the occurrence of those crimes.[189]

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[186] *Prosecutor v Enver Hadzihasanovic Amir Kubura*, (The Trial Chamber, Judgement), para 75.
[187] Ibid., para 41.
[188] *Hadžihasanović* Decision on Interlocutory Appeal, (Partially Dissenting Opinion of Judge Shahabuddeen), para. 32.
[189] *Prosecutor v, Naser Oric* (The Trial Chamber II, Judgement), para 293.

3.4.3 The Doctrine of Command Responsibility under the Statute of the ICC

Article 28 of the Rome Statue, embodies two different degrees of criminal liability of both the military and civilian superiors, for the atrocious acts perpetrated by the forces under their control. Article 28 (a) & (b) ascribes criminal liability to a military commander or person acting as a military commander for the crimes perpetrated by the troops acting under his/her effective command and control which occurred due to his failure to exercise control over them, provided he knew or should have known about those crimes and he could not take necessary measures to stop the occurrence of the crimes or refer the matter to the concerned authorities for further investigation. Article 28 (c) of the RS assigns criminal liability to a civilian superior for those crimes of his/her subordinates which took place under his/her effective authority and control due to his/her failure to perform his/her duty to stop the occurrence of those crimes, where the superior either knew or consciously disregard information that his/her subordinates either perpetrated or were about to perpetrate the crimes coming within the domain of the court and he did not utilise his power to suppress the occurrence of those crimes or to refer the matter to the concerned authorities empowered to interrogate and prosecute the alleged violators thereof.

The exact scope of article 28 of the RS is equally controversial as some writers believe that the command responsibility under that article arises due to neglect of his/her duty to control the crimes of his/her underling. According to Ambos, if a commander fails to properly supervise the actions of his/her subordinates, the liability arising out under article 28 will be the liability for omission:

> Article 28 can be characterized as a genuine offence or separate crime of omission (*echtesUnterlassungsdelikt*), since it makes the superior liable only for a failure of proper supervision and control of his or her subordinates but not, at least not 'directly', for crimes they commit. [190]

The proponents of the omission approach argue that this interpretation is in line with the principle of culpability which postulates that a person cannot be blamed for a crime in which he did not participate. Moreover, in those cases where he/she is physically involved in the perpetration of the crimes, he/she will be prosecuted in conformity with article 25 (3) of the RS.[191] This view is also claimed to be quite flexible as it excludes the need to establish a causal connection between the alleged offense and omission. It thereby makes possible not only to charge a successor superior for his/her failure to penalise his subordinates even for those crimes which occurred before he/she took charge, but it also paves the way towards imputing criminal liability to more than one superior.[192]

Conversely, others commentators have the opinion that according to article 28 of the RS, a commander is liable for the underlying offenses perpetrated by his/her subordinates coming within the domain of the court.[193] According to Olasolo, the

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[190] Kai Ambos," Superior Responsibility" in *The Rome Statute of International Criminal Court: A Commentary*, eds. *Antonio Cassese*, Paola Gaeta and John R. W. D. Jones (Oxford, 2002), 833.(Kai Ambos, "Superior Responsibility" hereinafter); Kai Ambos, "Joint Criminal Enterprise and Command Responsibility", *Journal of International Criminal Justice* 5 (2007): 159-183; Evan Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: Asser Press, 2003), 90–1; Meloni, "Command Responsibility": 637, Supra note 6; B Sander, "Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence" *Leiden Journal of International Law* 23 (2010): 105–35.

[191] Martina Pechackova, "The Nature of Command Responsibility under International Criminal Law": 6.https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1861342 (last assessed: January 20, 2021); Meloni. "Command Responsibility": 633, supra note, 6.

[192] Frulli, "Exploring the Applicability of Command Responsibility": 454-56, Supra note 173.

[193] Robinson, "The Identity Crisis of International Criminal Law": 925, supra note 177; Christopher Greenwood, "Command Responsibility and the *Hadzihasanovic* Decision", *Journal of International Criminal justice* 2 (2004): 599; Jackson, "Command Responsibility", 412, Supra note 180.

expression ‘the result of’ mentioned in article 28 (a) & (b) implies that by omitting to perform their duty, superiors are deemed to be liable as principals for the underlying offenses perpetrated by their subordinates.[194] The proponents of this approach assert that article 28 unequivocally establishes the accountability of superiors for the actions of their subordinates, in addition to other basis of criminal responsibility outlined in the Statute. Therefore, it does not replace, but rather complements all types of criminal participation spelled out in Article 25(3) *(*a–f).[195]

In 2016, *Jean-Pierre Bemba Gombo*, the former Vice President of the Democratic Republic of the Congo, was prosecuted for crimes against humanity and war crimes perpetrated by his forces in the Central African Republic (CAR) during 2002–2003.[196] The Trial Chamber held him liable according to article 28 of the RS for the crimes perpetrated by his subordinates.[197] However, in 2018, the Appeals Chamber of the ICC reversed its decision and acquitted Bemba of all the charges brought against him.[198] In his concurring opinion, Judge Eboe-Osuji held that pursuant to article 28 of the RS, command responsibility is a form of complicity.[199]

In view of the present author, the liability of a commander arising pursuant to article 28 of the RS should in no case be less than the criminal liability of his/her subordinates. He should be deemed liable for the principal crimes perpetrated by his

[194] Hector Olasolo, The Criminal Responsibility of Senior Political and Military Leaders, 108. supra note 9.

[195] Otto Triffterer, "Causality, A Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?" *Leiden Journal of International Law* 15 (2002): 186.

[196] *Prosecutor v. Jean-Pierre Bemba Gombo,* (The Trial Chamber III Judgement), para 742.

[197] *Bemba* Trial Judgment Pursuant to Article 74 of the Statute, para. 171.

[198] *Prosecutor v. Jean-Pierre Bemba Gombo* (The Appeals Chamber Judgement).

[199] Concurring Separate Opinion of Judge Eboe-Osuji, para 190.

subordinates. This is in harmony with article 31 of the Vienna Convention which suggests that while interpreting treaties plain meaning must be assigned to the terms of the treaty. The simple reading of article 28 of the RS indicates that it makes the commander responsible for the crimes coming within the domain of the court which include war crimes, crimes against humanity, and genocide etc. Thus, the commander is deemed to be liable for the principal crime regarding which the court is empowered to exercise its jurisdiction. Liability for omission gives rise to secondary liability and will therefore lead to a lessen form of sentence of the commander. Moreover, some prominent cases decided after WWII also proves that the commanders were held liable for the principal crimes perpetrated by their subordinates. The ICTY, in its earlier cases also followed the same approach until it decided *Halilovic* case, in which it departed from its earlier position and made the commander liable for his failure to perform his duty to control the crimes of the subordinates.

3.5 Conclusion

The doctrine of 'command responsibility' is the earliest doctrine which laid the foundation of ascribing criminal liability to the superiors for those crimes of their subordinates which they failed to control. It was relied upon by the tribunals established after WW II and in most of the cases the commanders were deemed to be liable for the underlying offenses perpetrated by their subordinates. The early cases decided by the ICTY prove that it almost followed the same approach and commanders were held liable for the principal crimes perpetrated by their subordinates until the tribunal held in *Halilovic* case that a commander is responsible for dereliction of his/her duty to control the crimes of his/her underlings. From then onwards, the ICTY in a vast

majority of cases followed *Halilovic* decision and considered command responsibility as a liability for omission. The writers of ICL are equally divided regarding the scope of article 7 (3) of the statute of the ICTY; a few consider it a liability for the crimes perpetrated by his/her underlings while some others consider it as a liability for omission.

Similar controversy can be found regarding the interpretation of article 28 of the RS. The matter still needs to be resolved by the ICC in future cases to make it clear whether it makes the commander liable for the crimes perpetrated by his/her subordinates or he/she is merely liable for the dereliction of his/her duty to control the occurrence of those crimes.

CHAPTER IV

THE DOCTRINE OF JOINT CRIMINAL ENTERPRISE (JCE)

Introduction

International crimes are characterised by large-scale atrocities committed systematically making it difficult to determine the criminal liability of each person involved in committing them. Since the *ad hoc* tribunals, lacked express provisions dealing with the individuals who collectively participate in a criminal enterprise, the ICTY in *Tadić* case relied on the doctrine of Joint Criminal Enterprise (JCE), an Anglo-American concept and applied it to a small-scale enterprise. However, after some time the tribunals expanded its scope by applying it to large scale enterprises as well, i.e., at leadership level. Though, the doctrine was also applied by other internationalised tribunals, it was severely criticised for infringing the rudimentary rules of criminal law. The future of the doctrine is uncertain since both the ICTY and ICTR, which adopted and developed the doctrine had been established for a limited period of time, having jurisdiction over the atrocities that took place in certain specific countries only and the ICC has also expressly rejected it.

4.1 The Doctrine of Joint Criminal Enterprise (JCE)

The doctrine of JCE imputes criminal liability to all those who contribute in a criminal enterprise. The term criminal enterprise refers to a mutual express or implied agreement to perpetrate certain crimes in order to attain the desired criminal objects, such as the purpose of a genocidal enterprise is to destroy the members of a targeted group. The participants of the criminal enterprise are bound to attain the desired goals with all the necessary means, i.e., they achieve their desired goals by committing different crimes. Usually, large scale enterprises consist of different subsidiary or sub-enterprises in the form of concentration or prison camps to keep or persecute the participants of the targeted group at local or regional levels.[200]

During the proceedings held after WW II, the concept of JCE neither appeared in the charter of the tribunal nor was it relied upon by the judges presiding over the proceedings.[201] The charter of the IMT adopted divergent approaches while dealing with mass atrocity crimes perpetrated during post-WWII. All those who were alleged to be involved in initiating aggressive war culminating in the destruction of Jews were charged on the basis of conspiracy, while the leading Nazi criminals were tried as being members of criminal organisations, like the SS and the Gestapo.[202]The Anglo-Saxon concept of conspiracy was considered as an important tool to assign criminal liability to all those who were only involved in the planning and perpetration of war of aggression and connecting them to all those who physically perpetrated those crimes.

[200] Ambos, ″Joint Criminal Enterprise and Command Responsibility″: 167, supra note 190.

[201] Michael P. Scharf, "Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change", *Cornell International Law Journal* 43 (2010): 456.

[202] Harmen van der Wilt, "Joint Criminal Enterprise: Possibilities and limitations", *Journal of International Criminal Justice* 5 (2007): 2.

Thus, conspiracy as an inchoate crime was only recognised and applied in respect of crimes against peace, while the conspiracy-complicity was meant to be applied to those crimes regarding which the tribunal was empowered to exercise its jurisdiction.[203]

4.2 Application of the Doctrine of Joint Criminal Enterprise (JCE) by the ICTY in the *Tadic Case*

The doctrine of JCE also known as common purpose, common plan, or common design liability did not appear in the statutes of the ICTY or ICTR. The Appeals Chamber in *Tadić* case, for the first time concluded that it was well recognised in customary international law and was construed by the tribunal as being impliedly mentioned in the statute of the tribunal:

> [I]t does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons ... The notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly [in the ICTY Statute].[204]

According to the facts of the case, *Dusko Tadić* was a member of the group of Serbian armed forces that went to a Bourg named *Jaski* where they looked for men and beat them. When the group left, five dead bodies were found in the village; four among them were shot on the head and no one knew who killed them. The Trial Chamber could not come across the evidence suggesting that the accused directly killed either of those men.[205] The question that arose before the Appeals Chamber was whether criminal liability could conceivably be assigned to the appellant even for those crimes in which

[203] Ibid.
[204] *Prosecutor v. Tadić,* (Appeals Chamber judgment), para. 220.
[205] *Prosecutor v. Tadić,* (Trial Chamber II 0pinion and Judgement), para 373.

he did not personally participate. This gave rise to two crucial issues: firstly; whether the acts of one person could be attributed to another person where both of them act together to pursue their 'common criminal goals' and secondly; to what extent the component of '*mens rea'* would be applicable in such a situation.[206] The tribunal laid down that in ICL, individual guilt of a person is ascertained according to the principle of criminal culpability, which contemplates that a person cannot be blamed for a crime in which he did not personally participate ("*nulla peona sine culpa")*. This principle is incorporated in article 7 (1) of the statute which enumerates five different categories of criminal participation giving rise to individual criminal responsibility.[207] Since the said article did not talk about the criminal culpability of individuals who collectively get involved in a crime, the tribunal needed to settle the issue according to the article 7(1) of the Statute.[208] The tribunal while interpreting the scope of the said article recognised that though the provision primarily deals with the physical perpetrators who are accused to have perpetrated the crimes mentioned in articles 2-5 of the statute, it also deals with those situations where criminal acts are carried out by individuals who jointly act to pursue their common criminal goals.[209] Keeping in view the object and purpose of the statute, which seeks to give jurisdiction to the tribunal over all those individuals who were accused to be indulged in grave violations of humanitarian rules of warfare in the former Yugoslavia, the tribunal elaborated the scope of article 7 (1) by providing that it not only includes physical perpetrators of international crimes, but its provisions are

[206] *Tadić* Appeals Chamber Judgement, para 185.
[207] Ibid., para 186.
[208] Ibid., para 187.
[209] Ibid., para 188.

also applicable to those offenders who in any other form participated in the perpetration of crimes like by way ordering, abetting, or complicity etc.[210] The Appeals Chamber held that

> to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.[211]

The tribunal further elucidated the matter by laying down that since international crimes are most commonly committed by a group of individuals who act jointly to achieve common criminal goals these acts are physically committed by the perpetrators who most often commit crimes like manslaughter, extermination, malicious destruction of cities without military necessity, etc. the moral gravity of all those who facilitate the occurrence of these crime is not less than the physical perpetrators.[212] In such a situation, considering the facilitators of these crimes as aiders and abettors undermine the role played by them.[213]

4.2.1 Categorisation of Joint Criminal Enterprise (JCE)

Since, the objective and subjective elements (‘*actus reus’* and ‘*mens rea’*) of the category of collective criminality did not either expressly or impliedly appear in the statute of the ICTY, in order to trace these elements, the tribunal resorted to the customary international law, especially to the jurisprudence emanating from the

[210] Ibid., para 189.
[211] Ibid., para 192.
[212] Ibid., para 191.
[213] Ibid., para 192.

decisions of international tribunals that were established after WW II. [214] The tribunal divided the doctrine of JCE into three different categories; namely the basic Joint Criminal Enterprise (JCE I), the systemic Joint Criminal Enterprise (JCE II) and the extended Joint Criminal Enterprise (JCE III). While elaborating the scope of these categories, the tribunal extensively relied on World War II case law, which is discussed below.[215]

A. Basic Joint Criminal Enterprise (JCE I)

The basic joint criminal enterprise (JCE I) covers those situations where all participants of the criminal enterprise have common intention to pursue particular criminal goals and thus are considered as equally liable, even though they performed different functions. For instance, if they formulated a plan to kill, the criminal responsibility of those persons who materially committed homicide will not be different from that person who merely assisted in the execution of that crime. The criminal responsibility can be attributed to that participant who did not affect the killing, if he/she voluntarily participated in any form like he/she inflicted non-fatal injury to the victim or provided assistance of any kind in the perpetration of the crime and secondly, though he/she did not physically participate in the crime, he/she must have the intention to achieve the desired purposes.[216]

Regarding this category, the Appeals Chamber relied upon the *Georg Otto Sandrock et al.* case, also recognised as the *Almelo Trial*, where three Germans were jointly held liable for killing a British internee and a non-combatant belonging to the

[214] Ibid., para 194.
[215] Ibid., para 195.
[216] Ibid., para 196.

occupied territory, by way of participating in a common enterprise. According to the ruling given by the judge advocate "If people were all present together at the same time, taking part in a common enterprise which was unlawful, each one in their own way assisting the common purpose of all, they were all equally guilty in law". [217]

Another case relied upon by the Appeals Chamber was *Jespen and others*, in which *Jespen*, a co-accused was indicted with the murder of the detainees of a concentration camp. Regarding this, the Prosecutor asserted which was not even refuted by the Judge Advocate "{I}f Jespen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act".[218]

Similarly, it was pointed out by Judge Advocate in *Schonfeld* that if numerous people jointly act to pursue an unlawful act, by using unlawful means and while achieving that purpose one of the members commits homicide, the murder will be attributed to all the members of the group.[219]

B. Systemic Joint Criminal Enterprise (JCE II)

The second distinct category, also known as the concentration camp case was applied to those cases where crimes had been committed by those running concentration camps against the inmates of the camp. The liability for those crimes was extended to all the representatives of military and administrative units running those camps who

[217] *Law Reports of Trials of War Criminals*, 43:1.
[218] *International Law Reports*, eds. Elihu Lauterpacht, C. J. Greenwood and A. G. Oppenheimer (Cambridge University Press, 2003), 124:140.
[219] Ibid., 141.

knowingly contributed to the implementation of the concerted plan to mistreat the detainees of the camp.[220] Regarding this category, the tribunal relied on *Belsen* case, in which Josef Kramer along with forty-four others were alleged to have collectively executed the common plan to victimise detainees in the prison camps under their control. Among them, thirty accused were found guilty and were given sentence ranging from death sentence to one year imprisonment which was later confirmed by military authorities as well.[221]

C. Extended Joint Criminal Enterprise (JCE III)

Under the extended form, the participants of a criminal enterprise are considered as criminally liable for those acts as well that did not form part of the common criminal plan, but were natural and predictable consequences. For example, a group in pursuance of their agreed plan forcibly eliminates members of an ethnic group from a certain place and in doing so one or more of the victims lost their lives, though homicide was not part of the plan, it will be considered as a natural and predictable repercussion of the agreed plan.[222] This category includes the cases of mob-violence where common plan is executed by multiple offenders and it becomes difficult to attribute those acts to the defendants or to find out a connection between the act and the resultant harm.[223]

Regarding this category, the Appeals Chamber relied on *Essen Lynching* (also called *EssenWest*) case, decided by a British military tribunal, in which a mob of

[220] Ibid., para 202.
[221] *The Law Reports of Trials of War Criminals,* 2: 1-3.
[222] *Tadic* Appeals Chamber Judgement, para 204.
[223] Ibid., para 205.

Germans lynched three British prisoners of war. Seven persons were jointly charged with killing those prisoners.[224]

Tadić was also held liable by the Appeals Chamber by virtue of extended JCE for killing five inhabitants of a village named *Jaskī*. It held that the appellant took part in an armed conflict that occurred in 1992 in the Prijedor region, as a part of a strategy to mistreat the non-Serb inhabitants of the region and it was predictable that they might be killed in the accomplishment of that goal. The Appellant knew that the activities of the group might lead to the killing of the residents of the village, but nevertheless he took the risk by participating in the activity.[225]

The *Tadić* Appeals Chamber decision was followed by the ICTR which also relied on the notion by considering it to be impliedly mentioned in article 6 (1) of its statute. In the *Gacumbitsi* case, the tribunal held that the defendant could be held liable under one of the three categories of JCE according to article 6 (1) of the Statute.[226] Similarly, in *Karemera* case the tribunal recognised the extended form of JCE to form part of customary international law.[227]

4.2.2. The Elements of Joint Criminal Enterprise (JCE)

The Appeals Chamber identified both the objective and subjective components of the concept of JCE, which are briefly discussed below.

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[224] The *Essen Lynching* Case, *The Law Reports of Trials of War Criminals*, 1:88.
[225] *Tadic* Appeals Chamber Judgement, para 232
[226] *Prosecutor v Gacumbitsi Sylvestre, (*Appeals Chamber Judgment), para 158.
[227]*Prosecutor v Karemerá* (Appeals Chamber Decision on Jurisdictional Appeals: Joint Criminal Enterprise), para 13.

