

# RIDP

**Renata Barbosa,  
Francesco Mazzacuva  
& Megumi Ochi** (*Eds.*)

## **Contemporary Challenges and Alternatives to International Criminal Justice**

(8th AIDP Symposium for Young Penalists, Maastricht, 10-11 June 2021)

Revue Internationale de Droit Pénal  
International Review of Penal Law  
Revista internacional de Derecho Penal  
Международное обозрение уголовного права  
刑事法律国际评论  
المجلة الدولية للقانون الجنائي  
Revista Internacional de Direito Penal  
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Internationale Revue für Strafrecht



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Edited by

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## **SETTING THE SCENE**





## PREFACE

*By André Klip\**

The system of international criminal justice was established in response to gross human rights violations committed during World War II. Despite its development over the past seven decades, challenges and critiques remain unresolved or have subsequently emerged, particularly in the context of the International Criminal Court. Key issues include amnesties, immunities, controversial acquittals, non-cooperation, interpretative fragmentation, and cultural clashes. Criticism emerged as a reaction to the perception of impunity and the system's underachievement. It is important to reflect on the extent to which such challenges are inherent to the system and whether they can be overcome. What is the state of international criminal justice today? What impact have these challenges had on the system's integrity, currency, and credibility? To what extent can we prevent or remedy them?

The 2021 Symposium on Contemporary Challenges and Alternatives to International Criminal Justice explored whether the current status of international criminal justice leads to the future society expects. This online symposium was organised as the VIII AIDP International Symposium for Young Penalists by the Young Penalists and Maastricht University.

This Special Volume of the International Review of Penal Law contains contributions around two major themes:

- I) Challenges to the International Criminal Court;
- II) Alternatives to the International Criminal Court.

In Part I *Giulia Lanza* looks at the International Criminal Court as a sui generis system. *Alejandro Sánchez Frías* zooms in on Afghanistan and the Statute of the International Criminal Court. *Paula Nunes Mamede Rosa* and *Sofia Larriera Santurio* take on a critical approach and analyse to legitimacy of international criminal law trials. *Owiso Owiso* deals with the challenging legal questions concerning seizure of assets before the International Criminal Court. Two contributions focus on matters of substantive criminal law: *Johannes Block* raises the question whether German doctrine can be helpful to developing indirect perpetration, whereas *Miren Odriozola* assesses co-perpetration.

In Part II specific national trials are discussed: *C. Sophia Müller* presents the Kosiah trial in Switzerland and *Kilian Wegner* the Syrian crimes adjudicated before the Koblenz Court of Appeal and other German courts. Corporate criminal responsibility is the theme of two contributions: both *Maria Giovanna Brancati*, as well as *Rosella Sabia* deal with the

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\* Professor of Criminal Law, Criminal Procedure and the Transnational Aspects of Criminal Law at Maastricht University; Member of the Royal Netherlands Academy of Arts and Sciences; Member of the Board of Directors of the International Association of Penal Law.

responsibilities of companies. Last but not least *Anna Carolina Canestraro and Túlio Felipe Xavier Januário* present the crime of ecocide as a potential new crime in the system of international criminal justice.

The authors did not only deliver high quality contributions; they also demonstrated that the Young Penalists continue to further strengthen and innovate both doctrinal research as well as the International Association of Penal Law. I am sure you will not be disappointed reading this Special Volume.

# CONTEMPORARY CHALLENGES AND ALTERNATIVES TO INTERNATIONAL CRIMINAL JUSTICE: AN INTRODUCTION TO THE VIII AIDP SYMPOSIUM FOR YOUNG PENALISTS

*By Renata Barbosa\*, Francesco Mazzacuvà\*\* and Megumi Ochi\*\*\**

This issue of the RIDP builds upon the contributions to the VIII AIDP Symposium for Young Penalists, which convened on 10 and 11 June 2021 in telematic mode, hosted by the Faculty of Law of Maastricht University. During five panels moderated by experts, young academics from fifteen different countries discussed strengths and weaknesses of the system of international criminal justice – and, in particular, of the International Criminal Court (ICC) – focusing on issues that are particularly topical today, also in the light of the conflict in Ukraine. This debate highlights the new challenges that the system of international criminal law will face in the near future and the alternatives that can be envisaged to recourse to this particular system of justice. Therefore, this volume is divided into two parts corresponding to these aspects.

## **Part I: Challenges to the International Criminal Court**

It has been over 20 years since the first international, universal, and permanent criminal adjudicatory body was established: The ICC. This world court is located in the Hague with the mandate to try and punish those who are responsible for serious crimes of international concern. The Rome Statute, which is the founding treaty of the ICC, was adopted in Rome in 1998 and now was ratified by 123 States (as of February 2022)<sup>1</sup>. The ICC has jurisdiction over the four so called core crimes (genocide, crimes against humanity, war crimes and crime of aggression) that have been considered to be of interest to the international community as a whole. As the court has the widest jurisdiction over the most serious and large-scale crimes taking place variety of places in the world, it has gone through numerous dramatic historical moments and challenges.

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\* Researcher and lecturer at Maastricht University, in the Netherlands. She holds a PhD from University of the State of Rio de Janeiro and has been part of the Young Penalists since 2014.

\*\* Researcher in Criminal Law at the University of Parma, where he was PhD graduate in 2012 and postdoctoral research fellow from 2014 to 2016, when he was appointed ordinary magistrate, serving as a judge at the Court of Modena until 2019. He coordinated the activities of the young penalists of the Italian group of the AIDP since 2015 and, at the 20th World Congress of the AIDP held in Rome in November 2019, he was elected president of the Young Penalists Committee.

\*\*\* Associate Professor at the College of International Relations and the Graduate School of International Relations of Ritsumeikan University in Kyoto, Japan. She specialises in public international law and international criminal justice. She completed her Ph.D. in Law at Osaka University and LL.M. at Leiden University. She is a member of the Young Penalist Committee of the International Association of Penal Law and a Senior Fellow at Centre for International Law Research and Policy's Case Matrix Network.

<sup>1</sup> ICC, 'The States Parties to the Rome Statute,' at [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (accessed 4 February 2022).

The first success was achieved in 2012, when the ICC found Thomas Lubanga Dyilo, a warlord in the internal armed conflict in the Democratic Republic of Congo (DRC), the very first accused, guilty for the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities. The 14 years of imprisonment was served, and the reparation procedure had reached hundreds of victims in a comprehensive manner. Until now, two more former soldiers in the war in the DRC, Germain Katanga in 2014 and Bosco Ntaganda in 2019 were convicted for committing war crimes and crimes against humanity, such as murder, rape, destruction of property and pillaging. Another high-ranking leader of an armed group in a non-international armed conflict in Mali, Ahmad Al Faqi Al Mahdi pleaded guilty for the war crimes consisting of intentionally directing attacks against religious and historic building in Timbuktu and was sentenced in 2016, and this led to granting reparation for the community and rebuilding of Timbuktu.

However, the conviction rate is not high. Four defendants have been declared innocent and released. Mathieu Ngudjolo Chui, jointly tried with Katanga in 2012, Jean-Pierre Bemba Gombo, a political leader in the DRC in 2018, and Laurent Gbagbo, former President of Côte d'Ivoire and Charles Blé Goudé, a political leader in 2019 were found not guilty after years of trials.

When it comes to the investigatory effort, the ICC is at this point conducting investigation over 30 cases and 16 situations and preliminary examination over 4 situations. The ICC in its earlier days has been criticized severely by the African Union for the alleged bias toward the African continent in selection of situations under investigations. Especially, a backlash raised for its repeated attempt to persuade the States which former Sudanese President Omar Al-Bashir against whom the ICC had issued arrest warrant visited to apprehend and surrender this political guest to the ICC. Furthermore, the United States of America was constructing another narrative against the legitimacy of the ICC by criticizing its wide jurisdiction over the nationals of non-member States and declared openly and actively its non-cooperation with the proceedings regarding the situation in Afghanistan. Meanwhile, in 2022, 41 likeminded states referred the situation in Ukraine to the Office of the Prosecutor, and the Prosecutor announced the initiation of its investigation into it, collaborating with world-wide effort that monitor and gather evidence on the commission of core crimes.

Against the above-mentioned backdrops, the ICC is now facing various institutional and normative challenges. One of the fundamental issues is about the ICC's legitimacy. Among those issues of legitimacy, the origin of the ICC as a western-oriented criminal court would require further attempt to appear impartial and unbiased. Paula Nunes Mamede Rosa and Sofia Larriera Santurio conduct case studies and offer practical solutions to tackle the issue of legitimacy before developing and least developed countries through engaging with the historical roots of contemporary conflict.

As the proceedings touches variety of issues that have not anticipated or clearly provided by the drafters of the Rome Statute, the judges attempted to find valid interpretation of

the applicable provisions and rules sometimes by referring to the Rome Statute's aim and purpose, or other times through analogy of domestic laws. One of the most controversial ones is the concept of 'interest of justice', when it was referred in the decision authorizing initiation of investigation in relation to the situation of Afghanistan, the traits and problems of which are discussed deeply in the Chapter contributed by Alejandro Sánchez Frías.

Interpretative efforts of judges are widely seen in relation to the issues of principles of criminal law. Especially, that of modes of liability is center of international academic debates. Since the provision on it within the Rome Statute is concise and does not provide much direction on what each type of modality means and the relevant criteria and elements, the judges took effort to cite domestic approaches and find solution for this ambiguity in the first judgments against Lubanga. The subsequent judgments on Katanga and Ntaganda also demonstrated various modes of participation in the core crime cases. This led to the confusion about the 'right' interpretation of the Rome Statute and allegation of legal fragmentation. This issue is discussed from the various perspectives intensively by three contributors in this book, namely, Giulia Lanza, Johannes Block, and Miren Odriozola.

At the operational level, human rights of the accused or acquitted are often directly affected by the ICC's inherent institutional problems or incapacity. One of such issues is asset freezing that enables the court to be ready for future potential reparation procedure but would frustrate accused persons' rights to property. As the circumstances surrounding the *Bemba* case illustrated, since the assets are frozen through the States cooperation, how the ICC can oversight and control excessive cooperation by States in violation of human rights of the accused is at stake. The mechanisms of and solution for this important operational issue is effectively discussed by Owiso Owiso.

## **Part II: Alternatives to the International Criminal Court**

The first part of this introduction demonstrated that the expectations concerning the creation of an international criminal justice system, involving international criminal courts and the legal framework related to it, had set the bar high leaving room for unattended wishes in the international community. As peace has demonstrated to lead eventually to compromises on accountability, it created questions as to whether the alternatives to this system result to the same deterrent, retributive, expressivist and restorative objectives. The second part of this introduction reflects upon the two specific alternatives, namely, corporation's role in criminal liability for core crimes and the role of domestic jurisdiction as an alternative to international jurisdiction.

The questions of whether domestic jurisdiction operates as an alternative, be it for transnational or international crimes, raises some challenges especially in cases which the ICC had not started investigating yet. The first difficulty are the boundaries and even the need of universal jurisdiction to tackle such cases. The second refers to procedural issues, such as evidence gathering and the remaining need of international criminal

cooperation in some cases as in Kosiah and in Islamic State in Iraq and the Levant (ISIL) returnees. In the keynote speech of our symposium Professor Elies van Sliedregt attested that ‘the future is domestic’. The papers of C. Sophia Müller and Kilian Wegner tackle domestic jurisdictions as alternatives, not necessarily substitutes, to international criminal courts. Hence, it remains opened whether domestic prosecutions offer a good enough approach to achieve international criminal justice’s goals, especially on what concerns expressivist and restorative goals.

A second issue is how the role of corporations in financing, stimulating, and benefiting from conflict seem to be in the contradiction with the dogmatic framework dedicated to it. In this sense, alternatives such as compliance and due diligence emerge as possibilities that enable deterrence, retribution and eventually restorative goals. Yet, to be questioned whether alternative approaches hold the ability to deliver expressivist goal, thus, there is still potential room for research in this sense. The article of Rossella Sabia revisits the corporate liability discussion approaching corporate liability as *crucial element of modern strategies of prevention and repression*. Maria Giovanna Brancati discusses as an alternative to the caveats raise by corporate liability in international criminal law the possibility of improving the individual responsibility of business leaders. Anna Carolina Canestraro and Túlio Felipe Xavier Januário analyse if and to what extent due diligence procedures have the potential to achieve the intended purposes of penalties applied to international crime.

Hence, the issues tackled in the part II of this publication, alternatives to the International Criminal Court lead to question: what are the deliverables of alternatives to international criminal law in terms of domestic jurisdiction and of corporate liability, whether they are enough, and most importantly, do they need to be enough.

## **CHALLENGES TO THE INTERNATIONAL CRIMINAL COURT**





# THE INTERNATIONAL CRIMINAL COURT AND THE SYMBOLIC PURPOSE OF TRIALS: RESCUING THE COURT'S LEGITIMACY IN DEVELOPING AND LEAST DEVELOPED COUNTRIES

By Sofia Larriera Santurio\* and Paula Nunes Mamede Rosa\*\*

## Abstract

*The present article takes the International Criminal Court ('ICC')'s legitimacy crisis in many developing and least developed countries as a starting point. Recognizing that international criminal justice is a work in progress, this article seeks to contribute to the enhancing of ICC's legitimacy, offering a Global South perspective on the current prosecution mechanisms. For this, the article analyzes the symbolic and expressive aspects of international criminal justice and its trials, as well as the historic processes that have been identified in crimes prosecuted before the ICC. It also makes use of two case studies before the ICC, Central African Republic and Uganda, which allow a broader analysis of the Court's practice regarding historical backgrounds. The goal is to show that by engaging with the historical roots of contemporary conflicts, including colonization and de-colonization processes, the Court could enhance its expressive power, achieving a broader historical justice and improving its legitimacy before the developing and the least developed countries.*

## 1 Introduction

In a broad sense, legitimacy is understood as the right to rule and to exercise authority<sup>1</sup> and can be divided into normative and sociological legitimacy.<sup>2</sup> While the normative legitimacy of the International Criminal Court ('ICC' or 'Court') derives primarily from the Rome Statute, its constituent document, the sociological legitimacy stems from the general perception that the Court has such a right to operate.<sup>3</sup> For the purpose of this article, legitimacy refers to the sociological legitimacy, which can increase or decrease

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\* LL.M. (adv) in Public International Law, Clinical Teaching Fellow at the University of Amsterdam (Amsterdam Law Clinics/Amsterdam Law School); e-mail: s.larrierasanturio@uva.nl. ORCID: 0000-0001-7141-3150.

\*\* PhD in Criminal Law at the Faculty of Law of the University of São Paulo – USP, with a period as Visiting Researcher at Università degli Studi di Firenze; M.A. in Criminal Law at the Faculty of Law of the University of São Paulo – USP; e-mail: paula.mamede.sf@gmail.com. ORCID: 0000-0003-0746-0686.

<sup>1</sup> Daniel Bodansky, 'Legitimacy in International Law and International Relations' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 324

<sup>2</sup> Harlan Grant Cohen, Andreas Follesdal, Nienke Grossman and Geir Ulfstein, 'Legitimacy and International Courts – A Framework' in Nienke Grossman, Harlan Grant Cohen, Andreas Follesdal and Geir Ulfstein (eds), *Legitimacy and International Courts* (CUP 2018) 4.

<sup>3</sup> *ibid.*

over time,<sup>4</sup> and relates to the external perceptions of the ICC and the degree of support it enjoys.<sup>5</sup>

Many have labelled the ICC as an imperialist court with a bias to prosecute and punish individuals from the African continent while turning a blind eye on the crimes committed by individuals from Western countries, especially Western European countries and the United States of America.<sup>6</sup> Whilst the accuracy of such statements is not the subject of this article, it is important to understand how they undermine the legitimacy of the ICC especially in developing and least developed countries.<sup>7</sup>

Therefore, this article does not aim to question the legitimacy of the ICC or the foundations and goals of the international criminal justice. Understanding this to be a field 'still defining its identity',<sup>8</sup> this article seeks to contribute to enhancing the operation and legitimacy of the ICC in developing and least developed countries by offering a Global South perspective on the current approach. Using its symbolic and expressive function as well as the pedagogical role of trials,<sup>9</sup> the ICC could include in every judgment a complete historical background of the conflict in which the crimes prosecuted are inserted. This would acknowledge the colonial roots of the contemporary conflicts and identify historical responsibilities, serving as a tool to rescue the Court's legitimacy.

To develop the proposed study, section 2 explores the symbolism of the ICC, while section 3 discusses claims of selectivity and how this impacts the Court's legitimacy. Section 4 provides an overview on the colonial roots of contemporary violence in Africa. Section 5 proposes a new approach to the court's judgments and provides two case studies to illustrate the proposal. Finally, the article concludes that this new approach

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<sup>4</sup> Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 145–147.

<sup>5</sup> Cohen et al (n 2) 4.

<sup>6</sup> So far, only individuals from African countries were prosecuted – Flávia Piovesan and Daniela Ribeiro Ikawa, 'O Tribunal Penal Internacional e o direito brasileiro' 154, 186 <<https://www.corteidh.or.cr/tablas/r33247.pdf>> accessed 2 August 2021). Also see: Claire Felter, 'The Role of the International Criminal Court' (*Council on Foreign Relations*, 23 February 2021) <<https://www.cfr.org/backgrounder/role-international-criminal-court>> accessed 18 July 2021; and 'A number of factors hamper the ICC: it lacks legitimacy, and it can be constrained by power politics when it investigates a case and when an arrest warrant needs implementing. It is very selective in its cases, and this goes against the principle of universal justice on the ground. Further-more it has only indicted Africans. For some criminals and victims alike the Court lacks credibility. The ICC is considered by some researchers and practitioners a potentially counter-productive actor in peace negotiations' – Catherine Gegout, 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace' (2013) TWQ 800, 801.

<sup>7</sup> Kurt Mills and Alan Bloomfield, when treating the African resistance to the ICC, identify the potential damage it has to 'the wider effort to establish the ICC as an effective institution and to entrench the anti-impunity norm'. See Kurt Mills and Alan Bloomfield, 'African resistance to the International Criminal Court: Halting the advance of the anti-impunity norm' (2018) 44 RIS 101, 102.

<sup>8</sup> Carsten Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (Oxford University Press 2020) 2.

<sup>9</sup> Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007) 17.

could be a tool to enhance the Court's legitimacy in developing and least developed countries.

## 2 The Symbolism of the International Criminal Court

There are four main concepts of justice when it comes to international criminal law, which can be classified in retributive, restorative, distributive and, for what is the subject of this article, the expressivist justice, which 'emphasizes the communicative and performative dimensions of criminal justice.'<sup>10</sup>

The expressivist theories are intimately related to the symbolism of justice, they 'extol the messaging value of punishment to affirm respect for law, reinforce a moral consensus, narrate history, and educate the public.'<sup>11</sup> The punishment, according to these theories, is applied in order to 'strengthen faith in rule of law among the public, as opposed to punishing because the perpetrator deserves it or because potential perpetrators will be deterred by fear of it.'<sup>12</sup>

While this aspect of the criminal justice is recognized in domestic law, which also faces limits pertaining to resources and capacity, it is even more important in the international field. Despite its many limitations,<sup>13</sup> international criminal justice has the authority of determining what actions are deemed to be the worst crimes for humankind<sup>14</sup> and how

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<sup>10</sup> Stahn (n 8) 4.

<sup>11</sup> Drumbl (n 9) 12. According to Carsten Stahn, 'Expressivist theories provide a novel lens to understand processes of norm diffusion, the symbolic value and limits of institutions, or the recognition of specific forms of harm. For instance, regional systems, such as the EU or the Inter-American system on human rights, rely on legal messaging in order to foster macro goals or promote the internalization of norms via domestic acceptance and application.' – Stahn (n 8) 6-7.

<sup>12</sup> Drumbl (n 9) 12.

<sup>13</sup> When addressing the purposes and goals of international criminal law, Anette Bringedal Houge identifies that 'It is not difficult, nor unusual, to criticize international criminal justice institutions for their lack of success in terms of these purposes (Clark, 2009; Fletcher and Weinsten, 2002; Ramji-Nogales, 2010; Tallgren, 2002). In utter brevity, such critique often points to how international criminal courts accuse, prosecute, convict and punish too few; that proportionality in punishment is illusory; and that selectivity at all levels – from the selection of prosecutors, judges and conflict cases, to crimes selected for charges, individuals selected for prosecution and victims selected for testimony – hampers and prevents these desired outcomes.' – Anette Bringedal Houge, 'Narrative expressivism: A criminological approach to the expressive function of international criminal justice' (2019) CCJ 277, 281.

<sup>14</sup> '(...) Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, (...) Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation (...) – Preamble of the Rome Statute of the ICC. Also, '(...) international criminal justice has captured a new zone and forms of social behaviour through thematic investigations and prosecutions (eg sexual and gender-based violence, child soldiers, cultural property) and legal practice relating to core crimes (genocide, crimes against humanity, war crimes, aggression).' – Stahn (n 8) 10.

they should be punished, being intrinsic to this determination the communication of values, this is, that a set of values is reinforced, and another set of values is rejected.<sup>15</sup>

Although the criminal justice system as a whole communicates values and ideals, trials are particularly relevant when justice is exercising this symbolic and expressive function. Trials have a pedagogical role, publicly narrating events, punishing the guilty and repudiating violence.<sup>16</sup> It is through trials and their mechanisms of producing evidence and shedding light on the facts that constitute crimes, that a historical record of the violations is made, a story of what happened is told, showing the wrongs and rights committed, giving context to atrocities.

International crimes profoundly scar the history of humankind and to focus simply on the individual liability, pushing aside the organizational and political dimensions of these crimes, is a simplistic approach to the phenomenon. Merely focusing on the outcome of history – the crimes committed and the individual liability – and ignoring the structures and the historical and political contexts that led to these crimes, prevents us from deeply knowing and understanding them.

In this sense, many scholars have pointed out that, when it comes to international criminal justice, the punishment and its execution are less significant than the trial,<sup>17</sup> as '[i]nternational criminal justice is more concerned with *defining* and *declaring* wrongs and responsibilities, with communicative acts that gain leverage through the imposition of sanctions, than with the particular act of punishing'.<sup>18</sup>

Narrative expressivism analyzes the story telling intrinsic to criminal trials, the performance of the people involved, and the 'narratives about charged criminal offences, their causes and consequences, are read as constitutive parts of discursive power battles about how mass violence is best understood, explained and responded to.'<sup>19</sup> And, indeed, 'legal norms and institutions speak not only through the (rudimentary) language of law, but through symbols, narratives, performances, and repetition.'<sup>20</sup>

International crimes must be understood as crimes committed within the structures and/or with the permission of States, but also as crimes resulting from a historical process

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<sup>15</sup> Indeed, expressivism 'may explain both some of the aspirations of international criminal justice as well as some of its paradoxes (eg high social relevance, despite selectivity, normative authority despite non-compliance). It offers a framework to understand how a comparatively limited system of justice (eg in terms of arrest, prosecutions, or punishment) may be socially significant. It is linked to the continuous effort of the field to present an alternate reality and justify its own existence in a state of normative uncertainty.' – Stahn (n 8) 7.

<sup>16</sup> Drumbl (n 9) 17.

<sup>17</sup> 'The sanction imposed on extraordinary international criminals largely remains little more than an afterthought to the closure purportedly obtained by the conviction. Ultimately, relegating punishment to the status of an afterthought demeans its value and meaning.' – Drumbl (n 9) 11.

<sup>18</sup> Houge (n 13) 282.

<sup>19</sup> *ibid.*

<sup>20</sup> Stahn (n 8) 14.

that laid the structures that led to them. In other words, the ICC should ‘not only seek to decide *what* crimes happened and *who* is responsible’ for them, but also ‘explain *why*’ these crimes have taken place.<sup>21</sup>

When the subject is, for example, international crimes committed by African individuals in African countries, the history of colonialism and the responsibility of European states for the structures that led to these crimes should be brought to light. Whenever this does not happen, the symbolism of the trials before the ICC and their communicative feature are hindered and lead to the delegitimization of the Court’s procedures, creating and reinforcing the idea that the ICC is a biased court.

That is because only a part of the story is told, only that part is exposed, labelled, rejected and condemned. The conflicts in which the crimes take place are taken out of their historical context and international criminal proceedings fail to tell the whole truth. Whereas this context erasure is a feature of domestic criminal justice and already receives a lot of criticism by scholars,<sup>22</sup> this is even more grave when it comes to international crimes, that usually do not derive simply from an individual will. They only happen with a broad and collective support and adherence.<sup>23</sup> To understand the social, historical and political processes that culminated in these international crimes is part of the symbolic purpose of the ICC, and to tell this story, the whole story, could help rescue its legitimacy.

### 3 Politicized Justice? Selectivity and Legitimacy

As previously mentioned, the ICC faces legitimacy problems that go beyond the courtroom and the fairness of trials. These problems relate to the selection of cases to investigate and prosecute.<sup>24</sup> The criticism that the ICC has an ‘African problem’<sup>25</sup> is not new. Although recently the Court has started preliminary examinations and investigations elsewhere, its ‘almost-exclusive focus to date on crimes committed in Africa has led to criticisms that the Court is a ‘neocolonialist’ institution, purportedly dispensing justice at the whims of Western powers.’<sup>26</sup>

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<sup>21</sup> Houge (n 13) 282.

<sup>22</sup> Nils Christie, for example, points out how, in the criminal justice system, the conflict involved in the crime is stolen by the state, excluding, for example, the victim from the solution. See: Nils Christie, ‘The Conflict as Property’ (1977) 17(1) BJC 1.

<sup>23</sup> Drumbl (n 9) 8.

<sup>24</sup> Asad Kiyani, ‘Legitimacy, Legality, and the Possibility of a Pluralist International Criminal Law’ in Nobuo Hayashi and Cecilia M Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (CUP 2017) 101.

<sup>25</sup> Lucrecia García Iommi, ‘Whose justice? The ICC ‘Africa problem’ (2020) 34(1) IR 105, 105.

<sup>26</sup> Paul D. Schmitt, ‘France, Africa, and the ICC: The Neocolonialist Critique and the Crisis of Institutional Legitimacy’ in Kamari M. Clarke, Abel S. Knottnerus, and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (CUP 2017) 127.

It is relevant to note, however, that many of these cases were self-referrals made by the situation country to the ICC,<sup>27</sup> something that might undermine the argument that the Court singles out the continent.<sup>28</sup> Additionally, it has been highlighted that the pushback from the African Union and the claims that the ICC was a 'tool of Western powers' and a 'colonial white man's court'<sup>29</sup> only started after the Court indicted 'leading African kleptocrats, such as Uhuru Kenyatta of Kenya and Omar al-Bashir of Sudan.'<sup>30</sup> Nevertheless, this do not erase the fact that the Court has insufficiently addressed violations outside Africa.<sup>31</sup>

At the same time that the ICC has been focusing on African perpetrators,<sup>32</sup> it 'remains blind to similar situations in other parts of the world.'<sup>33</sup> Moreover, the UN Security Council referral of the situation in Darfur<sup>34</sup> illustrates that while the Court is unable or unwilling to investigate and prosecute leaders of Western non-member states, it can prosecute the sitting President of a non-party African state.<sup>35</sup> Against this backdrop, some argue that the Court's focus on Africa goes beyond a mere jurisdictional problem and contributes to a deeply racialized and misleading narrative of conflicts and violence while, at the same time, exonerates foreign (and often Western) countries that have started and 'fanned the flames of conflict in the first place.'<sup>36</sup>

Although there are different points of view to the ICC's selectivity issue, scholarship generally agrees that the Court needs to address the perception of race-based prosecutions<sup>37</sup> and directly engage with these issues.<sup>38</sup> As the Court is highly dependent of its continued legitimacy to remain effective,<sup>39</sup> it must either adapt to solve the ongoing legitimacy crisis or it might end up facing disempowerment.<sup>40</sup> The fact that several African states and the African Union express concerns about the Court's practices 'not only undermines the role that the ICC stands to play in Africa, but it also negatively

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<sup>27</sup> Makau W. Mutua, 'Africans and the ICC: Hypocrisy, Impunity, and Perversion' in Kamari M. Clarke, Abel S. Knottnerus, and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (CUP 2017) 53; Iommi (n 2525) 107.

<sup>28</sup> Iommi (n 2525) 107.

<sup>29</sup> Mutua (n 2727) 55-56.

<sup>30</sup> *ibid* 49.

<sup>31</sup> Iommi (n 2525) 107.

<sup>32</sup> Mutua (n 2727) 47.

<sup>33</sup> Solomon A. Dersso, 'The ICC's Africa Problem: A Spotlight on the Politics and Limits of International Criminal Justice' in Kamari M. Clarke, Abel S. Knottnerus, and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (CUP 2017) 72.

<sup>34</sup> UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593.

<sup>35</sup> Iommi (n 2525) 108.

<sup>36</sup> Kiyani (n 24) 101.

<sup>37</sup> Mutua (n 2727) 56; Dersso (n 33) 61;

<sup>38</sup> Dersso (n 33) 61.

<sup>39</sup> Lee J. M. Seymour, 'The ICC and Africa: Rhetoric, Hypocrisy Management, and Legitimacy' in Kamari M. Clarke, Abel S. Knottnerus, and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (CUP 2017) 110.

<sup>40</sup> Christian Reus-Smit, 'International Crises of Legitimacy' (2007) 44 IP 157, 158.

affects the prospects of expanding its membership and reach to states in other parts of the world – states that are not yet parties to the Rome Statute.’<sup>41</sup>

Within this context, this article proposes that by including a comprehensive historical background in its judgments, the ICC could start re-building its legitimacy in developing and least developed countries. Such historical background is only one of the different measures the ICC can adopt to address its legitimacy issue and will not solve the crisis by itself. However, taking into consideration the expressivist power of the ICC, the inclusion of a background that acknowledges past wrongs and assigns historical responsibilities in ICC judgments could be an effective tool to rescue the Court’s legitimacy.

#### **4 Colonial Roots of the Contemporary Problems before the ICC**

Over the last five centuries Africa has suffered more trauma than any other continent in the world, much of it inflicted by countries from the North Atlantic community.<sup>42</sup> Foreign intervention in African countries started centuries ago. The European and Euro-American slave trade routes took place between the 15<sup>th</sup> and the 19<sup>th</sup> centuries and Europeans powers were eager to control African rich resources.<sup>43</sup> To avoid inter-European disputes, the 1884-1885 Berlin Conference took place aiming to develop a plan to organize colonial rule in the continent,<sup>44</sup> effectively sharing the ‘magnificent African cake’.<sup>45</sup> The conference convened without the presence of a single representative from Africa.<sup>46</sup>

Makau W. Mutua highlights that international law was largely used to plan and organize the exploitation of several regions and countries around the globe for the benefit of countries of the North Atlantic community. Particularly about Africa, he argues that international law and the dominant powers have treated the continent as ‘a blank slate on which Europe could scribble its forms of logic, hierarchies, and forms of social organization’.<sup>47</sup> With this, most of the African continent ‘had been conquered, colonized, and placed under European control’ by the beginning of the 20<sup>th</sup> century.<sup>48</sup>

With the racist justification of civilizing and pacifying natives to ‘uplift inferior races’,<sup>49</sup> colonization was based on state-sanctioned violence, forced labor and exploitation of

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<sup>41</sup> Dersso (n 33) 64.

<sup>42</sup> Mutua (n 2727) 48.

<sup>43</sup> Elizabeth Schmidt, *Foreign intervention in Africa: from the Cold War to the War on Terror* (Ohio University Press 2018) 5.

<sup>44</sup> *ibid.*

<sup>45</sup> Adam Hochschild, *King Leopold’s Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (Houghton Mifflin 1998) 58.

<sup>46</sup> Schmidt (n 43) 5.

<sup>47</sup> Mutua (n 2727) 49.

<sup>48</sup> Schmidt (n 43) 6.