A. The Objective Element *(Actus Reus) of JCE*

The objective elements (*actus reus*) of the *JCE* as identified by the tribunal are as follows:

> Firstly; there must be a plurality of individuals who do not need to be formally organised in a military, political or administrative structure.
>
> Secondly; these individuals must have a common purpose or plan which must amount to crime under the statute though, the plan need not necessarily be previously formulated by the participants of the group and can be determined on the basis of the acts of the participants of the group who seemingly act together to implement the desired goals of the enterprise.
>
> Thirdly; it is necessary that the accused must have perpetrated in the crimes enumerated in the statute like murder, extermination, torture, or rape etc. or he/she might have contributed or assisted in any other way in the execution of the common plan.[228]

B. The Subjective Element *(Mens Rea)* of JCE

The element of *mens rea* varies in relation to the above-mentioned categories, as expounded by the Appeals Chamber. For instance, regarding the first category, it is necessary that the accused must share criminal intention with other co-perpetrators. In case of the second category (which deals with concentration camp cases), personal knowledge regarding the ill-treatment of the inmates of the camp is required which becomes evident by virtue of the position of authority held by him. Regarding the third

[228] Ibid., para 227.

category, an intention to contribute to the criminal activities of the enterprise to further the common criminal goals is required. According to this category, a participant is deemed to be responsible for the crimes other than those agreed upon by the members of the group; if it was predictable that those crimes could be perpetrated by any member belonging to the enterprise and he/she deliberately took that risk.[229]

4.3 Distinction Between JCE and Abetting

The notion of JCE and aiding and abetting seem to be identical, but the Appeals Chamber in *Tadić* case elaborated the difference between the two. According to the tribunal, contribution in a JCE amounts to commission pursuant to article 7 (1) of the statute of the ICTY, which thereby makes the participants of the enterprise liable as co-perpetrators. Comparatively, the criminal liability of an aider and abettor is low,[230] as he/she always facilitates the execution of the crime in accordance with the directions issued to him by another person, i.e., the principal. His/her support significantly affects the crime and it is futile to establish that there existed a common plan between the parties. However, in case of JCE where participants act in furtherance of a common criminal plan, it is enough that the participants of the enterprise, in any way contribute in the achievement of common criminal purpose. Another vital difference is that if a person aids and abets a crime, the required *mens rea* is knowledge on the part of the aider and abettor that he is providing assistance to the principal perpetrator in the execution of the offense. However, where a person participates in a common purpose,

[229] Ibid., para 228; *Prosecutor v Mitar Vasiljevic*, (The Appeals Chamber Judgement), para 101. (*Vasiljevic* Appeals Chamber Judgement hereinafter).

[230] *Vasiljevic* Appeals Chamber Judgement, para 102.

predictability that some crimes outside the common criminal purpose could also occur is sufficient to make the participant guilty.[231]

4.4 The Nature of the Doctrine of Joint Criminal Enterprise (JCE)

The Appeals Chamber in *Tadić* case embraced the doctrine of JCE by considering it to be impliedly mentioned in article 7(1) of the ICTY statute. However, it failed to determine its nature accurately as it simultaneously relied on both the notions of co-perpetration and complicity. The crucial question that arose before the tribunal was whether JCE was integrated in one of the several modes of liability spelled out in article 7 (1) of the statute and thus incurs principal liability or it is tantamount to accessorial liability.[232] In order to ascertain whether the doctrine establishes principal liability of the accused or not, the cases decided by the tribunals determining the nature of the doctrine are discussed below.

The Appeals Chamber in *Tadić* case treated *JCE* ambivalently. On the one hand, the chamber interpreted the doctrine as amounting to commission appearing in article 7 of the statute of the tribunal and by doing so it distinguished it from aiding and abetting which amounts to participating in a crime, instead of materially committing it, while on the other hand it was considered as an accomplice liability.[233] This uncertainty can be found in a number of decisions rendered by the ICTY following *Tadic* case. For instance, in *Vasiljević* case, contribution in a *JCE* was considered as amounting to

[231] *Tadic* Appeals Chamber Judgement, para 229.

[232] Hector Olasolo, "Joint Criminal Enterprise and its Extended Form", *Criminal Law Forum* 20 (2009): 273.

[233] Elies van Sliedregt, "Joint Criminal Enterprise as a Pathway to Convicting Genocide", *Journal of International Criminal Justice* 5 (2007): 190. (Sliedregt, "JCE as a pathway to convicting Genocide" hereinafter).

commission.[234] The tribunal further elaborated the matter by providing that the liability of an actor in a JCE amounts to the liability of a co-perpetrator and thus their degree of responsibility is higher compared to an aider and abettor, who is most often considered as an accessory to the crime. [235] In *Brdanin* case, the liability of a member of *JCE* was considered as equal to an accomplice liability, and hence it did not amount to commission by virtue of Article 7 (1) of the ICTY Statute.[236] In *Krnojelać* Case, JCE was considered as amounting to accomplice liability, though it clearly recognised that the difference between the principal offender and other participants is immaterial for the purpose of imposing sentence.[237]

In other cases, the ICTY imprecisely determined whether partakers in a *JCE* could be considered as co-perpetrators, i.e. principals to a crime or aiders or abettors, i.e. accessories to a crime, according to the role played by them.[238] The ICTY Appeals chamber recognised that since there does not exist a formal distinction between a participant whose contribution is larger than the one whose participation is less significant, the introduction of special contribution may lead to some disparities.[239]

Eventually, in 2003 the ICTY Appeals Chamber in *Odjanić* case, resolved the matter by clearly stating that the liability of an individual who participates in a JCE amounts to commission, thus equating it with co-perpetration that incurs principal liability:

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[234] *Prosecutor v Mitar Vasiljevic*, (Appeals Chamber Judgment), para 95.
[235] Ibid., para 102.
[236] *Prosecutor v. Brđanin,* (Decision on Motion by Momir Talic for Provisional Release), paras 40–45. (*Bradnin* Decision on Motion for Provisional Relief hereinafter).
[237] Prosecutor v. *MiloradKrnojrlac*, (The Trial Chamber II Judgement), para 74-77.
[238] *Prosecutor v. Radislav Krstic,* (The Trial Chamber, Judgement), paras 642–43.
[239]*Bradnin* Decision on Motion for Provisional Relief, para 432.

> criminal enterprise is to be regarded, not as a form of accomplice liability, but as a form of "commission" and that liability stems not… from mere membership of an organisation, but from participating in the commission of a crime as part of a criminal enterprise.[240]

Since that decision, the *ad hoc* tribunal in the later cases seemed to be inclined to adopt a more subjective approach by considering the members of a criminal enterprise who act together to pursue common criminal goals as principals to the crime, irrespective of the contribution made by each one of them.

4.5 Application of the Doctrine of Joint Criminal Enterprise (JCE) at Leadership Level

Initially, in *Tadić* case the doctrine of *JCE* was applied to small scale enterprises, but with the passage of time its scope was expanded and was applied to large scale enterprises as well to cover both military and civilian leaders who though are distant from the place of occurrence of the crimes, play a vital role in their execution. It was designated as 'leadership JCE' or 'vertical JCE' unlike 'horizontal *Tadić*-type JCE'.[241] The leading case that endorsed the application of JCE at leadership level is *Brdanin* case. Before analysing it, *Stakic* case deserves special mention where the trial chamber had expressly resorted to the notion of JCE as a preferred mode of liability at leadership level, though it was rejected by the Appeal Chamber.

[240] *Prosecutor vs Milan Milutinovic, Nikola Sainovic & Dragoljub Ojdanic*,(The Appeals Chamber Decision on *Dragoljub Ojdanic's* Motion Challenging Jurisdiction on Joint Criminal Enterprise), paras 20 & 31.

[241] Sliedregt, Elies van, Joint Criminal Confusion: Exploring the Merits and Demerits of Joint Enterprise Liability (June 24, 2019). *Accessorial Liability After Jogee*, ed. Beatrice Krebs (Hart Publishing 2019), 18.
https://ssrn.com/abstract=3409197, (last assessed: March 20, 2021).

A. Stakic Case

The accused, Dr. *MilomirStakić*, who was the mayor of Prijedor region which was considered as one of the highest political authorities was charged as being individually responsible by virtue of article 7(1) of the Statute for planning, ordering, instigating, committing, aiding or abetting the crimes mentioned in articles 2-5 of the statute,[242] and as a superior responsible according to article 7(3) of the Statute for the crimes that occurred in the region.[243] He was alleged to be criminally liable for all the charges mentioned in the indictment because he knowingly contributed in the alleged offenses as a participant of the criminal enterprise.[244]

The trial chamber while interpreting the word 'commission' as it appears in article 7 (1) of the statute, emphasised that apart from interpreting JCE as a mode of liability, other definitions of co-perpetration must also be relied upon.[245] Thus, in the tribunal's view, the word 'commission' means that the defendant satisfied the material elements of the crime by participating in the alleged offenses through act or omission, either physically or in any other way directly or indirectly, individually or jointly with others.[246] It further elaborated the scope of co-perpetration by providing that it is sufficient that there must be an explicit or implicit agreement to reach the desired goal through concerted efforts. Since all the participants jointly managed the execution of

[242] *Prosecutor* v *Milomir Stakic* (The Trial Chamber II, Judgement), paras 417& 494.
[243] Ibid., para 419.
[244] Ibid., para 422 &427.
[245] Ibid., para 438.
[246] Ibid., para 439.

the crime, any one of them could defeat its purpose by refraining to fulfil the obligation assigned to him.[247]

In the trial chamber's view, co-perpetration best explains the role played by Mr Stakic for participating in offences that occurred in Prijedor Municipality in 1992 along with the prominent members of police, military and other departments. [248] However, the Appeals Chamber rejected the trials chamber's reliance on indirect co-perpetrator ship,[249] and argued that the doctrine is neither recognised by customary international law nor it is approved by the jurisprudence of the tribunal. Conversely, it preferred to rely on the doctrine of JCE claiming it to be ingrained both in the customary law as well in the tribunal's jurisprudence.[250]

B. Leadership JCE as Applied in *Brdanin Case*

Mr *Brdanin*, was accused to have participated in strategic planning along with other Bosnian Serb leadership, in order to occupy the Serb-populated areas and to create an independent Bosnian-Serb state, i.e., Serbian Republic of Bosnia Herzegovina (SerBiH). For the purpose of achieving that goal, the leaders of the Serbian Democratic Party (SDS) performed a crucial role in permanently removing the Bosnian and Croat Muslims whom they considered as a major hindrance in the establishment of a separate entity.[251] Mr Brdanin, who was a prominent leader of SDS also held other official positions in the Bosnian Serb political structure was accused to have facilitated the

[247] Ibid., para 440.
[248] Ibid., para 468.
[249] *Stakic* Appeals Chamber decision, para 58.
[250] Ibid., para 62.
[251] *Brdanin* Trial Chamber Judgement, paras 2 & 3.

campaign of the ethnic cleansing of Bosnian and Croatian Muslims with the help of the state machinery[252]

The charges against Mr Brdanin were that he participated in a JCE, which aimed to permanently and forcibly remove the inhabitants of the region of the proposed Bosnian-Serb state, including the Bosnian Muslims and Bosnian Croats with the support of the leaders of the Serbian Republic and SDS.[253] The prosecution pleaded criminal liability of the accused, under JCE I & III. [254]

Since, Mr Brdanin had not materially perpetrated any of the impugned acts, the Trial Chamber asked the prosecution to prove the existence of an agreement amongst the defendant and all those who had materially committed those crimes.[255] However, the prosecution could not prove the existence of any such agreement.[256] The Trial Chamber concluded that JCE could not be invoked to impute criminal responsibility to the non-physical perpetrators who were miles away from the actual crime zone. It further laid down that it could only be utilised in cases involving small scale enterprises as was done in *Tadić* case and is inapplicable to the existing (Brdanin) case.[257] Thus, instead of convicting the accused under the JCE, the Trial Chamber found him culpable of instigating, ordering and abetting the perpetration of war crimes and crimes against humanity.[258]

[252] Ibid., para 9.
[253] Ibid., para 10.
[254] Ibid., paras 340 & 356.
[255] Ibid., para 344, 355.
[256] Ibid., para 353-354.
[257] Ibid., para 355.
[258] Ibid., para 360.

Subsequent to the decision of the Trial Chamber, the prosecutor comprehended that the *Brdanin* judgement might subvert its policy of indicting top leadership and of preferring JCE over other concepts including instigating, and planning.[259] The prosecution filed an appeal against the verdict of the Trial Chamber in which it submitted that the chamber erroneously rejected JCE by not recognising it as an appropriate 'mode of liability' and also by necessitating that physical perpetrators must be holding membership of the enterprise by virtue of an agreement among the 'physical' and 'non-physical' actors of the crime.[260]

The prosecution asserted that JCE also include non-physical perpetrators (i.e., high level perpetrators) who use others to physically perpetrate the crimes and thus it is not essential that physical perpetrators must necessarily share intention and criminal purpose with non-physical perpetrators. The prosecution additionally argued that the application of other modes of liability including aiding, abetting, and planning etc., fails to accurately depict the real circumstances and the actual culpability of the high-level perpetrators.[261]

The Appeals Chamber issued its judgement in which it rejected the Trial Chamber's decision and made some important rulings. It expressly laid down that it is not necessary that physical actors must be members of JCE, and that it is adequate to prove that their acts constitutes part of the common purpose which can be deduced from the factual circumstances.[262] It further laid down that physical perpetrators will also be

[259] Sliedregt, *Individual Criminal Responsibility*, 160-161, Supra note 98.
[260] *Prosecutor V Radoslav Brdanin*, (The Appeals Chamber Judgement), para 6.
[261] *Brdanin* Appeals Chamber Judgement, para 367.
[262] Ibid., para 410.

deemed to be liable for those offenses which were not part of the agreed plan, provided that such acts are inevitable consequences of the agreed plan.[263] The Appeals Chamber laid down that the crimes perpetrated by non-members who are used as instruments to attain the common criminal purpose will also be ascribed to the members of the criminal enterprise.[264] The Appeals Chamber set aside the decision of the Trial Chamber in which it considered JCE as an inappropriate mode of liability for large scale enterprises like the one at hand.[265] It emphasized that once all the necessary elements such as the requisite intention to indulge in a criminal act, or joining others to attain that goal are met beyond a reasonable doubt a person can be deemed to be liable not for his own crimes but for the offenses committed by other members of the JCE.[266] The Appeals Chamber considered *Brdanin* liable as a member of JCE whch used physical actors as mere instruments to achieve the desired common criminal design,[267] and was given a sentence of 30 years of imprisonment.[268]

4.6 Critique of JCE

Since its inception, the doctrine of JCE has been subjected to severe criticism, which is analysed briefly below here.

Firstly; the most common criticism levelled against the doctrine is that it contravenes the principle of fair labelling which contemplates that a person should be blamed according to the level of contribution made by him. In case of *JCE*,

[263] Ibid., para 411.
[264] Ibid., para 413.
[265] Ibid., para 425.
[266] Ibid., paras 429-431.
[267] Ibid., para 448.
[268] Ibid., para 506.

notwithstanding the different roles played by the participants of the enterprise, all of them are considered as equally liable,[269] though, some factors may help judges to distinguish between the liability of principals and accessories and mitigate the sentence of the accused.

Secondly; the Appeals Chamber erroneously took into consideration post-WWII case law as those cases do not support the conclusion they reached.[270] Martinez and Danner in this regard argue that the cases cited in *Tadić* case were taken from the proceedings that were organised by the national military authorities following the proceedings of the IMT held at Nuremberg and these cases does not suggest that JCE in any of its form was ever relied upon by those tribunals. They further assert that the cases relied upon in *Tadić* case falls into one of two types; the first type refers to the killing of a small group of POWs belonging to the allied powers and the second type weas related to concentration camps. The *Essen Lynching* case is an example of the first category which was a mob violence case and involved the killing of a group of POWs by both the German soldiers and the civilians. There is no evidence which suggests the reliance of the prosecution on the notions of common design, common purpose, or common plan.[271] On the other hand, the US prosecuted forty staff members in *Dachau Concentration camp case* in which it was claimed that the defendants committed the alleged offenses while acting in the pursuance of a common design to perpetrate those crimes. It is asserted that this case provides ample justification to category II of the

[269] *An Introduction to International Criminal Law and Procedure*, eds. Robert Cryer, et al., (UK: Cambridge University Press, 2010). 372.

[270] Ibid.

[271] Danner and Martinez, ″Guilty Associations: Joint Criminal Enterprise, Command Responsibility″: 110-111, supra note 14.

doctrine in contrast to the first and the third categories.[272] Similarly, the tribunal is also criticised for erroneously relying on *Justice* Case and it is asserted that the US military tribunal did not resort to on any such type of criminal liability that could be considered as resembling to or equating with the concept of co-perpetration grounded on JCE as expounded by the *ad hoc* tribunal in *Tadić* case.[273]

Thirdly; the doctrine of JCE does not provide a consistent criterion to differentiate between the liability of a principal and an accessory since it makes it difficult to analyse the individual guilt of hierarchic superiors who perpetrate crimes in the context of large-scale atrocities.[274]

Fourthly; the criteria laid down in *Tadić* case explaining the difference between JCE and aiding and abetting, is quite confusing. On the one hand, it is required that an aider or abettor's role should be substantial in the perpetration of the crime in question while, on the other hand it is sufficient to establish the criminal culpability of a person who participates in any way to further the cause of common design. Thus, the level of contribution made by an aider or abettor is much higher compared to the contribution made by a participant in a JCE.[275] The outcome of such a distinction is that all those who have a central role in the perpetration of crimes are regarded as accessories to the crime while all those who have a minor role are considered as the sole principals.[276]

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[272] Ibid.

[273] Hector Olasolo, *The Criminal Responsibility of Senior Political and Military Leaders*, 207-210, Supra note 9.

[274] Juan-Pablo Pérez-León-Acevedo, "Bringing the Bosses to International Criminal Trials": 14, supra note 11.

[275] Ibid., 27.

[276] Ibid.

Fifthly; it has unnecessarily expanded the scope of individual criminal responsibility. For instance, JCE III makes the participants liable for all those crimes which are natural and possible consequences of the acts. [277] On the basis of that inherent feature, a few writers assert that JCE III is inapplicable to cases requiring *dolus specialis*, i.e., special intention like genocide. The application of the doctrine in such a situation can lead to guilt by association, and thereby makes liable every person who participates in genocide for murder of hundreds and thousands of people in which he/she did not personally make any contribution.[278]

Sixthly; though the ruling of the appellate court in *Brdanin* case can be considered as a breakthrough in the law on the JCE as it authorised the prosecutors both at ICTY and ICTR to apply *JCE* at the leadership level once it is proved that physical perpetrators were mere instruments at the hands of the participants of the JCE,[279] it has also attracted a lot of criticism. Cassese, who is considered as a founding father of the doctrine of JCE has criticised *Brdanin* decision as being excessive and contrary to the principle of *nullem crimes sine lege*, i.e., no punishment without law.[280]

Seventhly; though senior leaders can be deemed to be principals to the crime despite being far away from the crime scene, JCE distinguishes between principals and accessories by taking into consideration the will of the defendants. In a few situations, slight participation that may ultimately include perpetration of the concrete crime may be sufficient, provided that the accused shared common criminal purpose with other

[277] Ibid.
[278] Martinez & Danner, "Guilty Associations": 13, supra note 14.
[279] Sliedregt, *Individual Criminal Responsibility*, supra note 98.
[280] Antonio Cassese, *International Criminal Law* (Oxford University Press, 2008), 195.

participants of the enterprise. On the other hand, major contributions made with mere knowledge but without sharing the common purpose do not incur principal liability of the accused under the doctrine of JCE.[281]

Eighthly; the *Brdanin* ruling adequately loosened the connection between those members who belong to the apex of a hierarchy and the physical perpetrators at the execution level. The physical actor may be familiar with the common criminal purpose, but they are not required to necessarily possess the requisite *mens rea* to become a member of the criminal enterprise. Moreover, the doctrine not only necessitates the existence of an agreed plan, but it also requires that the crimes must be carried out by one or more members of the criminal enterprise.[282] Thus, it is problematic to find out a connection between the defendants and the physical perpetrators and vicariously assign criminal liability to the former for the acts of the latter. The Appeals Chamber in *Brđanin* case has been criticised that it could not establish such a linking principle even in its decision, though in *dicta* it propounded that the linking principle could be found by relying on indirect perpetration or perpetration-by-means. Thus, the co-defendants will be considered as using the physical actors as mere tools to effectuate their criminal endeavour. But the decision of the case did not reflect any such stance and the problem remains unresolved in subsequent decisions as well. The absence of such a linking principle which establishes a connection between the defendant and the perpetrator

[281] Pérez-León-Acevedo, "Bringing the Bosses to International Criminal Trials": 20, supra note 11.

[282] BarrieSander, Doing Justice to History: Confronting the Past in International Criminal Courts (Oxford: Oxford University Press, 2021), 204; Sliedregt, *Individual Criminal Responsibility in International Law*, 163-4, supra note 98.

casts doubt about the efficacy of the doctrine of JC, because vicarious liability is actually based on that link and its absence makes the entire doctrine irrelevant.[283]

Notwithstanding the shortcomings of the doctrine, it was relied upon by the ICTR in a number of cases including *Karemera*,[284]*Kayishema* and *Ruzindana*,[285] and *Simba* case.[286] On the other hand, the notion was also relied upon by the Special Court for Sierra Leone (SCSL) and the Extra Ordinary Chambers in the Courts of Cambodia (ECCC) in the prosecution of Liberia's former President Charles Taylor[287] and senior Khmer Rouge leaders, respectively.[288] Similarly, the Iraqi High Tribunal applied the doctrine of JCE in the prosecution of Saddam Hussein and other Iraqi leaders.[289] Though JCE was extensively relied upon by the *ad hoc* tribunals, it was expressly rejected by the ICC, which preferred to adopt the control theory of perpetration which shall be discussed in detail in the next chapter.