<sup>49</sup> Alice L Conklin, ‘Colonialism and Human Rights, A Contradiction in Terms? The Case of France and West Africa, 1895-1914’ (1998) 103(2) AHR 419, 419-420.



natural resources.<sup>50</sup> 'France, Britain, Belgium, Portugal, Germany, Italy, and Spain had established regimes to extract African wealth (...) and to force Africans to provide the labor and taxes necessary to keep the system afloat.'<sup>51</sup> Applying strategies to divide and rule, colonizers intentionally created societal divisions and further instigated existing ethnic, tribal, religious and other rivalries aiming at prolonging its rule.<sup>52</sup>

Against this backdrop, scholars argue that many of problems that the continent face today are not merely a result of internal issues, bad national governance and the failure of local institutions. Instead, these problems can be largely attributed to historical foreign interference in the continent.<sup>53</sup> The same link can also be made specifically regarding modern conflicts in Africa, considered a natural result of the colonial past imposed on the continent.<sup>54</sup>

Paul Tiyambe Zeleza argues that '[t]here is hardly any zone of conflict in contemporary Africa that cannot trace its sordid violence to colonial history and even the late nineteenth century.'<sup>55</sup> The region that now is the stage of many international crimes, has an extensive history of colonial violence and exploitation,<sup>56</sup> and these conflicts are deeply rooted in the continent's colonial past.<sup>57</sup>

## 5 A New Approach for the ICC

Despite this intrinsic link between colonization and many of the current conflicts in the African continent today, the ICC and other international courts that preceded it have only a very limited and selective historical contextualization of the conflicts, if any. ICC judgments usually analyze strictly the most recent period of conflict, shedding light only on the immediate causes and events that led to the crimes that are being prosecuted, without addressing the role played by foreign powers and the colonial practices.

We argue that this limited approach regarding the historical background of the conflicts may fuel the classification of the ICC as a neocolonialist Court 'dispensing justice at the whims of Western powers.'<sup>58</sup> This also reduces the Court's legitimacy not only amongst African countries, but also in developing and least developed countries from the Global South which, generally, were also historically subjected to colonization.

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<sup>50</sup> Fonkem Achankeng I, 'Conflict and conflict resolution in Africa: Engaging the colonial factor' (2013) 13(2) AJCR 11, 17; Conklin (n 49) 419.

<sup>51</sup> Schmidt (n 43) 6.

<sup>52</sup> Achankeng I (n 50) 16-17.

<sup>53</sup> Schmidt (n 43) 1.

<sup>54</sup> Achankeng I (n 50) 13.

<sup>55</sup> Paul Tiyambe Zeleza, 'The Causes & Costs of War in Africa from Liberation Struggles to the "War on Terror"', in Alfred Nhema and Paul Tiyambe Zeleza (eds) *The roots of African conflicts: the causes & costs*; Ohio University Press 2008) 1-2.

<sup>56</sup> Niels Kastfelt, *Religion and African Civil Wars* (Palgrave Macmillan 2005) 2.

<sup>57</sup> Zeleza (n 5555) 1-2.

<sup>58</sup> Schmidt (n 43) 127.

The need for a complete historical background that understands the colonial roots of the conflict is twofold. For international criminal justice to be effective and successful, it should understand and address the structural issues that produced international crimes.<sup>59</sup> This comprehensive approach which includes historical roots aims to analyze the conflict and the crimes that took place in order to truly understand what happened. From a legitimacy perspective, the main focus of this article, the proposed comprehensive account of history that takes into consideration all players (historically) involved, can serve as a way to assign historical responsibilities and acknowledge past wrongs that are usually erased.

This approach is not completely unprecedented in international criminal justice. The International Criminal Tribunal for Rwanda (ICTR), in its first judgment, examined in detail the history of Rwanda from the pre-colonial period.<sup>60</sup> In *The Prosecutor v. Jean Paul Akayesu*, the Trial Chamber I considered that 'in order to understand the events alleged in the Indictment, it is necessary to say, however briefly, something about the history of Rwanda, beginning from the pre-colonial period up to 1994.'<sup>61</sup> In this historical background, based on an expert testimony, the Chamber outlined the German and Belgium colonial rule, the instigation of ethnic rivalries based on self-interests and racist considerations, the interference of the Catholic Church and how all this contributed to the conflict that broke out in 1994.<sup>62</sup> Later on, the Chamber highlighted how Rwanda and the conflict were shaped by colonial practices:

In Rwanda, reality was shaped by the colonial experience which imposed a categorisation which was probably more fixed, and not completely appropriate to the scene. But, the Belgians did impose this classification in the early 1930's when they required the population to be registered according to ethnic group. The categorisation imposed at that time is what people of the current generation have grown up with. They have always thought in terms of these categories, even if they did not, in their daily lives have to take cognizance of that. This practice was continued after independence by the First Republic and the Second Republic in Rwanda to such an extent that this division into three ethnic groups became an absolute reality.<sup>63</sup>

As mentioned, in order to be effective, international criminal justice must understand and address not only the immediate causes of the conflicts it analyzes, but also the historical structures that led to that conflict.<sup>64</sup> Thus, the colonial factor cannot be ignored

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<sup>59</sup> Dersso (n 33) 61.

<sup>60</sup> *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* (Judgment and Sentence) ICTR-99-52-T T Ch I (3 December 2003), at 29, para. 105.

<sup>61</sup> *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) para. 78.

<sup>62</sup> *Ibid* paras. 80-86.

<sup>63</sup> *ibid* para. 172.

<sup>64</sup> Dersso (n 33) 61.

because ‘the roots of many post-colonial conflicts in Africa remain buried in Africa’s past and, specifically, in the colonization and de-colonization processes’.<sup>65</sup>

### 5.1 Case studies: the situations in the Central African Republic and Uganda

This article now presents two brief case studies about countries with a colonial past that resulted in contemporary conflicts under scrutiny by the ICC: the Central African Republic, which was colonized by France, and Uganda, a former British colony. In both ‘situation countries’, the ICC has issued convictions, allowing for an analysis of the Court’s practice regarding historical backgrounds. Additionally, both countries were colonized by different powers. This allows for a broader understanding of the different colonizing practices and how they have impacted the contemporary conflict.

The goal of these cases studies is not to provide a complete and comprehensive historical account of the two countries, but to offer a glimpse on the historical roots of some of the contemporary issues that led to the opening of cases at the ICC. This will help to illustrate the types of historical facts that could be encompassed in the Court’s judgments to provide the comprehensive historical background proposed in this article.

#### 5.1.1 Central African Republic

The first case study relates to the situation in the Central African Republic (‘CAR’), which was a French colony from the late 19<sup>th</sup> century until independence in 1960.<sup>66</sup> The colonial period in the country was ‘brutal and neglectful’,<sup>67</sup> based on coercion and violence to control local populations and gain access to its natural resources.<sup>68</sup>

Instead of developing and governing the colony, France decided to lease most of the territory to private companies to exploit<sup>69</sup> in exchange for a purchase price and an annual fee.<sup>70</sup> These profit-seeking companies endowed with state authority<sup>71</sup> stripped the country’s resources and subjected the local populations to forced labor with little or no pay.<sup>72</sup> In addition to rubber and coffee,<sup>73</sup> the region has diamond-rich areas which have been exploited by France and other foreign entrepreneurs since colonization and

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<sup>65</sup> Achankeng I (n 50) 11.

<sup>66</sup> Tatiana Carayannis and Louisa Lombard, ‘Making Sense of CAR: An Introduction’ in Tatiana Carayannis and Louisa Lombard (eds) *Making Sense of the Central African Republic* (Zed Books, 2015), 3-4.

<sup>67</sup> *ibid* 3.

<sup>68</sup> Adriana Erthal Abdenur and Giovanna Kuele, ‘Central African Republic: historical roots and immediate causes of conflict’ (Igarapé Institute 2007) 2.

<sup>69</sup> Lombard and Carayannis (n 66) 3.

<sup>70</sup> Stephen W. Smith, ‘CAR’s History: The Past of a Tense Present’, in Tatiana Carayannis and Louisa Lombard, *Making Sense of the Central African Republic* (Zed Books, 2015) 21.

<sup>71</sup> *ibid* 23.

<sup>72</sup> Peter Knoope and Stephen Buchanan-Clarke, ‘Central African Republic: A Conflict Misunderstood (The Institute for Justice and Reconciliation) 8.

<sup>73</sup> *ibid* 8; Ty McCormick, ‘One Day We Will Start a Big War’ (Foreign Policy 2015).

disputes over natural resources have historically been one of the main drivers of armed conflict in the country.<sup>74</sup>

The brutal conditions imposed by the colonial period are demonstrated by the fact that after a century and a half of slave-raiding, forced labor and new diseases that were brought by foreigners, the population of the country drastically decreased.<sup>75</sup> 'Between 1890, a year after the first French explorers arrived in Bangui, and 1940, about half of the population died as a result of colonial violence or the disease that followed in its wake.'<sup>76</sup> French colonization also created or reinforced different social divisions in the country such as ethnic and political rivalries as well as political exclusion of the population in the Northeast region of the country.<sup>77</sup>

This system of private exploitation and the hardship imposed by it has continued to operate even after independence and, for years, the country's natural wealth and resources have 'flowed out of the country rather than been used for local development'.<sup>78</sup> Although the Central African Republic became independent in 1960, the country continued to heavily rely on France,<sup>79</sup> who acknowledged that from all their former colonies, this one 'was the least prepared to stand on its own'.<sup>80</sup> In this context, the institutions in the newly independent country were almost non-existent for most of the population,<sup>81</sup> particularly to those located in the Northeast region.

The post-colonial political elite, predominantly Christian, was able to benefit from this context of institutional fragility since the colonial period, concentrating its power in the capital.<sup>82</sup> Meanwhile, the Northeast region, predominantly Muslim, lacked central government administration and investment, fueling the general perception that the government did not care about the region and its Muslim citizens.<sup>83</sup> In addition, Christian Central Africans associated Muslim Central Africans with foreign interests, trying to 'Islamize' Central African society.<sup>84</sup> 'The government's failure to provide services to outlying regions in the North and East is a major grievance and a key driver of conflict.'<sup>85</sup> As a result, the population ended up excluded from the national government and control of natural resources, increasing ethnic and religious tensions that led to the conflict.<sup>86</sup>

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<sup>74</sup> Abdenur and Kuele (n 68) 2.

<sup>75</sup> Lombard and Carayannis (n 66) 3.

<sup>76</sup> McCormick (n 73).

<sup>77</sup> Abdenur and Kuele (n 68) 2.

<sup>78</sup> Knoope and Buchanan-Clarke (n 72) 8.

<sup>79</sup> Abdenur and Kuele (n 68) 2.

<sup>80</sup> Lombard and Carayannis (n 66) 4.

<sup>81</sup> Abdenur and Kuele (n 68) 2.

<sup>82</sup> *ibid.*

<sup>83</sup> Knoope and Buchanan-Clarke (n 72) 8.

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid* 9.

<sup>86</sup> Abdenur and Kuele (n 68) 3.

The conflict in the Central African Republic has been under investigation by the ICC for many years and has resulted in three cases so far,<sup>87</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*,<sup>88</sup> *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*<sup>89</sup> and *The Prosecutor v. Mahamat Said Abdel Kani*.<sup>90</sup> Out of these three cases, only the *Bemba* case has resulted in a judgment at the time of the writing of this article. Unfortunately, the historical background was completely ignored by the ICC in the *Bemba* judgment, which had no account whatsoever of the colonial roots of the contemporary conflict in the Central African Republic.

Nevertheless, this absence can be remedied in the future in the other two ongoing cases before the ICC, *Said* and *Yekatom and Ngaïssona*, all currently on trial. In these cases, the Court could definitely provide a broader picture of the conflict in its future judgments, encompassing relevant elements of the country's history such as the ones described above.

### 5.1.2 Uganda

The other case study concerns the situation in Uganda, which was under British colonial rule from the late 19<sup>th</sup> century up to 1962, when it became independent.<sup>91</sup> Similar to the CAR and many other African countries, the contemporary conflict between the Lord's Resistance Army (LRA) and the Ugandan government has its historical roots deeply intertwined with the country's colonial past, which is filled with ethnic hostilities and colonial-era marginalization.<sup>92</sup>

The deep historical roots of the contemporary conflict are said to be a result of a deliberated policy in which the British created and further instigated ethnic and regional division and mistrust.<sup>93</sup> During the many years of colonial rule, the British employed a 'divide-and-rule' approach that polarized the country along ethnic, political, and

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<sup>87</sup> This number does not include *The Prosecutor v. Jean-Pierre Bemba Gombo*, *Aimé Kilolo Musamba*, *Jean-Jacques Mangenda Kabongo*, *Fidèle Babala Wandu* and *Narcisse Arido* case (ICC-01/05-01/13), since the crimes prosecuted there were offences against the administration of justice and, therefore, fall outside of the scope of this article.

<sup>88</sup> ICC-01/05-01/08 (CAR I), case closed.

<sup>89</sup> ICC-01/14-01/18 (CAR II), currently on trial.

<sup>90</sup> ICC-01/14-01/21 (CAR II), currently on trial. On 9 December 2021 the Pre-Trial Chamber II partially confirmed the charges against the accused.

<sup>91</sup> Connor Joseph Cavanagh and David Himmelfarb, 'Much in Blood and Money: Necropolitical Ecology on the Margins of the Uganda Protectorate' (2015) 47(1) *Antipode* 55, 56.

<sup>92</sup> Justine Nannyonjo, 'Conflicts, poverty and human development in Northern Uganda' (2005) 94:381 *RT* 473, 475.

<sup>93</sup> Advisory Consortium on Conflict Sensitivity, 'Northern Uganda Conflict Analysis' (ACCS 2013) xii.

religious lines',<sup>94</sup> creating social and economic divisions between North and South<sup>95</sup> and an inter-ethnic competition for power.<sup>96</sup>

This North-South divide was fostered by the British who intentionally concentrated wealth and political power in the South while the North and other regions became economically marginalized.<sup>97</sup> More specifically, the British administration turned the South into a developed and prosperous region through productive ventures, such as industrial and commercial centers and agricultural zones.<sup>98</sup> In opposition, the North became 'a reservoir of cheap labour'.<sup>99</sup> While the southerners were selected for civil service, white-collar jobs, the northerners worked on the plantations and industry<sup>100</sup> and later into the armed forces<sup>101</sup> as an attempt to improve their livelihoods.<sup>102</sup>

The development of the South at the expense of the North led not only to an economic imbalance that persisted in the postcolonial era,<sup>103</sup> but also 'laid the foundations of economic and political exclusion (...) turbulent and violent history of domestic political instability, mayhem, armed violence and coups d'état which characterized the immediate post-independence era.'<sup>104</sup>

Uganda is another situation country under ICC investigation. So far, the investigation led to two cases, *The Prosecutor v. Joseph Kony and Vincent Otti*,<sup>105</sup> that has not moved past the pre-trial stage, and *The Prosecutor v. Dominic Ongwen*,<sup>106</sup> currently on appeal stage.

Focusing now on the *Ongwen* case, on 4 February 2021 the Trial Chamber IX issued its judgment in which it found the accused guilty of 61 crimes, including crimes against humanity and war crimes committed in Northern Uganda. In this occasion the Court took an interesting step. Although the charges concerned events that took place between July 2002 and December 2005, the Chamber noted that the LRA, rebel group of which the accused was a commander, has been active in since the 1980s, and the related conflict in Northern Uganda has been ongoing for decades. Thus, the Chamber deemed necessary to include in this judgment a brief background to the case aiming to place it in a historical

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<sup>94</sup> Sarah Kasande Kihika and Eva Kallweit, 'Building Blocks for Reparations Providing Interim Relief to Victims Through Targeted Development Assistance' (International Center for Transitional Justice 2020) 11.

<sup>95</sup> Nannyonjo (n 92) 475.

<sup>96</sup> International Crisis Group (ICG), 'Northern Uganda: Understanding and Solving the Conflict' (77 ICG Africa Report 2004) 2.

<sup>97</sup> Nannyonjo (n 92) 475.

<sup>98</sup> *ibid.*

<sup>99</sup> ICG (n 96) 2.

<sup>100</sup> Nannyonjo (n 92) 475.

<sup>101</sup> ACCS (n 93) xii.

<sup>102</sup> Nannyonjo (n 92) 475.

<sup>103</sup> *ibid.*

<sup>104</sup> ACCS (n 93) xiii

<sup>105</sup> ICC-02/04-01/05.

<sup>106</sup> ICC-02/04-01/15.

context.<sup>107</sup> To this end, a report was prepared by an expert witness who also testified before the chamber.<sup>108</sup>

Although the Court acknowledged the necessity to encompass a broader historical background of a contemporary conflict, this particular historical background included in the judgment fell short. The analysis provided in the judgment only considered events that took place from the late 1980s, when the LRA started to emerge. However, the Court could have provided a complete historical background of the conflict which acknowledged the colonial roots of the current situation and properly assigned historical responsibilities.

While the historical background included in the *Ongwen* judgement was limited, this step taken by the Trial Chamber IX has shown that it is possible for the ICC to contextualize the conflicts it investigates. With this, the Court could encompass a broader historical background into its judgments that goes beyond the immediate causes of the conflicts, seeks to uncover the truth about its roots and acknowledges colonial wrongdoings.

This does not mean, in any way, that this article proposes that the ICC should seek the criminal liability of States or even financial reparation. The analysis of the colonial background and roots of the conflicts provide historic accountability and the full picture of the facts prosecuted by the Court.

## 6 Conclusion

The practice of the ICC so far, particularly regarding the selection of cases to investigate and prosecute, has raised harsh criticism. The excessive focus on African countries, the legacy of colonialism and the lack of action regarding similar situations elsewhere, brought accusations that the Court is an imperialist tool in the hand of powerful and western countries. In addition, past colonization processes continue to create tension between the ICC and African countries, undermining the Court's legitimacy.<sup>109</sup>

The Court's selectivity undermines its legitimacy not only in African countries but also in developing and least developed countries elsewhere. In order to remedy this crisis and to ensure the ICC continues to be a significant tool in the fight against impunity, the Court must engage with these issues<sup>110</sup> and seek to have a better understanding of the cases it investigates and prosecutes.

In this context, this article focused on the expressivist power of international criminal justice to enhance the ICC's legitimacy in developing and least developed countries. It argued that by using the symbolic and communicative dimensions of trials, the Court could start addressing its legitimacy issues.

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<sup>107</sup> *The Prosecutor v. Dominic Ongwen* (Trial Judgment) ICC-02/04-01/15 T Ch IX (04 February 2021) para. 1.

<sup>108</sup> *ibid* para. 1.

<sup>109</sup> Schmidt (n 43) 127.

<sup>110</sup> Dersso (n 33) 61

To that end, the ICC should include a comprehensive historical background of the relevant conflict in every judgment, breaking free of the limited and selective historical analysis that has been observed so far, and shedding light on the role that historical processes, such as the process of colonization, played in fostering these conflicts. With this, the responsibility of foreign states would be acknowledged through the ICC judgements, making the accusation of a neocolonial Court hard to sustain. This acknowledgement of past wrongs and the assignment of historical responsibilities could, therefore, enhance the Court's legitimacy in developing and least developed countries.

The proposed approach does not mean that the statute of the ICC or its jurisdiction should be altered. The *Ongwen* case has shown that the Court already has the necessary tools to include a comprehensive historical overview in its judgments. Additionally, it should be noted that this proposal does not contradict the fact that the ICC is a court with jurisdiction over natural persons and, as such, attributes individual criminal responsibility. The inclusion of a comprehensive historical background in every judgment aligns with the Court's expressive power and only contributes to a better understanding of the conflict as a whole.

Due to space limitations, this article presented only two examples of cases in which the ICC could (or still can) have a holistic approach to historical contexts that have created and influenced the conflict in which its cases are inserted. However, many other cases in which the same approach could be taken come easily to mind, such as Mali, Côte d'Ivoire, Sudan and the Democratic Republic of the Congo. Through 'engagement with the West's history in Africa'<sup>111</sup> and its expressive power, the Court will be able to achieve a broader historical justice and rescue its legitimacy.

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<sup>111</sup> Schmidt (n 43) 143.



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# LOST AND FOUND IN AFGHANISTAN? THE INTERESTS OF JUSTICE IN THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT

By Alejandro Sánchez Frías\*

## Abstract

*The decision of the Pre-Trial Chamber of 12 April 2019 rejecting the request to open an investigation in Afghanistan, considering that such investigation would be contrary to the interests of justice, caused a serious crisis of legitimacy in the ICC. Although the Appeals Chamber overturned the decision and authorized the opening of an investigation, it did not assess which elements should be considered within the requirement of the interests of justice. This study analyses the elements considered by the Pre-Trial Chamber as part of the expansive approach to the interests of justice (namely the elapse of time between the commission of the crime, the lack of cooperation and the efficient allocation of resources) and the factors mentioned by the Appeals Chamber (the gravity of the crime and the interests of the victims). It concludes that the inclusion of first set of elements is not only based on an erroneous legal reasoning, but it is also contrary to the purpose and goals of the Rome Statute.*

## 1 Introduction

The preamble of the Rome Statute (RS) affirms that the spirit of the International Criminal Court (ICC) is based on the ideal ‘that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’. With this ambitious goal, it is not strange that the ICC has had to face many challenges in a period of 20 years. One of the most recent challenges comes from the request made by the Office of the Prosecutor to open an investigation regarding the situation in Afghanistan.

In 2006, the Office of the Prosecutor started a preliminary examination in the situation in Afghanistan and, with the information collected during more than a decade, requested to start a *proprio motu* investigation in 2017<sup>1</sup>. The request included a wide list of alleged crimes against humanity and war crimes committed in the territory of Afghanistan, Poland, Romania and Lithuania by Taliban and affiliated armed groups, Afghan

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\* Alejandro Sánchez Frías is Assistant Professor of Public International Law and EU Law at the University of Málaga. The author wishes to thank the organizers and participants to the VII AIDP Symposium ‘Contemporary Challenges and Alternatives to International Criminal Justice’ for the invitation to this event and their useful comments during the presentation of this paper. This is an updated and extended version of the article published in Spanish in *the Anuario Iberoamericano de Derecho Internacional Penal* (vol. 9).

<sup>1</sup> ICC, Request for authorisation of an investigation pursuant to article 15, Situation in the Islamic Republic of Afghanistan (ICC-02/17), Office of the Prosecutor, 20 November 2017.

National Security Forces, the United States (US) armed forces and members of the Central Intelligence Agency<sup>2</sup>.

The first challenge came from an external source. As a non-party State, the US threatened, and ultimately imposed, sanctions on ICC officials, including the Prosecutor. The Trump administration at that time considered that the opening of an investigation over acts allegedly committed by US personnel in the territory of States Parties to the RS was an attack against American sovereignty<sup>3</sup>. These sanctions were in force until the arrival of the Biden Administration<sup>4</sup>.

The second challenge came from the Pre-Trial Chamber. Regarding the scope of the investigation, it considered that, according to international humanitarian law, the ICC had no jurisdiction over crimes committed outside of the territory where the armed conflict is taking place, thus excluding the possibility of an investigation in the territory of the three other State Parties involved, namely Poland, Romania and Lithuania<sup>5</sup>. But, more importantly, the Pre-Trial Chamber decided to deny the authorization because an investigation in Afghanistan would not be in 'the interests of justice' under article 53(1)(c) of the RS<sup>6</sup>.

This analysis is focused only on the 'interests of justice' requirement<sup>7</sup>. In its decision concerning the situation in Afghanistan, the Pre-Trial Chamber denied for the first time an authorization using this basis and establishing which factors should be included in the assessment of this requirement, thus offering a specific case study to assess previous theoretical studies about what the 'interests of justice' could be. One year and a half later, the Appeals Chamber overturned this decision, highlighting the relevance of the gravity of the crimes and the interests of the victims in such assessment, but not expressly excluding the factors used by the Pre-Trial Chamber.

In this sense, De Souza Dias had already identified two possible meanings of this concept according to previous scholarship. The first would be a broad meaning, according to which the 'interests of justice' should include considerations 'other than those strictly

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<sup>2</sup> Ibid, pars. 53-71.

<sup>3</sup> About these sanctions see Beth Van Schaack, 'Introductory Note To Executive Order 13928 On Blocking Property Of Certain Persons Associated With The International Criminal Court' (2020) 60 ILM 18.

<sup>4</sup> Joe Biden, 'Executive Order on the Termination of Emergency With Respect to the International Criminal Court', 1 April 2021, <<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/01/executive-order-on-the-termination-of-emergency-with-respect-to-the-international-criminal-court/>> accessed 13 July 2021.

<sup>5</sup> ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber II, 12 April 2019, ICC-02/17, pars. 49-59.

<sup>6</sup> Ibid, par. 96.

<sup>7</sup> For critical studies about the territorial application of the RS and its connection to International humanitarian law see, among others, Cormier, Monique, 'Testing the boundaries of the ICC's territorial jurisdiction in the Afghanistan situation' (2021) 78 QIL 43; Sasha Radin, 'Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts' (2013) 89 ILS 696.

related to the criminal proceedings themselves (such as fair trial rights or inherent budgetary limitations)<sup>8</sup>. By contrast, defenders of a narrow meaning consider that it 'could only comprise procedural considerations and the criteria which are explicitly listed in Article 53(1)(c) (the gravity of the crime and the interests of victims)<sup>9</sup>.

As we shall see below, these two meanings are present in the Afghanistan situation in the decisions of the Pre-Trial Chamber and the Appeals Chamber. On the one hand, the Pre-Trial Chamber adopted a narrow meaning to exclude the existence of 'interests of justice' in the request by the Prosecutor. On the other hand, the Appeals Chamber initially seems to adopt a broad meaning. However, it does not completely rule out the possibility of introducing elements from the narrow meaning. In the next pages, we will analyse both perspectives in the context of the decisions in Afghanistan.

## 2 The Decision of the Pre-Trial Chamber: A Narrow Meaning

On 12<sup>th</sup> April 2019, the Pre-Trial Chamber of the ICC substantially examined, for the first time in the short history of this court, the requirement of the interests of justice for the purpose of authorizing an investigation under article 53(1)(c) of the RS<sup>10</sup>. Three main elements are assessed in this regard: the significant time elapsed between the alleged crimes and the Request (i)<sup>11</sup>; the lack of State cooperation (ii)<sup>12</sup>; and the efficient allocation of the ICC resources (iii)<sup>13</sup>.

The analysis of the interests of justice led the Pre-Trial Chamber to reject the request for the opening of an investigation in Afghanistan<sup>14</sup>, a decision that was considered by some as 'the anti-climax of more than a decade-long preliminary examination by the Office of the Prosecutor and one-and-a-half years of judicial deliberations'<sup>15</sup>. The decision was challenged by the Prosecutor before the Appeals Chamber which, as we shall see in the next section, overturned the outcome of the Pre-Trial Chamber on procedural grounds<sup>16</sup>,

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<sup>8</sup> Talita De Souza Dias, 'Interests of justice: Defining the scope of Prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court' (2017) 30 LJIL 731, 732.

<sup>9</sup> Idem.

<sup>10</sup> ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber II, 12 April 2019, ICC-02/17.

<sup>11</sup> Ibid, par. 93.

<sup>12</sup> Ibid, par. 94.

<sup>13</sup> Ibid, par. 95.

<sup>14</sup> Ibid, par. 96.

<sup>15</sup> Sergei Vasilev, 'Not just another 'crisis': Could the blocking of the Afghanistan investigation spell the end of the ICC?' (*EJIL: Talk!*, 19 April 2019), <<https://www.ejiltalk.org/not-just-another-crisis-could-the-blocking-of-the-afghanistan-investigation-spell-the-end-of-the-icc-part-i/>> accessed 13 July 2021.

<sup>16</sup> For the power of review of the Pre-trial Chamber on these cases see, among others, Luca Poltroneri Rosetti, 'The Pre-Trial Chamber's Afghanistan Decision: A Step Too Far in the Judicial Review of Prosecutorial Discretion? *Journal of International Criminal Justice*' (2019) 17 JICJ 585. By contrast, Ishii considers that the Pre-Trial Chamber should have the power to review the factors under article 53 in order to guarantee robust judicial oversight and, therefore, that it is the Appeals Chamber the one that went too far in providing the widest possible discretionary powers to the prosecutor. See Yurika Ishii, 'Situation in the Islamic Republic of Afghanistan' (2021) 115 AJIL 688.

thus authorizing the opening of an investigation in Afghanistan. However, the Appeals Chamber did not substantively analyse the ‘interests of justice’ requirement. It is necessary to critically analyse each one of the elements used by the Pre-Trial Chamber, mostly because these elements are not specifically mentioned in the RS and are the basis of the doctrine that defends a narrow understanding of concept of the interests of justice.

## 2.1 The time elapsed between the alleged crimes and the request

The first element taken into consideration by the Pre-Trial Chamber is the significant time elapsed between the alleged crimes and the Request. The alleged crimes took place in 2002 and 2003, the preliminary examination started in 2006 and the request by the Prosecutor to officially open an investigation was not filled until 2017. Indeed, as the Pre-Trial Chamber points out, ‘the preliminary examination in the situation in Afghanistan was particularly long’<sup>17</sup>.

The Pre-Trial Chamber considers that the fourteen years elapsed put into question the potential success of the investigation and, with it, the interests of justice in opening it. This would be a clear example of the American aphorism ‘justice delayed is justice denied’<sup>18</sup> and, therefore, the first sign that the opening of an investigation would not be in the interests of justice.

Undoubtedly, the extreme length of the preliminary examination negatively affects the future investigation. In some situations, it has been necessary to request information to the Prosecutor regarding the length of the procedure, reminding that ‘the preliminary examination of a situation [...] must be completed within a reasonable time [...], regardless of its complexity’<sup>19</sup>. As Olásolo highlights, although the RS do not expressly impose any time-limit to the Prosecutor in this regard, a reasonable period of time should be considered for the very purpose of this procedure and the rights of the parties<sup>20</sup>. Even the Prosecutor accepts this reality: ‘the time gap between events on the ground and the moment when the Office can investigate can result in loss of evidence. This is contrary to the ‘golden hour’ principle which recognises that the sooner one can be present at the crime scene, the higher the chances are that better quality evidence and leads will be discovered and secured’<sup>21</sup>.

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<sup>17</sup> ICC, Decision Pursuant to Article 15 of the Rome Statute (n 10), par. 92.

<sup>18</sup> *United States v. Hastings*, 847 F. 2d 920,923 (1st Cir., 1998).

<sup>19</sup> ICC, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, Appeals Chamber, 30 November 2006, ICC-01/05, 4.

<sup>20</sup> Héctor Olásolo Alonso, ‘The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor’ (2005) 5 ICLR 121 144.

<sup>21</sup> ICC, Strategic Plan 2016 – 2018, Office of the Prosecutor, 2015, par. 24.

Nevertheless, as other authors point out, this is a common feature in the more complex cases before the Office of the Prosecutor<sup>22</sup>. We can see several examples of long preliminary examinations in the situations of Colombia, Nigeria, Guinea, Georgia or Côte d'Ivoire, being some of them still in this preliminary stage<sup>23</sup>. Under certain circumstances, this delay is even a strategy of the Prosecutor to push for the opening of effective domestic investigations<sup>24</sup>. In addition, a recent study shows that the length usually depends on the actor referring the situation: an average of three weeks for cases referred by the UN Security Council; between four and ten months for cases referred by States; and more than five years for cases started by the Prosecutor *proprio motu*, usually because of lack of cooperation of the involved States<sup>25</sup>.

Despite of the existence of precedents with long preliminary examinations, the Pre-Trial Chamber decided for the first time to use this element to reject the request of the Prosecutor. In their submission, the legal representatives of the victims precisely criticised the lack of legal basis in the RS and in previous case-law, also underlining the fact that

the successful prosecutions of Khmer Rouge leaders by the ECCC, with trials starting in 2009, for crimes committed in 1975-1979, demonstrate that probative evidence and suspects can remain available for decades. World War II-era trials have famously taken place in every decade since the war. By reading into the Statute a criterion of 'feasibility' that does not appear in it, the Chamber exceeded its discretion and unfairly deprived the Victims of their only chance of investigation and prosecution.<sup>26</sup>

The inclusion of the temporal element may be subject to criticism. As the legal representative of the victims correctly points out, there are precedents in which crimes have been successfully prosecuted more than thirty years after their commission. The very principle of complementarity, a keystone in the action of the ICC, means that this court acts in cases in which States are unwilling or unable to prosecute the suspects of the worst crimes against the international community, and the lack of cooperation obviously influences the length of this procedure. The inclusion of the temporal elements in the interests of justice, either by the Prosecutor or by the Pre-Trial Chamber, could

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<sup>22</sup> Claire Maignoux, 'The Sound of Silence: le pouvoir discrétionnaire du procureur de la Cour pénale internationale à travers l'utilisation des critères d'intérêts de la justice et de gravité lors de l'ouverture d'une enquête' [2017] RQDI 9, 26-27.

<sup>23</sup> See for this purpose, among others, Davis Bosco, 'Putting the Prosecutor on a Clock? Responding to Variance in the Length of Preliminary Examinations' (2018) 112 AJIL Unbound 158.