4.7 Conclusion

The doctrine of JCE is a judicial innovation that proved to be one of the prosecutorial tools used by the *ad hoc* tribunals to make the superiors principals to the crimes perpetrated by their subordinates. Historically speaking, express reference to the doctrine cannot be found in the charters of both the IMT and IMTFE, neither was it

[283] Jens David Ohlin, "Joint Intentions to Commit International Crimes", *Chicago Journal of International Law* 11 (2011): 5-6.

[284] *Prosecutor v Édouard Karemera & Matthieu Ngirumpatse*, (Trial Chamber III: Judgement and Sentence), para 1433.

[285] *Prosecutor v Kayishema & Ruzindana,* (Appeals Chamber Judgement)

[286] *Prosecutor v Simba* (Appeals Chamber Judgement).

[287] *Prosecutor v. Taylor*, (Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE (para 76.

[288] *Co-Prosecutors v. Nuon Chea,* (The Trial Chamber Judgement), paras 690–96.

[289] Ian M. Ralby, "Joint Criminal Enterprise Liability in the Iraqi High Tribunal", *Boston University International Law Journal* 28 (2010).

expressly mentioned in the statutes of both the ICTY and ICTR. Rather, both the *ad hoc* tribunals enumerated ordinary modes of liability including aiding, abetting, ordering, instigating etc. These modes of liability appeared to be insufficient to impute principal liability to the non-physical perpetrators who used physical perpetrators as mere tools to achieve their common criminal goals and would thus play a decisive role. The problem for the first time appeared in *Tadić* case where the question arose before the tribunal was whether criminal acts of a group could be ascribed to other participants of the group who did not materially perpetrate those crimes. In order to address the issue of assigning criminal liability to those members of a group who did not physically perpetrate any of the alleged offenses, the tribunal relied on the notion of JCE, by considering it as a part of customary international law.

Though the appeals chamber in *Tadić* case relied on the doctrine of JCE, the exact nature of the doctrine and whether it gave rise to principal liability or not remained a contentious issue. In a few cases, it was understood as a mode of liability which incurs principal liability of the non-physical perpetrators while in some other cases it was interpreted as giving rise to accessorial liability. The matter remained controversial until 2003 when in *Odjanic* case, the tribunal expressly laid down that the responsibility under the doctrine of JCE must be considered as principal liability according to article 7 (1) of the statute. An important development regarding the application of the doctrine at international level was that the tribunals expanded the scope of the doctrine by applying it at leadership level. In that case the tribunal expressly recognised that the criminal responsibility of non-physical perpetrators who master-mind the crimes correspond to the responsibility of physical actors. It appeared to be the most

controversial mode of liability and has been relied upon by other international tribunals as well. It has been severely criticised especially JCE III which raises guilt by association. The legality and legitimacy of the doctrine is equally problematic. As a matter of the fact, the *ad hoc* nature of both the ICTY and ICTR formulating the doctrine, and the rejection of the doctrine by the ICC casts doubt about its utilisation in future cases at international level.

CHAPTER V

THE CONTROL THEORY OF PERPETRATION

Introduction

The control theory of perpetration gained attention of the world after it was interpreted by the ICC chambers to be incorporated in article 25 (3) (a) of the Rome Statute. The reason of relying on the theory was twofold; firstly, to find out difference between the principal and accessorial liability and secondly, to assign the principal liability to those non-physical perpetrators whose role is decisive in the execution of international crimes by deciding how and when the crimes will be committed, despite being away from the crime scene. The first case which appeared before the court was *Lubanga* case, in which the court by relying on the control theory held the accused liable as a co-perpetrator. The control theory was further elaborated by the Pre-trial Chamber in *Katánga* and *Ngudjôlo* case which combined the notions of co-perpetration and indirect perpetration in the form of indirect co-perpetration. However, these two dimensions of control theory attracted a lot of criticism from both the judges and academicians in the field of ICL.

5.1 Origin of the Control Theory of Perpetration

The control theory of perpetration was developed by Claus Roxin who was not satisfied with the legal criteria being utilised by the German Federal Court, to

make a clear distinction between the principal and accessorial liability. Under the previous criteria, the criminal culpability of the accused was ascertained on the basis of criminal intention of the accused. Accordingly, a person was considered as principal if he himself committed the crime, i.e., 'as his own' ('*animus auctoris'*) and an accessory if he simply intended to facilitate the occurrence of a crime, i.e., 'act of another' ('*animus socli'*). The most controversial decision in this regard was the one rendered by the Federal Court of Germany in the *Stashynsky* case, which attracted attention across the country. The case was related to the assassination of two Ukrainian citizens, who were opponents of the Soviet regime by a KGB[290] agent in Munich. The defendant was considered as liable as an aider or abettor since he perpetrated the crime under the apprehension that lest he fulfils the instructions given to him, he himself will be executed. The court while deciding the case relied on the subjective criteria, i.e., according to the *mens rea* of the defendant. The decision of the court was criticised that it was irrational and was decided by the judges using wide discretionary powers. In response to the subjective criteria used by the German Federal Court, Roxin devised the theory of control over the crime, which postulates that all those people who dominates the commission of the crime are deemed to be principals, while all those who have a marginal influence in the execution of the offense are considered as accessories:

> A person is a perpetrator if he controls the course of events; one who, in contrast, merely stimulates in someone else the decision to act or helps him to do so, but leaves the execution to the attributable act of the other person, is an instigator or abettor.

[290] A security agency of the USSR which was formed in 1954 and lasted till the collapse of the Soviet Union in 1991.

The theory is commonly known as the theory of 'Control Based on Organised Power Structures' ('*Organisationsherrschaftlehre*'). Roxin further divided it into three different modes of perpetration including directly committing a crime, committing it through an agent, and jointly with another person. The theory is a variation of indirect perpetration which makes both the parties principal to the crime, i.e., the person behind the scene (*e.g.* the Chairman of the KGB) *and* the direct perpetrator of the crime (*e.g.* Stashynsky) by virtue of a hierarchical power structure or apparatus (*e.g.* the KGB) that is controlled by the former who thereby imposes his will on the later. The decisive factor in this regard is the degree of control exerted by the persons behind the scenes on the innocent agents because he is presumed to dominate the will of the innocent agent and thus uses him/her as an instrument to perpetrate the crime. The notion also finds an expression in cases of direct perpetration, under the nomenclature of 'control over the act'. The third expression of the control theory, and the one that is the centre of attention of the research at hand, is the notion of co-perpetration by virtue of joint control over the crime. According to this type, where an offense is committed by a plurality of individuals who act together to pursue common criminal goals, all those individuals will be considered as key figures whose role is so much crucial that in the absence of the contribution made by them the crime would not have been committed.[291]

5.2 Application of the Control Theory of Perpetration by the ICC

The Control theory of perpetration attracted the attention of the world when the ICC rejected the doctrine of JCE and considered control theory as a suitable mode of liability to ascribe criminal liability to the 'most responsible'. The theory was initially applied

[291] Yanev, *Theories of Co-perpetration in International Criminal Law*, 326-28, supra note 12.

by the ICC in *Lubanga* case and later in *Katánga* and *Ngudjôlo Chui* case. In both these cases the ICC chamber developed two dimensions of the doctrine including 'co-perpetration' and 'indirect co-perpetration', respectively which are discussed below.

5.2.1 The Notion of Co-Perpetration as Developed in *Lubanga Case*

Thomas Lubanga who was the former President of a political party *Union des Patriots Congolais* (UPC) and Commanding-in-Chief of its military wing *Patriotiques pour la Libération du Congo* (FPLC), was accused to have conscripted children below the age of fifteen years, who later took part in non-international armed conflict. [292] Those children were forced to join FPLC as a part of the recruitment policy carried out by FPLC commanders.[293] He was thus alleged to have contributed as a co-perpetrator in carrying out the policy in coordination with FPLC officers and UPC members and supporters pursuant to article 25 (3) (a) of the RS, which embodies the concepts of direct responsibility, co-perpetration; and indirect perpetration.[294] The Pre-Trial Chamber I in its decision on the confirmation of charges laid down that:

> There is sufficient evidence to establish substantial grounds to believe that from early September 2002 to 13 August 2003, Thomas Lubanga Dyilo incurred criminal responsibility as a co-perpetrator within the meaning of article 25(3)(a) of the Statute...[295]

[292] *Prosecutor v Thomas Lubanga Diylo* (Pre-Trial Chamber I Decision on the Confirmation of Charges), para 9. (Lubanga PTC I Decision on the Confirmation of Charges hereinafter).
[293] Ibid., para 251.
[294] Ibid., paras 318, 319.
[295] Ibid., para 410.

Thus, *Lubanga* was considered as liable as a co-perpetrator for recruiting child soldiers and authorising them to take part in non-international armed conflict pursuant to article 25 (3) (a) of the statute and was sentenced to 14 years penal servitude.[296]

In *Lubanga case*, the Pre-Trial chamber outlined the criteria which could be used to mark a distinction between the liability of the principal and accessory. In view of the Chamber where crimes are perpetrated by two or more persons, three different approaches are used to discriminate between principal and accessory liability; the objective' approach, the subjective approach and the control over the crime approach.[297] According to the objective approach, all those individuals who are physically involved in the perpetration of the crime are deemed to be principal to the crime, [298] while according to the subjective approach, as adopted by the ICTY in *Tadic* case all those people who participate in a crime with shared intention are considered as principals to the crime.[299] The Pre-Trial chamber rejected both these approaches and preferred to resort to the control over the crime approach, which assigns principal liability to all those individuals who makes the execution of the crime possible without physically getting involved therein.[300] Thus, all those individuals who control the execution of the crimes are considered as principals to the crime because they either materially perpetrate the alleged offence (direct perpetration), or they control the will of physical perpetrators of the crime, like by using an innocent agent to perpetrate a crime (indirect perpetration) or they have control over the crime by virtue of an indispensable task

[296] *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, Trial Chamber I, ICC-01/04-01/06, 10 July 2012. (The Appeals Chamber decision pursuant to article 76 of the Statute hereinafter).

[297] The Pre-Trial Chamber I Decision on Confirmation of charges, para 326-330.

[298] Ibid., para 328.

[299] Ibid., para 329.

[300] Ibid., para 338.

given to them and they can ruin the plan by not performing their part of task (co-perpetration).[301] It clearly stated that the most common form of exercising control over the crime is perpetrating it through another person, which has been embodied in article 25(3)(a) of the RS. [302]

In view of the Pre-Trial Chamber many countries adhere to the control over the crime approach.[303] The Pre-Trial Chamber identified two reasons due to which it relied on the control theory of perpetration: the first one was to differentiate between the liability of principal and accessory,[304] while the second was to assign principal liability to all those individuals who though are distant from crime scene, substantially contribute to the execution of the crimes.[305]

Since the liability of a co-perpetrator, as elaborated in article 25 (3) (a) of the RS was the focus of attention in the case at hand, the ICC Chamber emphasised that it must also be interpreted in accordance with the control theory of perpetration.[306] In view of the chamber, where crime is controlled by several masterminds, they will be deemed to jointly control the crime by dividing essential tasks between them. Though, none of the co-offenders enjoy entire control over the impugned acts, still they depend on each other regarding the accomplishment of the common objective because each one of them could defeat the object of the criminal enterprise by abstaining to perform his part of task.[307]

[301] Ibid., 332.
[302] Ibid., para 339.
[303] Ibid., para 330.
[304] Ibid., para 327.
[305] Ibid., paras 329-330.
[306] Ibid., para 340.
[307] Ibid., para 340, 342 & 347.

A. The Objective and Subjective Elements of Co-Perpetration Based on Control Theory

The chamber also elaborated the objective and subjective elements of co-perpetration based on control theory of perpetration. The objective requirement in view of the Pre-Trial Chamber is that it is imperative that there must exist a common plan or agreement and each participant must make an essential contribution in the implementation of the agreed plan.[308] According to the subjective element, all co-perpetrators must be aware that the execution of the agreed plan might bring about the desired criminal goals;[309] and must also be acquainted with the factual circumstances that enable him/her to jointly control the crime i.e., in the achievement of the common goal his/her role is so much crucial that he /she can devastate the plan by not performing his/her part of task.[310]

5.2.2 Indirect Co-Perpetration as Developed in the *Katanga* and *Ngudjolo Cases*

The concept of 'control' developed by the ICC chamber in *Lubanga* case was further elaborated by the Pre-Trial Chamber in *Katánga* and *Ngudjôlo* case. According to the facts of the case, both *Katánga* and *Ngudjôlo* were military leaders of FRPI (*Force De Resistence Patriotique en Ituri*) and FNI (*Frontdes Nationalisteset Intégrationniste*), respectively in the Ituri district of Democratic Republic of Congo (DRC). In 2003, both these groups attacked a village named Bogoro, which resulted in the death of around 200 inhabitants of the village. Both were indicted with war crimes and crimes against humanity directed against the civilian population by the troops under their control. They

[308] Ibid., para 346.
[309] Ibid., para 361.
[310] Ibid., para 366.

were accused of having participated in the execution of the 'common plan' by supplying weapons and ammunition to FRPI and FNI and making sure that the plan was executed in a coordinated manner. They were also alleged to be aware that the implementation of the common plan would lead to the perpetration of crimes listed in the statute of the ICC. [311]

The prosecution asserted that both of them were responsible as co-perpetrators according to the control over the crime approach, which contemplates that an individual can become a co-perpetrator due to the essential contribution made by him in the accomplishment of the task.[312] Since none of the defendants physically perpetrated those crimes, according to the Pre-Trial Chamber they perpetrated the impugned acts through other persons and it thus combined both the notions of 'co-perpetration' and 'indirect perpetration' embodied in article 25 (3) (a) of the RS in the form of 'indirect co-perpetration'.[313] The Pre-Trial Chamber asserted that the commission of a crime through another person is a mode of liability acknowledged by the major legal systems of the world according to which the principal uses the direct perpetrator as a tool to execute the crime.[314] The concept can be found in the writings of Claus Roxin and is termed as perpetrator behind the perpetrator (*Tater hinter dem Tater*).[315] The court elaborated that article 25 (3) (a) of the RS also recognises the criminal liability of a person who uses another person to physically perpetrate a crime by inserting 'commission of crime through another person' and assigns him the highest degree of

[311] *The Prosecutor v Germain Katánga and Mathieu Ndugjôlo Chui*, (Pre-Trial Chamber I Decision on Confirmation of Charges), paras 6-34.
[312] Ibid., 473.
[313] Ibid., para 491-494.
[314] Ibid., para 495.
[315] Ibid., para 496.

criminal responsibility.[316] The court further laid down that since all those crimes which are adjudicated by the court are perpetrated collectively and on extensive scale, the expression 'commission of crime through another person' actually refers to perpetration of crime by exercising control over the organisation (*Organisationsherrschaft*).[317]

The Pre-Trial Chamber introduced a few elements of committing crimes through another person which makes the perpetrator behind the perpetrator as principal to the crime by exercising control over the organisation.[318] Among these, the first element is the effective control exercised by the perpetrator over the organisation, which empowers him to mobilise his authority and secure the execution of the crimes which are within the ambit the court.[319]

The second element is that the organisation must have a hierarchical apparatus of power consisting of an adequate number of subordinates, which ensures compliance with orders in such a way that if some of the subordinates refuses to obey the orders of superiors, those orders must be carried out by others.[320] He can exercise his control through various means such as hiring, training, imposing discipline and providing resources to his subordinates.[321]

The third element is that the superior secures the execution of his orders through automatic compliance with orders.[322] However, successful execution of crimes cannot be secured until it is certain that if any subordinate refuses to comply with the orders,

[316] Ibid., para 497.
[317] Ibid., para 501.
[318] Ibid., para 511.
[319] Ibid., para 514.
[320] Ibid., para 512.
[321] Ibid., para 513.
[322] Ibid., paras 515-18.

he should simply be replaced with others. Thus, the organisation must consist of an adequate number of members.[323] Another way of securing automatic compliance with orders is through violent and strict training of the subordinates. For instance, if minors are kidnapped and are trained to perpetrate crimes like rape, murder, it is a sort of insurance that the orders of the superiors to commit crimes shall be automatically complied with. The power of the superior to acquire automatic compliance with the directions issued by him makes him principal to the crime because superior authorities are not only deemed to issue illegal orders to the subordinates, but by having control over the organisation they also decide how and when the crimes shall be executed.[324]

A. The Objective and Subjective Elements of Joint Control Over an Organisation

The objective and subjective elements of the control over an organisation, as formulated by the ICC chamber are as follows:

i. The Objective Element

These are the essential elements by virtue of which hierarchic superiors can be blamed for the offenses perpetrated by their subordinates.[325] Once these elements are satisfied, the crimes in question can be mutually attributed to all the participants involved therein.[326] The first among them is that there must be an express or implied agreement inferable (from the circumstances) which could be either between physical perpetrators or between indirect perpetrators.[327] The second requirement is that there must be an

[323] Ibid., para 516.
[324] Ibid., para 518.
[325] Ibid., para 519.
[326] Ibid., para 520.
[327] Ibid., para 522-23.

essential contribution in the perpetration of the crime, on the part of each co-offender.[328] However, if several co-perpetrators jointly act to pursue a shared criminal goal, only those participants will be considered as having joint control over the crime who could devastate the plan by not performing the task assigned to them. As far as those perpetrators are concerned who play their role from behind the scenes by using other persons to physically commit the crimes, their role to activate the apparatus leading to the automatic compliance with their orders and thus making the execution of the offenses possible will be considered as an essential contribution on their part.[329]

ii. The Subjective Element

It is necessary that the accused must also satisfy the subjective elements of the crimes, including '*dolus speclias'* or ulterior intent for the concerned crime.[330] A person is considered as satisfying the general elements of a crime where he/she gets engaged in the impugned acts with the intention to bring about certain consequences and he/she also knows that those consequences will occur in ordinary circumstances and he is also aware that there exist such circumstances that makes the possibility of occurrence of those consequences.[331] Thus, it is necessary that the defendant must participate in the impugned acts deliberately and knowingly that his/her action amounts to compliance with the objective elements of the crime.[332]

[328] Ibid., para 524.
[329] Ibid., para 525.
[330] Ibid., para 527.
[331] Ibid., para 528.
[332] Ibid., para 529.

5.3 Critique of Control Over the Crime Approach

The control over the crime approach has been subject to severe criticism both within and outside the ICC. The criticism levelled against the doctrine will be summarized below:

Firstly; it is not yet clear whether the ICC relied on treaty interpretation or on customary international law or on general principles of law when resorting to the control theory. It is unlikely that the court relied on treaty provisions because it cannot be presumed that the drafters of the RS had Roxin's doctrine in their minds. Additionally, the doctrine does not meet the criteria for the customary international law because it lacks widespread and consistent state practice. Furthermore, the control theory also does not qualify as a general principle of law since it is based on German criminal law and is not widely practised,[333] beyond the legal systems of Spain and Germany legal systems. It is, therefore difficult to believe that it is extensively used by different countries of the world as asserted by the Pre-Trial Chamber in *Katanga* case.[334]

In his dissenting opinion in *Lubanga* case, Judge Fulford also expressed reservation about the statutory status of the control theory. He argued that the theory is not supported by the text of article 25 (3) (a) of the RS, as asserted by the ICC

[333] Jens David Ohlin, Co-Perpetration: German Dogmatic or German Invasion? in Carsten Stahn, *The Law and the Practice of the International Criminal Court*, ed. Carsten Stahn, (Oxford University Press, 2015), 524.

[334] Sliedregt, *Individual Criminal Responsibility*, 86-7, Supra note 98.

chamber.[335] He suggested that the court should further investigate whether or not it is compatible with the framework of the ICC. [336]

In a similar vein, Judge Van den Wyngaert, in her concurring opinion in the '*Ngudjôlo* decision of acquittal', also considered the control theory as being incompatible with the spirit of article 25 (3) (a) of the RS. She argued that since the article mentions 'commission through another person', it is difficult to assume that it refers to the responsibility of the organisations as well.[337] She further contented that treaty interpretation should not be used to fill the perceived gaps regarding the forms of criminal responsibility.[338] It is also unjustifiable to incorporate those types of criminal liability that are outside the scope of the statute.[339] She further criticised the consolidation of 'joint perpetration' and 'indirect perpetration' into 'indirect co-perpetration' and considered it as an unnecessary expansion of article 25 (3) (a) of the RS.[340]

Secondly; the impact of the control theory as developed by the *Lubanga* Pre-Trial and Trial Chamber is somewhat ambiguous. On the one hand, the theory narrows down the concept of joint perpetration to individuals who play a necessary role in the criminal enterprise without which the crime would not have committed. On the other hand, it broadens the scope of perpetrator-ship to include individuals who are

[335] Separate Opinion of Judge Fulford, (Trial Chamber Judgement pursuant to article 74 of the Statute), paras 3& 6.

[336] Ibid., para 10.

[337] Concurring Opinion of Judge Christine Van den Wyngaert in *The Prosecutor v. Mathleu Ngudjolo Chui* (Judgment pursuant to Article 74 of the Statute) Trial Chamber II Decision No.: ICC-01/04-02/12, Para 52.(Concurring opinion of Judge Wyngaert hereinafter).

[338] Ibid., 16.

[339] Ibid., para 17.

[340] Ibid., para 61.

geographically distant from the crime scene and do not physically carry out any of the actions required by the offense definition.[341]

Thirdly; the concept of control exercised by a person by virtue of hierarchical organisation is better suited for regulating criminal participation within strictly hierarchical organisations, such as those seen in Nazi Germany or Communist Germany, for which this doctrine was originally developed. It may not be as well-suited for crimes committed in informal power structures, such as the conflicts that have taken place on the African continent that are currently under the jurisdiction of the court.[342]

Fourthly, The hallmark element of the doctrine which requires that there must be an essential contribution on the part of the co-perpetrators gives wide discretionary powers to the judges to ascertain whether or not the conduct of the accused amounts to an essential contribution in the perpetration of the offense, especially in those situations where he did not physically participate.[343]According to Wyngaert, this requirement engages Chambers in speculative activities regarding the possibility of occurrence of the crimes in those situations where the defendant did not contribute to it.[344]

Fifthly, the criteria laid down in the control theory which requires that co-perpetrators do not need to be physically present at the place of occurrence of crimes

[341] Jens David Ohlin, Elies Van Sliedregt and Thomas Weigned, "Assessing the Control Theory", *Cornell Law Faculty Publications* (2013): 727-28. (Ohlin, Sliedregt and Weigend, "Assessing the Control-Theory" hereinafter).

[342] Manacorda and Meloni, "Indirect Perpetration vs JCE", 171, supra note 6.

[343] Yanev, *Theories of Co-Perpetration*, 291, supra note 5.

[344] Concurring opinion of Judge Wyngaert, para 42.

and can rather participate by way of formulating policies, or controlling other co-perpetrators etc. makes it identical to the liability of an instigator, aider or abettor.[345]

Sixthly, the interchange ability criteria of the immediate perpetrator is also subject to rigorous criticism because it is difficult to assume that there are sufficient number of specialists in an organisation who can easily and immediately be replaced.[346] The problematic nature of the interchange ability criterion is even more apparent when it comes to the responsibility of individuals who are not part of the top level of the organisation such as mid-ranking bureaucrats like Adolf Eichmann. If these individuals are truly essential to the fulfilment of the entire criminal plan, it is difficult to assume that they are interchangeable with their superiors.[347]

Seventhly, the act of domination of organisation is also criticised because it is hard to believe that the superiors can directly dominate those perpetrators who are physically carrying out the crime. For instance, if a torturer abstains from torturing, domination of the concrete act of torture from the organisation's high-level could only presume to exist if the act of torture could forthwith be commenced, despite the fact that the actual torturer abstained from doing so.[348]

Eighthly, this theory also does not articulate up to which level of hierarchy it could be presumed that the man in the background exerts effective control over the organisation. The German case law applies Roxin's theory even to defendants who are

[345] Ohlin, Sliedregt, and Weigend, "Assessing the Control-Theory", 732, Supra note .

[346] Kai Ambos, "Command Responsibility and *Organisationsherrschaft:* Ways of Attributing International Crimes to the 'Most Responsible'" in *System Criminality in International Law*, Andre Nollkaemper & Hermen Van Der Wilt eds. (UK: Cambridge University Press, 2009), 146.

[347] Ibid., 147.

[348] Ibid.,

not part of the leadership of the organisation.[349] As a matter of fact, only few persons can be believed to exercise such a control and according to Ambos they are those who belong to the leadership level as they are empowered to implement the common plan without any intervention by other members of the organisation.[350]

In *Katánga* and *Ngudjôlo* case, where none of the defendants was physically involved in the perpetration of the crime, the Pre-Trial Chamber further expanded the scope of control theory by laying down that article 25 (3) (a) of the RS recognises the criminal liability of a person who perpetrate a crime by exercising control over an organisation. It was a novel approach introduced by the ICC Chamber to inculpate hierarchic superiors for the crimes perpetrated by their underlings. The application of the control theory by the ICC received rigorous criticism both within and outside the ICC. The most important criticism is that the court by relying on German and Spanish legal systems has departed from article 21 of its statute which authorises the court to rely on general principles of law. The statutory status of the theory has been questioned even by the judges of the ICC who showed their reservations by claiming that it is not supported by article 25 (3) (a) of the RS. The concept of control over an organisation is equally not clear and many of its aspects have been criticised by the academicians which needs clarification. If the ICC wants to continue with the doctrine, it is necessary that it must clarify the scope of the doctrine.

[349] Ibid., 147.

[350] *The Rome Statute of the International Criminal Court: A Commentary*, Otto Triffterer and Kai Ambos eds. Third Edition (C.H. Beck, Hart, Nomos, 2016), 1000.

5.4 CONSPIRACY: AN ALTERNATIVE FRAMEWORK FOR LIABILITY IN ICL

A conspiracy refers to "an agreement between two or more individuals to engage in an unlawful act". Whether the conspiracy is prosecuted as an independent crime or utilized as a basis to hold one conspirator criminally responsible for the actions of another, the fundamental elements remain consistent: an agreement to undertake collective criminal activity. Within this framework, however, conspiracy manifests as two distinct concepts: a substantive offense and a form of liability.[351] A substantive crime of conspiracy is classified as an inchoate crime, which refers to an incomplete crime—specifically, actions taken during the planning or attempt to commit another crime. This other, 'failed' crime is known as the object crime of the conspiracy. The rationale for criminalizing inchoate crimes lies in the belief that actions leading up to a crime represent steps toward an illegal act, regardless of whether the perpetrator was apprehended before the crime occurred. What may seem like innocuous actions are actually significant. By criminalizing these preparatory acts, there is hope for a deterrent effect on society as a whole. Conspiracy is fundamentally a collective crime, requiring collaboration among individuals. The essence of the crime is the agreement among a group to engage in criminal activity. Each member of the conspiracy must possess 'knowledge' of the relevant facts surrounding the intended crime and must 'intend' to execute the plan. This type of crime is primarily found within common law legal systems.[352]

[351] *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassesse (Oxford University Press, 2009), 279.

[352] Taylor Reeves Dalton, "Counterfeit Conspiracy: The Misapplication of conspiracy as a substantive Crime in International Crime", *ILSA Journal of International & Comparative Law* 17 (2010):

Following World War II, tribunals began assessing the criminal responsibility of the accused by establishing indirect connections to the crimes committed. Instead of directly linking the accused to specific acts of violence, the emphasis was placed on their association with the collective group responsible for these criminal activities. For example, the Nuremberg tribunal convicted former Nazi officials for their participation in a "conspiracy" to wage aggressive war or for their membership in a "criminal organization." Thus, conspiracy in Nuremberg Charter was only on one count, i.e., conspiracy to commit aggression to prosecute Major Nazi war criminals.[353] There was also a general conspiracy clause in the last paragraph of article 6 of the charter which provided for attribution of liability to all those persons who in any way participated in the execution of the crimes mentioned in the said article. The conspiracy principle was introduced by U.S. lawyer Murray Bernays, who argued that the entire Nazi party should be viewed as a criminal gang that took over the German government and exploited state power to achieve their illegitimate goals. However, delegates from France and Russia, representing civil law nations, opposed this idea during the London debates, as their legal systems do not recognize a similar concept.[354]

The IMT judges made several significant rulings regarding conspiracy law. First, they determined that Article 6(a) of the IMT Charter recognises the formation of a conspiracy to commit crimes against peace as a distinct criminal offense. Although the Tribunal did not provide a detailed interpretation of the legal elements of this

5-6. (Dalton, Counterfeit Conspiracy: The Misapplication of conspiracy as a substantive Crime in International Crime" hereinafter).

[353] Article 6 (a) of the Charter of IMT.

[354] Dalton, "Counterfeit Conspiracy: The Misapplication of conspiracy as a substantive Crime in International Crime", 9, supra note 352.

inchoate crime, it clearly identified the existence of an agreement to wage aggressive war as the central aspect of the charge. Specifically, to prove this charge, the judges required evidence of specific meetings between Hitler and his close associates, during which the invasion of other European countries was planned and coordinated. Conspiracy liability was thus limited to those few accused individuals who participated in these meetings and, with knowledge of Hitler's intentions, offered their cooperation.[355]

In 1948, the Convention on the Prevention and the Punishment of the Crime of Genocide, formally recognised conspiracy to commit genocide as a punishable offense.[356] In 1993, the Statute of the ICTY also acknowledged conspiracy to commit genocide as a crime.[357] However, during the drafting of the RS, delegates from countries with varying domestic legal systems had considerable disagreements about the appropriate scope of criminal responsibility. Representatives from common law countries supported the inclusion of a provision similar to conspiracy, believing it would help the court effectively address and end impunity for mass crimes. However, this proposal faced strong opposition from civil law countries, who were concerned about whether such theories aligned with the principle of culpability.[358] The term 'conspiracy' is not explicitly mentioned in the Rome Statute; neither in the definitions

[355] Lachezar Yanev, "A Janus-Faced Concept: Nuremeber's Law on Conspiracy Vis-a`-Vis the Notion of Joint Criminal Enterprise", *Criminal Law Forum* (2015) 26: 444–445.
[356] See article 3 (b).
[357] Art. 4 (3) (b) of the state of the ICTY.
[358] Ibid., 525

of crimes nor in Article 25, which outlines modes of perpetration and participation in international crimes by a group of persons 'acting with a common purpose'.[359]

As a mode of liability, 'conspiracy' can be used to convict a defendant for the substantive crimes of the defendant's co-conspirators. In common law countries, conspiracy is recognized as a means of holding individuals criminally accountable for their participation in collective crimes. Shortly, after the adoption of the Nuremberg Charter, the U.S. Supreme Court incorporated conspiracy as a mode of liability into federal criminal law. Pinkerton v. United States held that each conspirator is responsible for all reasonably foreseeable crimes committed by the group in the furtherance of the conspiracy. This form of responsibility is known as "Pinkerton Liability." Under "Pinkerton liability", a large conspiracy with many acts going on in different places can produce a large number of crimes that an individual is liable for. Prosecutors in the United States use conspiracy as a powerful weapon to leverage and convict defendants in criminal organizations, providing many substantive and procedural advantages. [360] In the U.S, each state has its own conspiracy statutes, often mirroring federal law. For example, California Penal Code § 182 defines conspiracy as an agreement between two or more people to commit a crime, allowing for punishment as if the crime had been completed. Similarly, in the UK, Section 1 of the Criminal Law Act 1977 addresses conspiracies to commit various offenses, including theft, fraud, and serious crimes like murder. In New Zealand, Section 310 of the Crimes Act 1961 outlines the framework for prosecuting individuals involved in agreements to commit unlawful acts. As

[359] See articles 5,6,7 & 8.

[360] Dalton, "Counterfeit Conspiracy: The Misapplication of conspiracy as a substantive Crime in International Crime", 12, supra note 352.

preceded earlier, Islamic law equally recognises conspiracy in cases where a group of individuals collaborates to commit crimes such as murder, rape, and other offenses.

The theory of conspiracy is particularly effective for prosecuting key figures, like criminal masterminds, who initiate and drive conspiratorial actions. These individuals often possess the charisma and influence to orchestrate criminal activities while skilfully distancing themselves from direct involvement. As a result, they can evade conviction due to their status, connections, or the challenge prosecutors face in linking their actions and intentions to specific crimes, thus avoiding responsibility under aiding and abetting or joint enterprise theories. Prosecuting conspiracy can facilitate the accountability of leaders who orchestrate and motivate criminal activities. By emphasizing the agreement among parties and treating conspiracy as an independent offense, this approach allows prosecutors to circumvent the pitfalls associated with focusing solely on crimes committed by other individuals. Conspiracy enables the punishment of key organizational figures who engage in planning, deliberation, and reflection on criminal schemes, even if they do not directly execute the planned actions. Concerns regarding the potential for prosecutors to overreach in pursuing vicarious liability can be mitigated by requiring clear evidence of an individual's membership in the conspiratorial group and their intent to engage in an agreement for criminal purposes.[361]

Under Article 21(1)(c) of the RS, the Court may draw on general principles of law from national legal systems, including the laws of States that would typically have

[361] Richard P. Barret & Laura E. Little, "Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals", *Minnesto Law Review* 88 (2003): 62-63.

jurisdiction over the crime, provided those principles are not inconsistent with the Statute, international law, or internationally recognized norms and standards. However, instead of relying on the legal systems of one or two countries, as was the case with the adoption of the control theory of perpetration, it is more appropriate to base the approach on elements of domestic legal systems that are both widely accepted and practiced, and are also recognized as part of customary law, as is the case with conspiracy.

5.5 Conclusion

The control theory of perpetration has faced substantial criticism both within and outside the International Criminal Court (ICC). Key criticisms centre around its unclear statutory foundation, its potential incompatibility with the Rome Statute, and its expansive interpretation in cases such as *Katanga* and *Ngudjolo*. Critics argue that the theory lacks widespread support in customary international law and does not align with the legal frameworks of many countries. Furthermore, the theory's application has resulted in ambiguous legal outcomes, particularly in situations where individuals who were not physically present at the crime scene or did not directly participate in the crimes were nonetheless held criminally liable. This approach, based on control over a hierarchical organization, has been questioned for its suitability in addressing crimes committed in less formal power structures, such as those found in certain African conflicts under ICC jurisdiction.

Additionally, the broad discretionary powers granted to judges in determining whether a co-perpetrator's contribution is essential to the crime has been criticized for leading to speculative judgments. The interchangeable perpetrator and domination

elements of the control theory also raise concerns regarding the practical applicability and fairness of assigning liability based on theoretical control rather than direct participation. Moreover, the expansion of the theory to include individuals who did not directly commit crimes but were linked to an organization raises questions about the fairness and clarity of such legal interpretations.

Given these concerns, it is evident that the control theory requires further clarification if it is to continue being used by the ICC. A more coherent and widely accepted approach, such as the concept of conspiracy, might offer a more reliable framework for assigning liability in cases involving collective criminal activity. Conspiracy, as recognized in both domestic and international legal systems, provides a more universally understood method for holding individuals accountable for their involvement in collective crimes. Ultimately, for the ICC to ensure that its legal framework remains both effective and fair, it must consider alternative theories of liability that better reflect widely accepted international legal principles, such as those relating to conspiracy.

CHAPTER VI

ISLAMIC LEGAL PERSPECTIVES ON THE ROLE OF POLITICAL AND MILITARY SUPERIORS

Introduction

The role of the *imām* is central to Islamic governance, with both political and military responsibilities grounded in justice, mercy, and the protection of human dignity. These principles continue to shape Islamic legal and ethical approaches to leadership and warfare. The Prophet's conduct during warfare set important ethical standards, including the protection of non-combatants and respect for places of worship, laying the foundation for Islamic principles of warfare known as "*Siyar"*, which align with modern international humanitarian law (IHL).

6.1 *Amir:* Political and Military Superior in Islamic Law

In an Islamic state, the administration of the government is entrusted to an *Amīr* or *Imām* (leader), who can be likened to a president or prime minister in a contemporary democratic system.[362] According to Al-Māwardī, the establishment of the *imāmate* occurs through two primary means: first, through the election by those holding positions of power and influence; and second, through the delegation of authority by the preceding *imām*.[363] He maintains that the *imām* is elected by an electoral body comprised of individuals who are just, knowledgeable, and endowed with the insight

[362] Abul A 'la al-Mawddudi, *Human Rights in Islam* (Lahore: Islamic Publications: Lahore), 1995, 9.

[363] Abul Hassan al-Māwardi, *al-Ahkām al-Sultāniyyah* (The Laws of Governance), tr. Asadullah Yate (Ta-Ha Publishers Ltd: London), 12. (Māwardi, *al-Ahkām al-Sultāniyyah* hereinafter).

and wisdom necessary to identify the most qualified candidate capable of effectively governing and managing the affairs of the state.[364]

In Islam, leadership is viewed as a public trust, where leaders serve as representatives of Allah on earth. Their authority is defined by the power granted to them by Allah Almighty, and they must operate within the boundaries set by divine law. As such, a ruler acts as an executor of Allah's law, responsible for ensuring justice and fairness in all interactions within the public trust they oversee. As Allah the exalted says "O Dawood, indeed We have made you a successor upon the earth, so judge between the people in truth and do not follow [your own] desire, as it will lead you astray from the way of Allah." [365] Abdullah ibn Umar reported: The Messenger of Allah, (PBUH) said, "Beware. every one of you is a shepherd and everyone is answerable with regard to his flock. The Caliph is a shepherd over the people and shall be questioned about his subjects ..." [366]

A fundamental requirement for the preservation of the *imāmate* is the possession of a formidable military force, which serves as the means through which the *imām* ensures the safety and security of the people. In Islam, the *imām* possesses the authority to either lead the army as a military commander or delegate this responsibility to another, as demonstrated by the practice of the Holy Prophet (PBUH). As the Commander-in-Chief of the Muslim army, the Prophet (PBUH) personally led key battles, including those at Badr, Uhud, Khaybar, Tabuk, and the conquest of Mecca. In other military campaigns, he entrusted the leadership of the army to his trusted senior

[364] Ibid., 11.
[365] Al-Qur'ān, 38:25.
[366] Sahīh Muslim, *Kitāb al-Imāra*, *Hadīth* No. 1829.

companions. Throughout these battles, he emphasised the importance of observing the humanitarian methods of warfare which align with the rules of International Humanitarian law (IHL). The conduct of the Prophet (PBUH) laid down the foundation of the laws of war in Islam and was termed as "*Siyar"* or the "Islamic law of nations" or the "Islamic International law".[367] Thus, *sharī'ah* has been one of the primitive legal systems to have included within its scope certain principles and norms that have come to be known as the law of armed conflict or IHL.[368]

6.2 The Conduct of the Holy Prophet (PBUH) as a Commander-in-Chief of the Muslim Army

During all the wars fought by the Prophet (PBUH), he gave clear instructions to his troops not to kill all those who were placed *horse de combat* owing to sickness, wound or any other reason: "Wounded shall never be killed, *mudabbar* shall never be chased... and whosoever shuts his door then he shall be immune."[369] The Prophet (PBUH) granted similar protection to all those enemy combatants who surrendered by laying down their weapons. Once he dispatched a detachment towards al-*Huruqāt* and during the battle, Muslim soldier assaulted a non-Muslim fighter who declared oneness of God. Osāma b. Zaid narrates that when he reported the incident to the Prophet (PBUH), the later said "Who will save you from ″There is no God but Allah″ on the Day of

[367] For the origin and development of '*Siyar'* or Islamic International Law Muhammad b. Hassan al-Shaybānī, *The Shorter Book on Muslim International Law*, ed. Mahmood Ahmed Ghazi (Islamabad: Islamabad Research Institute, 1998), 1-35; Muhammad Munir, Islamic International Law (*Siyar*): an Introduction, *Hamdard Islamicus,* 40 (2012): 37-60; Muhammad Munir, *The Law of War and Peace in Islam: Causes and conduct of jihad and non-state Islamic actors under Islamic Law* (New York: The Edwin Mellen Press, 2018); Reza Mousazadeh, "The Islamic View on International Criminal Law", *International Study Journal* 71 (2005): 1-35.

[368] Cheriff Bassiouni, *The Sharī'ah and Islamic Criminal Justice in time of War and Peace* (Cambridge University Press, 2014), 160.

[369] Abū 'Ubaid, *Kitāb al-Amwāl* (AL-Qahira: Maaktabah al-kulliyā al-Azhariyyah, 1975), 82.