<sup>24</sup> Geoff Dancy and Florencia Montal, 'Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions' (2017) 111 AJIL 689; Olásolo Alonso, Héctor, 'El principio de complementariedad y las estrategias de actuación de la Corte Penal Internacional en la fase de examen preliminar: ¿Por qué la Corte Penal Internacional mantiene su examen preliminar, pero no abre una investigación, sobre la situación en Colombia?' (2012) 24 REEI 1.

<sup>25</sup> Anni Pues, 'Towards the 'Golden Hour'? A Critical Exploration of the Length of Preliminary Examinations' (2017) 15 JICJ 435, 438-439.

<sup>26</sup> ICC, Legal representatives of the victims, Victims' Appeal Brief, 24 June 2019, ICC-02/17 OA, par. 55.



negatively impact on pending cases and give another argument to those who criticise the legitimacy of the system selection of situations and cases<sup>27</sup>.

## 2.2 Lack of State cooperation

The second element considered by the Pre-Trial Chamber is the lack of cooperation of the States involved in the case of Afghanistan. This would include not only Afghanistan, but also Poland, Romania, Lithuania and the US. The legal justification of the Pre-Trial Chamber for including this element in the 'interests of justice' is rather poor, which makes it difficult to critically assess element behind it. In just one paragraph, it establishes that:

subsequent changes within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute), coupled with the complexity and volatility of the political climate still surrounding the Afghan scenario, make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects; suffice it to say that nothing in the present conjuncture gives any reason to believe such cooperation can be taken for granted.<sup>28</sup>

However, we can find several arguments based in domestic and International law in the transcripts of the appeals hearing coming from the European Centre for Law and Justice (ECLJ), the Jerusalem Institute of Justice, the International Legal Forum, My Truth, the Simon Wiesenthal Centre, the Lawfare Project and UK Lawyers for Israel<sup>29</sup>. Considering the scarcity of the reasoning of the Pre-trial Chamber and, as we shall see, the fact that the Appeals Chamber did not rule out this factor, we think that these arguments are worthy of comment because of their potential impact in future cases.

Firstly, the argument of lack of State cooperation would be supported by the principle of customary international law known as *pacta tertiis nec nocent nec prosunt*. Indeed, this is a classic principle of international law codified in article 34 of the Vienna Convention on the Law of the Treaties (VCLT): 'a treaty does not create either obligations or rights for a third State without its consent'. The ECLJ uses this principle to defend that those States which are not parties to the RS, such is the case of the US, have no obligation to cooperate with the ICC<sup>30</sup>. This principle also means, according to the ECLJ, that the exercise of jurisdiction over national of non-party States (article 12(2)(a) of the RS) is an *ultra vires* or null action without the consent of the non-party State<sup>31</sup>. This is also the position of the Jerusalem Institute for Justice:

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<sup>27</sup> See, among others, Birju Kotecha, 'The International Criminal Court's Selectivity and Procedural Justice' (2020) 18 (1) JICJ 107-139; Kai Ambos, 'Office of the Prosecutor: Policy Paper on Case Selection and Prioritisation' (2018) 57 (6) ILM 1131-1145.

<sup>28</sup> ICC, Decision Pursuant to Article 15 of the Rome Statute (n 10), par. 94.

<sup>29</sup> ICC, Appeals Hearing, 5 December 2019, ICC-02/17-T-001.

<sup>30</sup> Ibid, 101.

<sup>31</sup> Idem.

The interests of justice oblige the Court to be mindful that whereas between its relationship with States Parties [...], the system of cooperation under Part 9 of the Statute is a self-contained regime. [...] Between the Court and non-States Parties we must identify the specific rules of customary law that apply to that separate circumstance. And the ICC does not operate in a legal vacuum.<sup>32</sup>

Of course, the customary status and relevance of the principle contained in article 34 VCLT is widely accepted<sup>33</sup>. However, the application of this principle is incorrect from an international law perspective. The ECLJ confuses the absence of any obligation of cooperation of third States with the ICC, with the effects that such obligations, when complied with by State Parties, may have over those third States. In other words, conventional obligations are obligations of behaviour directed towards States Parties and cannot bind non-State parties, while the effect of conventional obligations are the consequences that the fulfilment of the obligations may have over this Parties. Therefore, while obligations over third States are contrary the principle of *pacta tertiis*, their effects are not<sup>34</sup>.

Article 12(2)(a) of the RS establishes that the ICC may exercise its jurisdiction over crimes committed in the territory of a State Party, thus including those committed by nationals of both State Parties and non-party States, such is the case of Afghanistan and the US respectively. This possibility was already pointed out by some authors even before the entry into force of the RS: 'non-Member States will not be able to block prosecutions of their nationals. Although only nationals of Third States, and not the Third States themselves, will be defendants before the ICC, it is obvious that the activities of the new institution will implicate vital legal interests of non-Member States'<sup>35</sup>. This exercise of jurisdiction, as we mentioned above, does not mean that the U S have the obligation to cooperate with the ICC<sup>36</sup>. However, like in the situation of Afghanistan, it may have the effect of opening of an investigation over nationals of third States that have allegedly committed crimes in the territory of a State Party.

Secondly, the ECLJ argues that, because of this customary principle, States are not allowed to delegate their criminal jurisdiction over foreign nationals, including delegation to international courts<sup>37</sup>. This is also an erroneous assessment. The customary

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<sup>32</sup> Ibid, 99.

<sup>33</sup> See on this point Elbert Vierdag, 'The Law Governing Treaty Relations between Parties to the Vienna Convention on the Law of Treaties and States not Party to the Convention' (1982) 76 AJIL 779-801.

<sup>34</sup> Dörr, Oliver and Schmalenbach, Kirsten, 'Article 34: general rule regarding third States', in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 613-615.

<sup>35</sup> Gennady Danilenko, 'The Statute of the International Criminal Court and Third States' (2000) 21 MJIL 445.

<sup>36</sup> Nevertheless, some authors defend that in some circumstances this obligation exists, namely when the case is referred by the UNSC or it involves a violation of common article 1 to the Geneva Conventions. See Zhu Wenqi, 'On co-operation by states not party to the International Criminal Court. International' (2006) 88 IRRC 87-110.

<sup>37</sup> Idem.

principle of territoriality allows States, and sometimes even impose them, the right to exercise jurisdiction over crimes committed in their territory, regardless of the nationality of the accused<sup>38</sup>. This is one of the oldest principles of international law, recognised in judgments of the International Court of Justice (ICJ)<sup>39</sup> and landmark cases of domestic tribunals<sup>40</sup>, which is particularly present in international criminal law for the simple reason that the authorities of the State where the crime is committed are generally the best suited to collect evidence and prosecute the alleged criminals<sup>41</sup>. And it is also common in international conventions on criminal cooperation that States may delegate their jurisdiction over crimes in their territory committed by foreign nationals to the State of nationality of the victim or the States whose interests were affected by the crime in question, for instance<sup>42</sup>.

Nevertheless, we could ask ourselves: does the right to delegate jurisdiction also extends to international courts, such as the ICC? After reviewing the precedents of several international courts and organs of international organizations, Akande concludes that indeed

the precedents discussed above are evidence of extensive practice of states delegating part of their criminal jurisdiction over non-nationals either to states or to tribunals created by international agreements, in circumstances in which no attempt is made to obtain the consent of the state of nationality. This practice, together with the lack of objections by states of nationality of accused persons, points to a general acceptance of the lawfulness of delegating criminal jurisdiction.<sup>43</sup>

Another argument to exclude that the opening of an investigation would be contrary to the interests of justice is based on the existing treaties between the US and Afghanistan known as status of force agreements (SOFAs). According to the several SOFAs signed in 2002, 2003 and 2014, the US personnel 'will under all circumstances and at all times be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them on the territory of Afghanistan'<sup>44</sup>. The ECLJ defends that the principle of *lex specialis* implies that the specific obligations of these agreements have priority over the obligations assumed by Afghanistan in the RS<sup>45</sup>. Furthermore, for some authors, as a result of the principle *nemo dat quod non habet*, the result would be the same, defending that 'the territorial state

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<sup>38</sup> Kai Ambos, *Treatise on International Criminal Law* (Oxford University Press 2018) 211.

<sup>39</sup> ICJ, *The Case of the S.S. Lotus (France v. Turkey)*, 7 September 1927, 18.

<sup>40</sup> *Schooner Exchange v. McFaddon*, 11 U.S. (7 Granch) 116, 136, 3 L.Ed. 287 (1812).

<sup>41</sup> Illias Bantekas, *International Criminal Law* (Hart 2010) 233.

<sup>42</sup> About the principles that allow the delegation of jurisdiction see, among others, Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2015) 29-41; Illias Bantekas, 'Criminal Jurisdiction of States under International Law', in *Max Planck Encyclopedia of Public International Law* (OUP 2011).

<sup>43</sup> Dapo Akande, 'The Jurisdiction of the International Criminal Court, over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 JICJ 618.

<sup>44</sup> ICC, Appeals Hearing, 5 December 2019 (n 29) 102.

<sup>45</sup> *Idem*.

transfers its own authority in the same manner that the co-owner of a house could choose to sell or to transfer his/her property right without the consent of the other co-owner'<sup>46</sup>.

The previous reasoning was expressly contested by the Prosecutor, and even by the Pre-Trial Chamber<sup>47</sup>. According to the Prosecutor, the existence of SOFAs does not have any impact on the jurisdiction of the ICC, being just an element within the test of admissibility when assessing whether the State is unwilling or unable to prosecute certain crimes of groups of alleged criminals<sup>48</sup>. The approach of the Prosecutor seems to be the correct one, considering that the reasoning ECLJ ignores the distinction between jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce<sup>49</sup>.

In the particular case of Afghanistan, O'Keefe points out that the sentence 'subject to the exclusive jurisdiction' of the SOFA does not include the jurisdiction to prescribe, and only the last two categories<sup>50</sup>. Furthermore, O'Keefe concludes that

by way of Article 12(2)(a) of the Rome Statute, a receiving State Party to the Statute delegates to the ICC the exercise of its customary right to entertain criminal proceedings in respect of the crimes specified in Article 5 of the Statute when these crimes are committed in its territory. Since its treaty-based acknowledgement of the 'exclusive jurisdiction' of the sending State or its according of immunity from its 'criminal jurisdiction' in no way diminishes the plenary right it possesses under customary international law to entertain criminal proceedings in respect of crimes under Article 5 of the Statute committed in its territory, a receiving State Party is competent to confer on the Court a plenary 'jurisdiction' over such crimes. In short, the scope of the Court's jurisdiction over genocide, crimes against humanity, and war crimes committed in the territory of a State Party is unaffected by the terms of any SOFA or analogous agreement or any treaty provision on jurisdictional immunities by which the State Party may be bound.<sup>51</sup>

Another argument for rejecting the use of the SOFA to block the jurisdiction of the ICC is proposed, although with a less compelling reasoning, by Stahn:

ICC jurisdiction is not derived from the territorial or national jurisdiction of a specific state, but grounded in a broader entitlement of states and the international legal

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<sup>46</sup> Michael Newton, 'How the International Criminal Court Threatens Treaty Norms' (2016) 49 VJTL 371, 399.

<sup>47</sup> ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation (n 10), par. 59.

<sup>48</sup> ICC, Request for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', Office of the Prosecutor, 7 June 2019, ICC-02/17, par. 46.

<sup>49</sup> For a comprehensive explanation of this distinction see Christopher Staker, 'Jurisdiction', in Malcom Evans (ed), *International Law* (Oxford University Press 2014) 309; James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2008) 456.

<sup>50</sup> Roger O'Keefe, 'Quid Not Quantum: A Comment on How the International Criminal Court Threatens Treaty Norms' (2016) 49 VJTL 433, 438.

<sup>51</sup> *Ibid*, 439.

community under international law. This theory posits that the normative justification of punishment is independent of the will of the respective sovereign. It receives support from the fact that individuals face direct individual criminal responsibility under international law for international crimes. States exercise this jurisdiction on behalf of the international community.<sup>52</sup>

Apart from the different arguments regarding the possibility or not of delegating jurisdiction to the ICC, a general criticism against the inclusion of the element of lack of cooperation must be made here. Although it is undeniably true that the US have no obligation to cooperate with the ICC, the Pre-Trial Chamber seems to forget that there are States Parties involved in the conflict that have certain obligation under Part IX of the RS. In the *Burundi* situation, the Pre-Trial Chamber made clear that ‘States Parties are not obliged to cooperate with the Court prior to the initiation of an investigation, even though the Prosecutor and the Court may seek their voluntary cooperation’<sup>53</sup>. The lack of cooperation of the State Parties in the preliminary examination is, therefore, something to be expected.

However, once the investigation is authorized by the Pre-Trial Chamber, all the obligations to cooperate established in the RS become fully operative. The lack of fulfilment of requests regarding the collection of evidence, for instance, would be a breach of international law, with the potential intervention of the Assembly of States Parties and the United Nations Security Council and, with it, a high political cost that may motivate States to cooperate<sup>54</sup>. Considering, as we mentioned above, that the lack of cooperation during the preliminary examination is not a violation of the RS, the assessment of such an element in the requirement of the interests of justice for opening an investigation could have the dangerous effect of motivating States parties to not cooperate in the preliminary examination, as the Pre-Trial Chamber would subsequently use this lack of cooperation to reject the request on the authorization of an investigation<sup>55</sup>.

### 2.3 The limited amount of resources

The third and last element considered by the Pre-trial Chamber to conclude that an investigation in Afghanistan would not be in the interests of justice is an economic one:

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<sup>52</sup> Carsten Stahn, ‘The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the limits of the *Nemo Dat Quod Non Habet* Doctrine - A Reply to Michael Newton’ (2016) 49 VJTL 443, 448.

<sup>53</sup> ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, Pre-Trial Chamber, 25 October 2017, ICC-01/17-X, par. 15.

<sup>54</sup> Dapo Akande and Talita De Souza Dias, ‘The ICC Pre-Trial Chamber Decision on the Situation in Afghanistan: A Few Thoughts on the Interests of Justice’ (*EJIL: Talk!*, 18 April 2019), <<https://www.ejiltalk.org/the-icc-pre-trial-chamber-decision-on-the-situation-in-afghanistan-a-few-thoughts-on-the-interests-of-justice/>>, accessed 13 July 2021.

<sup>55</sup> See in this sense Patryk Labuda, ‘A Neo-Colonial Court for Weak States? Not Quite. Making Sense of the International Criminal Court’s Afghanistan Decision’ (*EJIL: Talk!*, 13 April 2019), <<https://www.ejiltalk.org/a-neo-colonial-court-for-weak-states-not-quite-making-sense-of-the-international-criminal-courts-afghanistan-decision/>>, accessed 13 July 2021.

in the foreseeable absence of additional resources for the coming years in the Court's budget, authorising the investigation would therefore result in the Prosecution having to reallocate its financial and human resources; in light of the limited amount of such resources, this will go to the detriment of other scenarios (be it preliminary examinations, investigations or cases) which appear to have more realistic prospects to lead to trials and thus effectively foster the interests of justice, possibly compromising their chances for success.<sup>56</sup>

This is indeed the more practical reasoning used by the chamber in its decision<sup>57</sup>. We can find some precedents of this economic reasoning related to the opening of criminal investigations. Germany, for instance, introduced this economic discretion in the law implementing the RS: 'to prevent a waste of judicial resources on prosecutions which are either unlikely to succeed because the suspect is not in Germany or unnecessary because the suspect is being properly prosecuted elsewhere'<sup>58</sup>. Australia also has a similar provision regarding domestic prosecutions<sup>59</sup>. In his dissenting opinion in the *Jelisić* case, Judge Wald also pointed out that 'resources of the Tribunal are stretched thin and there may well be reason to prioritise cases involving allegations of State-planned and executed crimes, rather than individualistic or opportunistic crimes'<sup>60</sup>.

However, all these precedents have in common that it is a decision to be taken by the Prosecutor, as Judge Wald also highlights:

any such decision based on 'judicial economy' inevitably reflects judges' views as to which cases are 'worthy' and which are not. That, however, is the job of the Prosecutor who must calibrate legal and policy considerations in making her choices on how to utilise limited resources. To recognise a parallel power in judges to accept or reject cases on extra-legal grounds invites challenges to their impartiality as exclusively definers and interpreters of the law.<sup>61</sup>

In this line, article 42(2) of the RS establishes that 'the Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof'. The purpose of this provision is to ensure the independence of the Office of the

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<sup>56</sup> ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation (n 10) par. 95.

<sup>57</sup> Mark Kersten, 'Whither the Aspirational ICC, Welcome the 'Practical' Court?' (*EJIL: Talk!*, 22 May 2019), <<https://www.ejiltalk.org/whither-the-aspirational-icc-welcome-the-practical-court/>>, accessed 13 July 2021.

<sup>58</sup> Stefan Wirth, 'Germany's New International Crimes Code: Bringing a Case to Court' (2003) 1 JICJ 151, 160.

<sup>59</sup> Australia's Federal Prosecution Service, Prosecution Policy of the Commonwealth, criteria 2.1, p.4.

<sup>60</sup> ICTY, *Prosecutor v. Goran Jelisić*, partly dissenting opinion of judge Wald, Appeals Chamber, 5 July 2001, IT-95-10-A, par. 2.

<sup>61</sup> *Ibid*, part. 14.

Prosecutor<sup>62</sup>. That is why, according to article 112(2)(b), only the Assembly of States Parties have the power of review over the allocation of resources by this office. Therefore, the economic reasoning used by the Pre-Trial Chamber has been correctly qualified as an *ultra vires* action<sup>63</sup>.

In addition, the introduction of such criteria seriously put into question the legitimacy of the ICC. While the prosecution of the most serious crimes against the international community is one of the main values and purposes of the ICC, the criterion of economic efficiency is not, or should not be, an equal value<sup>64</sup>. In the words of Webb, 'the amount of financial and temporal resources that a trial would use should be a criterion in assessing the 'interests of justice', but it should not be a decisive criterion. Efficiency is a worthy goal, but it is not the purpose of the ICC'<sup>65</sup>.

### 3 The Decision of the Appeals Chamber: A Broad Meaning?

The Appeals Chamber, as we mentioned above, decided that the request of the Prosecutor should be accepted and that the Pre-Trial Chamber had no power to review the fulfilment of the 'interests of justice requirement' in requests for opening a *proprio motu* investigation. Nevertheless, being aware of the intense debate in the scholarship in the society that the pronouncement of the Pre-Trial Chamber had caused, it points out in an *obiter dictum* that

[t]he Pre-Trial Chamber's reasoning in support of its conclusion regarding the 'interests of justice' was cursory, speculative and did not refer to information capable of supporting it. [...] There is no indication that the Pre-Trial Chamber considered the gravity of the crimes and the interests of victims as articulated by the victims themselves in conducting this assessment. In these circumstances, the Appeals Chamber is of the view that the Pre-Trial Chamber did not properly assess the interests of justice.<sup>66</sup>

The Appeals Chamber clearly accepts the arguments defended by the restrictive approach (gravity of the crimes and interests of the victims), thus excluding of those who defend that the assessment of the interests of justice element should be completely separated from the gravity of the crimes and the interests of the victims under article 53(1)(c) of the RS: '[t]he wording of Article 53(1)(c) clearly denotes a separation between

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<sup>62</sup> Benson Chinedu Olugbuo, 'Challenges in the Relationship Between the ICC and African States: The Role of Preliminary Examinations under the First ICC Prosecutor', in Bergsmo, Morten and Stahn, Carsten (eds), *Quality Control in Preliminary Examination* (Opsahl Academic EPublisher, 2018), 317-370.

<sup>63</sup> ICC, Request for Leave to Appeal (n 45), pars. 22-27.

<sup>64</sup> Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 AJIL 510, 545.

<sup>65</sup> Philippa Webb, 'The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice"' (2005) 50 CLQ 305, 342.

<sup>66</sup> ICC, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, Appeals Chamber, 5 March 2020, ICC-02/17 OA4, par. 49.

the gravity of the crime and the interests of victims on the one hand and the ‘interests of justice’ on the other. The use of the word ‘nonetheless’ clearly delineates this separation<sup>67</sup>.

At the same time, the Appeals Chamber does not completely exclude the possibility of considering other elements. It just criticises that the gravity of the crimes and the interests of the victims were not considered, and that the Pre-Trial Chamber did not offer any kind of information to support its assessment under the expansive approach. This possibility of interpreting the ‘interests of justice’ – which includes the gravity of the crimes and the interests of justice as main elements without excluding the possibility of balancing other factors – has been pointed out by some authors<sup>68</sup>, and confirms once again the importance of the analysis made above regarding the elements not mentioned in the RS.

### 3.1 The gravity of the crimes

The gravity of the crimes is the first element mentioned by the Appeals Chamber, being also expressly mentioned in article 53(1)(c) of the RS. This criterion is of outmost importance considering that the ICC was created to address the most serious crimes of concern to the international community, as it is mentioned in the preamble of the RS. Its importance is remarked by the fact that is also considered in the admissibility test under article 17(1)(d). This repetition, as Webb points out, means that the Prosecutor must consider the gravity of the crime in two stages<sup>69</sup>.

However, does this repetition mean that the analysis under both articles is substantially identical? Or there are different thresholds of gravity? For some authors, the fact that the gravity threshold is already examined under article 17(1)(d) creates doubts about the importance of this element within the assessment of the interests of justice<sup>70</sup>, being the assessment under such article the one that really determines whether a situation should be investigated or not<sup>71</sup>. For others, the gravity requirement under the ‘interests of justice’ allows the Prosecutor to reject a case even if the gravity threshold under article 17(1)(d) was fulfilled<sup>72</sup>, and some even consider that gravity under 53(1)(c) works as a *lex specialis*, thus excluding the assessment under any other provision<sup>73</sup>.

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<sup>67</sup> Chris Gallavin, ‘Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?’ (2003) 14 KLJ 179, 185.

<sup>68</sup> De Souza Dias (n 8) 737.

<sup>69</sup> Webb (n 65) 327.

<sup>70</sup> Joana Loyo Cabezudo, ‘La llave del «interés de la justicia» en el Estatuto de Roma: su controvertido empleo en el caso de Afganistán’ (2021) 73 REDI 165, 181.

<sup>71</sup> Phil Clark, ‘Law, Politics and Pragmatism: the ICC and Case Selection in the Democratic Republic of Congo and Uganda’, in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa*, (Royal African Society 2008) 37-45, 37.

<sup>72</sup> Morten Bergsmo and Pieter Kruger, ‘Investigation and prosecution’, in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing 2008) 1065-1076, 1071.

<sup>73</sup> Giuliano Turone, ‘Powers and Duties of the Prosecutor’, in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the ICC: A Commentary*, (Oxford University Press 2002) 1138-1180, 1153.



Within the second approach, the scholarship distinguishes different thresholds of gravity and several factors linked to them. The distinction between the assessment in cases and situations is pointed out by Ochi, when she concludes that despite of severe inconsistencies, 'it seems that the assessment of the gravity of a case considers only the crimes themselves and the victims' perspective, and the assessment of the gravity of a situation also includes the suspect's role or rank'<sup>74</sup>. Within the category of situations – such is the context of the decision of Afghanistan –, Stegmiller defends the need to separate 'legal gravity' under article 17(1)(d) – which implies a low threshold based only on quantitative factors – from 'relative gravity' under article 53(1)(c) – which would impose a higher threshold based on qualitative elements and policy choices, such as the comparison with other serious situations investigated by the ICC –<sup>75</sup>.

Apart from establishing for the first time in the ICC jurisprudence that the gravity of the crime should be considered in the assessment of the interests of justice, the Appeals Chamber does not give any guidance regarding the gravity threshold. The Policy Paper of the Office of the Prosecutor does not seem to make any distinction: 'before considering whether there are substantial reasons to believe that it is not in the interests of justice to initiate an investigation, the Prosecutor will necessarily have already come to a positive view on admissibility, including that the case is of sufficient gravity to justify further action'<sup>76</sup>. In such case, Regulation 29 of the Regulation of the Office of the Prosecutor establishes that the office 'the Office shall consider various factors including their scale, nature, manner of commission, and impact'<sup>77</sup>.

In the framework of the situation of Afghanistan, therefore, if the Pre-Trial Chamber would have considered these elements in the requirement of the 'interests of justice', it seems that the conclusion would have been positive. It considered that the gravity threshold was met in respect to all categories of crime considering here factors related to the crimes themselves, the victim's perspectives and the suspect's role, the level of responsibility of the offenders, the high number of victims, the impact on the victims, the devastating and unfinished consequences on the life of innocent people of the violence inflicted, the recurrent targeting of civilians, the large-scale commission over a prolonged period of time and the numbers and seriousness of the crimes<sup>78</sup>. By contrast, following the criterion of 'relative gravity' could have led to a negative assessment, as this criterion also includes policy choices and practical considerations, such as the use of the limited resources of the ICC for the most serious investigations, following a comparative

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<sup>74</sup> Megumi Ochi, 'Gravity Threshold before the International Criminal Court: An Overview of the Court's Practice' (2016) 19 ICD Brief 14.

<sup>75</sup> Ignaz Stegmiller, 'Interpretative gravity under the Rome Statute: Identifying common gravity criteria', in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity From Theory to Practice* (Cambridge University Press 2014) 603-641.

<sup>76</sup> ICC, Policy Paper, cit. supra., 5.

<sup>77</sup> ICC, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09.

<sup>78</sup> ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation (n 10), pars. 80-86.

approach<sup>79</sup>. In fact, as we have analysed above, this element was erroneously considered by the Pre-Trial Chamber in its assessment of the interests of justice under article 53(1)(c) though, in this case, gravity threshold was not mentioned.

### 3.2 The interests of the victims

Until the decisions about Afghanistan were adopted, there were almost no mention of the requirement of the 'interests of justice' in the official documents of the ICC. This is not unusual considering that, until now, the Pre-Trial Chamber had never used this element to deny an authorization and, as the Appeals Chamber confirmed, the Prosecutor only has to justify the lack of 'interests of justice', but not the absence of it<sup>80</sup>. Despite of this scarcity, it is interesting to note that, in these few references, there is usually a connection between the interests of justice and the interests of the victims. In its Policy Paper, the Office of the Prosecutor acknowledges the importance of the role of the victims in the framework of the RS<sup>81</sup>.

According to the Policy Paper, the mention of the interests of the victims in article 53(1)(c) would be generally used to favour the prosecution and the opening of an investigation. However, it does not always have to be the case, as the interests of the victims could also advise against prosecution: 'the central goal of respecting victims through the possibilities of participation in the proceedings also implies a duty to be respectful of possibly divergent views. The Office will give due consideration to the different views of victims, their communities and the broader societies in which it may be required to act'<sup>82</sup>. To understand what the interests of the victims may be, the Prosecutor conducts dialogues not only with the victims, but also with intermediaries and representatives of local communities that can give insights of the situation<sup>83</sup>.

One example of this line of action can be found in the situation of Georgia. After reminding that it only must justify when the interests of justice are not present, the Prosecutor nevertheless gives a brief insight of the elements that led to the conclusion that an investigation in Georgia would be in the interests of justice. In particular, the Prosecutor devotes an entire section to inform about the result of the meetings with ethnic Georgian who alleged to be victims, witnesses, human rights organisations and representatives of Georgian public administration, all leading to the conclusion that 'neither in communications from victims nor in any of the consultations with organisations representing victims or knowledgeable of the interests of victims, the

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<sup>79</sup> Stegmiller (n 75) 636. See also Margaret McAuliffe de Guzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32 FJIL 1400, 1414.

<sup>80</sup> ICC, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, par. 39.

<sup>81</sup> ICC, Policy Paper, cit. supra., 5.

<sup>82</sup> Idem.

<sup>83</sup> Ibid, p. 7.

Prosecution received views that the interests of justice would not be served by an investigation into the situation in Georgia'<sup>84</sup>.

More recently, and probably as a response to avoid the precedent that could have been set up in Afghanistan, the Pre-Trial Chambers have connected the interests of justice with that of the victims. In the decision authorizing the opening of an investigation in Myanmar, the Pre-Trial Chamber devotes a section to the 'interests of justice' and how the opening of an investigation is in the interests of the victims:

many of the consulted alleged victims believe that only justice and accountability can ensure that the perceived circle of violence and abuse comes to an end and that the Rohingya can go back to their homeland, Myanmar, in a dignified manner and with full citizenship rights. Victims have also expressed their willingness and eagerness to engage with the ICC and explained that bringing the perpetrators to justice within a reasonable time is crucial in preventing future crimes from being committed and for the safe and dignified return of the Rohingya to their homeland Myanmar.<sup>85</sup>

The necessary presence of the interests of the victims when assessing the interests of justice, solidly defended by both scholarship<sup>86</sup> and civil society<sup>87</sup>, has clearly been confirmed by the Appeals Chamber in Afghanistan and the Pre-Trial Chamber in Myanmar. Their reasoning, based on information on specific cases, contrasts with the rejected approach of the Pre-trial Chamber in Afghanistan, which indeed did not refer to any information to support that the assertion that

it is unlikely that pursuing an investigation would result in meeting the objectives listed by the victims favouring the investigation, or otherwise positively contributing to it. It is worth recalling that only victims of specific cases brought before the Court could ever have the opportunity of playing a meaningful role in as participants in the relevant proceedings; in the absence of any such cases, this meaningful role will never materialise in spite of the investigation having been authorised; victims' expectations will not go beyond little more than aspirations. This, far from honouring the victims' wishes and aspiration that justice be done, would result in creating frustration and

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<sup>84</sup> ICC, Request for authorisation of an investigation pursuant to article 15 in the situation of Georgia, Corrected version, Office of the Prosecutor, 16 October 2015, ICC-01/15-4-Corr, pars. 340-343.

<sup>85</sup> ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, ICC-01/19, par. 38.

<sup>86</sup> See, among others, Bergsmo, Morten and Pieter Kruger, 'Investigation and prosecution', in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing, 2008), 1065.

<sup>87</sup> Human Rights Watch, 'The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute', <<https://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>> accessed 13 July 2021.

possibly hostility vis-a-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve.<sup>88</sup>

#### 4 Conclusion

Broadly considered, we can say that the decision of the Pre-Trial Chamber in the situation of Afghanistan – and its assessment of the ‘interests of justice’ specifically –, temporarily caused a crisis of legitimacy and purpose in the ICC, considering that ‘if the credibility of the Court was in doubt before it, and if the future of the Court was uncertain, now is possible that the Pre-Trial Chamber has facilitated its own demise’<sup>89</sup>. The introduction of economic and political elements in the requirement of the interests of justice, in order to deny for the first time in its history the opening of a *proprio motu* investigation, created many doubts about the independence of the ICC from external actors, particularly considering the extreme pressure under which the court was put by the US government.

Fortunately, the decision of the Pre-Trial Chamber was overturned by the Appeals Chamber in a very welcomed decision. However, the reasoning was based on procedural grounds, so the Appeals Chamber did not make any substantive analysis of what is the interests of justice under article 53(1)(c) of the RS. In a brief *obiter dictum*, the Appeals Chamber just declared the necessity of including the gravity of the crime and the interests of the victims in the assessment, but it did not specifically reject the possibility of considering other factors.

The factors used by the Pre-Trial Chamber in its decision of April 2019 – namely the lapse of time, the lack of cooperation and the efficient use of the economic resources of the court – should be rejected for the reasons exposed in this study. The inclusion of external factors – particularly political and economic ones – instead of factors directly related to the case – such as the seriousness of the crimes – to determine the opening of an investigation may even exacerbate existing criticisms of partial justice and lack of equality in the selection of cases by the ICC<sup>90</sup>. Recent developments in the situation of Afghanistan suggests that the Pre-Trial Chamber is now aware of this fact and that it has also adopted this perspective. On 27 September 2021, the newly elected Prosecutor filed an application to resume the investigation in Afghanistan – which had been deferred to the authorities in Afghanistan in 2020 –<sup>91</sup>, issuing also a statement declaring that his office would focus ‘on crimes allegedly committed by the Taliban and the Islamic State –

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<sup>88</sup> ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation (n 10) par. 96.

<sup>89</sup> Esperanza Orihuela, ‘When are there substantial reasons to believe that an investigation of core crimes would not serve the interests of justice?’ (2019) 23 SYIL 9, 30.

<sup>90</sup> Sarah M H Nouwen and Wouter G Werner, ‘Monopolizing Global Justice International Criminal Law as Challenge to Human Diversity’ (2015) 13 JICJ 157, 172.

<sup>91</sup> ICC, Request to authorise resumption of investigation under article 18(2) of the Statute, 27 September 2021, ICC-02/17.

Khorasan Province ('IS-K') and to deprioritise other aspects of this investigation'<sup>92</sup>. As Elderfield points out, external factors have been considered to suspend the crimes allegedly committed by US personnel, despite being an integral basis of the original request filed by former Prosecutor Bensouda<sup>93</sup>. This time, by contrast to its initial approach, it is the Pre-Trial Chamber – with the same composition – the one that has reminded the Prosecutor that 'a proper investigation should focus first on crimes, and then on identifying who the responsible persons of those crimes are. Not only impartiality, but also *appearance of impartiality*, is a *sine qua non* requirement for justice to contribute to peace and reconciliation'<sup>94</sup>. It seems that, while the actors involved may have modified their perspective, the question of which factors must be weighted to determine the interests of justice remains unsolved.

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<sup>92</sup> ICC, Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan, 27 September 2021.

<sup>93</sup> Julian Elderfield, 'Uncertain Future for the ICC's Investigation into the CIA Torture Program' (Just Security, 12 November 2021), <<https://www.justsecurity.org/79136/uncertain-future-for-the-iccs-investigation-into-the-cia-torture-program/>>, accessed 3 February 2022.

<sup>94</sup> ICC, Decision on submissions received and order to the Registry regarding the filing of documents in the proceedings pursuant to articles 18(2) and 68(3) of the Statute, 8 November 2021, ICC-02/17, par. 15.

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# INDIRECT PERPETRATION IN THE ROME STATUTE: THE SEARCH FOR INDEPENDENCE FROM DOMESTIC LAW AND DOCTRINES

By Giulia Lanza\*

## Abstract

*The International Criminal Court (ICC) represents the major expression of the internalization of criminal justice. However, at times, the influence of the judges' domestic legal background plays a determining role in the interpretation and application of the Rome Statute. This is clear, for example, in the case law on the interpretation and application of indirect perpetration within the meaning of art. 25(3)(a), third alternative, of the Rome Statute of the International Criminal Court (ICCSt or Rome Statute), where the predominance of the German doctrine is manifest. Therefore, a domestic legal system predominates over the others, without there being a solid legal basis for this choice. An individualistic approach to the interpretation and application of the Rome Statute, too anchored to one's domestic legal background and culture, could challenge the credibility of the Court and affect its legitimacy. By highlighting the inadequacy of the ICC's decisions on the transposition of the German Organisationsherrschaftslehre to the ICC, with particular regard to its theoretical foundations in the Rome Statute, this paper highlights the importance of the comparative analysis aimed at determining a common approach which results from the solutions adopted in different domestic legal systems to solve similar problems. It appears to be the only solution in order to transform the ICC into an independent system of global international justice not only in abstract terms but also by means of the interpretation and application of the Rome Statute and thus in the development of a theory on indirect perpetration, independent from specific domestic law and doctrines.*

## 1 Introduction

The International Criminal Court (ICC) can be considered a *sui generis* system of global international criminal justice<sup>1</sup> notably differing from the previous justice models (eg, the ad hoc Tribunals). It is based on the Rome Statute which is the result of a pluralistic

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\* PhD University of Verona/University of Göttingen, Lawyer. This is an elaborated version of the paper presented on 10 June 2021 at the VIII AIDP International Symposium for Young Penalists *Contemporary Challenges and Alternatives to International Criminal Justice*. E-mail: giulia.lanza00@gmail.com

<sup>1</sup> Fatou Bensouda, 'The ICC Statute – An Insider's Perspective on a Sui Generis System for Global Justice' (2011) 36 NCJIL 277. The former Prosecutor of the ICC, Fatou Bensouda, uses this wording to show that in the international context the Rome Statute represents a unique system for global justice. This is manifest in the drafting history, in the legal framework, in the practice of the ICC as well as in the mechanisms triggering its jurisdiction. The Rome Statute can be considered 'of its own kind'.

decision-making process and a compromise between different legal cultures<sup>2</sup>. Likewise, many of the ICC's decisions embody and reflect such a varied pluralistic reality.

One of the greatest challenges faced by the ICC today is that of achieving its own autonomy from national legal systems, focusing on its specific function, which is to prosecute and punish 'the most serious crimes of concern to the international community as a whole'.<sup>3</sup> This is fundamental in order to convey to the States parties (and to the states willing to take part in the Rome Statute) the idea that the ICC is an autonomous and independent court, where no domestic legal system prevails over the others.

The paper will focus, in particular, on indirect perpetration under the meaning and interpretation of art. 25(3)(a), third alternative, ICCSt, used here as an example where a domestic doctrine (the German *Organisationsherrschaftslehre*)<sup>4</sup> prevailed over other approaches in the interpretation and application of the provision. The transposition of the German doctrine into the jurisprudence of the Court has been strongly criticised for several reasons, including its origin and the methodology used to adopt it. However, the purpose of this paper is not to examine the control over the organization theory resulting from the application of the *Organisationsherrschaftslehre* and its constitutive elements in details, but it is to delve into the reasons at the basis of its adoption at the ICC. It will show how, in the case law, it is not possible to find a deep theoretical discussion related to the transposition of the German theory to the ICC, but it seems more the result of the deciding judges' legal background. It concludes that an excessively domestic approach is at odds with the global function of the Court, and that the development and elaboration of an autonomous approach to indirect perpetration has to be based on a deep comparative analysis of different domestic legal systems. Along with the most recent case law, the *Organisationsherrschaftslehre* could be used as a 'source of inspiration'<sup>5</sup> in the development of an autonomous international criminal law (ICL) doctrine relating to indirect perpetration, which can fully reflect the dynamics and magnitude of international crimes, as well as the involvement of those in the highest position, who, despite being far removed from the scene of the crime, are responsible for the worst atrocities.

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<sup>2</sup> For a detailed analysis of the drafting history of the Rome Statute article-by-article, see M. Cherif Bassiouni and William A. Schabas, *The Legislative History of the International Criminal Court* (2<sup>nd</sup> ed, Brill) 2016.

<sup>3</sup> Preamble of the Rome Statute, para. 4.

<sup>4</sup> As the German theory has not been applied in its original version, '*Organisationsherrschaftslehre*' is used to refer to the original version of Roxin's theory, while 'control over the organization (theory)' is generally used to designate the theory resulting from the adoption of the *Organisationsherrschaftslehre* at the ICC.

<sup>5</sup> Along the line of Neha Jain, in *Perpetrators and Accessories in International Criminal Law* (Hart 2014) 11, where she pointed out that 'the [national] legal systems serve as sources of ideas and concepts, and not as true sources of law'.

## 2 General Remarks on the International Criminal Court

The creation of the ICC marks a turning point in the history of ICL.<sup>6</sup> For the first time, a treaty-based permanent international criminal court was set up with the purpose of prosecuting and punishing genocide, war crimes, crimes against humanity and aggression, considered by the international community as the most heinous crimes of concern. It plays a fundamental and primary role in the international panorama as it is the only permanent, independent, universal and complementary system of international criminal justice, contributing to the protection of victims and populations. The ICC's universal mission<sup>7</sup> enables its decision to be the greatest expression of the symbolic function of ICL.<sup>8</sup> International criminal proceedings become the symbol of the fight against the impunity of the most serious crimes of concern to the international community and offer the opportunity to communicate the wrong done not only to the offender, but also to the victims and to the society as a whole.<sup>9</sup>

However, the ICC is a treaty-based institution and lacks an enforcement apparatus, therefore support from states and civil society is indispensable for keeping the system viable and operational.<sup>10</sup> In order to sustain the ICC, states must recognise the importance of its function and have faith in its work. This is the reason why the ICC, since its inception, struggled to assert its credibility and thus its legitimacy.<sup>11</sup> The legitimacy of the Court hangs, in particular, on the quality of its procedure and decisions, as consent from states remains its lifeblood.<sup>12</sup> From this perspective, the interpretation of the sources of law, on top of which is the Rome Statute, must be coherent and impartial, without favoring one legal system over another, since the predominance of a domestic

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<sup>6</sup> Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 194 ff.; Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 EJIL 144; more generally Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational Publishers 2002).

<sup>7</sup> Judge Van den Wyngaert in her concurring opinion appended to the *Ngudjolo* judgment refers to the 'universalist mission' of the ICC: *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-4, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, para. 5 (hereinafter 'Van den Wyngaert concurring opinion').

<sup>8</sup> Marina Aksenova, 'Symbolism as a Constraint on International Criminal Law' (2017) 30 LJIL 475. For an overview on the symbolic function of ICL, more related to its 'didactic' or 'expressivist' function, see Mirjan R. Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 CKLR 329, 347; Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 173 ff.

<sup>9</sup> Lucia Zedner, *Criminal Justice* (Oxford University Press 2004) 109. On the stigmatization function of the ICC Frédéric Mégret, 'Practice of Stigmatization' (2014) 76 LCP 287.

<sup>10</sup> Aksenova (n 8) 499; Damaška (n 8) 330.

<sup>11</sup> On the different aspects that may challenge the legitimacy of the ICC, *inter alia*, Marieke de Hoon, 'The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy' in Joanna Nicholson (ed), *Strengthening the Validity of International Criminal Tribunals* (Brill 2018) 17. See also Margaret M. De Guzman, 'The Global-Local Dilemma and the ICC's Legitimacy' in Nieke Grossman, Hurlan Grant Cohen, Andreas Follesdal and Geir Ulfstein (eds), *Legitimacy and International Courts* (Cambridge University Press 2018) 62.

<sup>12</sup> Damaška (n 8) 345.

legal system or doctrine could compromise the credibility of the Court, challenge its autonomy and consequently challenge its legitimacy.

### 3 Article 25 of the Rome Statute of the International Criminal Court

The Rome Statute has enormously enriched the content of international law<sup>13</sup> and constitutes a major step forward for the development of substantive international criminal law.<sup>14</sup> Such an evolution is clearly reflected in art. 25 ICCSt, the central pillar of the entire system built by the Rome Statute in the fight against the impunity of those responsible for the crimes within the jurisdiction of the Court (art. 5 ICCSt). It is the most detailed provision on individual responsibility that exists in the history of ICL. It is not limited to the recognition of the universal acceptance of the principle of individual criminal responsibility<sup>15</sup> in art. 25(2) ICCSt. Moreover, art. 25(3) ICCSt, in contrast to the quite rudimentary provisions on individual criminal responsibility that previously appeared in arts. 6 and 9 of the Charter of the International Military Tribunal (IMTCharter), art. 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTYSt) and art. 6 of the Statute of the International Criminal Tribunal for Rwanda (ICTRSt), provides for a complex and detailed regulation and systematisation of the different modes of participation in a crime.

As highlighted by Judge Van den Wyngaert in her concurring opinion appended to the *Ngudjolo* judgment, the formulation of art. 25(3) ICCSt reveals its 'multi-faceted origins'.<sup>16</sup> It is the result of long and intense negotiations culminating in a compromise between several different domestic actors. It is characterized by the coexistence of concepts developed in national legal traditions as well as in international instruments<sup>17</sup>. For

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<sup>13</sup> Roy S. Lee, 'The Rome Conference and its Contribution to International Law' in Roy S. Lee (ed), *The International Criminal Court. The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International 1999) 1, 27.

<sup>14</sup> Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (4th edn, Oxford University Press 2020) 29.

<sup>15</sup> The principle of individual criminal responsibility was established for the first time in international law during the trial of the Major War Criminals, in the judgment of 1 October 1946 in *France et al. v. Göring et al.* The Chamber claimed that 'Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provision of international law be enforced'. This decision can be considered a milestone in the affirmation of the principle in the international arena. The judgment is available in Am. J. Int. L. (1947) 172 ff. (in particular 221). On the history of the principle of individual criminal responsibility in ICL, see Kai Ambos, 'Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis – from Nuremberg to the Hague' in Gabrielle Kirk McDonald, Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Vol. 1, Commentary* (Kluwer Law International 2000) 5 ff.

<sup>16</sup> Van den Wyngaert concurring opinion, para. 13.

<sup>17</sup> Hans Vest, 'Problems of Participation – Unitarian, Differentiated Approach, or Something Else?' (2014) 12 JICJ 295, 300; Jain Neha, *Perpetrators and Accessories in International Criminal Law* (Hart 2014) 81-82; Elies van Sliedregt, *Individual Criminal Responsibility in International Criminal Law* (University Press 2012) 64-65.

example, the wording of subparagraph (a) may remind one of § 25 StGB,<sup>18</sup> while the terms contained in subparagraphs (b) and (c) reflect forms of participation familiar in most legal systems. With regard to the influence of international instruments, subparagraphs (d) and (e) derive respectively from art. 2(3)(c) of the 1997 International Convention for the Suppression of Terrorist Bombings<sup>19</sup> and art. III (c) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide<sup>20</sup>.

In spite of the general acceptance of the provision's final formulation, its interpretation is fragmentary and controversial both in the doctrine and in the ICC case law. The meaning attributed to the terms endorsed in the provision notably changes according to the individual who interprets them and to his or her legal background<sup>21</sup>. This is particularly manifest in the case law related to the interpretation and application of art. 25(3)(a), third alternative, ICCSt. It is not surprising as the same term may have a different meaning depending on the legal system in which it is considered<sup>22</sup>. This holds true in particular in a context where those interpreting the provisions are international judges (and legal officers) coming from extremely different legal backgrounds and cultures. However, an excessively pluralistic and domestic approach in the interpretation of the provision by the ICC judges could create a certain confusion in its concrete application and undermine the credibility of the Court considered – as mentioned above – an autonomous system of international criminal justice, independent from its States parties and their legal orders.

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<sup>18</sup> According to § 25 StGB ('Täterschaft', 'Principals'): '(1) Any person who commits the offence himself or through another shall be liable as a principal. (2) If more than one person commit the crime jointly, each shall be liable as a principal (joint principals)'. Translation of Michael Bohlander, *The German Criminal Code. A Modern English Translation* (Hart 2008) 43.

<sup>19</sup> According to art. 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings 'Any person also commits an offence if that person: (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned'.

<sup>20</sup> Art. III (c) of the Genocide Convention on the Prevention and Punishment of the Crime of Genocide states that 'The following acts shall be punishable: [...] (c) Direct and public incitement to commit genocide'.

<sup>21</sup> In academic literature, art. 25 ICCSt has been labelled as 'a legal Rorschach blot, taking on a different meaning depending upon the underlying legal training, tradition, and even policy-orientation of those seeking to interpret it', see Leila Nadya Sadat and Jarrod M. Jolly, 'International Criminal Courts and Tribunals. Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot' (2014) 27 LJIL 755, 756.

<sup>22</sup> Kai Ambos, Antony Duff, Julian Roberts and Thomas Weigend, 'Introductory Remarks' in Kai Ambos, Antony Duff, Julian Roberts and Thomas Weigend (eds), *Core Concepts in Criminal Law and Criminal Justice, Vol. I* (Cambridge University Press 2019) 1.



#### 4 The Codification of Indirect Perpetration in Article 25(3)(a), third alternative, ICCSt

Before focusing on the interpretation and application of art. 25(3)(a), third alternative, ICCSt, it is important, even briefly, to draw attention to the steps that led to the introduction of indirect perpetration in art. 25(3)(a), third alternative, ICCSt in its current formulation. Indeed, the language adopted in the final version notably differs from that proposed by the Preparatory Committee in 1996.

The Committee's initial idea was to introduce indirect perpetration as a mode of liability in its traditional form, with the following wording: '[a] person shall be deemed to be a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed, such as a minor, a person of defective mental capacity or a person acting under mistake of law or otherwise acting without mens rea'.<sup>23</sup> A few months later, in February 1997, the Chairman of the Working Group on General Principles of Criminal Law and Penalties proposed a broader concept of commission which included perpetration by means of a criminally responsible person.<sup>24</sup> During the negotiations, delegates did not pay significant attention to the modification of the provision's wording.<sup>25</sup> However, the wider notion of indirect perpetration was accepted and included in the final text of art. 25(3)(a) adopted at the Rome Conference and subparagraph (a) – in its present formulation – states that a person can commit a crime 'through another person, regardless of whether that other person is criminally responsible'.

The codification of indirect perpetration in art. 25(3)(a), third alternative, ICCSt constitutes a novelty – above all, because it is the first time that an international instrument has referred explicitly to this mode of liability, and secondly, because of its broad formulation. Before its introduction in the Rome Statute, indirect perpetration had rarely been addressed in international criminal law, both in the practice of the international criminal tribunals and in academic literature.<sup>26</sup>

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<sup>23</sup> Preparatory Committee on the Establishment of an International Criminal Court, Informal Group on General Principles of Criminal Law, Proposal of 26 August 1996 (A/AC.249/CRP.13) 5.

<sup>24</sup> Preparatory Committee on the Establishment of an International Criminal Court, Working Group on General Principles of Criminal Law and Penalties, Chairman's Text, 19 February 1997 (A/AC.249/1997/WG.2/CRP.2/Add.2) 1.

<sup>25</sup> Thomas Weigend, 'Indirect Perpetration' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 538, 543, fn 34 (the author highlights that 'the issue is not [even] mentioned in the brief account on the main debates at the Rome conference by P. Saland'). The German scholar refers to Per Saland, 'International Criminal Law Principles' in S. Lee Roy (ed), *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer International Law 1999) 189, 198–200.

<sup>26</sup> Gerhard Werle and Boris Burghardt, 'Indirect Perpetration: A Perfect Fit for International Prosecution of Armchair Killers?' (2011) 9 JICJ 85; Claus Roxin, 'Sobre la más reciente discusión acerca del dominio de la organización' (2011) 3 RDPC 3, 5.

Indirect perpetration quickly became one of the most frequently applied modes of liability used to capture the responsibility of those in leadership-like positions for the crimes committed by their subordinates.<sup>27</sup> It became one of the main objects of judicial creativity and its interpretation probably represents one of the clearest examples of the importation of a domestic theory on crime attribution at the ICC.

## 5 The Interpretation of Article 25(3)(a), third alternative, ICCSt in the Case Law of the ICC

The interpretative process plays a fundamental role in the application of the Rome Statute. It represents the bridge that connects a rule and its application.<sup>28</sup> As correctly emphasized in academic literature, ‘the application of law is dependent on a preceding act of interpretation, since it is necessary ‘to form an understanding of what the authoritative text requires in order to apply it’’.<sup>29</sup> In such a process, judges play a leading role. However, their task is to interpret ‘rather than to add or subtract’.<sup>30</sup> The interpretative process is not ‘an exact science’ and is highly influenced by the individual background of who is interpreting. This holds true, in particular, in a pluralist context characterized by the coexistence of different legal cultures and backgrounds.

In the absence of a definition of the ‘independence clause’<sup>31</sup> in art. 25(3)(a), third alternative, ICCSt, the majority of judges, since the early decisions, interpreted the provision in accordance with the control over the organization theory, resulting from the application of the *Organisationsherrschaftslehre*, elaborated by the German scholar Claus Roxin.<sup>32</sup> In order to examine the theoretical reasons at the basis of the theory’s adoption at the ICC, it is, first of all, important to focus on its original version.

### 5.1 The *Organisationsherrschaftslehre*

The *Organisationsherrschaftslehre* is part of the broader doctrine developed by Roxin for the purpose of distinguishing principals (or perpetrators) from accessories (or secondary

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<sup>27</sup> For a deep analysis of the ICC case law on art. 25(3)(a), third alternative, ICCSt, see Giulia Lanza, *Indirect Perpetration and Organisationsherrschaftslehre. An Analysis of Article 25(3) of the Rome Statute in light of the German Differentiated and Italian Unitarian Models of Participation in a Crime* (Duncker & Humblot 2021) 101 ff.

<sup>28</sup> Andrei Marmor, *Interpretation and Legal Theory* (2nd edn, Oxford University Press 2005) 112.

<sup>29</sup> Joseph Powderly, ‘The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function. Reflections on Sources of Law and Interpretative Technique’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 444, 445.

<sup>30</sup> Andrew Ashworth, ‘Interpreting Criminal Statutes: A Crisis of Legality’ (1991) 107 LQR 419, 420.

<sup>31</sup> This is the term used by Eser to refer to the autonomous nature of the indirect perpetrator’s responsibility from the responsibility of the tool that he or she uses to carry out the criminal conduct; see Albin Eser, ‘Individual Criminal Responsibility’ in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary, Vol. I* (Oxford University Press 2002) 767, 795.

<sup>32</sup> See infra 5.2.

participants) to a crime: the 'control over' or 'domination of' the act theory (*Tatherrschaftslehre*), elaborated in his seminal work '*Täterschaft und Tatherrschaft*'.<sup>33</sup>

It is important to point out that the German Penal Code contains a prominent example of a differentiated participation model<sup>34</sup>. In the differentiated participation models, it is particularly important to distinguish between principals and accessories because the liability of the latter necessarily hinges on, and derives from, the liability of the former. Consequently, principals to a crime generally bear the greatest responsibility and are punished more severely.<sup>35</sup>

According to Roxin, the difference between principals and accessories hinges on the control, exerted by the former but not by the latter, over the crime. The three main forms of control identified by the German scholar are: (1) the control over the act (*die unmittelbare Täterschaft als Handlungsherrschaft*) characterizing the direct and physical perpetration of a crime (the commission *propria manu* of the crime); (2) the control over the will of the direct perpetrator (*die mittelbare Täterschaft als Willensherrschaft*) characteristic of indirect perpetration, where the individual in the background (*Hintermann*) controls the crime through the control he or she exercises over the will of the physical perpetrator (*Vordermann*); and (3) the functional control over the act (*die Mittäterschaft als funktionelle Tatherrschaft*) based on the functional division of tasks between at least two other perpetrators.<sup>36</sup> It is within the second category that Roxin developed, in an article published for the first time in the *Goldammer's Archiv für*

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<sup>33</sup> On the origins of the theory, see Claus Roxin, *Täterschaft und Tatherrschaft* (first published 1963, 10th edn, De Gruyter 2019) 67 ff. The first to use the term *Tatherrschaft* was Hegler in his monography entitled '*Die Merkmale der Verbrechen*' in 1915. However, an initial version of the control over the act theory was presented for the first time by Welzel: Hans Welzel, 'Studien zum System des Strafrechts' (1939) 58 ZStW 491.

<sup>34</sup> In particular, § 25 StGB provides for modes of principal liability (direct perpetration, indirect perpetration (paragraph (1)) and co-perpetration (paragraph (2))), while § 26 StGB and § 27 StGB include accessory forms of participation in a crime (respectively instigation and assisting in the commission of the crime). For an overview of the German differentiated model, see Antje Du Bois-Pedain, 'Participation in Crime' in Kai Ambos, Antony Duff, Julian Roberts, Thomas Weigend and Alexander Heinze (eds), *Core Concepts in Criminal Law and Criminal Justice, Vol. I* (Cambridge University Press 2020) 94, 112–117; Bernd Heinrich, *Strafrecht Allgemeiner Teil* (6th edn, Kohlhammer 2019) 509 ff.; Uwe Murmann, *Grundkurs Strafrecht: Allgemeiner Teil, Tötungsdelikte, Körperverletzungsdelikte* (5th edn, C.H. Beck 2019) 342 ff.; Geneuss, Julia, 'German Report on Individual Liability for Business Involvement in International Crimes' (2017) 88 RIDP 267, 272–278; Markus D. Dubber, Tatjana Hörnle, *Criminal Law: A Comparative Approach* (Oxford University Press 2014) 323 ff.; Kai Ambos, Stefanie Bock, 'Germany' in Alan Reed, Michael Bohlander (eds), *Participation in Crime. Domestic and Comparative Perspectives* (Routledge 2013) 323; Thomas Weigend, 'Germany' in Kevin J. Heller and Markus D. Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2011) 252, 265–267; Michael Bohlander, *Principles of German Criminal Law* (Oxford University Press 2009) 153.

<sup>35</sup> According to § 26 StGB instigators are punished with the same penalty provided for perpetrators. However, it has been noted that it is likely that the instigator will be considered less blameworthy than the perpetrator, see Vest (n 17) 302.

<sup>36</sup> Claus Roxin, *Strafrecht Allgemeiner Teil, Band II, Besondere Erscheinungsformen der Straftat* (3rd edn, C.H. Beck 2003) 19 ff.

*Strafrecht* in 1963,<sup>37</sup> a new and autonomous form of indirect perpetration, based on the control over the will by means of organized power structures (*die Willensherrschaft kraft organisatorischer Machapparate*).<sup>38</sup> This variant is in addition to the traditional conception of indirect perpetration: *die Willensherrschaft kraft Nötigung*, where the physical perpetrator of the crime acts under duress or coercion, and *die Willensherrschaft kraft Irrtums*, where the perpetrator acts as a result of a mistake due to deceit from the individual in the background, or where the latter takes advantage of a pre-existing mistake of the former.<sup>39</sup> On the basis of the new formulation, an individual can be considered an indirect perpetrator when he or she commits the crime by means of an organized power structure at his or her disposal, in spite of the criminal responsibility of its members and thus of the executors of the crime. In this scenario, the indirect perpetrator controls the will of the direct agents by means of the control exerted over the organization. This innovative version of Roxin's theory broadens the concept of perpetration, going beyond the traditional forms of indirect perpetration, where the direct agent is innocent. Therefore, in light of the new form of indirect perpetration, a criminally responsible agent may also be used as a tool to commit the crime. In other words, such an agent is considered a cog in the machinery (the organization) used by the *Hintermann* as an instrument to execute the crime.<sup>40</sup>

## 5.2 The transposition of the *Organisationsherrschaftslehre* to the ICC

Since the initial jurisprudence of the ICC, the *Organisationsherrschaftslehre* has been the favored criterion for the interpretation and application of art. 25(3)(a), third alternative, ICCSt. It addresses instances in which a crime is committed through a criminally responsible person, and, at first sight, it seems capable of reflecting the responsibility of those who occupy senior leadership positions and use others to physically commit the crimes and carry out the criminal conduct, while they remain in the background (the so-called 'intellectual perpetrators', 'masterminds' or 'perpetrators behind the desk').

This variant of the control theory implicitly appeared for the first time in the warrant of arrest decision against *Lubanga*.<sup>41</sup> The aforementioned decision is particularly important because it outlined, albeit rudimentarily, the requisite elements of indirect perpetration and served as a model for the Prosecutor's request of a warrant of arrest against *Al*

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<sup>37</sup> Claus Roxin, 'Straftaten im Rahmen organisatorischer Machtapparate' (1963) GA, 193.

<sup>38</sup> For an updated discussion on the theory, see Roxin (n 33) 269–280, 839–848; id. (n 36) 46–58. For an overview of the doctrine and its application at both domestic and international levels, see Lanza (n 27).

<sup>39</sup> Roxin (n 36) 46–47. See also Wolfgang Joecks, Jörg Scheinfeld, 'StGB § 25 Täterschaft' in Volker Erb, Jürgen Schäfer (eds), *Münchener Kommentar zum Strafgesetzbuch, Band I*, §§ 1–37 (4th edn, C.H. Beck 2020) mn 141 ff.

<sup>40</sup> Roxin (n 33) 272.

<sup>41</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-US-Corr, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, Pre-Trial Chamber I, 10 February 2006, paras. 94–96.

*Bashir*.<sup>42</sup> The most elaborate analysis of the application of the *Organisationsherrschaftslehre* at the ICC is contained in the *Katanga* and *Ngudjolo* confirmation of charges decision<sup>43</sup> and in the *Katanga* trial judgment<sup>44</sup>. For a long time, the former had served as a benchmark for subsequent ICC case law (eg, the *Al Bashir* warrant of arrest, the confirmation of charges decisions in the *Muthaura*, *Kenyatta* and *Ali*, and *Ruto*, *Kosgey* and *Sang* cases). Nevertheless, the *Katanga* trial judgment played a fundamental role in the determination and elaboration of the doctrine's constitutive elements, in spite of the defendant's conviction under a different mode of liability (art. 25(3)(d) ICCSt). Indirect perpetration within the meaning of art. 25(3)(a), third alternative, ICCSt, interpreted according to the *Organisationsherrschaftslehre*, has been applied in many other cases before the ICC; however, at times, it has only been applied as a potential and alternative mode of liability, and in most cases, it has been applied jointly with co-perpetration, resulting in indirect co-perpetration.<sup>45</sup>

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<sup>42</sup> *Situation in Darfur, Sudan*, ICC-02/05-157-AnxA, Public Redacted Version of the Prosecutor's Application under Article 58, Office of the Prosecutor, 14 July 2008, paras. 248–249, fn 309. The latter explicitly refers to the Pre-Trial Chamber's decision on the issuance of the arrest warrant against *Lubanga*.

<sup>43</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the confirmation of charges, Pre-Trial Chamber I, 30 September 2008 (hereinafter '*Katanga and Ngudjolo* confirmation of charges').

<sup>44</sup> *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436-tENG, Judgment pursuant to article 74 of the Statute, Trial Chamber II, 7 March 2014 (hereinafter '*Katanga* trial judgment').

<sup>45</sup> *Inter alia*, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-461-Corr-Red, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Pre-Trial Chamber I, 13 November 2019, para. 809 ff.; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2359, Judgment, Trial Chamber VI, 8 July 2019, paras. 772–780; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014, paras. 97, 101–135; *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-422-Red, Decision on the confirmation of charges against Dominic Ongwen, Pre-Trial Chamber II, 23 March 2016, paras. 38–41; *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-186, Decision on the confirmation of charges against Charles Blé Goudé, Pre-Trial Chamber I, 11 December 2014, paras. 136–158; *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-654-Red, Decision on the confirmation of charges against Laurent Gbagbo, Pre-Trial Chamber I, 12 June 2014, paras. 230–241; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, para. 428; *Situation in the Libyan Arab Jamahiriya*, ICC-01/11-01/11-1, Decision on the 'Prosecutor's Application pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENSUSI', Pre-Trial Chamber I, 27 June 2011, paras. 69–71; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, para. 349; *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010, paras. 154, 157; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 223; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-14-tENG, Decision on the Prosecutor's Application for Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008 (hereinafter '*Bemba* warrant of arrest

Before the control theory was introduced at the ICC, it made a timid appearance in a few cases at the ad hoc Tribunals. In particular, it was adopted for the purpose of interpreting the term ‘commission’ under art. 7(1) ICTYSt in the *Stakić* trial judgment,<sup>46</sup> was furthermore proposed by the ICTY Prosecutor in the *Milutinović et al.* case,<sup>47</sup> and was also mentioned in Judge Schomburg’s separate opinion appended to the *Gacumbitsi* appeals judgment.<sup>48</sup> As this innovative approach first appeared in a context dominated by the joint criminal enterprise (JCE) doctrine,<sup>49</sup> it was destined to be cast aside. Nonetheless, it is interesting to note as, at that stage, the adoption of an alternative approach to JCE, namely the control theory, seemed to be more a reflection of the deciding Judge’s German legal background than the result of a deep and grounded doctrinal reflection. Indeed, Judge Schomburg was the presiding judge of the ICTY Chamber that convicted *Stakić*.

One of the most critical issues regarding the application of the control over the organization theory at the ICC is related to its genesis in domestic German criminal law,<sup>50</sup> to its consistency with the Rome Statute<sup>51</sup> and to the inadequacy of the majority’s

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decision’); *Katanga and Ngudjolo* confirmation of charges, para. 508. In the *Bemba* warrant of arrest decision, however, we find a rudimentary application of the combined mode of liability.

<sup>46</sup> *Prosecutor v. Milomir Stakić*, IT-97-24-T, Judgment, Trial Chamber II, 31 July 2003, paras. 438–440 (‘*Stakić* trial judgment’).

<sup>47</sup> *Prosecutor v. Milan Milutinović et al.*, IT-05-87-PT, Prosecution’s Notice of Filing Amended Joinder Indictment and Motion to Amend the Indictment with Annexes, 16 August 2005.

<sup>48</sup> *Prosecutor v. Sylvestre Gacumbitsi*, ICTR-2001-64-A, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006 (‘Schomburg separate opinion’). In his dissenting opinion appended to the *Gacumbitsi* appeals judgment, Judge Schomburg promoted the adoption of the approach previously employed in the *Stakić* trial judgment.

<sup>49</sup> The doctrine was adopted by the Appeals Chamber of the ICTY in the *Tadić* case to interpret the term ‘commission’ within the meaning of art. 7 ICTYSt. It is primarily based on the English joint enterprise doctrine and the U.S. Pinkerton conspiracy doctrine. For an overview on the JCE in ICL, *inter alia*, Lachezar Yanev, ‘Joint Criminal Enterprise’ in Jérôme De Hemptinne, Robert Roth, Elies Van Sliedregt (eds), *Modes of Liability in International Criminal Law* (Cambridge University Press 2019) 121; Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes* (Springer 2008), 127 ff.; Gideon Boas, James L. Bischoff and Natalie L. Reid, *International Criminal Law Practitioner Library Series, Vol. 1: Forms of Responsibility in International Criminal Law* (Cambridge University Press 2007) 8 ff.; Antonio Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise’ (2007) 5 JICJ 109.