Judgement?" Upon this Osāma responded that he uttered those words under the fear of the weapon. The Prophet asked Osāma whether he had torn his heart so that he realised that he had uttered it under the fear of weapon or not.[370] Similarly, women, children, elderly, and religious personnel were granted immunity from being subjected to attack.[371] The Prophet (PBUH) clearly instructed "fight but do not steal (from the captured goods), commit treachery, mutilate, or kill a child or those who reside in houses of worship".[372]

According to another report, the Prophet (PBUH) prohibited to kill children and religious people.[373] In an expedition, he came across a group of people gathered around a woman upon which he conveyed message to Khālid b. Walīd prohibiting him from killing women or a servant.[374] Once the Prophet (PBUH) dispatched Khālid b. Walīd towards the tribe of *Banū Judhaima* to invite them towards Islam. The people of the tribe, instead of saying '*aslamna*' which means 'we have accepted Islam', proclaimed '*Saba'na'*which means "we have come out of one religion to another". When Khālid heard these words, he got angry and killed a few of them and divided the remaining members of the tribe among his fellows as captives of war. He later ordered his companions to kill those captives but they declined to do so. Upon their return to Medina, Khālid mentioned the incident to the Prophet who hearing this raised both his hands and said twice "O God! I am free from what Khālid has done**.**"[375] Thereafter, he summoned 'Alī, gave him money and said ″O 'Alī, go out to these people, look into

[370] Abū Dāwūd, *Kitāb al-jihād, Hadīth* No 951.

[371] For non-combatant immunity in Islamic law see Muhammad Munir, "The Protection of Civilians in war: Non-Combatant Immunity in Islamic Law", *Hamdard Islamicus* 34 (2011): 7-39.

[372] Muhammad 'Alī al-Shawkāni, *Nayl al-awtār Sharh Muntaqa al-Akhbār min ahādīth Sayyed al-al-akhbār*, vol 7 (Misar: Mustafā al-Bābi al-Hilbī, n.d), 261. (Shawkāni, *Nayl al-awtār* hereinafter).

[373] AL-Baihaqī, *al-Sunan al-Saghīr*, vol. 2 (Mecca: al-Maktabah al-Tijāriyyah, n.d), 312.

[374] Abu Dawūd, *Kitāb al-Jihād*, *Hadīth* No 968.

[375] Sahih Bukhari, *Kitāb al-Maghāzi, Hadīth* No 629.

what has happened to them, and make an end to the way of the Time of Ignorance.″ i.e., the pre-Islamic traditions. ‘Alī went to the people of *Banū Jadhīma*, and paid compensation for the loss of lives and properties and inquired them if they still had any claims, upon which they replied ‘no’. Thereafter, ‘Alī distributed the remaining money among them as a precautionary measure and after returning to the Prophet, he informed him about the redress made to the victims of the tribe. Upon hearing that, the Prophet once again turned towards *Qibla* and repeated ″O God, I am innocent of what Khālid b Walīd has done″.[376] This is the only incident where innocent people had been killed by Muslim commander Khalid b. Walīd and the Prophet paid compensation which clearly shows that Muslim state is responsible and liable to pay compensation for war crimes committed by the Muslim army or Musli combatants during *Jihād*.

During the Battle of ‘Uhad, the body of Hamza (RA) was severely mutilated by the *Quraish*; he was found in a condition that his belly was ripped up and his lever was missing and his nose and ears were also cut off. The Prophet (PBUH) was so much aggrieved that he even swore to mutilate thirty of them in retaliation. Thereupon Allah Almighty sent down the message, ″If you punish, then punish as they have been punished. If you endure patiently that is better for patient″ Thereafter, the Prophet (PBUH) remained patient and forbade his companions from mutilation.[377]

[376] Abū Jaʿfar Muhammad b. Jurair al-Tabarī, *Tārīkh Tabarī* (Karachi: Nafees Academy, 2004), 188-190, (Tabarī, *Tārīkh Tabarī* hereinafter).

[377] Ibne Ishāq, *The Life of Muhammad*, tr. A. Guillaume (Oxford University Press, 1967). 387-88.

The Prophet (PBUH) also used to encourage his companions to offer good treatment to the prisoners of war[378] and his behaviour with the prisoners of the battle of Badar,[379] was even applauded by Allah ″and they feed, for the love of Allah the indigent, the orphan and the prisoner.″[380] Once a detainee belonging to the tribe of *Thaqīf* requested the Holy Prophet (PBUH) for food and water, upon which he replied ″these are your basic needs″.[381]

Similarly, International Humanitarian Law (IHL) ensures that, during armed conflict, all individuals are afforded protection without any adverse distinction based on race, religion, sex, or other factors. This fundamental principle is reflected in various provisions that specifically protect women, children, and religious personnel. For instance, Article 24 of Geneva Convention IV,1949 provides special protection to children in armed conflict, emphasizing the need to ensure their safety and well-being by guaranteeing access to adequate food, shelter, and medical care. Similarly, Article 27 of the same convention offers specific protection to women who are pregnant, nursing, or have young children, prohibiting acts of violence, cruel treatment, and degrading practices, including sexual violence and exploitation. Additionally, Article 9 of Geneva Convention I, 1949 ensures that religious personnel attached to armed forces or medical services are entitled to protection, as long as they are not directly involved in hostilities. Similarly, Article 3 common to the Geneva Conventions, 1949 provides protection to wounded, sick, and captured soldiers by emphasising that they must be

[378] For rights of Prisoners of War in Islam See Muhammad Munir, "Debates on the Rights of Prisoners of War in Islam″, *Islamic Studies* 49 (2010): 463-492.
[379] Tabarī, *Tārīkh Tabarī*, 191, supra note 31.
[380] Al-Qur'ān, 76: 8.
[381] Shawkāni, *Nayl al-awtār*, 247, supra note 28.

treated humanely and should not be subjected to violence, torture or degrading treatment.

The Prophet whenever entered into a peace treaty with other nations, he fully respected the rights of their lives, properties and their places of worship. According to the peace agreement signed with the people of Najrān, he assured that their lives, properties and places of worship shall remain secured:

> Full protection is accorded from Allah and His Prophet (pbuh) to the Christian inhabitants of Najrān regarding their life, land, nationhood, property and wealth, even to those who are residing as their dependants in the vicinity villages of Najrān and to those living in Najrān and outside the territory, their priests, monks, churches and everything whether great or small.[382]

It is prudent to mention here that the conduct of the Prophet (PBUH) is a primary source of law; it is secondary and complementary to the Holy *Qur'ān*, and thus it is strictly binding on Muslim combatants.[383] Al-Qarāfi writes:

> God's Messenger (pbuh) is the supreme *imām*, the most judicious judge and the most learned jurisconsult (*mufti*). He is the leader of all leaders, the judge of all judges and the foremost scholar of all scholars. We cannot think of any religious function (*mansabdīni*) without thinking of him as its perfect model and prototype ... Thus, everything he said or did by way of transmission and conveyance is a binding general rule (*hukam ʿāmm*) for all until the Day of Resurrection. If it consists of prescriptions, each one should personally abide by them, and the same applies to what is permissible (*mubāh*). If it consists of prohibitions, everyone is also personally duty bound to avoid them.[384]

The companions of the Prophet (PBUH) also respected these divine commands and followed the conduct of the Prophet (PBUH) in their wars with non-Muslims. Yahya b. Saʿīd reports that Caliph Abu Bakar, while bidding farewell to the army going

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[382] Abū Yoūsuf, *Kitāb al-Kharāj* (Dār al-Maʿrifah, 1979), 145.

[383] Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (International Institute of Islamic Thought and Islmaic Research Institute, 2006), 176-77.

[384] Shihāb al-Dīn Ahmeb b. Idrīs al-Qarāfī, *Anwār al-Burūq fī Anwā al-Furūq*, vol. 1, 349–350 as quoted in Muhammad al-Tahir Ibne Āshūr, *Ibn Āshūr: Treaties on Maqāsid al-Sharʿīʿah*, tr. Mohamed Tahir El-Mesawi (London: The International Institute of Islamic Thought, 2006), 30.

to Syria gave some instructions to Yazīd b. Abu Sufyān who was leading one-fourth of that army "do not cut down a fruit tree, and never shall you devastate a building. Do not injure sheep or camel except for meal. Do not burn a palm tree nor shall you inundate it..."[385] Similar instructions were given by Caliph ʿUmar, ʿUsmān and ʻAlī. Similarly, whenever the companions of the Prophet (PBUH) conquered any non-Muslim country, they entered into peace agreements with the inhabitants of the occupied area and gave the assurance that their lives, properties and religious places would remain safe. When Abū ʿUbaida subjugated Syria, he entered into a peace accord with the residents of Syria in which he undertook that Muslims would neither destroy their churches and synagogues nor they would make any interference with regard to them.[386] Similarly protection was granted by ʿAmar b. al-ʿAās when he conquered Egypt. On the occasion of the conquest of Jerusalem, a covenant was concluded between Caliph ʿOmar and the Christians of Jerusalem according to which ʿOmar agreed to grant protection to their lives, properties and religion. He also ensured them that their places of worship would not be devastated, neither they would be turned into residential areas.[387]

On the other hand, the presence of historical monuments of Pharaoh and Qubtīs is also a proof that Muslims after subjugating countries like Egypt and Syria did not destroy their cultural heritage. Apart from this, all those countries that were subjugated by Muslims during the initial period of Islam preserved their culture and tradition. When Muslims conquered the palace of Caesar, they neither destroyed nor distributed

[385] Mālik b. Anas, *al-Muwatta*, tr. Muhammad Raheem-ud-din (New Delhi: Kitab Bhavan, 2000), 200.
[386] Ibid., 149.
[387] Tabarī, *Tarīkh al-Tabarī*, 2: 472, supra note, 370.

among themselves the antiques found therein, including jewels, idols cast in gold and silver etc., but instead they sent these things to ʿOmar.[388]

IHL also provides specific protections for cultural property and cultural objects during armed conflict to safeguard humanity's heritage and prevent unnecessary destruction. These protections are enshrined in key legal instruments, particularly the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954). For example, Article 9 of the Convention prohibits the targeting of cultural property, specifying that cultural sites must not be used for military purposes, and their destruction is strictly forbidden under any circumstances. Similarly, Article 53 of Additional Protocol I (1977) prohibits the use of cultural property for military purposes and the destruction of cultural property, regardless of whether it is in occupied territories. It explicitly forbids any attack or pillaging of cultural property, categorizing such acts as violations of the laws of war.

6.3 Conclusion

The leadership role in an Islamic state, entrusted to the *Amīr* or *Imām*, is both a political and military responsibility, grounded in divine law and the principles of justice. The *imām* acts as a representative of Allah on Earth, with the authority to govern and protect the welfare of the people under their care. This leadership, while holding significant power, is bound by ethical and legal constraints, as demonstrated by the practices of the Prophet Muhammad (PBUH) in both governance and warfare.

[388] Ibid., 503-505.

The Prophet's conduct during battles, emphasizing mercy, justice, and the protection of vulnerable groups, established foundational principles that continue to guide Islamic military jurisprudence today. These principles, encapsulated in the concept of *Siyar* or Islamic law of nations, align closely with modern international humanitarian law, highlighting Islam's early commitment to ethical warfare. Ultimately, the Islamic conception of leadership underscores the importance of responsibility, accountability, and adherence to divine principles. The *imām* must exercise their authority not only for the protection of the state but also for the well-being and dignity of all people, ensuring that justice prevails both in times of peace and conflict.

CHAPTER VII
EXPLORING SUPERIOR CRIMINAL RESPONSIBILITY IN ISLAMIC LEGAL FRAMEWORK

Introduction

Criminal responsibility in Islamic law offers a nuanced approach that emphasizes individual accountability and justice, regardless of social or hierarchical status. The teachings and actions of the Prophet Muhammad (PBUH) serve as a model, underscoring the importance of upholding justice, even when it conflicts with personal interests or those of close relations. Additionally, the Prophet (PBUH) clarified that obedience to rulers is not required when they issue sinful commands. Muslim jurists have further examined the concept of *Ikrāh* (duress), which addresses the legal responsibility of both the coercer and the coerced. Based on the principles of the Qur'an and the Sunnah, Islamic jurisprudence provides a comprehensive framework for criminal liability, with similarities to aspects of International Criminal Law (ICL), particularly in the context of institutions such as the International Criminal Court (ICC).

7.1 CRIMINAL RESPONSIBILITY IN ISLAMIC LAW: ENSURING JUSTICE THROUGH *NULLA PEONA SINE CULPA*

In Islamic law, responsibility is a fundamental principle underpinning the implementation and application of its jurisdiction. It encompasses various forms of responsibility, including moral, civil, contractual, familial, social, economic, tax-related, universal, and criminal responsibility. The foundation for all these responsibilities is rooted in violations of the Islamic code of conduct. As far as responsibility related to criminal matters is concerned, Islamic law assigns it solely to

individuals, grounding the accountability of offenders in the intentional or deliberate misuse of their freedom of choice in social or international contexts.[389] There are innumerable verses in the Holy Qur'ān that reinforce the principle of *nulla peona sine culpa*; no one can be held responsible for the wrongdoings of others: ″And that man can have nothing but what he strives for″ [390] "No soul burdened with sin will bear the burden of another. And if a sin-burdened soul cries for help with its burden, none of it will be carried even by a close relative".[391] "ʿDivine grace isʾ neither by your wishes nor those of the People of the Book! Whoever commits evil will be rewarded accordingly, and they will find no protector or helper besides Allah."[392]

The Sunnah also reaffirms the principle of *nulla poena sine culpa* (no punishment without guilt. Abū Rimthah narrates that once he went to the Prophet (PBUH) with his father. The Prophet (PBUH) asked his father: Is this your son? The father replied in affirmative while swearing on oath. Upon this, the Messenger of Allah smiled and said: "He will not bring evil on you, nor will you bring evil on him".[393] Thus, accountability serves as a mechanism for attaining justice and is fundamentally an individual responsibility.

While individual criminal responsibility is firmly established in Islamic law, there are certain cases in which a person may be deemed vicariously liable for the

[389] Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search*. (Brill's Arab and Islamic Law Publishers, 2011), 388. (Malekian, *Principles of Islamic International Criminal Law* hereinafter).

[390] Al-Qur'ān, 53: 39.

[391] Al-Qur'ān, 35:18.

[392] Al-Qur'ān, 4: 123.

[393] Abū Dawūd, *Kitāb al-Diyāt, Hadith* No 4495.

actions of others. [394] These include the institution of *al-ʿāqila*, wherein the relatives of the killer are supposed to pay compensation on his/her behalf. It has been narrated those two women from a tribe known as *Hudhail* quarrelled with each other and one of them threw a stone towards the other due to which she died along with her foetus. The relatives of both the offender and the victim took the case to the Prophet (PBUH) for adjudication, who held that the *'Asaba* (near relatives) of the murderer had to pay *diyya* to the family of the victim.[395]

A person is also considered as responsible for the actions of another due to a pr-existent legal duty towards him /her. For example, the liability of an employer arises for those actions of his employee that occurred during the performance of his duties and caused damage to a stranger.[396] Similarly, a person can also be considered liable for the acts of his/her child, animal, or object under his control if it resulted in loss to a stranger. In the case of damage caused by an animal or other object, the liability will be

[394] The term 'vicarious liability' is not expressly mentioned in the classical books of *fiqh*; it could rather be inferred from the interpretation of *ahadiīh* and can be inferred from cases involving responsibility on behalf of others like the use of the term *'āqilah*'. It has been used by contemporary jurists, both in relation to tort and criminal law. They use the terms *'mas'ūliyyah 'an fi'l al-ghayr"*, "*damān fī al-ghayr"*, *"damān fī al-ākhirīn", "damān al-shakhs fi'l al-tābi'īn"* and "*damān al-shakhs fī al-khadi' īn liriqābatihim"*. All these terms generally refer to 'vicarious liability', which could be defined as "the liability imposed on one person for the tortuous act or omission of another which causes loss to a third person". Abdul Bashir bin Mohamed, "Vicarious Liability: A Study of the Liability of Employer and Employee in the Islamic Law of Tort", *Arab Law Quarterly* 15 (2000).

[395] Sahīh al-Bukhāri, *Kitāb al-Diyāt , Hadiīh* No 48.

[396] Muslim jurists have divided employee (*ajīr*) into two categories: *Ajīr Khās* i.e a private agent who works for another for a definite period and for a specific work or he is a person who is hired to do work exclusively for the hirer. While *ajīr mushtarak*, i.e independent contractor is a person who is not under any restriction of not working for any other person and is usually paid after completion of his work. Unlike *ajīr mushtarak*, the benefits of the services of *ajīr khā*s belongs exclusively to the employer, in case of any injury accruing to a third party, the act is attributed to the master who is considered as vicariously liable for his act. For details see Abdul Basir b. Muhamad,″ Vicarious Liability: The Liability of Employer and Employee in the Islamic Law of Tort″, *Arab Law Quarterly* 15 (2000): 200-201.

imposed on its owner or lessee (*musta'jir*), or trustee (*mūda'*), or usurper (*ghāsib*) or borrower (*musta'īr*).[397]

Individual criminal responsibility is equally recognised in the RS of the ICC. Article 25 of the statute provides that "a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute." In the context of Article 25, *nulla poena sine culpa* (no punishment without a crime) is integral to the ICC's framework for individual criminal responsibility. It ensures that criminal liability is based on a person's intent or knowledge of the crime, and it prevents unjust punishment for acts that do not meet the threshold of criminal intent or awareness.

7.2 Equality Before the Law in Islamic Law

Like other aspects of life, Islam places a strong emphasis on justice in the criminal sphere and has established clear guidelines for upholding criminal justice, without any discrimination based on colour, sex, faith, or social status. The Holy Qur'ān says, "O ye who believe! stand out firmly for justice as witnesses even against yourselves or your parents or your kin, and whether it be against rich or poor for Allah can best protect both."[398] On another occasion, the Qur'ān states: ″Surely God bids to justice and doing good″.[399]

The Prophet (PBUH) during his last speech reiterated the 'principle of equality' of all human beings: "All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also, a White has no

[397] Ibid., 198
[398] Al-Qur'ān, 4: 135.
[399] Al-Qur'ān, 16: 90.

superiority over a Black nor a Black has any superiority over a White except by piety and good action."[400] 'A'isha, (R.A) narrates that once a woman from *Quraish* committed theft during the time of the Prophet. When Osāma tried to intercede on her behalf, the Prophet (PBUH) got angry and said that this injustice destroyed the earlier nations because if a person holding a high social position committed theft, he/she was spared, and if a weak person committed the same crime, they inflicted on him/her ordinary punishment. He swore to God and said that had his daughter Fatima had committed theft, he would have amputated her hand.[401]

Every person who commits a crime is answerable before a court of law just like an ordinary person, irrespective of his official capacity. The Prophet (PBUH), on many occasions, had presented himself for accountability. One such incident has been narrated by Ibn-e-Hibbān, according to which on the 'day of Badar',[402] the Prophet (PBUH) while straightening the rows, hit a soldier on the belly with a baton in his hand, who had moved a bit forward. The soldier made a complaint to the Prophet (PBUH) upon which he lifted his shirt and asked the soldier to take retaliation. [403] Similarly, complaints were made against the noble Caliphs of the Prophet in the courts of the *qādi*

[400] This sermon was delivered on the ninth day of *Dhul-Hijjah* in the *Urānah* valley of Mount '*Arafāt* in *Mecca* and is also known as the 'Farewell Pilgrimage'.

[401] Sahīh Muslim, *Kitāb al-Hudūd, Hadīth* No 4188.

[402]The battle of *Badar* was fought in 634 CE between Muslims and the infidels of Mecca.

[403] Ibn-e-Kathīr, *Sīrat al-Nabī, tr. Hidayat Ullah Nadwi,* vol. 1 (Lahore: Maktaba Quddusia, 1996),558.

and Abū Bakar,[404] ʿUmar,[405] ʿAlī[406] and many *Umayyad*[407] and *Abbasid*[408] Caliphs had appeared before the courts and defended their suits.[409] Thus, by affirming the criminal responsibility of all individuals irrespective of their status, Islam rejects impunity which is the fundamental goal of ICL.

As far as ICL is concerned article 27 (2) of the RS equally reinforces the principle that all individuals are equal subject to international law, ensuring that justice is upheld regardless of a person's status. It clearly states that any immunities or special procedural rules associated with a person's official capacity, whether under national or international law, do not prevent the Court from exercising its jurisdiction over that individual.