<sup>50</sup> This aspect has been recently highlighted by the Nigerian Judge Chile Eboe-Osuji in his partly concurring opinion, attached to the *Ntaganda* appeals judgment: *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2666-Anx5, Partly concurring opinion of Judge Chile Eboe-Osuji, 30 March 2021, paras. 35, 43 (hereinafter ‘Judge Chile Eboe-Osuji partly concurring opinion’).

<sup>51</sup> According to some German scholars – and scholars with a German background – the wording of art. 25(3)(a) ICCSt reflects Roxin’s *Organisationsherrschaftslehre*: Alejandro Kiss, ‘Indirect Commission’ in Jérôme De Hemptinne, Robert Roth, Elies Van Sliedregt (eds), *Modes of Liability in International Criminal Law* (Cambridge University Press 2019) 30; Thomas Weigend, ‘Perpetration through an Organization: The Unexpected Career of a German Legal Concept’ (2011) 9 JICJ 91, 95; Claus Kreß, ‘Claus Roxin’s Lehre von der Organisationsherrschaft und das Völkerstrafrecht’ (2006) GA 304, 307.

reasoning for its adoption on the basis of the sources of law provided by the Statute<sup>52</sup>. Art. 21 ICCSt, in contrast to art. 38(1)(d) of the Statute of the International Court of Justice, does not refer to ‘the teachings of the most highly qualified publicists of the various nations’ as a subsidiary source of law.<sup>53</sup> Moreover, the Rome Statute codifies the principle of legality (art. 22 ICCSt)<sup>54</sup> and, as an international treaty, is subject to the Vienna Convention on the Law of Treaties (VCLT) and its interpretative techniques<sup>55</sup>. All these aspects must be considered in the interpretative process since it plays a fundamental role in the application of the Rome Statute.

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<sup>52</sup> Art. 21 ICCSt (‘Applicable law’) contains the sources of law upon which judges rely on their judicial activity.

<sup>53</sup> The provision has a peculiar structure and contains several different hierarchical levels. The first level consists of the internal sources of law found in subparagraph (a): the Statute, the Elements of Crimes and the Rules of Procedure and Evidence. These are ranked in decreasing order of importance. The Statute is therefore paramount and is followed by the Elements of Crimes and then by the Rules of Procedure and Evidence. A second level of hierarchy exists between internal sources (subparagraph (a)) and external sources of law (subparagraphs (b) and (c)), where the first category prevails over the second. Within the external sources of law, one can distinguish two categories: (1) ‘applicable treaties, principles and rules of international law, including the established principles of international law of armed conflict’ (subparagraph (b)); and (2) ‘general principles of law derived from national legal systems of the world including, as appropriate, the national laws of the states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards’ (subparagraph (c)). Given the primacy of art. 21(1)(a) ICCSt, and thus of the Statute, the Elements of Crimes and the Rules of Procedure and Evidence, the following subparagraphs (b)–(c), containing subsidiary sources of law, are only applicable when there is a gap after relying upon the sources listed in subparagraph (a). In this vein Gilbert Bitti, ‘Article 21 and the Hierarchy of Sources of Law before the ICC’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 411.

<sup>54</sup> The corollaries of the principle of legality, strictly related to the interpretation of art. 25(3) ICCSt, are the principles of strict construction and *in dubio pro reo* contained in art. 22(2) ICCSt. In light of the first, judges cannot expand the definitions of the crimes under the jurisdiction of the Court beyond their original meaning or create new law amending the Statute’s provisions. The *in dubio pro reo* principle can be used when doubts regarding the meaning that is attributed to a term or a provision remain after having applied the interpretative techniques. According to it, in case of ambiguity, the meaning most favorable to the accused must be chosen.

<sup>55</sup> Since the ICC is a treaty-based institution and the Rome Statute is an international treaty, the interpretative techniques set by art. 31 (‘General rule of interpretation’) and art. 33 (‘Supplementary means of interpretation’) VCLT are applicable also before the Court. According to art. 31(1) VCLT, the interpretation of a treaty must be carried out in good faith, considering the meaning of the terms used and their context, in light of the object and purpose of the treaty. There are several interpretative approaches in this provision: (1) textual analysis of the terms (literal interpretation); (2) context of the terms to be analyzed (contextual interpretation); and (3) object and purpose of the treaty (teleological interpretation). These methods of interpretation are not ordered according to importance. Rather, they should be considered as occupying an equal position, complementing one another. Art. 32 VCLT provides supplementary means of interpretation, such as the preparatory works (*travaux préparatoires*) and the circumstances under which the treaty was concluded. It is only possible to rely on the preparatory works for the purpose of confirming the meaning attributed to a certain term or provision according to the methods provided by art. 31 VCLT, or when ambiguities remain after its application.

### 5.3 The theoretical foundation of the control over the organization theory according to the case law of the ICC

The adoption of the control over the organization theory at the ICC is based on several premises: (i) the prevailing hierarchical reading of art. 25(3) ICCSt;<sup>56</sup> (ii) the presumed adoption of a differentiated model of participation in a crime; and (iii) the rejection of the subjective and objective approaches typically used to distinguish between principals and accessories to a crime.<sup>57</sup> The dominant approach can be considered a ‘German approach’ to the provision, not only for the adoption of the control theory, but also for the general approach to art. 25(3) ICCSt and to its structure. Indeed, as mentioned above, the existence of a hierarchy among modes of liability and the necessity to differentiate between principals and accessories to a crime are typical of the differentiated participation model such as the German one<sup>58</sup>.

From a detailed analysis of the case law<sup>59</sup>, it is notable that those premises are taken for granted and are not the result of a deep theoretical analysis. As will be seen, the same holds true with regards to the adoption of the control theory and, in particular, of the control over the organization theory resulting from the transposition of the *Organisationsherrschaftslehre* to the ICC.

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<sup>56</sup> An exception is represented by the *Katanga* trial judgment, where the majority of judges adopted the control over the crime theory despite the rejection of a hierarchical reading of the provision: *Katanga* trial judgment, paras. 1386–1387, 1393–1396. The absence of ‘correlation between mode of liability and penalty’ is highlighted also in the *Bemba et al.* appeals judgment: *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-2276-Red, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Decision on Sentence pursuant to Article 76 of the Statute’, Appeals Chamber, 8 March 2018, paras. 1, 59–60 and related footnotes (the judges stated that it is not automatic ‘that the principal perpetrator of a crime/an offence necessarily deserves a higher sentence than the accessory to that crime/offence’ since, in order to determine the sanction, it is necessary to proceed with ‘a case-by-case assessment of the individual circumstances of each case’). In this vein, more recently, is also Judge Luz Del Carmen Ibáñez Carranza: *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2666-Anx3, Separate opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr. Ntaganda’s appeal, 30 March 2021, para. 224. In spite the Judge is in favor of the adoption of the control theory, she stated that this does not implies that ‘in all cases the perpetrators will deserve a higher sentence than persons bearing criminal responsibility under article 25(3)(b) to (d) or pursuant to article 28 of the Statute’ (hereinafter ‘Luz Del Carmen Ibáñez Carranza separate opinion’).

<sup>57</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, paras. 996–999 (‘*Lubanga* trial judgment’); *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803tEN, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, paras. 330–341 (‘*Lubanga* confirmation of charges’); *Katanga and Ngudjolo* confirmation of charges, paras. 482–486. In this sense *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, paras. 346–348; *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, Pre-Trial Chamber I, 16 December 2011, para. 279.

<sup>58</sup> See supra 5.1.

<sup>59</sup> Lanza (n 27) 150 ff.



### 5.3.1 Dominant approach

In the first decision that adopted the control theory, the *Lubanga* confirmation of charges decision, the judges failed to make any reference to the mechanisms of interpretation provided for in the VCLT. No allusion is made to an apparent lacuna in art. 25(3)(a) ICCSt justifying the reliance on subsidiary sources of law.<sup>60</sup> They simply applied the theory without explicitly invoking the sources of law listed in art. 21(1)(b)–(c) ICCSt. The Chamber relied on its broad application in several legal systems,<sup>61</sup> but only quoted Judge Schomburg’s isolated separate opinion and a few other doctrinal sources (in particular Fletcher and Werle).<sup>62</sup> The decision does not contain an in-depth analysis of the theory’s adoption in other legal systems. Consequently, it is difficult to establish whether the judges intended to attribute the status of general principle of law to the control theory. A few additional references to the doctrine are included in the discussion of co-perpetration and its constitutive elements.<sup>63</sup> The Chamber’s doctrinal approach is particularly manifest in this part of the decision, where the judges relied on Roxin’s writings among the scholars quoted and on the *Stakić* trial judgment issued by the ICTY.<sup>64</sup>

In its decision on the confirmation of charges in the *Katanga and Ngudjolo* case, the Pre-Trial Chamber continued along the path laid in the *Lubanga* case and followed the same approach that had been previously adopted.<sup>65</sup> In applying the control theory, the Chamber analyzed its consistency with the Statute, being the primary source of law upon which to rely according to art. 21(1)(a) ICCSt.<sup>66</sup> The judges further specified that the ‘[a]pplication of the Statute requires not only resorting to a group of norms by applying any of the possible meanings of the words in the Statute, but also requires excluding at least those interpretations of the Statute in which the application would engender an asystematic *corpus juris* of unrelated norms’.<sup>67</sup> After invoking the objective, subjective and control over the crime approaches as possible criteria used for distinguishing between principals and accessories, the judges opted for the third alternative, deciding that it was the most consistent with the Statute.<sup>68</sup> In justifying the application of the combined mode of liability (indirect co-perpetration) used to attribute the crimes to *Katanga* and *Ngudjolo*, they relied primarily on a textual interpretation.<sup>69</sup> The key difference between the methodology adopted for the purpose of applying the German theory in the *Lubanga* and

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<sup>60</sup> See *supra* n 53.

<sup>61</sup> *Lubanga* confirmation of charges, para. 330.

<sup>62</sup> *Ibid.*, fn 418.

<sup>63</sup> *Ibid.*, paras. 342–367 and related footnotes.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Katanga and Ngudjolo* confirmation of charges, paras. 480–486.

<sup>66</sup> *Ibid.*, para. 481.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*, paras. 482–486. The Pre-Trial Chamber followed its previous decision, see *Lubanga* confirmation of charges, paras. 328–341.

<sup>69</sup> *Katanga and Ngudjolo* confirmation of charges, para. 491 (the Chamber adopted a ‘weak or inclusive’ interpretation of ‘or’ connecting joint commission and commission through another person within the meaning of art. 25(3)(a) ICCSt).

in the *Katanga and Ngudjolo* confirmation of charges decisions lies in the larger number of doctrinal references contained in the latter compared to the former.<sup>70</sup> However, the decision mainly quotes German and Spanish literature.

Even in this case, the judges did not expend significant energy verifying whether the doctrine adopted could be considered a principle of law according to art. 21(1)(c) ICCSt. They merely referred to the domestic jurisdictions whose practitioners have relied on the *Organisationsherrschaftslehre* when seeking to attribute criminal liability to leaders for crimes committed by their subordinates (Germany, Argentina, Peru, Chile and Spain).<sup>71</sup> It is important to note that the Chamber only quoted countries that were heavily influenced by German law and doctrine.<sup>72</sup> In support of its rationale, the Chamber also referred to the feeble attempt to adopt the theory at the ICTY (in the *Stakić* case) and in the *Bemba* case,<sup>73</sup> which only implicitly endorsed the control over the organization theory in the warrant of arrest decision.<sup>74</sup> The judges further confirmed that the control over the organization theory is encompassed in the legal framework of art. 25(3)(a), third alternative, ICCSt.<sup>75</sup>

The inadequacy of the Chamber's reasoning expounding the doctrine's theoretical foundations is manifest in both confirmation of charges decisions. Such deficiency also characterizes the subsequent case law that followed the reasoning of these decisions. This tendency can, to some extent, be justified by the peculiar role played by the Pre-Trial Chamber. Its task is not to carry out an in-depth analysis of substantive legal issues,<sup>76</sup> but to verify whether there is sufficient evidence to establish substantial grounds to believe that the suspect committed the crime charged and, consequently, to send the case on to the trial stage. Nevertheless, as will be seen, this became a thorny issue at the stages of the proceedings that followed the pre-trial phase, as the trial and appeals judgments also failed to pay significant attention to the theoretical foundations of the doctrine and to elaborate more on important points.

In the *Lubanga* case, the Trial Chamber highlighted the importance of resorting to art. 31(1) VCLT in order to interpret the Rome Statute and its provisions. The Trial Chamber

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<sup>70</sup> Ibid, fn 647.

<sup>71</sup> Ibid., paras. 500, 502–505 and related footnotes.

<sup>72</sup> Ibid., paras. 502–505 and related footnotes.

<sup>73</sup> Ibid., paras. 500, 506–509.

<sup>74</sup> *Bemba* warrant of arrest decision, para. 78.

<sup>75</sup> *Katanga and Ngudjolo* confirmation of charges, paras. 500–501, 508, 510. Along these lines, more recently, is also Judge Luz Del Carmen Ibáñez Carranza: Luz Del Carmen Ibáñez Carranza separate opinion, para. 311. According to the judge 'indirect perpetration through an organised power apparatus is a form of commission through another person as provided in article 25(3)(a) of the Statute whereby crimes are committed through an organised power apparatus'.

<sup>76</sup> With particular regard to the confirmation of charges hearing, it has been stated that it 'is neither a 'trial before the trial' nor a 'mini trial': *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-412, Decision on the admissibility for the confirmation hearing of the transcripts of deceased Witness 12, Pre-Trial Chamber I (Single Judge Steiner), 18 April 2008, p. 4; see also *Katanga and Ngudjolo* confirmation of charges, para. 64.

stated that art. 25(3)(a) ICCSt must be interpreted 'in good faith in accordance with the ordinary meaning to be given to the language of the Statute, bearing in mind the relevant context and in light of its object and purpose'.<sup>77</sup> Interestingly, the judges further claimed that arts. 25 and 28 ICCSt 'should be interpreted in a way that allows to properly expressing and addressing the responsibility for these crimes'.<sup>78</sup> This statement clearly reflects a teleological approach to the provisions on responsibility.

In the *Katanga* judgment, the methodology behind the Trial Chamber's reliance on the German doctrine is particularly innovative. The majority did not justify the adoption of this theory by pointing to its broad recognition and application in national legal systems, as was done in previous decisions.<sup>79</sup> Rather, it based its reasoning on the guiding role of the theory in the distinction between principals and accessories, and on the interpretation of the modes of liability listed in art. 25(3) ICCSt.<sup>80</sup> This part of the judgment must be read in conjunction with the section dealing with the 'Method of Interpretation on the Founding Texts of the Court'.<sup>81</sup>

In particular, the judges claimed that because art. 25 ICCSt does not contain a lacuna, it is not necessary to rely on the subsidiary sources of law provided by art. 21(1)(b)–(c) ICCSt.<sup>82</sup> As a result, the adoption of the control theory did not need to be based on its recognition in customary law, nor on its presumed status as a general principle of international law. In conformity with the prevailing case law, the judges drew attention to the importance of the methods of interpretation contained in arts. 31 and 32 VCLT.<sup>83</sup> They stated that in order to interpret the provision, it is necessary to consider several factors, including the ordinary meaning of the terms, their context, and the object and purpose of the treaty.<sup>84</sup>

The Chamber further invoked the principle of effectiveness, requiring good faith and the rejection of all interpretations resulting in the violation or nullity of other provisions.<sup>85</sup> In addition, the Chamber recalled the importance of the principle of legality and the protection of internationally recognized human rights in the interpretative process of the Rome Statute and in the limitation of judicial creativity.<sup>86</sup> The principle has been further invoked in order to justify the adoption of the control theory to distinguish principals from accessories.<sup>87</sup>

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<sup>77</sup> *Lubanga* trial judgment, para. 979.

<sup>78</sup> *Ibid.*, para. 976.

<sup>79</sup> *Lubanga* confirmation of charges, para. 330; *Katanga and Ngudjolo* confirmation of charges, para. 485.

<sup>80</sup> *Katanga* trial judgment, paras. 1388, 1395.

<sup>81</sup> *Ibid.*, paras. 37–57.

<sup>82</sup> *Ibid.*, paras. 39–40.

<sup>83</sup> *Ibid.*, paras. 43, 53, 57.

<sup>84</sup> *Ibid.*, para. 45.

<sup>85</sup> *Ibid.*, para. 46.

<sup>86</sup> *Ibid.*, paras. 50–57.

<sup>87</sup> *Ibid.*, para. 1388.

In the Chamber's view such an approach 'appears the most consonant with article 25 of the Statute, taken as a whole, and best takes its surrounding context into account, in due consideration of the terms of article 30'.<sup>88</sup> It is the 'guiding principle' which enables 'the body of relevant provisions of this article concerning individual criminal responsibility to take full effect'.<sup>89</sup> The judges did not consider as decisive the fact that the theory had been recognized by various domestic legal systems.<sup>90</sup>

While the Chamber initially appeared skeptical of the teleological approach,<sup>91</sup> it is likely that, substantially, such an approach played a role (along with the contextual approach) in justifying the application of the control theory.<sup>92</sup> This is particularly evident when the judges claimed that, considering the collective nature of the crimes under the ICC jurisdiction and the wording of art. 25(3)(a), third alternative, ICCSt, there were no reasons for excluding the possibility of committing a crime through an organization from its meaning.<sup>93</sup> They further specified that this was only one potential 'legal solution', capable of giving shape to indirect perpetration through a responsible person under art. 25(3)(a), third alternative, ICCSt.<sup>94</sup>

The Trial Chamber's methodological choice adopted in the *Katanga* case<sup>95</sup> was also followed in the *Lubanga* appeals judgment.<sup>96</sup> The Appeals Chamber referred to the control over the crime theory as the approach that 'better fits' the distinction between principal and accessories endorsed in art. 25(3) ICCSt,<sup>97</sup> rather than resorting to art. 21 ICCSt and general principles of law to justify the adoption of the theory. The methodology used by the Chamber to support its reasoning regarding the adoption of the theory at the ICC is not particularly sophisticated.

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<sup>88</sup> Ibid., para. 1394.

<sup>89</sup> Ibid., para. 1395.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid., paras. 54–55 (the Chamber claimed that 'a teleological approach entailing consideration of the need to end impunity for the perpetrators of the most serious crimes could be considered antithetical to the principle of legality and, more specifically, to the rule of strict construction and the principle of *in dubio pro reo*', para. 54; it further stated that 'the aim of the Statute [...] can under no circumstance be used to create a body of law extraneous to the terms of the treaty or incompatible with a purely literal reading of the text', para. 55).

<sup>92</sup> Ibid., paras. 1394–1395.

<sup>93</sup> Ibid., paras. 1403, 1405.

<sup>94</sup> Ibid., para. 1406.

<sup>95</sup> In favor of the Chamber's methodological approach, see Alicia Gil Gil and Elena Maculan, 'Current Trends in the Definition of 'Perpetrator' by the International Criminal Court: From the Decision on the Confirmation of Charges in the Lubanga case to the Katanga Judgment' (2015) 28 LJIL 349, 367. For a critical view, Carsten Stahn, 'Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment' (2014) 12 JICJ 809, 825, according to the author 'it would have been preferable to ground individual elements of Roxin's theory more carefully in comparative analysis'.

<sup>96</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction', Appeals Chamber, 1 December 2014.

<sup>97</sup> Ibid., 472–473.

The judges made clear that they were ‘not proposing to apply a particular legal doctrine or theory as a source of law’.<sup>98</sup> In contrast, they gave a guiding role to the German theory in the interpretation of the provision. The Chamber stated that it is ‘appropriate to seek guidance from approaches developed in other jurisdictions in order to reach a coherent and persuasive interpretation of the legal texts’.<sup>99</sup> In the judges’ view, this practice and reliance on the normative approach do not result in the violation of the principle of legality under art. 22 ICCSt.<sup>100</sup> The Chamber emphasized the importance of this approach in distinguishing between principals and accessories, and recalled that the JCE doctrine is also a reflection of the normative approach.<sup>101</sup>

The methodological approach adopted by the Trial and Appeals Chambers constitutes a turning point and an attempt to overcome some of the critiques previously raised with respect to the Pre-Trial Chamber’s decisions – in particular the inconsistency of the German doctrine with the Rome Statute, which the dissenting judges had already highlighted.

### 5.3.2 *Minority approach*

Even though the control theory has so far represented the prevailing approach to the interpretation of the provision, it is not without controversy. In case law, the dominant approach faced strong criticism, notably in Judge Fulford’s separate opinion appended to the *Lubanga* judgment,<sup>102</sup> in Judge Van den Wyngaert’s concurring opinion attached to the *Ngudjolo* trial judgment<sup>103</sup> and in her minority opinion submitted in the *Katanga* trial judgment.<sup>104</sup> In their dissenting opinions, both Judge Fulford and Judge Van den Wyngaert claimed that the theory was not supported by the Rome Statute.<sup>105</sup> They further criticized the dominant approach for its lack of adherence to the provision’s ordinary meaning.<sup>106</sup>

In order to challenge the majority opinion, the judges relied in particular on art. 31(1) VCLT and invoked the plain textual reading of art. 25(3)(a) ICCSt.<sup>107</sup> According to the judges, their colleagues went far beyond the ordinary meaning of the provision.<sup>108</sup> Judge Fulford underscored how the theory had been introduced in Germany to address the particular needs of its legal system and how these diverged from that of the Rome

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<sup>98</sup> *Ibid.*, para. 470.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*, para. 471.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, 14 March 2012 (hereinafter ‘Fulford separate opinion’).

<sup>103</sup> Van den Wyngaert concurring opinion.

<sup>104</sup> *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436-tENG, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014 (hereinafter ‘Van den Wyngaert minority opinion’).

<sup>105</sup> Fulford separate opinion, paras. 3, 6–12; Van den Wyngaert concurring opinion, paras. 6, 67.

<sup>106</sup> Fulford separate opinion, para. 10; Van den Wyngaert concurring opinion, para. 8.

<sup>107</sup> Fulford separate opinion, paras. 7, 13; Van den Wyngaert concurring opinion, paras. 8, 11, 30, 57, 69.

<sup>108</sup> Fulford separate opinion, para. 12; Van den Wyngaert concurring opinion, para. 17.

Statute.<sup>109</sup> Judge Van den Wyngaert focused on the universal mission of the Court and on the danger of implementing a particular national model.<sup>110</sup> She furthermore highlighted that it is very unlikely that the control theory ‘qualifies as a general principle of law in the sense of Article 21(1)(c) ICCSt’.<sup>111</sup> She stated that the extension of ‘the scope of certain forms of criminal responsibility’ entails ‘an inappropriate expansion of the Court’s jurisdiction’.<sup>112</sup> In the Belgian Judge’s view, the majority’s adoption of the control theory and the broad interpretation of art. 25(3)(a) ICCSt – including indirect co-perpetration – violate art. 22(2) ICCSt.<sup>113</sup> She established that the principles of strict construction and in *dubio pro reo* must also apply to the modes of liability contained in the Statute and prevail over the methods of treaty interpretation provided by the VCLT, in particular the teleological method.<sup>114</sup> In this regard, the Judge expressly stated that it is not possible to invoke the ‘fight against impunity’ to justify the teleological interpretation of the provisions on criminal responsibility.<sup>115</sup>

More recently, the theory was also criticized by Judge Morrison<sup>116</sup> and Judge Eboe-Osuji in their separate opinions appended to the *Ntaganda* appeals judgment. The concerns presented by the two dissenting judges on these aspects broadly align with those previously presented by Judge Fulford and Judge Van den Wyngaert.<sup>117</sup>

### 5.3.3 Some observations on the different approaches developed in the case law of the ICC

On the basis of the analyzed case law, it is not possible to identify a unique methodological approach to the interpretation of art. 25(3) ICCSt. It is not always clear whether the majority, in choosing to apply the control theory and the control over the organization theory relied on principles of treaty interpretation, general principles of law derived from national legal systems or whether this approach represents an attempt to develop an international *Dogmatik*.<sup>118</sup> The difficulty of adopting the theory purely on the basis of the plain reading of art. 25(3)(a) ICCSt is manifest.<sup>119</sup> What further emerges from

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<sup>109</sup> Fulford separate opinion, paras. 10–11.

<sup>110</sup> Van den Wyngaert concurring opinion, para. 5.

<sup>111</sup> *Ibid.*, para. 17.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*, paras. 6–7, 64, 68.

<sup>114</sup> *Ibid.*, para. 18.

<sup>115</sup> *Ibid.*, para. 16.

<sup>116</sup> *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-2666-Anx2, Separate Opinion of Judge Howard Morrison, 30 March 2021 (hereinafter ‘Judge Howard Morrison separate opinion’).

<sup>117</sup> Judge Chile Eboe-Osuji partly concurring opinion, para. 95; separate opinion of Judge Howard Morrison, paras. 3, 12.

<sup>118</sup> This has been highlighted by Ohlin, in particular with regards to the interpretation of co-perpetration, Jens David Ohlin, ‘Co-Perpetration German Dogmatik or German Invasion?’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 517–518, 525. However, Ohlin’s reasoning can be extended to the concept of indirect perpetration.

<sup>119</sup> Powderly (n 29) 473.

the case law is an insufficient justification of the methodology adopted by the judges in the discussion of the doctrine's theoretical foundations at the Court.

Regarding the analyzed case law, certain trends are identifiable.<sup>120</sup> For example, in most cases the 'techniques formally identified are 'not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means''.<sup>121</sup> In this regard, it is interesting to note how the *Katanga* Trial Chamber has used the principle of legality to justify its application of the control theory,<sup>122</sup> upon which Judge Van den Wyngaert also relied in her rejection of the theory.<sup>123</sup> Art. 31(1) VCLT was invoked in order to support both the approach favoring the adoption of the control theory<sup>124</sup> and the opposite one rejecting it.<sup>125</sup> This is not novel. The judges of the ad hoc Tribunals have also invoked different approaches to interpretation, contained in art. 31(1) VCLT, when justifying their different views.<sup>126</sup> Nevertheless, excessive divergence in the methodology adopted for interpreting a provision is likely to create confusion, leading to conflicting results. This is why it is desirable to ensure future uniformity on this matter. The development of a theory of interpretation would help remediate the current fragmentation that arises in a multicultural context, such as the one which characterizes the ICC, where the legal background of the judges and their legal officers notably influences the adoption of a certain approach or theory.<sup>127</sup>

The *Ntaganda* appeals judgment clearly reflects this scenario: indeed, in the dissenting opinions attached to the decision, the differences between the judges' legal backgrounds are manifest.<sup>128</sup> Judge Morrison firmly refused the control theory. The Judge, as well as Judge Fulford, for example, has a common law legal background and he is not familiar

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<sup>120</sup> On the difference between 'finding of the law' and 'justification of the law', see Alexander Heinze, *International Criminal Procedure and Disclosure: An Attempt to Better Understand and Regulate Disclosure and Communication at the ICC on the Basis of a Comprehensive and Comparative Theory of Criminal Procedure* (Duncker & Humblot 2014) 75–76.

<sup>121</sup> Powderly (n 29) 466; similarly, Christoph Safferling, *Internationales Strafrecht: Strafanwendungsrecht, Völkerstrafrecht, europäisches Strafrecht* (Springer 2011) 76–77.

<sup>122</sup> *Katanga* trial judgment, para. 1388.

<sup>123</sup> Van den Wyngaert concurring opinion, paras. 19–20, 61 (according to the Belgian Judge, indirect co-perpetration constitutes 'a totally new mode of liability', radically expanding art. 25(3)(a) ICCSt and violating the legality principle).

<sup>124</sup> *Katanga* trial judgment, para. 57.

<sup>125</sup> Van den Wyngaert concurring opinion, paras. 10, 11, 52, 57.

<sup>126</sup> Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press 2014) 43–44.

<sup>127</sup> Academic literature has attempted to do this. Some scholars have proposed seven canons of interpretation upon which the judges should rely when interpreting the Statute. These canons – functioning as core principles – would determine a uniform understanding of the statutory provisions. They would allow one to go beyond the divergent and fragmentary approaches, resulting in the application of different interpretative methods, in particular when dealing with substantive law and thus with art. 25 ICCSt. Sadat and Jolly (n 21) 756.

<sup>128</sup> Highlighting this aspect also Elies Van Sliedregt, 'The ICC *Ntaganda* Appeals Judgment: The End of Indirect co-perpetration?', *Just Security*, 14 May 2021 <<https://www.justsecurity.org/76136/the-icc-ntaganda-appeals-judgment-the-end-of-indirect-co-perpetration/>> accessed 2 August 2021.

with the control theory. The same holds true with regards to the Nigerian Judge Chile Eboe-Osuji. In contrast, the Peruvian Judge, Luz Del Carmen Ibáñez Carranza, wrote a dissenting opinion supporting the control theory and the reliance on indirect co-perpetration at the ICC. This is not surprising as Peruvian criminal law has been highly influenced by German criminal law and theory and provides for a differentiated participation model. The 2009 *Fujimori* judgment of the Special Criminal Chamber of the Peruvian Supreme Court,<sup>129</sup> convicting the former president of Peru, *Alberto Fujimori*, is one of the most important decisions on the application of the *Organisationsherrschaftslehre*.

## 6 Concluding Considerations

In spite of the reliance hitherto on the *Organisationsherrschaftslehre* in the interpretation of art. 25(3), third alternative, ICCSt seems to be more the reflection of the judges and legal officers' legal backgrounds and the result of the German doctrine's incursion at the ICC, its adoption cannot be excluded on the basis of its origin in one domestic legal system for several reasons. Art. 25(3)(a), third alternative, ICCSt does not contain a definition of indirect perpetration, determining what is meant by commission 'through another person regardless of whether that other person is criminally responsible'. Nevertheless, the same holds true for the national penal codes that endorse this mode of liability.<sup>130</sup> The wording of art. 25(3)(a), third alternative, ICCSt is sufficiently detailed and reflects formulations similar to those adopted at domestic level. Therefore, the provision, in accordance with the *Katanga* trial judgment, does not seem to contain a lacuna and it is thus unnecessary to determine whether the control over the organization theory is part of customary law under art. 21(1)(b) ICCSt or whether it is a general principle of law derived from national legal systems according to art. 21(1)(c) ICCSt. Its wide application in several domestic legal systems can certainly be evaluated, but only in order to examine its validity and persuasiveness.

The interpretation of the provision in accordance with the control over the organization theory, resulting from the application of the *Organisationsherrschaftslehre* at the ICC, seems to be compatible with the wording of art. 25(3)(a), third alternative, ICCSt and consistent with the system built by the Rome Statute, the applicable law and the principle of legality.<sup>131</sup> Moreover, the German doctrine was not automatically applied in its original version at the ICC, but rather, as highlighted in the most recent case law on the topic, represents one of the possible interpretations of the provision and, above all, is the expression of the normative approach to liability. Such an approach would help to avoid

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<sup>129</sup> Corte Suprema de Justicia de la República, Sala Penal Especial, Exp. N° A.V. 19-2001, Judgment, 7 April 2009 <<http://www.justiciaviva.org.pe/especiales/barrios-altos/42.pdf>> accessed 2 August 2021. This decision was subsequently confirmed: Corte Suprema de Justicia de la República, Primera Sala Penal Transitoria, Exp. N° 19-2001-09A.V., Judgment, 30 December 2009.

<sup>130</sup> Eg § 25(1) StGB reads that a crime can be committed 'durch einen anderen'; art. 28 of the Spanish Penal Code provides the possibility of committing a crime 'por medio de otro del que sirven como instrumento'; art. 29 of the Colombian Penal Code establishes that 'es autor quien realice la conducta punible por sí mismo o utilizando a otro como instrumento'.

<sup>131</sup> For a more detailed analysis, see Lanza (n 27) 168 ff.



the risk of attributing different meanings to specific terms on the basis of the different legal backgrounds of those interpreting the provision.

The possibility of relying on a theory deriving from the *Organisationsherrschaftstheorie* could also be reached by refusing the premises upon which the theory was adopted by the majority<sup>132</sup> at the ICC, but on the basis of a deep comparative analysis. In contrast to other legal systems, such as, for example, Italy's, the Rome Statute does not provide any mechanisms which can adequately reflect the double dimension of the responsibility of the leaders of criminal organizations, as well as of those who are in a leading position in hierarchical apparatuses of power. More precisely, it does not provide mechanisms that capture the leaders' responsibility for the role they concretely played as the masterminds, promoters or coordinators of the organizations or apparatuses, and their involvement in the crimes carried out by their subordinates, resulting in the implementation of the organizational strategy or apparatuses' objectives. It does not contain specific aggravating circumstances that adequately reflect the role and responsibility of the individuals in the background who mastermind, plan, promote, lead, or organize the commission of the crimes. It does not even endorse planning as a mode of liability.

Therefore, the *Organisationsherrschaftstheorie* may constitute the basis for the development of an autonomous ICL doctrine relating to indirect perpetration, notably differing from the original version, but capable of adequately reflecting the double dimension of the responsibility of the leaders of criminal organizations, as well as of those who are in a leading position in hierarchical apparatuses of power. From this perspective, the comparative analysis would play a fundamental role, also in light of the increasing globalization of international criminal law. However, ICL can benefit not only from national criminal law and theory, but also from their concrete application.<sup>133</sup> Particular attention should therefore also be given to the solutions that were found in domestic legal systems to solve problems similar to those faced by the ICC and to the concrete application of the terms in national legal contexts. This approach would contribute to the creation of an autonomous system of international criminal justice also in practice, where ICL 'includes the best that every country has to offer'<sup>134</sup> and the ICC becomes the major expression of its concrete application.

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<sup>132</sup> Supra 5.3.

<sup>133</sup> Elies Van Sliedregt, 'International Criminal Law: Over-Studied and Underachieving?' (2016) 29 LJIL 1, 3.

<sup>134</sup> George Fletcher, 'Parochial versus universal criminal law' (2005) 3 JICJ 20, 34.

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# INDIRECT PERPETRATION THROUGH AN ORGANISATION – THE UNCONVINCING IMPORT OF A GERMAN DOCTRINE?

By Johannes Block\*

## Abstract

*The Article sheds light on the German origins of indirect perpetration through an organisation and the theory of domination of/control over the crime. The different lines of thought that can be found in theory and jurisprudence are portrayed and contrasted. The essay finds that three versions of indirect perpetration through an organisation exist: a traditional approach, the jurisprudential version of the theory and the systemic approach. The article highlights the differences between those and explains central points of criticism on the three of them. It finds inter alia that the German jurisprudence is only vaguely akin to the traditional academic legal construct and is not strictly based on the same premise, ie on the theory of domination of the crime. It is argued that the inconsistency of the different approaches and the existing criticism on all of them should be considered. The unconvincing result of reproducing national doctrinal weaknesses can only be avoided if these details are recognized and acknowledged by the ICC and scholars in the current discussions on the interpretation of Art. 25 (3) Rome Statute.*

## 1 Introduction

With the recent Ntaganda appeals decision and several separate opinions on it, the debate about how to credibly attribute responsibility for international crimes under the Rome Statute has gained new momentum.<sup>1</sup> The International Criminal Court (ICC) sticks to its interpretation of Art. 25 (3) (a) Rome Statute, ie to the doctrines of indirect perpetration through an organisation and indirect co-perpetration. The control theory serves as the basis for these doctrines.

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\* The author is a PhD Candidate and Research Assistant at the Institute for Foreign and International Criminal Law of the University of Cologne and a trainee at the District Court of Cologne. His thesis, a comparison of indirect perpetration through an organisation and responsibility for ordering crimes, was submitted to the University of Cologne in May 2021, the *viva voce* took place on 17 December 2021. The author would like to thank Yara Bröcker for helpful comments on an earlier draft of the essay.

<sup>1</sup> *The Prosecutor v. Bosco Ntaganda* ICC (2021) Annex 2: Separate opinion of Judge Howard Morrison on Mr Ntaganda's appeal, Annex 3: Separate opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr Ntaganda's appeal, Annex 5: Partly concurring opinion of Judge Chile Eboe-Osuji. See also for recent scholarly contributions: Elies Van Sliedregt, 'The ICC Ntaganda Appeals Judgment: The End of Indirect Co-perpetration?' (2021) justsecurity.org < <https://www.justsecurity.org/76136/the-icc-ntaganda-appeals-judgment-the-end-of-indirect-co-perpetration/> >, accessed 7 February 2022; Liana Georgieva Minkova, 'A new Approach to Criminal Responsibility? Discussing the Separate Opinions on Indirect Co-Perpetration in the Ntaganda Appeals Judgment' (2021) opiniojuris.org < <http://opiniojuris.org/2021/04/08/a-new-approach-to-criminal-responsibility-discussing-the-separate-opinions-on-indirect-co-perpetration-in-the-ntaganda-appeals-judgment/> >, accessed 7 February 2022.

There is no doubt that these doctrines are inspired by the German theories of *mittelbare Täterschaft kraft Organisationsherrschaft* (indirect perpetration through an organisation) and its underlying *Tatherrschaftslehre* (theory of domination of the crime).<sup>2</sup> In German academia, domination of the crime is the leading line of thought on how to distinguish perpetrators from accessories. This distinction is relevant because under the German Criminal Code (GCC) *some* accessories receive an obligatory mitigation of sentence.<sup>3</sup>

Although such an obligatory reduction of punishment cannot be found in the Rome Statute,<sup>4</sup> chambers of the ICC established its doctrines with visible and open reliance on jurisprudence and academic writings from Germany, Spain and several Latin American countries.<sup>5</sup>

This essay explores the German origins of the theory of domination of the crime and indirect perpetration through an organisation<sup>6</sup> as the cornerstones of the ICC's doctrines.<sup>7</sup> Given that national legal theories played a great role in inspiring the ICC, this article sheds light on the state of the doctrines in Germany. It answers the question of whether there actually is a uniform opinion on these theories in the country of the doctrine's first appearance. The essay evaluates whether it is justified to speak of *one* such theory in Germany. Furthermore, certain points of criticism on the different German

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<sup>2</sup> *Mittelbare Täterschaft kraft Organisationsherrschaft* will be referred to as indirect perpetration through an organisation for both the ICC's and the German versions of this theory. *Tatherrschaftslehre* will be translated as the theory of 'domination of the crime' to distinguish it from the concept of control over the crime at the ICC.

<sup>3</sup> Aiders and abettors, referred to only as 'Aiders' in the official translation of the GCC, receive a mandatory reduction of sentence, as regulated in Section 27 (2) GCC.

<sup>4</sup> See also Douglas Guilfoyle, 'Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law' (2011) 64 CLP 255, 268; Elies Van Sliedregt, 'Perpetration and Participation in Article 25(3)' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015), 510-11; Ntaganda (2021) Annex 5: Partly concurring opinion of Judge Chile Eboe-Osuji, paras. 42, 48. But see to the contrary: Héctor Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Studies in International and Comparative Criminal Law, Hart Publishing 2009), 27.

<sup>5</sup> See especially *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ICC (2008) para. 485 with fn. 647 on the control over the crime theory and paras. 498 with fn. 659, 510 with fn. 678 et seq. on indirect perpetration through an organisation. See also already *The Prosecutor v. Thomas Lubanga* ICC (2007) para. 330 et seq. with fn. 418.

<sup>6</sup> In German academic debate and jurisprudence, the common term to discuss the topic is indirect perpetration through an organisation (*Mittelbare Täterschaft kraft Organisationsherrschaft*). This essay therefore focuses on this aspect of the concept, which the ICC has named indirect co-perpetration. Note however that any criticism on the way in which 'control over the crime' is supposedly exercised in indirect *and/or* joint perpetration must lead to question indirect co-perpetration which rests on the assumption that one, several or all co-perpetrators exercise control over the crime by acting as indirect perpetrators and using others as tools to commit crimes.

<sup>7</sup> It should be acknowledged that domination of/control over the crime and the theories of attribution of responsibility based on this theory are recognized, discussed, developed, and used independently in Spain and many Latin American countries. The author's insight into these legal systems and the opinions expressed there on the issue is limited however and to avoid doing wrong to any of these national debates the scope of this article is restricted to the German perspective.

approaches are outlined. From the weaknesses and inconsistencies of the German theories, the article concludes that certain points must be considered when working on the issue in international criminal law, to avoid the importation of unconvincing concepts.

## **2 The Plethora of Theories of Indirect Perpetration through an Organisation**

The ICC's judgments and many scholarly writings on international criminal law treat 'the' theory of indirect perpetration through an organisation and 'the' theory of domination of the crime, as developed in Germany, as one coherent and consistent body of legal thinking. Chambers of the ICC in particular have advanced the acceptance and recognition in modern legal doctrine and national jurisdictions<sup>8</sup> of 'the' theory. In this vein, Pre-Trial Chamber I, cited works of German eminent authority Professor Claus Roxin and judgments of the German Federal Court of Justice as sources in the same sentence. It did so to underline its claim that these theories would be well established in certain states parties of the ICC, such as Germany.<sup>9</sup> However, this portrayal of the doctrine's recognition is a major simplification. Since the emergence of the theory in Roxin's scholarly writings in the 1960s a plethora of different criteria for this doctrine have emerged in scholarly literature. The Federal Court of Justice has developed an own approach to the issue and finally, scholars developed more comprehensive, modern interpretations of this doctrine in academic writings.

## **3 Roxin, Schroeder and Other Advocates of Traditional Approaches**

Undoubtedly, Claus Roxin is most commonly associated with the doctrine of indirect perpetration through an organisation in international criminal law.

Under the impression of the *Eichmann* trial, Roxin developed his theory to explain, how to credibly attribute perpetrator liability (under German law) to persons who had worked within state organisations and had contributed to mass atrocities. Adolf Eichmann had been an SS official and senior desk officer within the Nazi state. He had coordinated the deportation of hundreds of thousands of Jewish people in Europe which directly led to them being murdered in Nazi extermination camps. After fleeing to Argentina, he had first taken on a quiet and undisturbed life before being captured by the Mossad and transferred to Israel. In Jerusalem he was tried and sentenced to death for his contributions to the Holocaust. Claus Roxin, by constructing his doctrine around

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<sup>8</sup> *Katanga and Chui* (2008) para. 510. See also *Lubanga* (2007) para. 330: 'The concept of control over the crime ... is applied in numerous legal systems'.

<sup>9</sup> See *Katanga and Chui* (2008) para. 510 with Fn. 678 and 679: „In sum, the acceptance of the notion of 'control over an organised apparatus of power' in modern legal doctrine, its recognition in jurisdictions ... present a compelling case for the Chamber's allowing this approach to criminal liability for the purposes of this Decision.'



Eichmann, also made him the most prominent example of a *Schreibtischtäter* ('desk perpetrator').<sup>10</sup>

This background influenced Roxin's theory as can be easily understood when looking at the shape it took in his writings. According to Roxin, indirect perpetration through an organisation as a first criterion requires an organised apparatus of power (or organised power structure).<sup>11</sup> This structure must exist independently of its individual members. Roxin further categorizes possible organised power structures into two groups: States and state like structures at the one hand and underground organisations with informal power structures on the other hand.<sup>12</sup> Following from this, Roxin asserts that groups that can be encountered in 'manifestations of organized crime, terror militias, parties to civil wars, tribal feuds or 'ethnic cleansings'' can qualify as organisations under his doctrine.<sup>13</sup>

The organisation, as a second requirement, must operate unbound by the law.<sup>14</sup> This is the case, if members of the organisation do not feel bound by the law when acting on behalf of the apparatus and do not expect to face consequences for their illegal conduct.<sup>15</sup>

Furthermore, the indirect perpetrator must have a position within the organised power structure to steer it into action.<sup>16</sup> It suffices if the person can move a part of the organisation into action. This means that the leaders of smaller divisional units of the power structure may fulfil this criterion as well as higher ranking decision makers. A chain of indirect perpetrators may exist, starting with the highest authority and going down through the organisation with each next person having a lower position within the apparatus.<sup>17</sup>

As a fourth requirement, the physical perpetrators of the organisation must be randomly replaceable (fungible).<sup>18</sup> This means that the indirect perpetrator must be able to replace unwilling or unable physical perpetrators of the crime immediately. In Roxin's view, this ensures the smooth working of the apparatus of power. Consequently, he compares the apparatus with a machine in which the perpetrators are only replaceable cogs. Their failing, or so it is believed by Roxin and many supporters of the traditional theory, will not affect the working of the apparatus of power as a whole. Consequently, crimes will

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<sup>10</sup> See on the *Eichmann* case Gerhard Werle and Boris Burghardt, 'Anthology - Claus Roxin on Crimes as Part of Organized Power Structures, Introductory Note' (2011) 9 JICJ 191 et seq.; Claus Roxin, 'Crimes as Part of Organized Power Structures' (2011) 9 JICJ 193 et seq.

<sup>11</sup> Claus Roxin, *Täterschaft und Tatherrschaft* (10th edn, De Gruyter 2019), 272; Roxin (n 10) 193 et seq.

<sup>12</sup> Roxin (n 11) 277-8 and Chapter 12, mn. 369.

<sup>13</sup> Roxin (n 11) Chapter 12, mn. 369.

<sup>14</sup> Roxin (n 11) 277.

<sup>15</sup> Roxin (n 10) 202-3; Roxin (n 11) 277.

<sup>16</sup> Roxin (n 11) 275-6; Roxin (n 10) 202.

<sup>17</sup> Roxin (n 11) 275-6; Roxin (n 10) 202.

<sup>18</sup> Roxin (n 11) 272; Roxin (n 10), 198. The German term *Fungibilität* is translated differently and can be found as fungibility, replaceability or interchangeability in English writings.

be committed according to instructions, no matter the potential defections by physical perpetrators.<sup>19</sup>

What follows from these criteria, according to Roxin, is that the indirect perpetrator dominates the crimes which are committed by members of this organised power structure.

The second most prominent approach to the issue of the *Schreibtischtäter* in Germany was advanced by Friedrich-Christian Schroeder briefly after the publishing of Roxin's ideas. Schroeder put forward that it would be the 'readiness to commit the crime' (*Tatbereitschaft*) of the physical perpetrators (the members of the organisation) that would lead to domination of the crime.<sup>20</sup> His approach thus relies on a different criterion than Roxin's. According to Schroeder, a leader who instructs his subordinates to commit a crime uses the pre-existing 'readiness' of these subordinates to carry out any kind of order. This readiness to commit the crime is channelled through the organisational circumstances.<sup>21</sup>

Many more approaches followed Roxin's and Schroeder's. They all laid emphasis on different dynamics and factors, which would – in the view of the respective authors – justify the attribution of domination of the crime and thus perpetrator liability to the *Schreibtischtäter*. According to Schünemann, eg, the relevant characteristic of the organised apparatus is a system of violence. He believes that such a system may exist within unjust regimes and mafia-type organizations.<sup>22</sup> Schlösser, on the other hand, argues that domination of the crime in indirect perpetration should be redefined. It should be understood as social domination of the physical actor. Such social domination, pursuant to Schlösser's theory, requires an organisation which has formalized structures, a hierarchy and the indirect and direct perpetrator must be in a superior-subordinate relation. Schlösser states that the capability to enforce instructions, will rise with conformity and discipline within the organisation.<sup>23</sup>

The quest for the 'correct' or most suitable requirements for indirect perpetration through an organisation thus developed into quite an own academic debate in Germany. One that was not settled until today, and in which even the most senior writers – Claus

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<sup>19</sup> Roxin (n 11) 272; Roxin (n 10) 198.

<sup>20</sup> Friedrich-Christian Schroeder, *Der Täter hinter dem Täter: Ein Beitrag zur Lehre von der mittelbaren Täterschaft* (Duncker & Humblot 1965) 168; Friedrich-Christian Schroeder, 'Tatbereitschaft gegen Fungibilität' (2009) *Zeitschrift für Internationale Strafrechtsdogmatik* (ZIS) 569.

<sup>21</sup> Schroeder, *Der Täter hinter dem Täter* (n 20) 166-9; Schroeder, 'Tatbereitschaft gegen Fungibilität' (n 20) 569.

<sup>22</sup> Bernd Schünemann, 'Die Rechtsfigur des "Täters hinter dem Täter" und das Prinzip der Tatherrschaftsstufen' in Andreas Hoyer and others (eds), *Festschrift für Friedrich-Christian Schroeder zum 70 Geburtstag* (C.F. Müller 2006) 412.

<sup>23</sup> Jan Schlösser, *Soziale Tatherrschaft - Ein Beitrag zur Frage der Täterschaft in organisatorischen Machtapparaten* (Duncker & Humblot 2004) 332.

Roxin and Friedrich-Christian Schroeder – still disagree about the appropriate criteria that should shape the doctrine.<sup>24</sup>

However, despite their differences, many scholars base their thoughts on indirect perpetration through an organisation on a uniform understanding of the concept of domination of the crime and in this, their theories are alike. Domination of the crime, in such more traditional views, is understood as a factual, real-life domination of the crime. It means that – according to Roxin, Schroeder and many others – an indirect perpetrator supposedly dominates the crime because he or she decides whether and how the crime is committed. This definition of domination is common in Germany. It is furthermore the same for all forms of domination of the crime: Domination of the act of the direct perpetrator, functional domination of a co-perpetrator and domination by superior will of the indirect perpetrator.<sup>25</sup> The traditional approaches therefore tell us: An indirect perpetrator, when using the members of an organisation, can decide whether and how specific criminal incidents will take place at the end of the chain of command.

#### 4 The German Federal Court of Justice

The German Federal Court of Justice adopted a theory of indirect perpetration through an organisation in 1994. It convicted several former high-ranking politicians of the former German Democratic Republic (GDR) as indirect perpetrators of manslaughter. The politicians had – as members of different organs – contributed to the killings by issuing and upholding the order that people who tried to flee the GDR by crossing its fortified border, should be shot.<sup>26</sup> The Federal Court of Justice in its first judgments on the matter outlined several requirements, which it deemed necessary to establish indirect perpetration through an organisation:

There are cases where the contribution by a person in the background almost automatically leads to the commission of the crime which he aimed at. This can be the case where the person in the background uses a certain framework, established by organisational structures, in which his contribution sets off standardized procedures. Such a framework with standardized procedures can exist in state, corporate or business-like organisational structures and within chains of command.

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<sup>24</sup> See only Roxin (n 11) Chpt. 12, mn. 375-6; Schroeder, 'Tatbereitschaft gegen Fungibilität' (n 20) 569 et seq.

<sup>25</sup> The common definition in Germany can be translated as: 'A perpetrator is who has domination of the crime, which means that he or she holds the criminal action in their hands and decides whether and how the crime will be committed.' See Günter Heine and Bettina Weisser in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019), 'Vor §§ 25ff.', mn. 57. See also more specifically for indirect perpetration: Roxin (n. 11), 196: 'a person is a perpetrator if he controls the course of events'. Another term, frequently employed by Roxin is that a perpetrator would be the 'central figure' of the crime, see Roxin (n. 11) 29.

<sup>26</sup> Federal Court of Justice, *Judgment of 26.7.1994* in Neue Juristische Wochenschrift (NJW) (1994), 2703 et seq. (Members of the National Defence Council); Federal Court of Justice, *Judgment of 08.11.1999* in NJW (2000), 443 et seq. (Members of the GDR's Political Bureau). The cases are known in Germany as 'Mauerschützen' cases referring to the *Berliner Mauer*, ie the Berlin Wall.

If the person in the back acts in awareness of these circumstances and especially uses the unconditional readiness of the direct actor to commit the crime, and if the person in the back also wants the consequence as the result of his own act, he is a perpetrator in the form of an indirect perpetrator.<sup>27</sup>

As one can see, the court's approach in the 1990s mirrored certain requirements from the more traditional theories, whilst also establishing new ones and leaving others aside. From the beginning on, the court outright ignored the criterion that the organised power structure would have to act 'unbound by the law'. Additionally, it did not place much emphasis on the idea of interchangeability (fungibility) of the physical perpetrator. It did however mention the willingness of the perpetrators, which resembled Schroeder's ideas. One reason for this mixture of thoughts lay in the court's strategic plan to use the doctrine on managers and other leaders in business enterprises in the future. By not requiring that the organisation act unbound by the law, the Federal Court of Justice made the doctrine applicable on business enterprises and corporations.<sup>28</sup>

The court did thus not adopt Roxin's or Schroeder's or any other scholar's theory. Instead, it mingled several suggestions into one own approach, that best fitted its needs as Germany's highest court in criminal matters, including those of white-collar crime.

In addition to that, the court did not adopt the underlying theory of domination of the crime either. It is true that the term of domination of the crime appeared and still appears in some of its judgments. But domination as the one decisive factor to distinguish perpetrators from accessories was never accepted as such by the court. It did recognize domination of the crime as a concept to reckon with, but at the same time, it kept its preferred subjective theory alive.<sup>29</sup> By stating that it would be important for an indirect perpetrator to want 'the consequence as the result of his own act', the court kept a possibility to fall back to its subjective theory.

It is interesting that the court convicted the members of the two relevant GDR committees as indirect perpetrators, without giving importance to the fact that they had participated in the relevant government/military panels together. As regards the structure of the accused's participation in these cases, it might better be described as indirect co-perpetration. This, however, has never been recognized by the Federal Court

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<sup>27</sup> Federal Court of Justice, *Judgment of 26.7.1994* in NJW (1994), 2706; translation by the author.

<sup>28</sup> This motive for adopting the theory has been openly discussed by one of the deciding judges of the leading cases: Armin Nack, 'Mittelbare Täterschaft durch Ausnutzung regelhafter Abläufe' [2006] GA 342, 344-5.

<sup>29</sup> According to the court's subjective theory, a perpetrator could only be distinguished from an accessory based on subjective criteria because causal objective contributions – all being essential for the crime – would not allow a proper distinction; see Bettina Weisser, *Täterschaft in Europa* (Mohr Siebeck 2011) 27-32.

of Justice. Thus, indirect co-perpetration as a combination of modes of responsibility has not yet been used explicitly in German jurisprudence.<sup>30</sup>

Since the 1990s the doctrine at the court developed and gradually became broader and less specific. The unconditional willingness of the perpetrators did not develop to play a greater role in the court's rulings and the theory was – as planned beforehand – applied to punish managers of business enterprises. The court also reordered the role of domination of the crime in its approach to distinguish perpetrators from accessories. Today, the court's 'theory of normative combination' reckons with several factors to distinguish primary from accessory liability. These are the actor's own interest in the crime, the actor's objective contribution, his or her domination of the crime and his or her will to dominate the crime.<sup>31</sup>

Today, scholarly evaluation of indirect perpetration through an organisation and the underlying doctrine as applied by the court differs. Some describe it as an open evaluative concept of perpetration others believe that the court does gradually fall back completely to its former subjective theory.<sup>32</sup>

In any case, the German Federal Court of Justice neither adopted (one of or all of) the academic theories of indirect perpetration through an organisation in its (or their) entirety, nor does it adhere to the doctrine of domination of the crime today.<sup>33</sup>

## 5 The Systemic Approach

Different authors from German academia developed a third line of thought to underpin and justify the doctrine of indirect perpetration through an organisation. This trend was fuelled by rising criticism on the traditional notion of domination of the crime in academic debate in Germany.

This criticism essentially aims at the idea, that a person in a leadership position could dominate the crime, ie the criminal act itself, by acting through an organisation while being removed from the scene. In 2000, Heine analysed the Federal Court's jurisprudence on the GDR committees and their members' influence on the killings at the Berlin Wall.

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<sup>30</sup> Gerhard Werle and Boris Burghardt, 'Die mittelbare Mittäterschaft - Fortentwicklung deutscher Strafrechtsdogmatik im Völkerstrafrecht?' in René Bloy (ed), *Gerechte Strafe und legitimes Strafrecht - Festschrift für Manfred Maiwald zum 75 Geburtstag* (Duncker & Humblot 2010) 862 with further literature in fn. 55. Also note their remark that the combination of indirect and co-perpetration has gained little attention in Germany.

<sup>31</sup> Heine and Weisser (n 25) 'Vor §§ 25ff.', mn. 64 et seq.

<sup>32</sup> Describing it as an open evaluative concept: Heine and Weisser (n 25), 'Vor §§ 25ff.', mn. 66 and '§ 25', mn. 29. Seeing a return of the subjective theory: Thomas Rotsch, 'Tatherrschaft kraft Organisationsherrschaft?' (2000) 112 *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 518, 561; Rainer Zazczyk, 'Die "Tatherrschaft Kraft organisatorischer Machtapparate" und der BGH' (1996) *GA* 411, 414.

<sup>33</sup> Rotsch (n 32) 561; Bettina Weisser, 'Die mittelbare Täterschaft kraft Organisationsherrschaft - Über den Werdegang einer Rechtsfigur vom Ausnahmeinstrument zur Allzweckwaffe' (2012) *Ad Legendum* 244, 249-50.

He pointed out that in such cases domination of the crime exercised by the relevant politicians could only exist in a 'very abstract' form.<sup>34</sup> He described the type of influence, exercised by the relevant leaders as 'functional domination of the system' (*funktionale Systemherrschaft*).<sup>35</sup>

Even earlier, in an essay from 1994 Ernst-Joachim Lampe had laid the groundwork for such an amendment and partial rethinking of the doctrine. Lampe's philosophical approach outlined that mass atrocities establish so-called 'systems of wrongdoing'. According to him, such systems arise through the connection of individual wrongs ('relational wrong', *Beziehungsunrecht* in Lampe's writings, which means single crimes) and the systemic wrong, ie the overarching socio-organisational construct aiming at the commission of crimes. Both are interconnected and, in such situations, do not occur without the other. The systemic wrong facilitates and channels the commission of individual wrongs. At the same time, only the commission of individual wrongs gives meaning to the overarching systemic wrong.<sup>36</sup>

In addition to that, Rolf Herzberg, despite being in favour of another solution to the leadership issue,<sup>37</sup> prominently described why leaders of organisations would not have the kind of factual, on-spot domination of the crimes which is at the heart of the traditional theory.<sup>38</sup> To explain this, he referred to the Federal Court's case of the *Mauerschützen*.

In these cases, the guards were briefed on their orders during training and before their shifts. Based on the more general instructions from the political leadership, they were ordered to shoot if there was no other way of stopping fleeing citizens. They were often deployed in groups of two, and one or two groups guarded a part of the border. From these positions they shot citizens of the GDR who were trying to escape to the Federal Republic of Germany. In such cases, it becomes obvious that an actual 'on-spot' influence of members of the national defence council or the political bureau on the specific crime did not exist.<sup>39</sup> Contrary to the belief of the traditional German theory, these guards were not fungible in a way that would have ensured the commission of the specific crimes, ie, the shooting of the victims. If the respective border guards would have decided not to shoot at all or to miss their target deliberately, no one else would have been ready to

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<sup>34</sup> Günter Heine, 'Täterschaft und Teilnahme in staatlichen Machtapparaten - NS- und DDR-Unrecht im Vergleich der Rechtsprechung' (2000) JZ 920, 925.

<sup>35</sup> Heine (n 34) 925.

<sup>36</sup> Ernst-Joachim Lampe, 'Systemunrecht und Unrechtssysteme' (1996) 106 ZStW 683, 702-3.

<sup>37</sup> Herzberg, as quite a range of other German academics, takes the stance that indirect perpetration through an organisation should in general be replaced through instigation, see Rolf D. Herzberg, 'Das Fujimori-Urteil: Zur Beteiligung des Befehlsgebers an den Verbrechen seines Machtapparates' (2009) 11 ZIS 576, 579 with further references.

<sup>38</sup> Rolf D. Herzberg 'Mittelbare Täterschaft und Anstiftung in formalen Organisationen' in Amelung (ed): *Individuelle Verantwortung und Beteiligungsverhältnisse bei Straftaten in bürokratischen Organisationen des Staates, der Wirtschaft und der Gesellschaft* (Pro Universitate 2000), 48 et seq.

<sup>39</sup> In the same vein: Herzberg (n 38), 37-8; Bettina Weisser, 'Organisationsherrschaft und organisationsbezogene Beihilfe' (2019) GA 244, 248.

shoot the fleeing persons instead. The guards would not have been replaced in time and the victims would not have been shot by other border guards.<sup>40</sup>

While some academics take this criticism as a reason to reject domination of the crime completely, other authors draw the conclusion that the concept of domination would have to be understood differently. Some underline that the tool in the hands of the indirect perpetrator, must be the organisation itself, not the respective persons who physically committed the crime.<sup>41</sup> Building upon this, commentators assert that domination of the crime should not be seen as a narrow concept in which a perpetrator would have to dominate the specific crimes committed by the physical perpetrators.<sup>42</sup>

In this approach, therefore, different suggestions do not necessarily contain other requirements than the traditional views on the doctrine, but the underlying concept of domination is redesigned. According to the group of systemic approaches to indirect perpetration through an organisation, an indirect perpetrator can be a person who contributes to an overarching system of wrongdoing, which is different from but closely connected to the individual wrongs committed in the specific crimes. Domination of the crime is therefore loosened from the specific crimes and gains a more normative, systemic or collective basis. A person who contributes decisively to the systemic wrong, eg, by organising, leading, and administrating the organisation through which individual crimes are committed, is then believed to dominate the crime. This domination is broad and builds more on the overall influence of the indirect perpetrator on the systemic dimension of the mass atrocity and less on his or her (perceived) influence on the specific crimes. Consequently, opinions that share this approach, define domination of the crime as a normative concept instead of a factual one. It is irrelevant whether an indirect perpetrator would decide whether and how a crime is committed. What is important is his or her overall influence that shapes the system of wrongdoing and thus (indirectly or directly) contributes to the commission of the crime. To use terminology from international criminal law, authors from this group of ideas favour an

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<sup>40</sup> Herzberg (n 38) 37-8. The District Court of Berlin rejected indirect perpetration through an organisation precisely because of these thoughts, see Federal Court of Justice, *Judgment of 26.7.1994* in NJW (1994) 2705. In a similar vein concerning the ICC see *Ntaganda* (2021) Partly concurring opinion of Judge Chile Eboe-Osuji, para. 85.

<sup>41</sup> Kai Ambos, 'Zur "Organisation" bei der Organisationsherrschaft', in Manfred Heinrich and others (eds), *Strafrecht als Scientia Universalis Festschrift für Claus Roxin zum 80. Geburtstag am 15. Mai 2011* (De Gruyter, 2011) 840; Heine and Weisser (n 25), '§ 25', mn. 27, Weisser (n 39) 250.

<sup>42</sup> See for the theoretic groundwork: Ernst-Joachim Lampe (n 36) 683, 743, 745; See also Heine's assessment: Heine (n 34) 920, 923, 925, 926. See also Ambos on the systemic dimension of indirect perpetration through an organisation: Kai Ambos, *Internationales Strafrecht* (5th edn, C. H. Beck 2018) § 7, mn. 27; Weisser (n 39) 249 who underlines that an indirect perpetrator is only able to control the organisation as such by creating certain automatisms but not to exercise control over the physical perpetrators.

attribution of criminal responsibility based on an indirect linkage principle. This indirect linkage principle is the normative or systemic domination of the crime.<sup>43</sup>

On the level of specific requirements, Weisser has accentuated how the necessary contributions of an indirect perpetrator could look like under the systemic view on domination of the crime. According to her, an indirect perpetrator has to design and/or implement the automatisms that shape the overall criminal system. Such automatisms define the ways in which the system works and through which it channels the commission of mass atrocities. She chooses the example of Nazi extermination camps in which, from the arrival of the victims on, every step of their murder was pre-planned and every SS myrmidon contributed to the mass murder in a pre-shaped way. Thus, by creating and designing this system, a person may become an indirect perpetrator, precisely because he or she does not have to instruct the commission of crimes in every specific instance anymore.<sup>44</sup> This line of thought can be translated to other criminal systems and situations. A warlord can establish mechanisms through which children under the age of 15 are recruited into his fighting force. Consequently, the warlord does not have to oversee every specific enlistment. A president and his ministers can establish a scheme, according to which violent militias and government forces cooperate on a pre-set basis and chose villages and towns, inhabited by certain ethnic groups, to attack. According to the systemic view, in such cases, the persons in leadership positions do not have to influence the single criminal incidents to justify attribution of indirect perpetration liability. Their scheming, shaping and organising constitutes normative domination of the crime.

This alteration of the doctrine of domination of the crime makes the whole doctrine more credible by changing its groundwork. However, by doing so, it does not share a common doctrinal basis with the more traditional views of Roxin and others because it builds upon a different understanding of the concept of domination of the crime. Nor does it share a basis with the broad and shapeless doctrine of the German jurisprudence.

A serious problem with this approach, however, could lie in the legality principle and the wording of indirect perpetration regulations. The German Section 25 (1) 2. alternative GCC and Art. 25 (3)(a) Rome statute are quite similar in this regard.<sup>45</sup> Both speak of

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<sup>43</sup> See on indirect linkage principles: Elies van Sliedregt, *Individual Criminal Responsibility* (OUP 2012) 181-2. See also on systemic/collective attribution Ambos (n 42) § 7 mn. 11-2, 27-8.

<sup>44</sup> Weisser (n 39) 249-50.