7.3 Superior Accountability for Illegal Directives

Generally speaking, Muslims are enjoined to obey their rulers, as Allah orders us to obey Him and His Messenger and the people of authority (rulers).'[410] Abū Huraira narrates that the Prophet (PBUH) obliged Muslims to obey their ruler.[411] However, obedience is required in lawful conducts only, not in sinful things, as narrated by Ibn-e -ʿUmar that the Prophet (PBUH) said "it is obligatory upon a Muslim that he should listen and obey him whether he likes it or not, except that he is ordered to do a sinful

[404] He became the first caliph of Muslims after the demise of the Holy Prophet (PBUH). His full name was Abū Bakar ʿAbdullah b. ʿUsmān Abī Quhāfa and was born in Mecca in 573 AD and died in 634 AD.

[405] ʿUmar b. al-Khattāb became the second caliph of Muslims after the death of Abū Bakar. He was born in 585 AD in Mecca and died in 644 AD.

[406] Alīa b. Abī Tālib was the fourth caliph of Muslims who was born in Mecca in 599 AD and died in 661 AD.

[407] Umayyad dynasty ruled the Muslim empire from 661-750 CE.

[408] Abbasid caliphate ruled the Muslim empire from 750-1258 CE.

[409] Muhammad Hamidullah, *The Muslim Conduct of State* (Kuala Lumpur: Islamic book trust, 2011), 138.

[410] Al-Qur'ān, 4:59

[411] Sahīh Muslim, *Kitāb al-Imārah, Hadīth* No 4523.

thing. If he is ordered to do a sinful act, a Muslim should neither listen to him nor should he obey his orders."[412] Thus it is clear that Muslims are not obliged to obey unlawful orders of superiors.

In relation to situations where an individual in a position of authority coerces others to commit an offense, classical Muslim jurists have addressed this issue under the doctrine of *Ikrāh*. The following section will examine the doctrine of *Ikrāh* and the implications of unlawful orders executed under duress. Jurists have clearly delineated the criminal liability of both the individual exerting pressure and the person acting under duress, although their interpretations may differ slightly.

7.3.1 The Doctrine of *Ikrāh* (Duress) in Islamic Law

Before proceeding further, it is pertinent to mention here the difference of opinion between Abū Hanīfa and both his disciples regarding the qualities of a coercer. According to Abū Hanīfa, the coercer must be a person holding a position of authority (state official), having material ability to execute his threat. In this regard Jasās writes that coercer must be a person in authority who commands obedience.[413] On the other hand, both Abū Yūsuf and Muhammad asserts that any person can exercise coercion irrespective of the fact that he is a ruler or not.[414] The reason of disagreement over the issue between the teacher and both his disciples as identified by Sarakhsī is that during the time of Abū Ḥanīfa, the ruler used to be the most influential person in the land whose commands were obeyed by all the people, and therefore he was deemed to be

[412] Ibid., *Hadīth* No 4533.

[413] Abū Bakar al-Rāzī al-Jaṣṣāṣ, *Sharḥ Mukhtaṣar al- Ṭaḥāwī fī al-Fiqh al- Ḥanafī*, ed. ʿIṣmat Allāh ʿInāyat Allāh Muḥammad and Saʿīd Bakdāsh, vol. 8 (Beirut: Dār al- Bashāʾir al- Islāmiyya lil-Ṭibāʿa wa al- Nashr wa al- Tawzīʿ, 2010), 437.

[414] Abū Bakar b. Mas'ud al-Kāsaniī, *Badāe' al-Sanāe' fī tartīb al-sharāi'*, vol 9 (Qahira: Matb'ā al-Imām, n.d), 4480. (al-Kāsaniī, *Badāe' al-Sanāe'* hereinafter).

the only person who could effectively exert coercion, unlike the ordinary people. However, during the time of both his disciples there emerged strong local authorities which could equally be considered as authoritative enough to exert coercion. This change in the political landscape led both the disciples to change their opinion and they eliminated the distinction between rulers and non-rulers, thus arguing that coercion could be exercised by any person, whether he is a ruler or not.[415] Below we shall discuss the meaning and types of duress and the legal outcome of illegal acts like murder, adultery, or destruction of other's property committed under illegal orders of superiors:

A. Meaning of *Ikrāh*

Ikrāh or duress refers to a situation where a person is forced to do something against his will.[416] The *Qur'ān* acknowledges such a situation and prescribes thus: "Save him who is forced thereto and whose heart is still content with Faith"[417]. The legal effect of performing an impermissible act under compulsion is that sometimes it becomes obligatory to perform the coerced act (like eating an unlawful thing is allowed in case of necessity), sometimes it is permissible to do it, and sometimes he gets exemption (*rukhsā*) like uttering *kailimāh al-kufr* or abusing another Muslim and some other times it is totally impermissible to commit the coerced act (like killing another person, committing rape etc).[418]

[415] Shams al-dīn al-Sarakhsī, *Al-Mabsūt*, vol. 12 (Beirūt: Kitāb al-Maʿrifa, n.d), 89. (Sarakhsī, *al-Mabsūt* hereinafter).

[416] Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western* (Shari'ah Academy, 2000), 28.

[417] Al-Qur'ān,16:106

[418] Kāsaniī, *Badaiʿal-Sanā'e,* 9: 4481-4485, supra note 414.

B. Types of *Ikrāh*

Hanafī jurists have categorised duress into two main types: the first is *ikrāh mulji*, i.e., compelling duress, which nullifies consent and revokes free choice. The second is *ikrāh ghayr muljī*, i.e., non-compelling duress which nullifies consent but does not revoke free choice.[419] Al-Kāsānī explains the two types in the following words:

> Duress is of two types. One type creates necessity and leaves no recourse by its very nature like (a threat) of death or maiming or a beating that endangers the life or limb (that is) whether the beating is excessive or light. And some have said that such beating must be about the number of lashes required in a *hadd* [a set punishment that ranges from 40 to 100 lashes], however, such an opinion is incorrect because what is important here is that necessity is created and if [necessity] exists then there is no reason to require a certain number of lashes. And this type is called *tāam* (complete). The second type does not create a necessity and does not have some recourse and that is like imprisonment or bondage or beating that does not threaten to cause grave injury. And [here again] there is no specific amount of duress required but that it [duress] causes agony... and this type is called *ikrāhnāqis* [incomplete compulsion].[420]

7.3.2 Legal Consequences of Illegal Acts Committed Under Orders of Superiors

Muslim jurists have discussed the outcome of illegal acts committed pursuant to illegal orders in quite detail and have clearly explained the limits of the criminal responsibility of both the coercer and the coerced in this regard.

A. Legal Consequences of Rape

Regarding coerced rape two opinions are attributed to *Abū Hanīfa*: one of his opinions is that coercion is not an excuse to commit offense like rape, and therefore a person commits any of these crimes under coercion, will nevertheless be subject to *hadd* punishment, whether coercion is by a ruler or any other person. The reason given by

[419] Sarakhsī, *Al-Mabsūt*, 38-9, supra note 415.
[420] Ibid.

him is that an erection is not possible without pleasure, especially when a person is under extreme fear. Thus, it is considered as a sign of willingness to commit the crime. This is in contrast with a woman, who is the object of the act; adultery is possible where she is under extreme fear and even where she is asleep.[421]

However, Abū Ḥanīfa is reported to have later modified his opinion, claiming that in a situation where coercion has been exerted by a ruler, the coerced rapist will not be subject to *hadd* punishment, though he will be liable to pay dower. According to him, another situation where a coerced rapist escapes *hadd* punishment is when he was taken to an isolated place where it is impossible to seek help from anyone, in such a situation it makes no difference if the coercer is a ruler or an ordinary person.[422] It is pertinent to mention here that only threats regarding loss of 'life' or 'limb' eliminate the rapist's *hadd* punishment in contrast to the threats of imprisonment or enchainment which do not play any role in diminishing his punishment. This implies that if the coercer complies with the latter type of threats and commits rape, he will be subjected to *hadd* penalty for having indulged in unlawful sexual intercourse. Conversely, a rape victim, i.e., a woman escapes *hadd* punishment even if she complies with the threat of imprisonment. [423]

B. Legal Consequences of Coerced Homicide

Regarding coerced homicide, there is a difference of opinion on whether the coercer or the coercing agent will be subject to retaliation. According to Abū Hanīfa, in case of complete threat the coerced will not be subject to *qisās* but would rather pay blood

[421] Sarakhsī, *al-Mabsūt*, 88, supra note 415.
[422] Muhammad b. al-Hassan al-Shaybānī, *Kitāb al-Asal*, vol. 7 (Qatar: Wazārat al-Awqāf wa al-Sha'ūn al-Islamia, 2012), 342-43. (Shaybānī, *Kitāb al-Asal* hereinafter).
[423] Ibid., 343-44.

money, rather the coercing agent will be subject to retaliation. However, in the view of Abū Yoūsuf, none of them shall be subject to execution; the coercing agent will be required to pay compensation, while Zufar opines that the coercing agent will be subject to execution. Conversely, *Imām Shāfʿī* opines that both the coercer and the coerced will be subject to retaliation because the coerced is the person who directly took the life of another person and the act of the coercing agent proved to be the major cause due to which death of the victim occurred.[424] In this regard, Shaybānī has presented a hypothetical situation in which coercion is exercised by a government official in the following words

> If caliph sends an agent over a given region, such as *Khurasān* or some other place where he forces a man and orders him to kill another person illegally. The man refuses to obey the command, to which the agent responds: "Either you kill him with a sword or I kill you." The man kills the other person, in such a situation according to Imam Abu Hanīfa, it is not the coerced but the coercing agent who will be subject to retaliation, while in view of Abū Yoūsuf, it is preferred that the coercing agent must not be subject to retaliation but should rather pay compensation.

Shaybāni prefers the opinion of Abū Hanīfa, according to which coercing agent will be subject to execution. He articulates the matter of how a person who did not physically kill anyone can still be killed in retaliation. According to him, the highway robbery better fits the situation where though one of them physically killed the victim, all of them will be subject to execution. He also cites the opinion of Hassan al-Basrī, who stated that if four witnesses testify to a person's adultery, leading to the accused being stoned to death, and later one of the witnesses retracts his testimony after the execution, that witness would himself be executed, even though he was not directly involved in the killing. Concerning those who are coerced, Shaybāni maintains that in

[424] Kāsāni, *Badāiʿal-Sanāeʿ*, 9: 4488, supra note 414.

such a scenario the coerced while complying with the orders of the coercer commits a sin and may be subject to discretionary punishment by the Caliph.[425]

C. Legal Consequences of Destruction of Property Belonging to Another

If a person destroys another's property under duress, Muslim jurists distinguish between the legal consequences based on whether the duress is complete or incomplete. In case of complete duress, it will be the coercer who will pay compensation to the victim, not the coerced. The reason is that the coerced in case of complete duress is considered as an instrument in the hands of the coercer, while in case of incomplete duress, the liability to pay compensation rests upon the coerced.[426]

In ICL, superior orders can be a valid defence if three cumulative conditions are met; the defendant must be under an obligation to obey orders of a government or a superior; the defendant must not know that the order was unlawful, and the order must not be manifestly unlawful. [427]

7.4 Conclusion

The concept of criminal responsibility in Islamic law, particularly regarding hierarchic superiors, underscores the principle of individual accountability irrespective of one's status or position. Islamic law, akin to the RS, emphasizes that no one can be held liable for the misdeeds of another, which is reinforced by numerous Qur'ānic verses. The teachings and actions of the Prophet and his companions provide a comprehensive model for the application of justice and accountability, ensuring that all individuals,

[425] Shaybānī, *Kitāb al-Asal*, 322, supra note 422.
[426] Kāsānī, *al-Badāe' al-Sanāe*', 9: 4487-88, supra note 414.
[427] Article 33 (1) of the RS.

regardless of their rank, are answerable for their actions. This holistic approach not only upholds the moral and ethical standards of Islamic law but also aligns with contemporary international legal principles, reinforcing the importance of justice in all spheres of life. Ultimately, the Islamic legal system's insistence on individual criminal responsibility serves as a vital safeguard for justice and ethical conduct within society. Islam confers on every citizen the right to refuse to commit a crime, pursuant to illegal orders of superiors. Even though the compulsion is such that it poses a threat to the life or limb of the coerced, no offender may seek to escape punishment for the commission of crimes like murder, or rape. If a person commits these crimes under compulsion, both the coerced and the coercer will liable for these crimes.

CHAPTER VIII

ISLAMIC LEGAL APPROACH TO CRIME AND CRIMINAL PARTICIPATION

Introduction

Islamic law strongly discourages activities that incite anarchy and violence by criminalizing the actions of individuals, groups, and government authorities that pose a threat to peace and tranquility. Qur'an says, “Every time they kindled the fire of war [against you], Allah extinguished it. And they strive throughout the land [causing] corruption and Allah does not like corrupters.”[428] The basic purpose of Islamic criminal justice is to uphold justice and establish authority over individuals who violate its rules or regulations. It categorises crimes into different categories and has its system of punishment depending upon the nature of the right violated, which underscores its ultimate aim of justice. Although the terminology varies between the two legal systems, the methods of committing crimes and the purpose of assigning principal liability to all individuals involved in systematically and extensively committed crimes are fundamentally the same.

8.1 Crime in Islamic Law

In Arabic, the word ‘*Jarīmah’* is used for unlawful conduct, and its literal meaning is a sin, offense, or crime.[429] In terms of *Sharī‘ah*, it means the commission of an act

[428] Al-Qur’ān, 5: 64

[429] Hans Wehr, *A dictionary of Modern written Arabic*, ed. J. Milton Cowan, Fourth Edition (Wiesbaden: Otto Harrassowitz), s.v *jarama*.

forbidden by Allah the Almighty or the omission of an act enjoined by Him.[430] Thus, it has been defined as "the commission of a prohibited act or the omission of a mandatory act required by the *sharī'ah* and for the failure in doing or not doing of which certain punishments are prescribed."[431]

Broadly speaking, the concept of crime in Western legal traditions is not different from Islamic legal tradition, as it is usually referred to as an act that violates social norms protected by a state. Technically, it is a violation of a legal rule that gives rise to the punishment of the violator in the form of a fine, imprisonment, forfeiture, or a combination of the three. Hence, a crime is a violation of a legal obligation, it could be negative, i.e., the commission of a prohibited act, or positive, i.e., omission to perform a legal duty.[432]

8.2 Classification of Crimes in Islamic Law

The crimes in Islamic law are classified into *hudūd*, *ta 'zīr* and *siyāsah. Hadd* literally means to limit, restrict, confine, or bound and refers to the restrictions imposed by Allah Almighty, in order to prevent people from committing acts forbidden by Him, or from omitting to perform what He has commanded them to do.[433] *Hadd* refers to those "fixed punishments which pertain to the rights of Allah",[434] and includes crimes such as unlawful sexual intercourse (*zinā)*, false accusation of illegal sexual intercourse

[430] Muhammad Abū Zahra, *Al-Jarīmah wa al-'Aqūba fi al-Fiqh al-Islāmi* (Dār al-Fiqar al-Arabi, n.d), 24. (Abū Zahrā, *Al-Jarīmah wa al-'Aqūba* hereinafter).

[431] ʿAbdul Qādir ʿAwdā, *al-Tashrīʿ al-Jinaē al-Islāmi Muqāranan bil-Qānūn al-Wadʿē,* vol. 2 (Qāhira: Dār al-Turās, n.d), 7.(ʿAwdā, *al-Tashrīʿ al-Jinaē al-Islāmi* hereinafter).

[432] For details see chapter two of the thesis.

[433] al-Māwardī, *al-Ahkām al-Sultāniyyah*, 312, supra note 363.

[434] Kāsāni, *Badāe' al-Sanāe'*, 9: 4149, supra note 414; Zayn al-Dīn Ibn-e-Ibrāhīm Ibn-e-Nujaym, *al-Bahr al-Rā'iq Sharh Kinz al-Daqāiq*, vol. 4 (Beirūt: Dār al-Kutub al-Ilmiyyah, 1996), 5. (Ibn-e-Nujaym, *al-Bahr al-Rā'iq* hereinafter).

(qadhf), drinking wine (*shurb al-khamar)*, theft (*sariqah)*, highway robbery (*qitā' al-tarīq)*, apostasy *(riddah)* and *baghā* (insurrection).[435]

The rules of '*qisās'* or '*qawad'*, which are applicable in cases of murder (as well as bodily injuries) are also fixed but are excluded from the category of *hudūd* crimes, since they pertain to the pure rights of an individual (*'abd*). [436] The word '*qisās'* means equivalence and it implies that a person who is indulged in a wrongful act against another person must be harmed in a similar way he harmed the victim.[437] The punishment of *Qisās* is either in the form of retaliation or payment of compensation. Allah says in the Qurān: "O ye who believe! *qisās* is prescribed for you in case of murder…"[438] Since homicide and wounding are considered as injuries directed against the victim or his/her family, instead of the society it is the sole discretion of the victim to choose an appropriate way of redressing the injury.[439]

Under the second category comes the crimes of *tā'zīr*, which means censure, blame, rebuke, reprimand,[440] and are related to the violation of pure individual rights and can be implemented in those situations where *hadd* or *qisās* cannot be inflicted due to strict procedural requirements.[441] Under t*a'zīr*, the types and categories of punishments include flogging, banishment, public condemnation and reproach and in

[435] Muslim jurists have different opinions regarding the incorporation of the crimes of insurrection and apostasy in the category of *hadd* offenses.

[436]Kāsanī, *Badāe' al-Sanāe'* , 4150:9, supra note 414; Ibn-e-Nujaym, *al-Bahr al-Rā'iq,* 4: 5, supra note 435.

[437] M. Cheriff Bassiouni, ″ Crimes and Criminal Process″, *Arab Law Quarterly* 12 (1997): 282.

[438] 2: 178.

[439] Mark Cammack, ″Islamic Law and Crime in Contemporary Courts″, *Berkley Journal of Middle Eastern and Islamic Law* 4 (2011): 5.

[440] Hans Wehr, A Dictionary of Modern Written Arabic, J. Milton Cowan, Fourth Edition (Wiesbaden: Otto Harrasssowitz, 1979), s.v '*Azāra*. (Wehr, A Dictionary of Modern Written Arabic hereinafter).

[441] Abū Zahrā, *al-Jarīmah wa al-'aqūbah,* 130, supra note 430.

some cases the punishment may be just a warning while in others it may be a death sentence.[442]

Apart from *hudūd* and *ta'zīr* crimes, there is also a third category that relates to the rights of the state (*haq al-saltanah*), or the collective rights of individuals and is termed '*siyāsah'*. Under this category, Muslim rulers have been given wide discretionary powers to adopt rules according to the growing needs of the time regarding those issues which have not been clearly regulated either by the text of the *Qur'ān* or the *Sunnah*.[443]

The classification of crimes into *hudūd, ta'zīr,* and *siyāsah* entails many consequences. One such consequence is that whenever the right of Allah is violated, (like in the cases of *Hudūd* crimes), no one is empowered to grant pardon or reduce the sentence of the accused. However, where a right pertaining to the individual (in the case of *ta*'zīr), or the one pertaining to the state (in the case of *siyāsah)* is violated, punishment can be commuted.[444] Another difference, that is related to criminal proceedings and evidence is that in *Hudūd* crimes, the testimony of women is inadmissible, while in cases of *ta*'*zīr*, the testimony of a single man and two women needs to be maintained. However, where the right of the state is violated, the testimony of a single woman is permissible just like other circumstantial evidence. Thus, the rules

[442] Etim E. Okon, ″Hudūd Punishments in Islamic Criminal Law″, *European Scientific Journal* 10 (2014): 228.

[443] Imran Ahsan Khan Nyazee, *Theories of Islamic Law; The Methodology of Ijtihad* (Islamabad: Islamic Research Institute, 1997), 122.

[444] Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western* (Islamabad: *Sharī'ah* Academy, 2007), 65.

of evidence are quite lenient in the case of *siyāsah* crimes, as compared to both *hudūd* and *ta'zīr* crimes.[445]

In the context of ICL, the definition of what does and does not constitute an international crime has been widely debated. Consequently, there is no universally accepted list of the most recognized international crimes within this framework.[446] However, Article 8 of the Rome Statute specifies certain crimes under its jurisdiction, which include war crimes, crimes against humanity, and genocide. The terminologies used to define crimes in both legal systems vary significantly, reflecting their distinct legal traditions and frameworks that shape how offenses are categorized and understood. However, the differences in the labeling of certain crimes and their legal elements in *sharī'ah* compared to contemporary ICL do not suggest that *Sharī'ah* lacks a counterpart in international law. Similar to domestic criminal laws that address international crimes, *sharī'ah* permits states to prosecute international offenses as *ta'zīr* or under *hudūd* and *qisās* norms, even if these crimes are not explicitly codified. For example, the killing of a - or an injured combatant is considered a war crime and may qualify as genocide or crimes against humanity, and while a state's domestic law may not specifically define these crimes, it can still prosecute such actions under murder provisions.[447] The terms used in Islamic law are as compatible with international crimes like genocide and crimes against humanity as the Western concepts of murder and manslaughter, which are commonly employed in domestic legislation to uphold these international standards. Bassiouni rightly argues that when substance takes precedence

[445] Ibid., 66.

[446] For details see chapter two of the thesis.

447 Cheriff Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press, 2014), 133. (Bassiouni, 2014 hereinafter).

over terminology, it becomes clear that *Sharī'ah* aligns with post-conflict justice and can effectively serve as a framework for its implementation. The modernization of criminal codes in many Muslim countries illustrates the flexibility of Islamic criminal justice and its capacity to operate within a contemporary context that respects international human rights law, victim rights, and the need for post-conflict justice, all while adhering to Islamic legal traditions.[448]

8.3 Elements of Crimes in Islamic Law

In Islamic law, the elements of a crime include both the *actus reus,* i.e., the physical commission of an act, and *mens rea,* i.e., the 'state of mind' of the acc*used*. *Actus reus* refers to the physical commission of the act declared unlawful by the *sharī'ah* like adultery theft, usurpation, etc. It can also be in the form of omission of a duty, which could be either personal like failure to pay *zakāt,* and could sometimes affect the rights of other persons as well. For example, if a person does not give food to a hungry person who later dies due to starvation, or leaves a blind person helpless on a road who eventually falls into a well, in both these situations he/she has committed a crime by omitting to perform his moral duty.[449]

Alongside *actus reus*, *mens rea* is also an important component of a crime in Islamic law by which criminal culpability of the defendant is ascertained and it refers to the 'state of mind' of the defendant during the course of commission of the crime. According to the Islamic legal maxim "matters shall be judged by their objectives" ('*al-umūr bi-maqāṣidihā'*), it implies that actions must be determined in accordance with

[448] Ibid., 146.
[449] Abū Zahrā, *al-Jarīmah wa al-'Aqūbah*, 134, supra note 430.

the intention (*niyya*) of the (wrong) doer.[450] This legal maxim has been derived from the Prophet's saying: "actions are judged according to the intentions".[451]

Since intention is a hidden matter as something between a person and his Lord, in homicide, Muslim jurists determine it by relying on external evidence. For instance, where murder is committed, the external evidence will be the weapon used to assault the victim. Thus, in view of *Hanafī* jurists,[452] if a person uses a lethal weapon that is more likely to cause death like a sword, knife, a sharp wood, a sharp stone, or any weapon made up of copper, silver, gold, the resultant death will be classified as '*qatal-e-*'*amad'* or 'intentional killing'. However, if an instrument that does not typically cause death is used such as a small stick, a small stone, or hit the victim with a single lash or two lashes, but still death occurs, in such cases the resultant death will be designated as 'quasi-intentional killing'.[453]

The balance between 'subjective' and 'objective' criteria in determining intent tends to favour 'objective' evidence. In many legal systems, 'objective' evidence becomes a key factor in establishing criminal liability, sometimes even overshadowing the actual intention of the accused. This approach focuses more on external actions and circumstances rather than the internal mental state (subjective intent), effectively making 'objective' evidence a central element in proving the crime.[454]

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[450] Luqman Zakariyah, *Legal Maxims in Islaāmic Criminal Law: Theory and Applications* (Leiden/Boston: Brill Nijhoff, 2015), 61;*'Al-qawāʿid al-fiqhīyah'*or 'legal maxims' refers to 'general rules of fiqh', which are applicable in those cases that come under the 'common rulings'. Buerhan Saiti and Adam Abdullah, ″The Legal Maxims of Islamic Law (Excluding Five Leading Legal Maxims) and Their Applications in Islamic Finance″, *Islamic Economics* 29 (2016): 140.

[451]*Sahīh Bukhāri, Kitāb Bad' al-wahyī, Hadīth* No 1.

[452] These jurists belong to the school founded by Abū Hanīfah Nauʿmān b. Thābit b. Zūtah who was born in Kufah in the year 80 A.H. and died in 150 A.H.

[453] -Kāsāni, *Badā'eʿal-Sanā'e*, 7: 233, Supra note 414.

[454] Mohammad Elewa Badar, "Islamic Law and the jurisdiction of International Criminal Court", *Leiden Journal of International Law* 24 (2011): 428.

It is noteworthy, that in the case of *hudūd* crimes, the accused must satisfy all the elements of the alleged offense. For instance, to be guilty of theft, the property must have been taken from a place of safekeeping (*hirz*). Thus, if a person steals an item from safekeeping and is caught before coming out of it, *hadd* punishment will not be inflicted, though he will be subject to amputation if he acquired possession of the stolen item after coming out of the safekeeping. Similarly, if he/she throws the stolen item towards his/her partner, who is standing outside the *hirz* or safekeeping, *hadd* punishment will not be inflicted on either of them because no one among them individually satisfied the element of theft, i.e., taking away the property from *hirz* or safekeeping. In this situation, (they would rather be given *ta'zīr* or discretionary punishment).[455]

In the realm of ICL, the *actus reus* and *mens rea* are essential elements in the commission of crime. The *actus reus* is embedded within the specific definitions and elements of the crimes outlined in the RS. For instance, Article 6 of the Statute of the ICC defines genocide by specifying the acts that can qualify as genocide, such as killing, causing serious bodily or mental harm, or deliberately inflicting conditions of life aimed at destroying a group. While Article 30 specifies that an individual will be held criminally responsible and subject to punishment for a crime within the Court's jurisdiction only if the material elements are committed with 'intent' and 'knowledge'.

[455] Kāsānī, *Badā'e al Sanā'e*, 10: 4223, supra note 414; Al-Māwardī, *al-Ahkām al-Sultāniyah*, 320, supra note 363.

8.4 Criminal Participation in Islamic Law

In Islamic law, the term *Ishtirāk* (participation) encompasses all forms of participation/involvement of people who act together to achieve their common criminal goals. The participation could be either 'direct', i.e., '*ishtirāk mubāshar'*, or indirect called '*ishtirāk ghair mubāshar'*:

1. Direct Participation (*Ishtirāk-Mubāshar*)

Direct participation occurs when several individuals engage in a criminal act. A person is considered to have directly participated if their actions are seen as initiating the crime, even if the crime isn't fully carried out. The completion of the act influences the severity of the punishment: if the crime is completed, the perpetrator faces *hadd* punishment; if not, they may receive a *ta'zīr* penalty. In this context, Muslim jurists distinguish between two types of cooperation:

a. Spontaneous participation, i.e., "*Tawāfuq*": *Tawāfuq* or spontaneous participation refers to spontaneous participation where individuals act on personal impulses, without prior agreement.

b. Premeditated cooperation "*Tamāllu*": *Tamāllu* or premeditated cooperation involves planned actions where individuals conspire to commit a crime.

Regarding "*al-tamāllu"* or "premeditated cooperation" the jurists from Hanafī, Shāf'ī, and Hanblī schools opine that a 'shared intention' is sufficient to establish this type of cooperation, even without prior agreement. Thus, according to this opinion spontaneous actions, such as an unexpected assault, still qualify to fall under the category of "*al-tamāllu"*. This interpretation encompasses both 'unplanned group

activities' and 'conspiratorial' schemes involving prior arrangements. In contrast, Malikī jurists define "*al-tamāllu"*, or "premeditated cooperation", as necessitating explicit agreement and conspiracy, meaning that at least two individuals must intend to kill or harm someone. They consider anyone who consents to a crime and witnesses its execution to be a "direct co-perpetrator," rather than an "indirect perpetrator". This theory applies to all "indirect participants", regardless of whether their involvement is through agreement, instigation, or assistance.[456]

The number of people involved in a crime does not affect the severity of the punishment; co-perpetrators receive the same penalties as individual offenders. In murder cases, all four schools of thought agree that a group must be punished for the killing of one person to prevent loopholes that could allow for the evasion of justice. Holding all involved parties accountable is essential for enforcing *qisās* law, especially since murders are often committed collaboratively. As a result, scholars have issued thorough rulings against all participants in such conspiracies.[457]

2. Indirect Participation (*Ishtirāk Ghair Mubāshar / Ishtirāk bil-Tasabbub*)

Indirect participation involves individuals who agree to, instigate, or assist in a criminal act, demonstrating deliberate intent. The term '*mutasabbib'* or 'indirect perpetrator' refers to someone whose actions can lead to harm or destruction, even if they do not directly cause it, as they act through another person's voluntary actions.

[456] Muhammad Arif Fattahillah & Noor Azizah, "Criminal Sanctions for Terrorism Perpetrators in the Perspective of Islamic Criminal Law; Bali Bombing Case Study I", *Waraqat: Journal of Islamic Sciences* 9 (2024): 63-66.

[457] Ibid., 64.

The "*mutasabbib*" or "indirect perpetrator" is held responsible only if their actions are seen as exceeding acceptable limits, regardless of intent. Responsibility is assigned to the "*mutasabbib"* when there is no direct perpetrator available for accountability, such as when the direct perpetrator cannot be identified, is incapable of being held responsible, or when the *mutasabbib's* (indirect perpetrator) actions have a greater impact than those of the direct perpetrator. Thus, the *mutasabbib* (indirect perpetrator) is accountable when their actions outweigh those of the direct perpetrator. Most Muslim jurists, except the *Hanafī* jurists, agree that both 'direct' and 'indirect' perpetrators can be punished together in murder cases, i.e., both direct and indirect perpetrators will be subject to retaliation in the opinion of the majority of jurists except Abū Hanīfa who argues that indirect perpetrators will be liable to pay *diyya*).[458] "Indirect participation" in criminal acts can occur in three key ways:

1. Agreement: This entails a mutual understanding and shared intent to commit a crime. Genuine 'participation' cannot occur without prior agreement. Imām Mālik distinguishes himself by considering anyone who agrees to a crime as a "direct co-perpetrator," regardless of whether their involvement arises from agreement, instigation, or assistance.
2. Incitement: Incitement involves encouraging others to commit a crime, serving as a motivating factor for the offense.[459]
3. Assistance: Those who assist others in committing a crime are considered "indirect perpetrators", even without prior agreement. For instance, someone who watches over a location during a theft offers assistance. Jurists distinguish

[458] Ibid., 65.
[459] Ibid., 66.

between direct perpetrators, who actively carry out the crime, and assistants, who do not participate directly. In the scenario where someone restrains a victim for another person to kill, opinions differ among scholars. Some view the person holding the victim as merely an assistant, while others, including Imam Malīk, consider both the holder and the killer as direct perpetrators. Malīk also argues that an assistant present during a premeditated crime may be regarded as a direct perpetrator. Generally, Islamic law imposes harsher penalties on 'direct perpetrators', while 'indirect perpetrator' face lighter penalties unless their actions are equivalent to those of a direct perpetrator. According to Malik, anyone witnessing a crime is treated as a "direct perpetrator" because of their potential to intervene.[460]

The penalty for 'indirect participation' is generally *ta'zir*, rather than the more severe *hudūd* or *qisās* punishments, which apply only to "direct perpetrators". Since indirect actions are often viewed as less culpable, they do not invoke the harsher penalties reserved for direct crimes.[461]

As far as the statute of the ICC is concerned, Article 25 (3) (a) identifies different forms of perpetration, which are not different from those recognised by Islamic law; direct or immediate perpetration, co-perpetration with another, and perpetration through another person. Article 25 (3) (b-d) further adds other modes of liability where the individual contributes to the commission of the crime by either

[460] Ibid., 67-68.
[461] Ibid., 65-66.

ordering, soliciting, or inducing its commission, aiding or abetting, or otherwise assisting the commission of the crime.

8.5 *Harābah*: Islamic Legal Mechanism for Addressing Systematic Crimes

The crime of *Ḥarābah* is commonly associated with *qaṭ' al-ṭarīq*, which describes a group of individuals who instigate disorder, violence, and the wrongful appropriation of property and dignity, resulting in chaos on the earth.[462] A renowned Hanafī jurist Al-Kasāni defined it as

> attacks upon pedestrians aimed at forcibly seizing their property resulting in the obstruction of free passage through public streets. Such assaults may be perpetrated by either individuals or groups that possess significant power to impede the movement of the public. These attackers may utilize weapons or weapon substitutes, such as sticks and stones, to enhance their ability to intimidate and control their victims.[463]

The renowned Malikī jurist, Sayyedi Khalīl characterizes the agents of *hirābah* as the ones "who, either acting singly or in concert with others, haunts the highways in order to waylay travellers, or who profits by the fact that his victims are far from help".[464] Some contemporary writers also categorise *ḥarābah* as a *hadd* crime, typically involving collective or group actions committed by multiple individuals representing that group.[465] Thus, the distinguishing feature of the *ḥarābah* is the organized use of force by a group of outlaws against innocent civilians who committed no wrongdoing.

[462] Sayyid Sābiq, *Fiqh al-Sunnah,* vol. 2 (Cairo: Dār Fatḥ al-I'lām al-'Arabī, 1999), 393.
[463] Kasāni, *Bada'i' al-Sana'i.* 7: 4283, supra note 414.
[464] Sayyedi Khalīl, *Mukhtasar of Sayyedi Khalīl*, tr. F. H. Ruxton (Cairo: El-Nahar Press, 2004), 343.
[465] Kamal, "Terrorism, Banditry and Hirabah: Advancing New Shariah Perspectives", Islam and Civilisational Renewal 8 (2017): 12

The Qur'ān describes the use of force accordingly as an act of waging war against Allah and His Messenger.[466]

The definitions of *ḥarābah* highlight crimes that are strikingly similar to international crimes, as they involve organized groups using violence and intimidation to instill fear, disrupt public safety, and seize property. *Harābah* (brigandage) is an act of terrorizing people for robbery or other purposes, armed banditry with its attendant crimes, kidnapping, culpable homicide, cattle rustling, and destroying society, irrespective of the gender of the actor or the place of the occurrence.[467] Additionally, it involves actions that jeopardize public safety, destroy vegetation, and kill livestock vital for transportation.[468]

In Islamic law, *Harābah* is the only crime regarding which equal criminal responsibility of both the principals and the accessories has been recognised. The majority of jurists, including the Hanafīs, Mālikīs, Hanbalīs, and Zāhirīs, argue that all accomplices who play a critical role in the commission of *harābah*—such as gathering intelligence—should face the same *hadd* (prescribed) punishment as those who directly carry out acts of killing, robbery, or terror. This is because the contributions of accomplices are vital to the crime's success, and the perpetrators rely on their support to carry out their actions. However, al- Shāfiʿī argues that accomplices who have only a supporting role in committing the crime, without actually taking part, should not

[466] Ahmed Al-Dawoody, "Al-Sarakhsī's Contribution to the Islamic Law of War", *UCLA Journal of Islamic and Near Eastern Law* 14 (1): 41.

[467] Abdulmajeed Hassan Bello, "Applying Hirāba in Islamic Criminal Law to Curb Armed Banditry in the Zamfara State of Nigerea: Oppurtunities and challenges", *Mazāhib Jurnal Pemikiran Hukum Islam, Mazahib*, 20 (2021): 1 , 17.

[468] Ibid.

receive the punishment prescribed in the *harābah* verse for the actual perpetrators, but rather a discretionary punishment and imprisonment. Similarly, if some among a group of *muhāribūn* kill their victims while others only rob them, all of the group should be punished for both killing and robbing; that is, they should receive the death penalty and gibbeting, according to the majority. However, according to al-Shāfiʿī, each member of the group would receive a punishment commensurate with the specific crime he committed.[469] Thus, unlike other *hudūd* crimes in the case of *harābah* or group criminality, Islamic law does not differentiate between principal and accessorial liability and rather treats them all. According to Vogel, *harābah* is "peculiar" in inflicting the same punishment on the accomplices as on the perpetrators, because "ordinarily *hudūd* crimes apply only to those who directly commit the elements of the crime."[470] Considering the size of a person's contribution to a crime is indeed a fundamental aspect of criminal responsibility. However, in the case of *ḥarābah*, the existence of the 'intention' to involve oneself in *ḥarābah* is the only determining factor that a person deserves to be categorized as the main actor, without considering his real position and contribution.[471]

The principle of equity is mainly used to determine the punishment for each crime. Based on verse 40 of *al-Shūrā*, "The recompense for an injury is an injury equal thereto...," Thus, the classical jurists state that it is acceptable to punish the offender based on the degree and seriousness of the crime being committed.[472]

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[469] 'Awdā, *al-Tashrīʿ al-Jinaē al-Islāmi*, 666– 668, supra note 431.

[470] Frank E. Vogel, "The Trial of Terrorists under Classical Islamic Law," *Harvard International Law Journal* 53 (2002): 62.

[471] Moh Khasan, "From Textuality to Universality: The Evolution of Ḥirābah Crimes", *Al-Jāmiʻah: Journal of Islamic Studies* 59 (2021): 23.

[472] Kāsānī, *Badāʻe al Sanāʻe*, 7: 93, supra note 414.

8.5.1 The Interplay of *Harābah* and Joint Criminal Enterprise (JCE)

The crime of *harābah* aligns closely with the doctrine of Joint Criminal Enterprise (JCE), also referred to as 'common purpose', 'common plan', or 'common design' liability which assigns equal criminal responsibility to all the individuals involved in a crime.[473] It presupposes the idea that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design. While the crime may be physically committed by some members of the group, the involvement of non-physical actors—those who assist or facilitate the offense—is often crucial to its execution.[474] Therefore, the criminal responsibility of those who directly commit the crime is not considered different from that person who aids or supports its commission.[475] The three fundamental elements of JCE are: First, there must be a plurality of individuals involved; second, these individuals must share a common purpose or plan; and third, the accused must have participated in the perpetration of serious crimes such as murder, extermination, torture, or rape.[476]

The preceding discussion highlights that both *ḥarābah* and the doctrine of Joint Criminal Enterprise (JCE) use 'subjective criteria' to determine the criminal liability of a group involved in a crime. In both frameworks, the presence of a shared intention is sufficient to hold all individuals accountable, regardless of their specific roles. When a group intentionally participates in a crime targeting a civilian population, each member is treated as a principal offender, irrespective of the level of involvement, under both legal systems.

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[473] *Prosecutor v. Tadić*, (Appeals Chamber Judgement), para 190.
[474] Ibid., para 191.
[475] Ibid., 192.
[476] For details see chapter four of the thesis.

8.6 Conclusion

Islamic criminal law provides a structured framework for addressing crimes, emphasizing justice, equality, and collective responsibility. Crimes are classified into three categories: Hudūd (fixed penalties for offenses against Allah's rights), *ta'zīr* (discretionary penalties for violations of individual or state rights), and *siyāsah* (penalties for state interest). The law emphasizes both direct and indirect participation in crimes, holding all involved parties equally accountable. *Tamāllu*, or premeditated cooperation, involves individuals conspiring to commit a crime, and the 'intention' and 'cooperation' of participants are key in determining liability. Different Islamic schools of thought vary in their interpretation, with some, like the Malikī school, requiring explicit agreement for premeditation, while others, such as Hanafī, Shāf'ī, and Hanbalī, focus on shared intent, regardless of prior agreement.

One of the most severe crimes in Islamic law is *harābah*, which involves acts of organized violence, such as highway robbery or banditry, aimed at disrupting public order and instilling fear. The crime is viewed as waging war against Allah and society, and its collective nature means that all participants, regardless of their roles, are treated as equally responsible. Islamic jurists generally agree that *harābah* is a collective offense, with most schools emphasizing the equal culpability of all participants. The intersection between *harābah* and JCE highlights the global relevance of the principle of collective criminal liability in both Islamic law and international criminal jurisprudence. While rooted in different legal traditions, the two doctrines share the fundamental idea that crimes committed by groups with a 'common intent' should result in equal responsibility for all participants. As such, both frameworks represent a

significant approach to addressing organized criminality and reinforcing the principle of shared culpability in the pursuit of justice.

CHAPTER IX

ADDRESSING SUPERIOR ACCOUNTABILITY THROUGH PERPETRATION BY MEANS IN ISLAMIC LAW

Introduction

The criminal responsibility of leaders who orchestrate atrocities without directly committing them is a significant challenge in the context of international crimes. In cases of macro-criminality, high-ranking officials often plan and direct crimes, leaving lower-level actors to carry them out. This raises questions about the liability of these leaders, who, though central to the crimes, are not direct perpetrators. While not explicitly addressed in the Qur'an or Sunnah, this issue can be explored through *Siyāsah Shar'īah*, which allows Muslim rulers to enact policies based on public interest and Islamic principles.