<sup>45</sup> The German Criminal Code states:

**Section 25 – Commission of Offence**

(1) Whoever commits an offence themselves or through another incurs a penalty as an offender.

The Rome Statute states:

**Article 25 Individual criminal responsibility**

(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.



committing the crime through another. This has triggered criticism in the national and international sphere that ‘committing through another’ would not encompass ‘committing a crime through an organisation’.<sup>46</sup> As is often questionable with traditional concepts of criminal responsibility, one must ask, whether the wording of the respective law/statute does still cover the abstract, normative concept, the indirect linkage principle, which is used to give sense to the wording. In this vein, one must critically question, whether the systemic approach to indirect perpetration can be interpreted reasonably into contemporary indirect perpetration norms.

## 6 Inconsistent Approaches with a Questionable Effect

The regular and well-established reference to ‘the’ German theories of indirect perpetration through an organisation and domination of the crime is based on a misconception. One of the motors of the international success and credibility of the doctrine, its ‘adoption’ by the German courts, is no such adoption at all but rather another doctrine. The theories belong to the most contentious in academic debate and there is no consensus neither on the exact shape of the underlying concept of domination of the crime nor on the relevant requirements on which such domination should be affirmed. What is more: All three groups of theories of indirect perpetration through an organisation face criticism that cannot and should not simply be cast aside. The traditional theories of Roxin, Schroeder and others face the common criticism that their concept of factual domination of the specific criminal incident is unconvincing, because such an influence may simply not exist in situations of mass atrocities. The jurisprudence of the Federal Court of Justice rests on an evaluative, broad and shapeless approach in which domination of the crime is only one of several criteria that may be combined at will to produce an indirect perpetrator. The systemic approach finally is built on convincing normative considerations but because of the rather complex groundwork, may not fit the wording of indirect perpetration regulations.

These differing doctrines, however, have one thing in common: They allow to convict a remote leader as a principal perpetrator for the crimes which were committed by persons at the other end of the chain of command. It is sometimes forwarded that this would be necessary in German law, given that accessories would receive a mandatory reduction of sentence.<sup>47</sup> However, according to Section 26 GCC, instigators are punished as perpetrators.<sup>48</sup> If looked upon directly, there is therefore no compelling need in the

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<sup>46</sup> Heine (n 34) 926; Weisser (n 39) 250; see also Ambos (n 42) § 7, mn. 28 (regarding the potential of turning the doctrine into an own mode of responsibility); for such criticism at the ICC see: *The Prosecutor v. Mathieu Ngudjolo* (2012), Concurring Opinion of Judge Christine Van den Wyngaert, para. 52-4; *The Prosecutor v. Bosco Ntaganda* ICC (2021), Annex 2: Separate opinion of Judge Howard Morrison on Mr. Ntaganda’s appeal, paras. 12-3, Annex 5: Partly concurring opinion of Judge Chile Eboe-Osuji, paras. 16, 66.

<sup>47</sup> See eg *Ntaganda* (2021), Annex 5: Partly concurring opinion of Judge Chile Eboe-Osuji, para. 37.

<sup>48</sup> The German Criminal Code reads:

### **Section 26 – Abetting**

Whoever intentionally induces another to intentionally commit an unlawful act (abettor) incurs the same penalty as an offender.

German legal system to punish remote leaders as perpetrators, as long as they have directly – potentially through a chain of command – instigated the commission of crimes.<sup>49</sup>

In fact, there is another reason for the success of the general concept of attributing perpetrator liability to remote leaders. It is the conviction that only perpetrator liability can adequately express the responsibility of political, administrative or military leaders who ordered the commission of crimes. This opinion is well known in German academic writing and jurisprudence.<sup>50</sup> In the international debate, it is readily referred to as the issue of fair labelling and the expressive value of judgments.<sup>51</sup> However, whether this goal is achieved by employing a rather obscure terminology like that of indirect perpetration (through an organisation) is questionable. As we have seen, there is no consistency within the German legal profession as to the correct groundwork and requirements of this doctrine. Consequently, even for professionals the doctrinal discussion may be confusing. Whether its terminology and underlying concepts are accessible and intelligible for lay persons remains doubtful as well. Other factors, such as a precise and understandable description of the perpetrator's conduct and a length of sentence that mirrors the great guilt of the actor may be equally or more important to convey the relevant message to the affected communities and may be easier to understand as well. In the face of these doubts, the conviction that the terminology of being an indirect perpetrator has an important communicational value seems uncertain and unverified.

## 7 Conclusion: Lessons for the Interpretation of the Rome Statute

In light of the above findings, the ICC's statement of the 'acceptance of the notion...in modern legal doctrine' and 'its recognition in national jurisdictions' seems unwarranted as far as the German legal system is concerned.<sup>52</sup> The use of corresponding terms

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<sup>49</sup> On this so-called *Anstiftungslösung* ('instigation solution'), see *inter alia* Herzberg (n 38), 580; Joachim Hruschka, 'Regreßverbot, Anstiftungsbegriff und die Konsequenzen' (1998) 110 ZStW 581, 607-8; Bettina Noltenius, *Kriterien der Abgrenzung von Anstiftung und mittelbarer Täterschaft* (Europäischer Verlag der Wissenschaften 2003) 322; Joachim Renzikowski, *Restriktiver Täterbegriff und fahrlässige Beteiligung* (Mohr Siebeck 1997) 91; Rotsch (n 32), 561. Note that this may not work, where a person does not hand out instructions to commit crimes but is rather concerned with organisational tasks that keep the apparatus of power itself running. In this case, in German law, only aiding pursuant to Section 27 GCC is available and this in fact carries a mandatory reduction of sentence.

<sup>50</sup> Federal Court of Justice, *Judgment of 26.7.1994* in NJW (1994) 2703, 2706: 'Not to treat the person in the background as a perpetrator in such cases would not do justice to the objective weight of his contribution' (translation by the author); Ambos, *Täterschaft durch Willensherrschaft kraft organisatorischer Machtapparate*, GA 1998, 226-245, 232; Heike Jung, 'Besprechung von BGH Urteil vom 26.07.1995' (1995) Juristische Schulung 173, 174; Uwe Murmann, 'Täterschaft durch Weisungsmacht' (1996) GA 269, 272.

<sup>51</sup> Ntaganda (2021), Annex 3: Separate opinion of Judge Luz del Carmen Ibáñez Carranza, para. 224; Jens David Ohlin, Elies van Sliedregt and Thomas Weigend, 'Assessing the Control-Theory' (2013) 26 LJIL 725; Van Sliedregt (n 4) 511; Thomas Weigend, 'Indirect Perpetration', in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 552.

<sup>52</sup> See *Katanga and Chui* ICC (2008), para. 510, footnotes omitted.

(domination of the crime), which do however not play the same doctrinal role and the uniform result of convicting someone as a perpetrator instead of an accessory do not warrant to speak of the establishment of a doctrine. It is much rather a conglomeration of different lines of thoughts which are akin to each other in certain parts and strive to justify the same result, perpetrator liability for remote leaders of mass atrocities. The ICC invoked the suggested establishment of indirect perpetration through an organisation and the control theory in academia and practice, when it first moved to establish its versions of these theories. With that argument, the ICC must have been referring to Art. 21 (1) (c) Rome Statute, the general principles of law, derived from national legal systems. Contrary to that assertion, the analysis above shows that there is no uniform doctrine in this regard in the German legal system and that, consequently, no such doctrine is 'well established'. This might prove true for other legal systems and their versions of the theories as well. If that is so, care should be taken in dealing with the court's apparent conviction that indirect perpetration through an organisation and the control theory would be general principles of law in many States Parties to the Rome Statute.

The findings of this article may be heeded in future academic considerations of the ICC's doctrine of indirect co-perpetration (through an organisation) and its theory of control over the crime.

Comparisons of the German origins of 'the' theories and their 'equivalents' at the ICC should take into account that one is effectively dealing with many different ideas in German academia and practice. If the vigorous debate within that particular national legal frame is to yield any benefit to international criminal law, the different views should be distinguished from each other. The arguments in favour and against certain objective requirements of indirect perpetration through an organisation, as well as those concerning the notion of control (factual vs. normative) should be treated as such, instead of suggesting the existence of one coherent German doctrine. Only through this, the most convincing version of indirect (co-)perpetration through an organisation can be construed.

That is, if there is any such convincing version of the doctrine. The ICC's notion of control over the crime may prove as factual and potentially unconvincing as the traditional German concept of domination of the crime. The systemic approach to domination/control over the crime circumvents this weakness and may be invoked by the ICC at some point. As a theory based on indirect linkage principles, it may well be more suitable to justify the ICC's doctrine of indirect co-perpetration (through an organisation). However, that leads back to the legality principle issue and the question whether the wording of Art. 25 (3) (a) Rome Statute covers a systemic, functional understanding of indirect perpetration through an organisation. For the existing system of Art. 25 (3) Rome Statute, it is therefore important to shed light on further alternatives, such as ordering (Art. 25 (3)(b)) and contributions to group crimes (Art. 25 (3) (d) Rome Statute) and to evaluate whether they do not provide more suitable solutions for leadership responsibility.

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# INTERPRETATIVE FRAGMENTATION IN INTERNATIONAL CRIMINAL LAW WITH REGARD TO MODES OF LIABILITY: THE SPECIFIC CASE OF CO-PERPETRATION

By Miren Odriozola Gurrutxaga\*

## Abstract

*Determining the individual criminal liability of the numerous individuals who are involved in the perpetration of atrocity crimes, which are massive by nature, constitutes one of the most relevant challenges that International Criminal Law (ICL) faces today. Thus, the analysis of the modes of liability becomes of great importance. The differences among legal cultures have given rise to various interpretations with regard to the modes of liability applied by the ICC and the ad hoc tribunals. The interpretative differences do not only depend on the tribunal, but they may also arise within the case law of the same tribunal. The present paper addresses the interpretative fragmentation related to co-perpetration. The author assesses the case law of the ad hoc tribunals and the ICC: whereas the first is based on the Joint Criminal Enterprise (JCE) doctrine, the second relies on the theory of control over the crime. The debate among the Chambers of the ICC concerning *dolus eventualis* – and its implications on the ‘common plan’ element of co-perpetration – deserves special attention. By analysing the existing case law, the author concludes that the ICC’s approach should be followed and that *dolus eventualis* should be considered included in Art. 30 of the Rome Statute (RS).*

## 1 Introduction

Due to the collective and massive nature of international crimes, determining the individual criminal liability of each of the individuals involved in their perpetration is one of the most important challenges that International Criminal Law (ICL) faces today. Despite the difficulty of determining the criminal liability of each participant, ICL must respect the basic principles of Criminal Law, especially the principle of individual criminal liability for one’s own acts.<sup>1</sup> Therefore, ICL must count on various modes of liability to establish the individual criminal liability of each of the individuals involved, in accordance with the characteristics of the *actus reus* and *mens rea*.

In contrast to the Statutes of the *ad hoc* tribunals, the Rome Statute (RS) establishes in Article 25(3) a set of rules that systematically regulate the modes of liability and adopts a differentiated model that clearly distinguishes between perpetration and participation.<sup>2</sup> However, the categorisation in Art. 25(3) does not necessarily result in the

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\* Lecturer in Criminal Law, University of the Basque Country.

<sup>1</sup> Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (OUP 2014) 193.

<sup>2</sup> Kai Ambos, ‘Article 25. Individual Criminal Responsibility’ in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart 2016) 984; Héctor Olásolo, *Tratado de Autoría and Participación en Derecho Penal Internacional* (Tirant lo Blanch 2013) 68; Elies Van

imposition of a higher or lower penalty depending on the attribution of principal or accessorial liability.<sup>3</sup>

The International Criminal Court (ICC) has relied on Roxin's theory of control over the crime to distinguish between principals and accessories to a crime.<sup>4</sup> It has departed from the case law of the *ad hoc* tribunals, in particular the subjective approach on which the Joint Criminal Enterprise (JCE) doctrine is based. In view of the problems posed by both the subjective approach<sup>5</sup> and the objective approach,<sup>6</sup> the adoption by the ICC of the theory of control over the crime is to be welcomed. According to such theory, perpetrators are those who have control over the perpetration of the crime,<sup>7</sup> that is, those who have the power to decide whether and when a crime is committed.<sup>8</sup>

While there is no doubt that Art. 25(3) RS distinguishes between modes of principal and accessorial liability, the ICC's case law is not uniform as regards the existence of a hierarchy between such modes. The *Katanga* Trial Judgement noted that Art. 25 RS does not establish a 'hierarchy of blameworthiness', since the Statute does not provide for, even implicitly, a mandatory mitigation of penalty for forms of liability other than commission.<sup>9</sup> The Trial Chamber concluded that, although the distinction between

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Slidregt, *Individual Criminal Responsibility in International Law* (OUP 2012), 74, 79; Elena Maculan, 'Las formas de intervención punibles: autoría and participación' in Alicia Gil Gil and Elena Maculan (eds), *Derecho penal internacional* (Dykinson SL 2016) 215-216.

<sup>3</sup> Hans Vest, 'Problems of Participation – Unitarian, Differentiated Approach, or Something Else?' (2014) 12 (2) JICJ 295, 301; Van Slidregt, *Individual* (n 2) 74; Maculan (n 2) 216.

<sup>4</sup> Prosecutor v. Lubanga, Decision on the confirmation of charges, PTC I, 29 January 2007 (ICC-01/04-01/06-803-Ten) (Decision in the Lubanga case), para 338; Prosecutor v. Katanga and Ngudjolo Chui, Decision on the confirmation of charges, PTC I, 30 September 2008 (ICC-01/04-01/07-717) (Decision in the Katanga case), para 484; Le procureur c. Germain Katanga, Jugement rendu en application de l'article 74 du Statut, TC II, 07 March 2014 (ICC-01/04-01/07-3436) (Katanga Trial Judgment), para 1394; Prosecutor v. Lubanga, Judgment on the appeal of Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 01 December 2014 (ICC-01/04-01/06 A 5) (Lubanga Appeal Judgment), paras 469, 473; Prosecutor v. Blé Goudé, Decision on the confirmation of charges, PTC I, 11 December 2014 (ICC-02/11-02/11) (Decision in the Blé Goudé case), paras 135, 141; Prosecutor v. Ongwen, Decision on the confirmation of charges, PTC II, 23 March 2016 (ICC-02/04-01/15) (Decision in the Ongwen case), para 38; Prosecutor v. Al Mahdi, Decision on the confirmation of charges, PTC I, 24 March 2016 (ICC-01/12-01/15) (Decision in the Al Mahdi case), para 24; Prosecutor v. Ntaganda, Judgment, TC VI, 08 July 2019 (ICC-01/04-02/06) (Ntaganda Trial Judgment), para 779-780; Le Procureur c. Al Hassan, Rectificatif à la Décision relative à la confirmation des charges, PTC I, 13 November 2019 (ICC-01/12-01/18) (Decision in the Al Hassan case), paras 797, 802.

<sup>5</sup> Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law. The Case for a Unified Approach* (Hart Publishing 2013) 159-160; Enrique Gimbernat Ordeig, *Autor y Cómplice en Derecho Penal* (B de F Ltda. 2007) 27-38; Miguel Díaz and García Conlledo, *La Autoría en Derecho Penal* (PPU 1991) 326-332.

<sup>6</sup> Gimbernat (n 5) 11-27; Díaz (n 5) 452-484.

<sup>7</sup> Maculan (n 2) 217; Elies Van Slidregt, 'Perpetration and Participation in Article 25(3)' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 507.

<sup>8</sup> Van Slidregt, 'Perpetration' (n 7) 507.

<sup>9</sup> Katanga Trial Judgment (n 4), para 1386. See also Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2019) 351-352.

‘perpetrator of and accessory to a crime inheres in the Statute’, this does not imply that there is a hierarchy of guilt and penalty.<sup>10</sup>

On the contrary, the *Lubanga* Appeal Judgment noted that the distinction between the modes of liability in sub-paragraph (a) –liability as a perpetrator, for ‘committing a crime’– and in sub-paragraphs (b) to (d) –liability as an accessory, for ‘contributing to the commission of a crime by another person or persons’– of Art. 25(3) RS is not merely terminological, since those who ‘commit a crime’ themselves bear ‘more blameworthiness’ than those who ‘contribute to the crime of another person(s)’.<sup>11</sup>

Like the *Lubanga* Appeal Judgment, we defend the need to distinguish between the liability as a perpetrator and as an accessory, as well as the relevance of punishing as perpetrators those most responsible for the crimes. This is because accessorial liability implies that the defendant has contributed to another individual’s crime, which means relegating them to the background.<sup>12</sup>

As noted, there are important interpretative differences with regard to the modes of liability applied by the international criminal tribunals. The present paper focuses on the interpretative fragmentation related to co-perpetration and the consequences of each interpretation: whereas the *ad hoc* tribunals’ case law is based on the JCE doctrine, the ICC relies on the theory of control over the crime (‘functional’ control). Thus, the main text is divided into two parts. In Section 2, the case law of the *ad hoc* tribunals will be assessed, analysing the elements of JCE-based co-perpetration and the critical aspects of such interpretation. In Section 3, the case law of the ICC will be addressed. Special attention will be drawn to the debate among the Chambers of the ICC concerning the inclusion of *dolus eventualis* in Art. 30 RS and its implications on the ‘common plan’ element of co-perpetration. Based on the analysis of the case law, specifically on the critical aspects of the JCE doctrine, the author recommends following the ICC’s approach. With regard to *dolus eventualis*, the assessment of the ICC’s case law leads the author to defend its inclusion in Art. 30 RS and to require, in the field of co-perpetration, the mutual awareness and acceptance of the risk of committing a crime.

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<sup>10</sup> Katanga Trial Judgment (n 4), para 1387.

<sup>11</sup> Lubanga Appeal Judgment (n 4), para 462. See also Prosecutor v. Lubanga, Trial Chamber Judgment, TC I, 14 March 2012 (ICC-01/04-01/06-2842), (Lubanga Trial Judgment), para 999.

<sup>12</sup> With regard to the inadequacy of instigation, see Patricia Faraldo Cabana, *Responsabilidad penal del dirigente en estructuras jerárquicas* (Tirant lo Blanch 2004) 180-188; Abraham Martínez Alcañiz, ‘La coautoría mediata: una combinación dogmática surgida de la coautoría and de la autoría mediata a través de aparatos organizados de poder’ (2012) 8 RDPC 145, 185-186.



## 2 Co-perpetration at the *Ad Hoc* Tribunals

When the ICTY Appeals Chamber first formulated the doctrine in the *Tadić* case, it did not specify the nature of such doctrine, since it applied both concepts of co-perpetration and complicity.<sup>13</sup> However, in its decision in the *Milutinović* case, the ICTY expressly stated that the three categories of JCE triggered principal liability as a co-perpetrator.<sup>14</sup>

The *Tadić* Appeal Judgment distinguished between three categories of JCE.<sup>15</sup> While the first and second categories of JCE are applicable to the ‘basic’ or ‘central’ crimes of the JCE, the third only applies to ‘additional’ or ‘foreseeable’ crimes, that is, crimes that go beyond what was agreed in the common plan but are a natural and foreseeable consequence of the plan.<sup>16</sup>

### 2.1 Objective and subjective elements

The same objective elements are required in the three categories of JCE:<sup>17</sup> 1) a plurality of persons; 2) the existence of a common plan, design or purpose; and 3) the involvement of the accused in the JCE by any form of assistance in, or contribution to, the implementation of the common purpose.

Unlike their initial case law, the *ad hoc* tribunals require since 2007 that the contribution of a member to the JCE be at least significant.<sup>18</sup> Nevertheless, such shift in the case law does not change the subjective approach of JCE doctrine’s definition of co-perpetration, since the level of contribution required remains far below the essential contribution

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<sup>13</sup> Prosecutor v. Tadić, Judgment, Appeals Chamber, 15 July 1999 (IT-94-1-A) (Tadić Appeal Judgment), paras 220-228.

<sup>14</sup> Prosecutor v. Milutinović et al., Decision on Ojdanic’s Motion challenging Jurisdiction, Appeals Chamber, 21 May 2003 (ICTY-99-37-AR72), paras 20, 31.

<sup>15</sup> Tadić Appeal Judgment (n 13), paras 220, 225-228.

<sup>16</sup> Olásolo (n 2) 307-308; Kai Ambos, ‘Joint Criminal Enterprise and Command Responsibility’ (2007) 5 JICJ 159, 160; Kai Ambos, *Treatise on International Criminal Law. Volume I: Foundations and General Part* (OUP 2013) 123-124; Antonio Cassese, *International Criminal Law*, Oxford University Press (OUP 2008) 199-209; María Gutiérrez Rodríguez, ‘Joint Criminal Enterprise ¿Una especie jurídica en vías de extinción en el Derecho Penal Internacional?’ in Alicia Gil Gil and Elena Maculan (eds), *Intervención delictiva y Derecho Penal Internacional. Reglas de atribución de la responsabilidad en crímenes internacionales* (Dykinson SL 2013) 418.

<sup>17</sup> Ambos, ‘Joint’ (n 16) 159-183, 160-161; Ambos, *Treatise* (n 16) 122, 124; Van Sliedregt, *Individual* (n 2) 135; Olásolo (n 2) 310; Badar (n 5) 348-349; Harmen van der Wilt, ‘Joint criminal enterprise and functional perpetration’ in André Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press 2009) 158; Gutiérrez (n 16) 419.

<sup>18</sup> Prosecutor v. Brđanin, Judgment, Appeals Chamber, 03 April 2007 (IT-99-36-A), (Brđanin Appeal Judgment), para 430; Prosecutor v. Krajišnik, Judgment, Appeals Chamber, 17 March 2009 (IT-00-39-A) (Krajišnik Appeal Judgment), para 215; Prosecutor v. Gotovina, Čermak and Markač, Judgment, TC I, 15 April 2011 (IT-06-90-T), para 1953; Prosecutor v. Đorđević, Judgment, TC II, 23 February 2011 (IT-05-87/1-T) (Đorđević Trial Judgment), para 1863; Prosecutor v. Kanyarukiga, Judgment, TC II, 01 November 2010 (ICTR-2002-78-T), para 624; Prosecutor v. Gatete, Judgment, TC III, 31 March 2011 (ICTR-2000-61-T), para 577. Olásolo (n 2) 318-322; Ambos, *Treatise* (n 16) 125; Gutiérrez (n 16) 422, 427-428.

required by the theory of control over the crime.<sup>19</sup> The *ad hoc* tribunals have defined the significant contribution as the action or omission that makes the criminal enterprise 'efficient or effective'.<sup>20</sup>

With regard to the subjective elements, they vary with each modality:<sup>21</sup>

- 1) JCE I demands the shared intent of all the members of the JCE.
- 2) JCE II requires personal knowledge of the system of ill-treatment implemented in an institution, such as a concentration camp, on the part of each member.
- 3) JCE III requires each member to be willing to participate in and to further the criminal purpose and to be aware of the contribution to the commission of the crime by the group. In this case, liability for a crime that was not part of the plan (excess of one of the members) arises if such a crime committed by one of the members of the JCE was foreseeable for the rest and they willingly decided to take such a risk.

In JCE II, it is understood that every member who is aware of the system of ill-treatment and continues performing his or her task, implicitly shares the criminal intent of the members of the JCE who directly commit the crimes.<sup>22</sup> Thus, both JCE I and II require the (explicitly or implicitly) shared intent of the co-perpetrators.

With respect to the foreseeable crimes in JCE III, the case law of the *ad hoc* tribunals establishes the sufficiency of *dolus eventualis*, and it requires the awareness of the substantial likelihood that a crime will be committed and the acceptance of such likelihood.<sup>23</sup> However, the foreseeability standard of JCE III does not fulfil certain indispensable requirements of co-perpetration – not only the essential contribution requirement, but also the mutual awareness and acceptance of the risk of committing a crime.

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<sup>19</sup> Olásolo (n 2) 322.

<sup>20</sup> Prosecutor v. Kvočka, Radić, Žigić and Prcać, Judgment, TC, 02 November 2001 (IT-98-30/1-T), paras 275 and 309; Prosecutor v. Simić, Tadić and Zarić, Judgment, TC II, 17 October 2003 (IT-95-9-T), para 159. Olásolo (n 2) 316-324.

<sup>21</sup> Ambos, 'Joint' (n 16) 160-161; Ambos, *Treatise* (n 16) 125-126; Van Sliedregt, *Individual* (n 2) 134; Van der Wilt (n 17) 158-159; Alicia Gil Gil, 'Principales figuras de imputación a título de autor en Derecho Penal Internacional: Empresa Criminal Conjunta, coautoría por dominio funcional and coautoría mediata' (2013) 109 CPC 109, 115; Gutiérrez (n 16) 419-420; Cassese (n 16) 191-200.

<sup>22</sup> Cassese (n 16) 195-196.

<sup>23</sup> Tadić Appeal Judgment (n 13), paras 220-228; Prosecutor v. Stakić, Judgment, Appeals Chamber, 22 March 2006 (IT-97-24-A), para 101; Prosecutor v. Blaškić, Judgment, TC, 03 March 2000 (IT-95-14-T), para 254; Prosecutor v. Kayishema and Ruzindana, Judgment, TC II, 21 May 1999 (ICTR-95-1-T), para 146; Prosecutor v. Martić, Judgment, Appeals Chamber, 08 October 2008 (IT-95-11-A), paras 222-223; Prosecutor v. Kordić and Čerkez, Judgment, Appeals Chamber, 17 December 2004 (IT-95-14/2-A), paras 29-32; Prosecutor v. Orić, Judgment, TC II, 30 June 2006 (IT-03-68-T), para 348; Prosecutor v. Strugar, Judgment, TC II, 31 January 2005 (IT-01-42-T), paras 235-236. Cassese (n 16) 199-209; Gutiérrez (n 16) 419-420.

## 2.2 Critical aspects

Applying JCE doctrine as a form of co-perpetration is subject to important critical remarks, especially with regard to JCE III.

First, since the three categories of JCE disregard the objective content or the importance of the contribution to the crime, none of them can be understood as a form of co-perpetration. As stated, the ICC has adopted another concept of co-perpetration based on the theory of control over the crime, according to which, co-perpetrators must make essential contributions to the commission of the crime, in the sense that they can frustrate its commission by not performing their tasks. This means that if the defendant made a contribution that was not essential, he or she could only be liable under some form of accessorial liability, while the same contributions would give rise to responsibility as a co-perpetrator under JCE.

Second, JCE III lacks another important feature of co-perpetration: the shared or mutual awareness and acceptance of the risk of committing a crime.<sup>24</sup> As will be discussed below, unlike the adoption of the *dolus eventualis* standard in the context of co-perpetration in the ICC, in JCE III, the individual awareness and acceptance constitute a sufficient standard. Thus, JCE III cannot be considered a form of co-perpetration, since the common purpose/plan to commit the crime constitutes the limit of the reciprocal imputation of the individual contributions, and the member of a JCE who goes beyond what has been agreed, becomes independent and the other members of the JCE cannot have joint control over such a crime.<sup>25</sup> In other words, the imputation of a mere 'foreseeable consequence' that had not been previously agreed upon by the members of the JCE cannot amount to co-perpetrator liability.<sup>26</sup>

Third, applying the traditional JCE concept to the leaders entails admitting the existence of extremely broad JCEs that are no more than a legal fiction, in the sense that all members must:<sup>27</sup> 1) act in furtherance of a common plan; 2) share the intent to commit the JCE's central crimes; and 3) share any *dolus specialis* required by such crimes. Therefore, the *ad hoc* tribunals resorted to the combination of the concepts of JCE-based co-perpetration and indirect perpetration through an Organized Power Apparatus (based on the theory of control over the crime) to overcome the legal fiction of a single vast JCE and the problems that including leaders in such a JCE presents.<sup>28</sup> However, the

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<sup>24</sup> Prosecutor v. Brđanin, Decision on interlocutory appeal, Appeals Chamber, 19 March 2004 (IT-99-36-A), para 6; Prosecutor v. Milošević, Decision on Motion for Judgment of Acquittal, TC, 16 June 2004 (IT-02-54-T), paras 290-292. Olásolo (n 2) 338, 513-514; Ambos, 'Joint' (n 16) 166.

<sup>25</sup> Ambos, 'Joint' (n 16) 174; Alicia Gil Gil, 'Mens Rea in Co-perpetration and Indirect Perpetration According to Article 30 of the Rome Statute. Arguments against Punishment for Excesses Committed by the Agent or the Co-perpetrator' (2014) 14 ICLR 82, 84; Claus Roxin, *Autoría y Dominio del Hecho en Derecho Penal* (Marcial Pons 2000) 317.

<sup>26</sup> Ambos, 'Joint' (n 16) 168-169.

<sup>27</sup> Olásolo (n 2) 359-360; Gil, 'Principales' (n 21) 116; Van der Wilt (n 17) 168.

<sup>28</sup> Brđanin Appeal Judgment (n 18), paras 410-414, 418-425. See also Krajišnik Appeal Judgment (n 18), para 714; Đorđević Trial Judgment (n 18), paras 2127-2128. Olásolo (n 2) 376; Van Sliedregt, *Individual* (n

combination of two antagonistic positions creates uncertainty as to which is the dominant criterion for distinguishing between principals and accessories.<sup>29</sup>

### 3 Co-Perpetration at the ICC

In contrast to the *ad hoc* tribunals' case law, the ICC does not base the concept of co-perpetration on the JCE doctrine, but instead it adopts the theory of control over the crime to establish criminal liability on the basis of co-perpetration.<sup>30</sup>

Co-perpetration applies when the accused has, together with others, control over the crime by reason of the essential tasks assigned to them.<sup>31</sup> In these cases, although none of the co-perpetrators has overall control over the offence, 'they all share control because each of them could frustrate the commission of the crime by not carrying out his or her essential task'.<sup>32</sup>

#### 3.1 Mental element (Art. 30 RS)

According to Art. 30 RS, for an individual to be criminally responsible, the 'material elements' of the crime must be committed 'with intent and knowledge'. These 'material elements' are defined as 'conduct', 'consequence' and 'circumstance' and must be identified with the objective elements of an offence.<sup>33</sup>

The general mental element contained in Art. 30 RS requires 'knowledge' and 'intent' with regard to the objective elements of an offence.<sup>34</sup> In other words, Art. 30 RS requires the combination of the cognitive and volitive element of *dolus*. However, it also contains the formula 'unless otherwise provided', meaning that Art. 30 RS itself foresees the possibility that, in certain cases, the Statute contains different subjective requirements.<sup>35</sup>

Therefore, the general rule of Art. 30 RS requires that the objective elements of the offence be covered by *dolus*. However, the case law of the ICC has not been uniform with regard to the sufficiency (or not) of *dolus eventualis*. As will be seen below, this question is closely related to the interpretation of the 'element of criminality' that the common agreement or plan must contain in the framework of co-perpetration.<sup>36</sup>

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2) 165; Jens David Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability' (2012) 25(3) LJIL 771, 772-775.

<sup>29</sup> Olásolo (n 2) 437.

<sup>30</sup> Lubanga Trial Judgment (n 11), paras 980-988.

<sup>31</sup> Decision in the Katanga case (n 4), paras 519-526; Decision in the Lubanga case (n 4), paras 326-332, 342. <sup>32</sup> *ibid*.

<sup>33</sup> Ambos, *Treatise* (n 16) 270-271.

<sup>34</sup> *ibid*; Badar (n 5) 382; Gil, 'Mens Rea' (n 25) 98; Martínez (n 12) 149.

<sup>35</sup> Ambos, *Treatise* (n 16) 291; Cassese (n 16) 73-74; Alicia Gil Gil, 'El elemento subjetivo de los crímenes (mens rea)' in Alicia Gil Gil and Elena Maculan (eds), *Derecho penal internacional* (Dykinson SL 2016) 185.

<sup>36</sup> Olásolo (n 2) 156-158; Jens David Ohlin, 'Co-perpetration. German *Dogmatik* or German Invasion?' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 535-537.

Despite the fact that, in the Decision on the confirmation of charges in the *Lubanga* case, Pre-Trial Chamber I (PTC I) included what it defined as the two scenarios of *dolus eventualis* in Article 30 RS,<sup>37</sup> the same Chamber in the Decision on the confirmation of charges in the *Katanga* case and Trial Chamber I (TC I) in the *Lubanga* Trial Judgement only admitted the first of these scenarios (including it in *dolus directus* of the second degree, hence the term ‘*dolus directus* of the second degree *lato sensu*’ will be used here),<sup>38</sup> while Pre-Trial Chamber II (PTC II) did not admit either of the two scenarios of *dolus eventualis* within the scope of Art. 30 RS (only *dolus directus* of the first degree and *dolus directus* of the second degree *stricto sensu*).<sup>39</sup>

The various levels of *mens rea* have been defined as follows by the case law of the ICC:

- *Dolus directus* of the first degree:<sup>40</sup> the suspect 1) knows that his/her actions/omissions will bring about the objective elements of the crime, and 2) undertakes such actions/omissions with the concrete will to carry out the objective elements of the crime.