9.1 Indirect Co-Perpetration and *Siyāsah al-Sharī'ah*

Perpetration by means implies that the individual "in the background," or the criminal mastermind, utilizes the "direct perpetrator" as a tool to carry out unlawful acts, as will be explained later in the thesis. In cases of macro criminality, these crimes are planned by hierarchic superiors and typically executed by low-level actors who directly perpetrate those crimes. This raises the question of imputed criminal responsibility for the "man in the background," which includes both military and civilian leaders, as they

are not the direct perpetrators of those crimes. This is a relatively new issue that did not arise during the time of the Holy Prophet (PBUH) or his four rightly-guided caliphs, as they strictly followed the humanitarian principles of warfare, and it is not explicitly addressed in the texts of the Holy Qur'ān or the Sunnah. This matter falls under the doctrine of *Siyāsah Sharīʿah*, which allows Muslim rulers broad authority to establish rules and regulations regarding the issue under the evolving needs of society.

9.2 Role of *Siyāsah* in the Settlement of New Issues

Siyāsah literally means 'administration, management, or policy.'[477] In the usage of Muslim jurists, the term '*siyāsah sharīʿah'* refers to 'an act of a Muslim ruler based on '*maslahāh'* (i.e. the protection of the objectives of *Sharīʿah* for public interest) in those cases when there does not exist specific text (of the Qur'ān and *Sunnah*) regulating that matter.'[478] If the policy is carried out following the constraints laid down by *Sharīʿah,* it will be termed as '*siyāsah ʿādilah'* or administration according to justice and will be thus binding on the subjects. However, if it is carried out in deviation of the basic rules of *Sharīʿah,* it will be termed as 's*iyāsah zālimah'* or tyrannical administration, thus making the directives issued under the policy as invalid.[479] The sole purpose of the doctrine is to serve the aims of justice and good governance, especially in those cases where there are no existing rules and regulations that properly address a specific situation or development.[480] Thus, Muslim ruler has wide discretionary powers to enact rules and initiate policies under the doctrine of s*iyāsah*, provided that these actions are in

[477] A Dictionary of Modern Written Arabic, s.v *Sauʿ*, supra note 441.

[478] Ibn-e-Nujaym, *al Bahr al-Rā'iq*, 5:118, supra note 435.

[479] Muhammad Amin b. 'Ābidīn al-Shāmi, *Radd al-Mukhtar 'alā al-Durr al-Mukhtār Sharh Tanvīr al-absār,* ed. 'Ādil Ahmed 'Abd al- Mawjūd & 'ALī Muhammad Muʿawwad Riyadh: Dār al-´Alam al-Kutub, 2003), 6: 20.

[480] Saim Kayadibi: "The Theory of *Syarî'ah* Oriented Public Policy", *Ahkam: Jurnal Ilmu Syariaah* 15 (2015): 173.

the interest of good government and do not violate any substantive principle of *Sharīʿah.*[481] The Muslim ruler is bound to exercise that power keeping in view the object and purpose of Islamic law, i.e. '*maqāsid al-sharīʿah'* or the 'goals and objectives of *sharīʿah*'.[482]

9.2.1 *Maqāsid al-Sharī'ah:* The Objectives of Islamic Law

Literally, *'maqāsid'* is derived from '*qasad'* which means intention, purpose, design, or aim,[483] while in terms of *sharīʿah* it refers to the objectives or intentions behind the Islamic rulings.[484] The object or purpose of *Sharīʿah* is to promote the welfare of the people and remove hardships from them, as Allah says: ″we have not sent you but as a mercy for all creatures″[485] According to Ghazālī, the protection of the purposes of *Sharīʿa* consists of the protection of religion (*hifz al-dīn*), life (*hifz al-nafs),* intellect (*hifz al-ʿaqal*), lineage (*hifz al-nasal)* and property (*māl*); whatever ensures the safeguard of these components and averts harm from them is *maslahāh*, and whatever fails to do so is *mafsadah.*[486] In the opinion of the contemporary writers, *maslahāh* plays an important role in developing new issues regarding which there is no clear ruling, either in the Holy *Qur'ān* or the *Sunnah.*[487] According to Opwis:

> The concept of *maslahah* can serve as a vehicle for legal change. It presents jurists with a frame work to tackle the problem, inherent in a legal system that is based on a finite text, of bringing to bear the limited material foundation of the law (i.e., the Qur'ān and *hadīth*) on everyday life in an ever-changing

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[481] Kamali, ″Siyasah Shar'iyah or the Policies of Islamic Government″: 59, supra note 14.

[482] Mohamad Hashim Kamali, *Maqāsi al-Sharī 'āh Made Simple* (London: The International Institute of Islamic Thought, 208), 1.

[483] Al-Mawrid: A Modern Arabic-English Dictionary, s.v '*qasā'*, supra note 433.

[484] Jasser Auda, *Maqasid Al-Shariah: A Beginner's Guide* (London: The International Institute of Islamic Thought, 2008), 3.

[485] Al-Qur'ān, 21: 107.

[486] Abu Hāmid Muhammad b. Muhammad b. Muhammad al-Ghazāli, *al-Mustasfā min Ilm al Asūl* (Riyadh, Dār al-Meemān Linashar wa al-Tauzī , ʿn.d), 328.

[487] Hayatullah Laluddin, *"Maslahah's* Role as an Instrument for Revival of Ijtihad″, *International Journal of Islamic Thought,* 8 (2015): 27.

> environment. It thus bestows legitimacy to new rulings and enables jurists to address situations that are not mentioned in the scriptural sources of the law.[488]

The criminal liability of a superior for the crimes perpetrated by his subordinates is among those issues which are not clearly regulated by the text of the Qur'ān or the *Sunnah* and the matter needs to be addressed, keeping in view the object and purpose of Islamic law. The aim of Islamic law by limiting the means and methods of warfare is to promote humanitarianism in war and lessen the horrors, evils, and unnecessary human suffering in war. In the view of Baderin, these rules could be observed only on the basis of reciprocity which can be acquired through international, political, and legal co-operation and depend on the ratification of international treaties.[489] Islam clearly allows to enter into relations with non-Muslims, provided that those treaties must not violate any of the fundamental principles of Islam. Allah says: "as for those who have honoured the treaty you made with them and who have not supported anyone against you: fulfil your agreement with them to the end of their term. God loves those who are mindful of Him".[490]

The Prophet (PBUH) signed the treaty of *Hudaybiyyah* with the Meccans at the end of sixth year after *Hijra*, though most of the terms of the treaty were biased against Muslims. According to one of the conditions of the treaty, Muslims were obliged to hand over any *Meccan* intending to join the Muslims while *Meccans* were not under any such reciprocal obligation. While, the negotiations regarding the terms and conditions of this treaty between the Prophet and Suhayl b. 'Amar were under process;

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[488] Felicitas Opwis, ″Maṣlaḥa in Contemporary Islamic Legal Theory″, *Islamic Law and Society* 12 (2005): 183.

[489] Baderin, ″Islamic Socio-Legal Norms and International Criminal Justice in Context", 60, supra note 15.

[490] 9:4.

Abū Jundal, a Meccan Muslim showed up having his feet tied with chains and sought help from the Prophet (PBUH), but the Prophet (PBUH) declined to do so as it was against the terms of the treaty.[491]

According to another incident, at the time of the migration of the Prophet (PBUH) to Medina, many of his companions stayed in Mecca due to some personal reasons, and among them were Hudhaifa b. Yamān and his father. Later on, the infidels of Mecca allowed them to move to Medina on the condition that they will not participate in any war against them. Upon reaching Medina, when they intended to join in a war against the Meccan infidels, the Prophet did not allow them because they had already undertaken not to participate in any hostility against the Infidels.[492]

Nowadays, many Muslim countries are members of the United Nations under which all its members are required to take necessary steps to secure the arrest of those war criminals who have either personally committed those crimes or have consented to the commission of those crimes and make arrangements to hand them over to the countries where the crimes took place.[493] Similar obligations have been spelled out in the Four Geneva Convention and their two Additional Protocols, which expressly criminalise certain acts like war crimes, crimes against humanity, and genocide and oblige the member states to criminalise and extradite the perpetrators of these crimes.[494]

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[491] For details see Tabarī, *Tarīkh al-Tabarī*, 335-37, supra note 370; *Sīrat Ibn-e-Hishām: Biography of the Prophet*, tr. Inas A. Farid (al-Falah Foundation for Translation, Publication and Distribution, 2000), 204-5.

[492] Shiblī Naumānī and Sulaimān Nadwi, *Sīrat al-Nabī*, vol. 1 (Idāra Islāmiyāt, 2002), 363.

[493] UN General Assembly Resolution 3 (1), Extradition and Punishment of War Criminals, 13 Feburary, 1946 https://www.refworld.org/docid/47fdfb350.html.

[494] See Arts. 49, 50, 129, 146 of the four GC, and Art. 85 of AP I.

Just like other legal systems, the purpose of Islamic law is to minimise the occurrence of crimes in a society and to bring to trial the perpetrators thereof, without any discrimination based on religion, colour, sex or any other status. The establishment of ICC is also the outcome of a treaty which is also ratified by a few Muslim countries. The basic aim of the establishment of the ICC is to bring to justice all those who are involved in heinous acts, especially the leaders, which is in concordance with the purpose and object of Islamic law. Malekin writes ″the statute of ICC would not have been regarded as a legal statute if it had differentiated from the principal intentions of Islamic criminal law″[495]

9.3 Conclusion

The issue of criminal responsibility for leaders who orchestrate crimes without directly committing them is a complex and evolving challenge, both in international law and within the framework of Islamic jurisprudence. While modern legal systems, including the International Criminal Court, have developed mechanisms to hold high-ranking officials accountable, Islamic law offers a unique perspective through the principles of *Siyāsah Shar'īah* and *maqāsid al-sharī'ah* which grant rulers the authority to enact policies that address new legal challenges, such as the responsibility of leaders in macro-criminality, while ensuring alignment with the objectives of justice, public welfare, and the protection of fundamental human rights.

The principles of *siyāsah shar'īah* allow flexibility in dealing with contemporary issues not directly addressed in the Qur'an or *Sunnah*, ensuring that the law evolves in response to societal needs. By focusing on the higher objectives of

[495] Malekian, *Principles of Islamic International Criminal Law*, 343, supra note 387.

Islamic law - such as the preservation of life, dignity, and justice - the doctrine provides a foundation for addressing the accountability of leaders involved in atrocities. Ultimately, the goal is to strike a balance between justice, mercy, and the protection of human welfare, while ensuring that those who plan and direct crimes are held to account, in accordance with both Islamic principles and international legal standards.

CHAPTER X

CONCLUSIONS AND RECOMMENDATIONS

International Criminal Law (ICL) seeks to combat impunity by prosecuting hierarchical superiors who, though not present on the crime scene, play decisive roles in orchestrating serious crimes. This thesis analysed the various modes of liability employed by international criminal justice mechanisms to assign principal liability to intellectual architects or conspirators of international crimes who do not physically participate in their commission. The study highlights the ongoing challenge within ICL to identify an appropriate mode of liability to successfully prosecute hierarchical superiors. In the absence of comprehensive legal provisions addressing superior culpability, judges at both the ICTY and ICC have relied on the doctrines of Joint Criminal Enterprise and the Control Theory of Perpetration - approaches that have been met with significant criticism.

An analysis of international tribunals established after WWII reveals that the distinction between principal and accessory liability was largely irrelevant at the time. This distinction gained prominence during the proceedings of the ad hoc tribunals, which explicitly differentiated between these categories. In some cases, these tribunals even reduced a defendant's punishment due to their minimal involvement or contribution in international crimes.

A significant development occurred in in the *Tadić* case (1998) in which the ICTY ruled that principal liability could also extend to the superiors who, as members of a criminal enterprise, act collectively to pursue shared criminal objectives. By relying on the

doctrine of Joint Criminal Enterprise (JCE), the tribunal attributed principal liability to non-physical participants/ perpetrators in the enterprise based on shared intent. Over time, the tribunal extended this application to include senior leadership by assigning them principal liability for using low-level perpetrators as instruments to perpetrate the crimes. The tribunal's reliance on the JCE doctrine was an act of judicial innovation, as the doctrine was not explicitly mentioned in the ICTY's statute but was interpreted as being implied within it. JCE became one of the most controversial modes of liability in ICL, as many aspects of the doctrine remained ambiguous. For instance, it remains unclear whether the actions of non-physical perpetrators constituted "commission", which incurs principal liability, or merely accessory liability. Case law from the ICTY demonstrates inconsistency in applying the doctrine: in some cases, the accused were deemed principal perpetrators, while in others, they were classified as accessories. Additionally, JCE was criticised for treating all participants equally, regardless of their level of contribution to or participation in the crime, thus making it difficult to treat senior leaders as principal perpetrators. The third variant of JCE faced criticism for unnecessarily broadening the scope of individual criminal responsibility and increasing the risk of guilt by association. The *mens rea* threshold for identifying principal perpetrators under the doctrine was also notably lower than that required for aiding or abetting. Despite its multiple shortcomings, JCE has been applied by other international tribunals. However, it was rejected by the ICC in the *Lubanga* case, leaving its future applicability by international legal institutions uncertain.

The ICC has continuously and rigorously sought an appropriate mode of liability to convict hierarchical superiors who play a critical role in enabling the execution of

crimes and to assign them principal responsibility. However, Article 25(3)(a) of the Rome Statute incorporates traditional forms of liability, such as perpetration, co-perpetration, and indirect perpetration, without providing a precise or comprehensive framework for addressing the responsibility of high-ranking superiors.

In the *Lubanga* case, the ICC interpreted co-perpetration through the lens of "control theory of perpetration." By expanding its scope, the Court established that co-perpetrators must divide essential tasks among themselves for committing the crime, with each individual exercising control over the crime. This control allows any co-perpetrator to halt the execution of the criminal plan by failing to fulfill their assigned task, without which the desired criminal objective cannot be achieved. The ICC also held that co-perpetrators must act pursuant to a common agreement, which can be inferred from factual circumstances, and from their knowledge that the agreed plan might result in the completion of the objective elements of the crime. Thus, element of "control" emerged as the defining factor for determining principal responsibility.

In the *Katanga* case, the ICC invoked the third form of liability under Article 25(3)(a) of the Rome Statute - "perpetration of a crime through another person" - to establish the legal foundation for attributing criminal liability to hierarchical superiors based on their control over an organisation. This approach emphasised that subordinates within the organisation are expected to follow orders from their superiors and they can be replaced easily if necessary. However, both the *Lubanga* and *Katanga* judgments faced substantial criticism, both within and beyond the courtroom, particularly concerning the interpretation and normative framework of Article 25(3) of the Rome Statute. Judge Fulford in the *Lubanga* case and Judge Wyngaert in the *Ngudjolo* case challenged the

statutory basis for the control theory, arguing that the text of Article 25(3) does not explicitly support its inclusion as interpreted by the ICC. Beyond the contested statutory foundation, the control theory's status as a general principle of law has also been criticised. It is rooted in German criminal law but does not have universal applicability. Moreover, several aspects of the doctrine remain ambiguous. For instance, the "essential contribution requirement" lacks clarity, and it grants judges excessive discretion to make hypothetical value judgments about each co-defendant's contribution. Additionally, the doctrine does not clearly specify which superiors can be presumed to exercise control over an organisation, thus further complicating its application.

Though the control theory of perpetration may be applied in future cases by the ICC, its effective use requires certain doctrinal reforms such as, the clarification of the doctrine's statutory basis, as incorporating forms of criminal liability not explicitly supported by the text of the Rome Statute undermines the legitimacy of the court's decisions. Similarly, the ICC must address ambiguities within the doctrine, such as the vague concept of "essential contribution" which fails to adequately differentiate between defendants whose roles are pivotal and those whose involvement is peripheral. Such vagueness grants the judges excessive discretionary powers to evaluate a defendant's contribution and determine their culpability. Furthermore, the concept of "control over the organisation" should be refined to clearly distinguish between superiors who genuinely exercise decisive control and those with only limited or nominal influence.

Article 25(3) of the ICC Statute provides a flexible framework for criminal responsibility, listing various modes of participation but leaving room for future developments. For instance, Article 25(3)(c) broadly encompasses any assistance that facilitates the commission of a crime, allowing for the inclusion of emerging forms of participation. Similarly, Article 25(3)(d) adopts a wide-ranging approach, reflecting the ICC's adaptability. The Court's practice and jurisprudence demonstrate that new modes of liability, such as indirect co-perpetration, can evolve over time. Given the illustrative nature of these provisions, responsibility must be assessed on a case-by-case basis and by avoiding rigid standards of assigning liability to the perpetrators.

The complexity of international crimes, involving multiple actors in various roles, makes determining individual criminal responsibility particularly challenging. While individual accountability has been a cornerstone of international justice since the Nuremberg trials, the ICC Statute - particularly Article 25 - offers the most detailed framework for addressing modes of responsibility. Article 25(3) delineates these modes into four subsections: Article 25(3)(a) addresses principal responsibility, while Articles 25(3)(b), (c), and (d) pertain to secondary participants. However, the Statute does not provide precise guidance on interpreting or distinguishing between these modes, thus leading to the ongoing debate within the ICC and among legal experts.

This thesis suggests that the ICC should adopt a mode of liability that accurately reflects the criminal responsibility of hierarchical superiors. The gaps in addressing the culpability of such superiors should not be filled through interpretative approaches by judges from diverse legal traditions, as this can lead to inconsistency and uncertainty. To address the prevailing ambiguity surrounding the application of modes of liability,

the ICC should develop its own comprehensive theory of perpetration which should be flexible enough to encompass various types of perpetrators and ensure that each accused is judged individually based on their specific role in the commission of crimes. A practical solution could be the inclusion of "conspiracy" as a mode of liability, which would better capture the responsibility of hierarchical superiors who act as the architects of international crimes. For superiors exercising control over smaller units, the doctrine of "command responsibility," as outlined in Article 28 of the Rome Statute, can remain applicable. However, the scope of Article 28 is currently ambiguous, particularly regarding whether it holds superiors accountable for the underlying offenses committed by their subordinates. This ambiguity could be resolved by explicitly including the phrase "underlying offenses" within the provision, thereby clarifying its application and ensuring consistency in its interpretation.

Islamic law emphasises individual accountability and it unequivocally rejects liability for the actions of others, regardless of their status or position. Rooted in Qur'anic principles of justice and fairness and the teachings of the Prophet, it ensures that everyone, including hierarchic superiors, is held accountable for their individual actions. This approach aligns with international legal principles, prioritising justice and ethical conduct. Islamic law grants individuals the right to refuse illegal orders of the superiors even under coercion. For severe crimes like murder or rape, both the coerced and the coercer are held accountable.

Islamic criminal law provides a robust framework for addressing crimes, emphasising justice, equality, and collective responsibility. It categorises offenses into *Hudud* (fixed penalties for violations against divine rights), ***Ta'zir*** (discretionary penalties for state

or individual rights), and *siyāsah* (penalties for state interests). The law holds both direct and indirect perpetrators equally accountable, with doctrines like *tamāllu* addressing premeditated cooperation in crimes. Liability is determined by the intention and cooperation of participants, with interpretations varying among Islamic schools of thought. For example, the Maliki school emphasises explicit agreement, while Hanafi, Shafi's, and Hanbali schools focus on shared intent, regardless of formal agreements.

A prominent example in Islamic criminal law is the crime of *harābah* - organised acts of violence such as robbery and banditry, which disrupt public order and instill fear in the hearts of the population. *Harabah* is treated as a collective offense in Islamic law, with all participants deemed equally culpable, regardless of their individual roles. This mirrors the principle of collective liability seen in international doctrines like Joint Criminal Enterprise (JCE). Both legal frameworks emphasise shared culpability for crimes committed with common intent, thus both having some points of convergence. Together, they offer valuable insights for addressing organised or joint criminal liability and ensuring justice by holding all conspirators accountable.

The accountability of hierarchical leaders in the design and planning of crimes is a key issue in both international law and Islamic jurisprudence. While the ICC and ad hoc tribunals address such crimes, Islamic law offers the principles of *Siyasah Shari'ah* and *maqasid al-shari'ah* which empower Muslim rulers to enact policies and rules for addressing modern and emerging challenges while aligning with the modern notions of justice, equity and public welfare. *Siyasah Shari'ah* ensures flexibility to adapt laws to the changing and evolving societal needs through seeking to balance justice and mercy, holding superiors accountable for atrocities committed by their subordinates or to

which they have contributed directly or indirectly, in line with both the principles of Islamic criminal justice and international standards.

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