- *Dolus directus* of the second degree (*stricto sensu*):<sup>41</sup> 1) without having the concrete intent to bring about the objective elements of the crime, 2) the suspect is aware that such elements will be the necessary outcome of his/her actions/omissions (standard of ‘virtual certainty’).

- First scenario of *dolus eventualis*<sup>42</sup> or *dolus directus* of the second degree (*lato sensu*):<sup>43</sup> the suspect (1) is aware of the substantial risk that the objective elements of the crime may result from his/her actions/omissions (substantial likelihood that ‘it will occur in the ordinary course of events’), and (2) accepts such an outcome by reconciling himself/herself with it or consenting to it, in which case the acceptance can be inferred from his/her awareness of the substantial likelihood and his/her decision, despite such awareness, to carry out such actions/omissions.

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<sup>37</sup> Decision in the *Lubanga* case (n 4), paras 352-354.

<sup>38</sup> Decision in the *Katanga* case (n 4), paras 529-531; *Lubanga* Trial Judgment (n 11), paras 1010-1012.

<sup>39</sup> Prosecutor v. Ruto, Kosgey and Sang, Decision on the Prosecutor’s Application for Summons to Appear, PTC II, 08 March 2011 (ICC-01/09-01/11) (Summons to appear in the Ruto, Kosgey and Sang case), para 40; Prosecutor v. Muthaura, Kenyatta and Ali, Decision on the Prosecutor’s Application for Summonses to Appear, PTC II, 08 March 2011 (ICC-01/09-02/11) (Summons to appear in the Muthaura, Kenyatta and Ali case), para 36. Before the *Lubanga* Appeal Judgment, PTC I had only followed such interpretation in one case: Prosecutor v. Banda and Jerbo, Corrigendum of the Decision on the Confirmation of Charges, PTC I, 07 March 2011 (ICC-02/05-03/09) (Decision in the Banda and Jerbo case), para 156.

<sup>40</sup> Decision in the *Lubanga* case (n 4), para 351; Decision in the *Katanga* case (n 4), para 529; *Lubanga* Trial Judgment (n 11), para 1009; Prosecutor v. Bemba, Decision on the confirmation of charges, PTC II, 15 June 2009 (ICC01/05-01/08-424) (Decision in the Bemba case), para 358.

<sup>41</sup> Decision in the *Lubanga* case (n 4), para 352; Decision in the Bemba case (n 40), paras 359, 362; Summons to appear in the Ruto, Kosgey and Sang case (n 39), para 40; Summons to appear in the Muthaura, Kenyatta and Ali case (n 39), para 36; Decision in the Banda and Jerbo case (n 39), para 156.

<sup>42</sup> Decision in the *Lubanga* case (n 4), para 353.

<sup>43</sup> Decision in the *Katanga* case (n 4), paras 530, 533; *Lubanga* Trial Judgment (n 11), paras 1010-1012.

- Second scenario of *dolus eventualis*:<sup>44</sup> the suspect 1) is aware of the low risk of bringing about the objective elements of the crime, and 2) clearly or expressly accepts this idea.

The Decision on the confirmation of charges in the *Katanga* case (PTC I) and the *Lubanga* Trial Judgment (TC I) only admitted the first scenario of *dolus eventualis*, and did not even do so expressly, since they referred to such a concept as *dolus directus* of the second degree. These decisions said that they established the minimum in *dolus directus* of the second degree.<sup>45</sup>

However, they included in the definition of *dolus directus* of the second degree the first scenario of *dolus eventualis* of the Decision on the confirmation of charges in the *Lubanga* case,<sup>46</sup> since they required that:<sup>47</sup> 1) without having the intent to bring about the objective elements of the crime, 2) the suspect is aware that the consequence of his/her conduct will occur in the ordinary course of events.

It coincides with the element of ‘awareness of the substantial likelihood that it will occur in the ordinary course of events’ of the first scenario of *dolus eventualis*.<sup>48</sup> Moreover, when referring to *dolus directus* of the second degree, the Chamber used terms such as ‘possibility’, ‘probability’, ‘danger’ and ‘risk’,<sup>49</sup> which are characteristic of *dolus eventualis*, as opposed to the ‘virtual certainty’ required by *dolus directus* of the second degree.<sup>50</sup>

PTC II did not admit either of the two scenarios of *dolus eventualis* within the scope of Art. 30 RS.<sup>51</sup> It gave a narrow definition of *dolus directus* of the second degree, insofar as it required the suspect to be aware that the realisation of the objective elements of the crime is an inevitable outcome of his/her acts/omissions, in the sense of the ‘virtual certainty’ that the consequence will occur, expressly excluding mere likelihood or possibility.<sup>52</sup> According to PTC II, if the aim had been to include *dolus eventualis* in Art. 30 RS, the aforementioned article would have used expressions such as ‘may occur’ or ‘might occur’, instead of ‘will occur’ in the ordinary course of events.<sup>53</sup>

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<sup>44</sup> Decision in the *Lubanga* case (n 4), para 354.

<sup>45</sup> Decision in the *Katanga* case (n 4), para 531; *Lubanga* Trial Judgment (n 11), paras 1011-1012.

<sup>46</sup> Olásolo (n 2) 142-148; Ohlin, ‘Co-perpetration’ (n 36) 534-535.

<sup>47</sup> Decision in the *Katanga* case (n 4), paras 530, 533; *Lubanga* Trial Judgment (n 11), para 1012.

<sup>48</sup> Decision in the *Lubanga* case (n 4), para 353.

<sup>49</sup> It stated that the awareness of a low risk is not sufficient. Thus, it excluded the second scenario of *dolus eventualis*.

<sup>50</sup> *Lubanga* Trial Judgment (n 11), para 1012. Olásolo (n 2) 147-148; Ohlin, ‘Co-perpetration’ (n 36) 534-535.

<sup>51</sup> Decision in the *Bemba* case (n 40), paras 358-363; Summons to appear in the *Ruto, Kosgey and Sang* case (n 39), para 40; Summons to appear in the *Muthaura, Kenyatta and Ali* case (n 39), para 36. Olásolo (n 2) 144-146; Gil, ‘Mens Rea’ (n 25) 86, 100; Gil, ‘Principales’ (n 21) 124.

<sup>52</sup> Decision in the *Bemba* case (n 40), paras 359-363.

<sup>53</sup> *ibid.*

The *Lubanga* Appeal Judgment endorsed the ‘virtual certainty’ standard.<sup>54</sup> Subsequent decisions seem to adopt the doctrine established by the Appeals Chamber in the sense of requiring ‘virtual certainty’ and rejecting the sufficiency of *dolus eventualis*.<sup>55</sup>

Several authors have been critical of the decision to exclude *dolus eventualis* from the scope of Art. 30 RS, as they rightly argue that: the ICC has departed from the case law of a large majority of States and from the ‘awareness of substantial likelihood’ standard established by the *ad hoc* tribunals, which coincides with the standard required by the ICC’s PTC I in relation to the first scenario of *dolus eventualis* in the *Lubanga* case;<sup>56</sup> the exclusion of *dolus eventualis* is a consequence of incorrectly equating *dolus eventualis* with recklessness;<sup>57</sup> the literal interpretation of the expression ‘will occur in the ordinary course of events’ does not exclude the scenario of substantial likelihood (in the sense of *dolus eventualis*);<sup>58</sup> and taking into account that the RS contains the crimes that most seriously affect the international community, the requirement of *dolus directus* of the first or second degree (*stricto sensu*) is excessive and unfortunate from the perspective of criminal policy.<sup>59</sup>

Therefore, Art. 30 RS should have been interpreted to include *dolus eventualis*, the latter being defined as the scenario in which the suspect (1) is aware of the substantial risk of producing the objective elements of the crime (substantial likelihood that ‘it will occur in the ordinary course of events’), and (2) accepts such an idea, in which case acceptance can be inferred from his/her awareness of the substantial likelihood and his/her decision, despite such awareness, to carry out such actions/omissions. In the Decision on the confirmation of charges in the *Lubanga* case, PTC I relied primarily on the volitional element, since, as long as the perpetrator accepted or assumed the result, the Chamber considered it sufficient that the perpetrator perceived a low risk of producing the objective elements of the crime. However, it subsequently also demanded compliance with the requirement of awareness of the substantial likelihood (cognitive element), which we consider appropriate, as it thus brought its case law into line with that of the *ad hoc* tribunals.

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<sup>54</sup> *Lubanga* Appeal Judgment (n 4), para 447-451.

<sup>55</sup> Ntaganda Trial Judgment (n 4), para 776; Decision in the Al Hassan case (n 4), para 801; Document containing the reasons of Judge Henderson with regard to the oral decision of Trial Chamber I to acquit Laurent Gbagbo, 16 July 2019 (ICC-02/11-01/15-1263-AnxB-Red) (Document in the Gbagbo case), paras 1916, 1920; Prosecutor v. Ongwen, Trial Judgment, TC IX, 4 February 2021 (ICC-02/04-01/15), para 2695; Prosecutor v. Ntaganda, Judgment, Appeals Chamber, 30 March 2021 (ICC-01/04-02/06 A A2) (Ntaganda Appeal Judgment), para 945.

<sup>56</sup> Olásolo (n 2) 160; Gutiérrez (n 16) 466; Werle and Jessberger (n 1) 182.

<sup>57</sup> Badar (n 5) 33-50, 423-425; Gil, ‘El elemento subjetivo’ (n 35) 189ff.

<sup>58</sup> Olásolo (n 2) 158-161; Gil, ‘El elemento subjetivo’ (n 35) 196.

<sup>59</sup> *ibid.*

### 3.2 Elements of co-perpetration at the ICC

According to the theory of joint control applied by the ICC, co-perpetrators are those who act jointly on the basis of a functional division of the criminal tasks in which they all share control over the crime.<sup>60</sup> They all have joint control over the crime, in the sense that they all depend on one another for its commission, but each of them has the 'power to frustrate its commission' by not performing their task; therefore, the co-perpetrator's contribution must be of 'essential' importance to the commission of the crime.<sup>61</sup>

In the context of co-perpetration, there is a 'functional' control over the crime.<sup>62</sup> This is one of the three expressions of control over the crime,<sup>63</sup> which corresponds to the reference to the person who commits the crime 'jointly with another... person' in Art. 25(3)(a) RS.

#### 3.2.1 *Objective elements*

The case law of the ICC demands two objective elements in the field of co-perpetration based on joint control over the crime:<sup>64</sup> 1) the existence of an agreement or common plan between two or more persons that, if implemented, will result in the commission of a crime; and 2) that each co-perpetrator provides a co-ordinated essential contribution resulting in the realisation of the objective elements of the crime.

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<sup>60</sup> Ambos, 'Article 25' (n 2) 988, 992; Van Sliedregt, *Individual* (n 2) 99; Martínez (n 12) 152; Díaz (n 5) 656-657.

<sup>61</sup> Roxin (n 25) 305-336; Badar (n 5) 156-157, 362-366; Olásolo (n 2) 500-502; Faraldo (n 12) 148. Lubanga Appeal Judgment (n 4), para 469, 473; Decision in the Lubanga case (n 4), paras 326, 342-348; Decision in the Katanga case (n 4), paras 519-521, 524-526; Decision in the Banda and Jerbo case (n 39), paras 126, 136-138; Prosecutor v. Muthaura, Kenyatta and Ali, Decision on the confirmation of charges, PTC II, 23 January 2012 (ICC-01/09-02/11) (Decision in the Muthaura, Kenyatta and Ali case), paras 401-404, 419; Decision in the Al Mahdi case (n 4), para 24; Prosecutor v. Al Mahdi, Judgment and Sentence, TC VIII, 27 September 2016 (ICC-01/12-01/15) (Al Mahdi Trial Judgment), paras 19, 53; Decision in the Blé Goudé case (n 4), para 135, 141; Decision in the Ongwen case (n 4), para 38; Decision in the Al Hassan case (n 4), paras 797-803; Ntaganda Trial Judgment (n 4), para 779; Ntaganda Appeal Judgment (n 55), paras 1040-1041.

<sup>62</sup> Roxin (n 25) 305-336.

<sup>63</sup> Ibid 310; Olásolo (n 2) 304-305; Gimbernat (n 5) 103-109; Díaz (n 5) 573-576; Ambos, 'Joint' (n 16) 170-172.

<sup>64</sup> Lubanga Trial Judgment (n 11), para 1006; Decision in the Lubanga case (n 4), paras 343-348; Decision in the Katanga case (n 4), paras 521-526; Decision in the Banda and Jerbo case (n 39), paras 128-138; Decision in the Bemba case (n 40), para 350; Prosecutor v. Abu Garda, Decision on the confirmation of charges, PTC I, 08 February 2010 (ICC-02/05-02/09) (Decision in the Abu Garda case), para 160. Olásolo (n 2) 494; Ambos, 'Article 25' (n 2) 992; Ambos, *Treatise* (n 16) 150; Badar (n 5) 362-366; Gil, 'Principales' (n 21) 123; Gil, 'Mens Rea' (n 25) 86; Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (OUP 2013) 176.



The requirement of a common plan or agreement constitutes the basis –and the limit– of the reciprocal imputation of the different contributions;<sup>65</sup> hence, each co-perpetrator is held responsible for the whole crime.<sup>66</sup> It is surprising that the ICC has considered the common agreement as an objective requirement, given that such a requirement is nothing more than the joint construction of the intent of the co-perpetrators, and therefore a subjective element.<sup>67</sup> This issue will be examined in more detail when analysing the subjective elements of co-perpetration.

The second objective element of co-perpetration requires that the accused's contribution be essential, since, according to the ICC's case law, this is the key to deciding whether the perpetrator has control over the crime.<sup>68</sup> In order to decide whether a contribution meets the requirement of being essential, the ICC has resorted to the analysis of the power to frustrate the commission of the crime by not performing their tasks.<sup>69</sup>

### 3.2.2 *Subjective elements*

According to the Decision on the confirmation of charges in the *Lubanga* case, co-perpetration based on joint control over the crime requires three subjective elements:<sup>70</sup> 1) the suspect must fulfil the subjective elements of the crime in question; 2) the suspect and the other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crime; and 3) the suspect must be aware of the factual circumstances enabling him or her to jointly control the crime.

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<sup>65</sup> Lubanga Appeal Judgment (n 4), para 445; Decision in the Al Hassan case (n 4), para 799; Decision in the Ongwen case (n 4), para 38; Decision in the Al Mahdi case (n 4), para 24; Decision in the Blé Goudé case (n 4), para 134; Werle and Jessberger (n 1) 205-207; Gil, 'El elemento subjetivo' (n 35) 200.

<sup>66</sup> Ambos, 'Article 25' (n 2) 988.

<sup>67</sup> Gil, 'Principales' (n 21) 123; Gil, 'El elemento subjetivo' (n 35) 199; Faraldo (n 12) 153; Martínez (n 12) 160; Díaz (n 5) 653.

<sup>68</sup> Lubanga Trial Judgment (n 11), paras 996-1001; Decision in the Katanga case (n 4), paras 524-526; Decision in the Bemba case (n 40), para 350; Decision in the Banda and Jerbo case (n 39), paras 136-138; Decision in the Abu Garda case (n 64), para 153; Summons to appear in the Ruto, Kosgey and Sang case (n 39), para 40; Prosecutor v. Ruto, Kosgey and Sang, Decision on the confirmation of charges, PTC II, 23 January 2012 (ICC-01/09-01/11) (Decision in the Ruto, Kosgey and Sang case), para 292; Summons to appear in the Muthaura, Kenyatta and Ali case (n 39), para 36; Decision in the Muthaura, Kenyatta and Ali case (n 61), 401-404, 419; Decision in the Al Mahdi case (n 4), para 24; Al Mahdi Trial Judgment (n 61), paras 19, 53; Lubanga Appeal Judgment (n 4), paras 469, 473; Decision in the Blé Goudé case (n 4), paras 135, 141; Decision in the Ongwen case (n 4), para 38; Decision in the Al Hassan case (n 4), para 802-803. Ambos, *Treatise* (n 16) 152-153; Roxin (n 25) 305-336; Olásolo (n 2) 500-502; Gil, 'Principales' (n 21) 123; Gil, 'Mens Rea' (n 25) 86; Maculan (n 2) 218; Cryer, Robinson and Vasiliev (n 9) 351.

<sup>69</sup> Lubanga Appeal Judgment (n 4), para 473; Decision in the Lubanga case (n 4), para 347; Lubanga Trial Judgment (n 11), paras 994ff; Decision in the Blé Goudé case (n 4), paras 135, 141; Decision in the Ongwen case (n 4), para 38; Decision in the Al Mahdi case (n 4), para 24; Al Mahdi Trial Judgment (n 61), paras 19, 53; Decision in the Al Hassan case (n 4), paras 802-803; Ntaganda Appeal Judgment (n 55), paras 1040-1041. Maculan (n 2) 218; Cryer, Robinson and Vasiliev (n 9) 351; Werle and Jessberger (n 1) 205-206.

<sup>70</sup> Decision in the Lubanga case (n 4), paras 349-367; Decision in the Katanga case (n 4), paras 527-539; Lubanga Trial Judgment (n 11), paras 1007-1016; Decision in the Abu Garda case (n 64), para 161.

In the Decision on the confirmation of charges in the *Lubanga* case, PTC I required mutual awareness and acceptance by the co-perpetrators that implementing their common plan ‘may result in’ the realisation of the objective elements of the crime.<sup>71</sup> In other words, the Chamber considered it sufficient that the co-perpetrators were mutually aware of the risk – both substantial and low – of the realisation of the objective elements of the crime, and mutually accepted such a result. This standard corresponds to the threshold of *dolus eventualis* established in the same decision.

However, since the Decision on the confirming of charges in the *Bemba* case, PTC II requires awareness and acceptance on the part of the suspect that implementing the common plan ‘will result in’ the fulfilment of the objective elements of the crime:<sup>72</sup> PTC II departed from PTC I in the Decision in the *Lubanga* case in two respects: (1) it did not require that the awareness and acceptance be mutual; and (2) it did not consider it sufficient that the common plan ‘may result in’ the realisation of the objective elements of the crime but required that the plan ‘will result in’ the realisation of such elements. PTC II interpreted the expression ‘will occur in the ordinary course of events’ in Art. 30(2)(b) RS, relating to the consequence, as setting the standard of foreseeability at ‘virtual certainty’.<sup>73</sup> What PTC II established in the area of co-perpetration is consistent with its decision, in relation to Art. 30 RS, to exclude *dolus eventualis*.

Despite the apparent exclusion of *dolus eventualis*, the Decision on the confirmation of charges in the *Katanga* case and the *Lubanga* Trial Judgment included the first scenario of *dolus eventualis* also in the scope of co-perpetration.<sup>74</sup> Both decisions required that the co-perpetrators are aware that implementing their common plan will result in the realisation of the objective elements of the crime ‘in the ordinary course of events’, but this does not imply that the co-perpetrators must know that the crime is a necessary consequence of implementing the plan, but that it is sufficient that they are mutually aware of the substantial risk that the consequence will occur.<sup>75</sup>

The most recent ICC case law is consistent in denying the need for the plan to be specifically directed at the commission of the crime in question, and it confirms the sufficiency of the plan to include an ‘element of criminality’.<sup>76</sup> Furthermore, it excludes *dolus eventualis* when interpreting this requirement and sets the threshold of

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<sup>71</sup> Decision in the *Lubanga* case (n 4), paras 361-365.

<sup>72</sup> Decision in the *Bemba* case (n 40), para 351; Decision in the *Banda and Jerbo* case (n 39), para 159; Decision in the *Ruto, Kosgey and Sang* case (n 68), para 333; Decision in the *Muthaura, Kenyatta and Ali* case (n 61), paras 297, 410.

<sup>73</sup> Decision in the *Bemba* case (n 40), para 362; Decision in the *Banda and Jerbo* case (n 39), paras 156, 159; Decision in the *Muthaura, Kenyatta and Ali* case (n 61), paras 297, 410, 415.

<sup>74</sup> Decision in the *Katanga* case (n 4), paras 527-539; *Lubanga* Trial Judgment (n 11), paras 982-987, 1010-1012. See also Decision in the *Abu Garda* case (n 64), para 161. Ohlin, ‘Co-perpetration’ (n 36) 536-537.

<sup>75</sup> Decision in the *Katanga* case (n 4), paras 527-539; *Lubanga* Trial Judgment (n 11), paras 982-987. See also Decision in the *Abu Garda* case (n 64), para 161. Mutual acceptance of the risk is also required.

<sup>76</sup> *Lubanga* Appeal Judgment (n 4), para 446; Decision in the *Blé Goudé* case (n 4), para 140; Document in the *Gbagbo* case (n 55), para 1907; Decision in the *Al Hassan* case (n 4), para 801; *Ntaganda* Trial Judgment (n 4), para 776.

foreseeability at 'virtual certainty', in the sense of *dolus directus* of the second degree (*stricto sensu*).<sup>77</sup>

On the contrary, we have defended the inclusion of *dolus eventualis* in Art. 30 RS. Therefore, we consider that, in the field of co-perpetration, this article would cover the cases in which the perpetration of crimes constitutes a substantial risk (acknowledged by the co-perpetrators) of implementing the plan and the co-perpetrators mutually accept the perpetration of the crimes (first scenario of *dolus eventualis*).<sup>78</sup>

Note that mutual awareness and acceptance are required.<sup>79</sup> Consequently, the following cannot be considered as an example of *dolus eventualis* in the field of co-perpetration: the mere foreseeability on the part of one co-perpetrator that another co-perpetrator may commit a non-agreed crime if certain circumstances are met. However, it could trigger liability as a co-perpetrator on the basis of JCE III.

Finally, the third subjective element requires the suspect to be aware of:<sup>80</sup> 1) the essential nature of his/her role in the implementation of the common plan, and hence in the commission of the crime; and 2) his/her ability to frustrate the implementation of the common plan, and hence the commission of the crime, by refusing to perform the task assigned to him/her.

#### 4 Concluding Remarks

It is essential for ICL to envisage various forms of principal and accessory liability that are adapted to the characteristics of the *actus reus* and the *mens rea* of the multiple participants. It is to be welcomed that the ICC, unlike the *ad hoc* tribunals, adopts in Art. 25(3) RS a differentiated model that clearly distinguishes between perpetrators and accessories, based on the theory of control over the crime.

Although ICC case law is not uniform on this point, we defend, in line with the *Lubanga* Appeal Judgement, the existence of a hierarchy between the forms of principal and accessory liability in Art. 25(3) RS. We consider it essential that the ICC punishes those most responsible for the crimes as perpetrators, since responsibility as accessories means relegating the perpetrator to a secondary position, on the understanding that he/she has contributed to the crime of another person(s).

As mentioned above, there are several interpretative differences concerning co-perpetration among the various tribunals and chambers. Due to the critical aspects raised

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<sup>77</sup> *Lubanga* Appeal Judgment (n 4), para 447; *Ntaganda* Trial Judgment (n 4), para 776; Decision in the *Al Hassan* case (n 4), para 801; Document in the *Gbagbo* case (n 55), para 1920; *Ntaganda* Appeal Judgment (n 55), para 945.

<sup>78</sup> Olásolo (n 2) 156-158. See also Roxin (n 25) 311; Gil, 'Mens Rea' (n 25) 101.

<sup>79</sup> To understand the relevance of such a requirement, see Roxin (n 25) 316-317.

<sup>80</sup> Decision in the *Lubanga* case (n 4), paras 366-367; Decision in the *Katanga* case (n 4), paras 538-539; Decision in the *Bemba* case (n 40), paras 351, 371; Decision in the *Banda and Jerbo* case (n 39), paras 160-161; Decision in the *Ruto, Kosgey and Sang* case (n 68), para 33.

by the case law of the *ad hoc* tribunals on the JCE doctrine and to the need to distinguish between the liability as a perpetrator and as an accessory, the ICC's approach, based on the theory of control over the crime ('functional' control), should be followed.

However, the question of the exclusion of *dolus eventualis* from Art. 30 RS deserves special attention. Although the case law of the ICC seems to have opted for the requirement of 'virtual certainty' and the rejection of *dolus eventualis*, we believe that there are strong reasons to defend its inclusion (in the sense of the first scenario of *dolus eventualis* in the *Lubanga* case) in the aforementioned article.

In relation to co-perpetration, the admission of *dolus eventualis* requires, in any case, that the awareness and acceptance (of the substantial likelihood of the perpetration of the crime) on the part of the co-perpetrators be mutual. Consequently, the inclusion of *dolus eventualis*, unlike JCE III, does not mean that co-perpetrators can be held responsible for the non-agreed excesses committed by other co-perpetrators.

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# RESPONSIBILITY FOR PROPERTY AND ASSETS FROZEN OR SEIZED UPON REQUEST BY THE INTERNATIONAL CRIMINAL COURT

By Owiso Owiso\*

## Abstract

*Article 57(3)(e) of the Rome Statute of the International Criminal Court empowers the International Criminal Court to 'seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims', while Article 93(1)(k) imposes an obligation on state parties to the statute to provide assistance to the Court in the 'identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture'. However, the Court does not yet have sufficient jurisprudence to flesh out the conceptual and practical boundaries of these provisions, including the question of responsibility for the management of the frozen or seized property and assets. If the Court's very limited relevant jurisprudence is anything to go by, it is urgently necessary to interrogate these provisions and their practical application, as these questions lie at the very core of the Court's integrity and credibility. This is especially so as the Court seeks to expand its practical reach beyond (mainly indigent) non-state actors to state actors, a situation that is likely to call more attention to the Court's powers and responsibilities specifically relating to Articles 57(3)(e) and 93(1)(k). This article interrogates the Court's powers under Article 57(3)(e) and the extent of obligations of the Court and of state parties arising from Article 93(1)(k), as well as the possible implications for the rights of accused persons, the rights and expectations of victims and for state cooperation.*

## 1 Introduction

The International Criminal Court (ICC or Court) has authority to take protective measures in relation to the property and assets of an accused person. Article 57(3)(e) of the Rome Statute of the International Criminal Court (Rome Statute) empowers the Pre-Trial Chamber, where the Court has issued arrest warrants or summons, to seek States' cooperation in taking protective measures.<sup>1</sup> Article 93(1)(k) obligates state parties to comply with the Court's requests for assistance in the 'identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the

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\* Lecturer in Public International Law, University of Groningen.

<sup>1</sup> Article 57(3)(e):

In addition to its other functions under this Statute, the Pre-Trial Chamber may: Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

purpose of eventual forfeiture’.<sup>2</sup> The Court’s powers under Article 57(3)(e) and the obligations imposed on state parties under Article 93(1)(k) together raise complex questions relating to international legal obligations; responsibility of states and of international organisations, particularly as relates to the question of attribution of conduct relevant to the seizure and freezing of assets upon the Court’s request; shared responsibility between states and international organisations; and state cooperation. This article engages with these questions and explores their possible implications.

As background to the discussion in this paper, Section 2 introduces the *Bemba* case in which the legal issues subject of this paper prominently came to the fore. Sections 3 and 4 interrogate the nature of the Court’s powers under Article 57(3)(e) and the extent of the Court’s and state parties’ obligations under Articles 57(3)(e) and 93(1)(k) and the question of responsibility for internationally wrongful acts from the position of general international law. Section 5 engages with the practical application of Articles 57(3)(e) and 93(1)(k) by discussing possible implications of the above powers, obligations and responsibilities for the rights of accused persons, for the rights of victims before the Court and for state cooperation. In so doing, sections 3, 4 and 5 make reference to the Court’s limited relevant jurisprudence, specifically *The Prosecutor v Jean-Pierre Bemba Gombo*, the only case before the Court where Articles 57(3)(e) and 93(1)(k) have been litigated post-acquittal. The paper concludes that the Court’s approach to the interpretation and application of Articles 57(3)(e) and 93(1)(k) has been evasive and narrow and that the Court has failed to provide sufficient guidance on management of assets seized and frozen pursuant to Articles 57(3)(e) and 93(1)(k) of the Rome Statute. Consequently, this state of affairs has exposed accused persons to violations of their rights to fair trial, private and family life and quiet enjoyment of property, and may potentially frustrate victims’ right to reparations and also potentially dampen state cooperation with the Court.

## 2 The Bemba Debacle

The presentation and writing of this paper occurred against the backdrop of the legal controversy surrounding assets belonging to Mr Jean-Pierre Bemba Gombo that were frozen or seized by state parties to the Rome Statute upon the request of the ICC. While the article engages in a general discussion of powers and obligations under Articles 57(3)(e) and 93(1)(k) of the Rome Statute, it uses the *Bemba* Case as a reference point.<sup>3</sup> As such, it is proper to briefly highlight the case before proceeding to the general discussion.

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<sup>2</sup> Article 93(1)(k):

States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.

<sup>3</sup> Preliminary observations on the *Bemba* Case were published earlier in the form of a blog post. See Owiso Owiso, “‘Oops, We Misplaced the Keys...Too Bad!’: The International Criminal Court and the Fiasco of

In a Claim filed before Pre-Trial Chamber II of the Court (PTC II) in March 2019<sup>4</sup> following his acquittal by the Appeals Chamber of the Court,<sup>5</sup> Mr Bemba sought compensation for the mismanagement and destruction of and damage to his property frozen or seized by state parties (specifically Belgium, Portugal, the Democratic Republic of the Congo and Cape Verde) upon request by the Court pursuant to Articles 57(3)(e) and 93(1)(k) of the Rome Statute. Mr Bemba spent ten years from 2007 to 2018 in pre-trial and trial detention, and during this time, he did not have access to most of these assets.<sup>6</sup> Mr Bemba alleged that as a result of the acts and omissions of the Court's Office of the Prosecutor (OTP) and Registry and of state parties, his assets valued at millions of Euros (including villas, motor vehicles, aircrafts, boats and bank accounts) had significantly deteriorated, depreciated or been destroyed during the ten years of his detention.<sup>7</sup> He alleged that instead of managing his assets in order to preserve or maximise their value, the responsible Court and/or state organs had instead neglected them leading to disintegration, deterioration and the raking up of debts in the form of fees and taxes. He argued that because these assets were frozen or seized by state parties pursuant to the Court's requests under Articles 57(3)(e) and 93(1)(k) of the Rome Statute, the Court had a responsibility to ensure that these assets were properly managed and preserved. Additionally, Mr Bemba argued that the Court has a responsibility to intervene with the relevant state parties in getting his assets unfrozen after his acquittal. Despite being notified of Mr Bemba's acquittal, most of these states had refused to unfreeze and hand over the property to Mr Bemba, and Mr Bemba's multiple requests to the Court's Registry to assist in getting his assets unfrozen by the concerned states were rebuffed.<sup>8</sup>

In its May 2020 decision,<sup>9</sup> PTC II dismissed the Claim, holding that it did not have jurisdiction under Article 85 of the Rome Statute under which the Claim was filed, or indeed under any other provision of the Rome Statute, to consider the Claim for

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Mr Jean-Pierre Bemba's Compensation Claim' (*EJIL: Talk!*, 3 June 2020) <https://www.ejiltalk.org/oops-we-misplaced-the-keystoo-bad-the-international-criminal-court-and-the-fiasco-of-mr-jean-pierre-bembas-compensation-claim/> accessed 3 June 2020.

<sup>4</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Second Public Redacted Version of 'Mr. Bemba's claim for compensation and damages', International Criminal Court, ICC-01/05-01/08-3673-Red2 (19 March 2019) [hereinafter *Bemba Claim*].

<sup>5</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's 'Judgment Pursuant to Article 74 of the Statute', International Criminal Court, ICC-01/05-01/08-3636-Red (08 June 2018) [hereinafter *Bemba Appeal Judgment*].

<sup>6</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Summary of the Decision on Legal Assistance for the Accused, International Criminal Court, Trial Chamber III, ICC-01/05-01/08-568 (20 October 2009) para 16.

<sup>7</sup> *Bemba Claim*, paras 123–165. See also *The Prosecutor v Jean-Pierre Bemba Gombo*, Public Redacted Version of Mr. Bemba's Request for the Designation of a Pre-Trial Chamber Pursuant to Regulation 46(3) of the Regulations of the Court', International Criminal Court, ICC-01/05-01/08-3698 (03 November 2020) [*Bemba Request for Designation of Chamber*] para 3–35.

<sup>8</sup> *Bemba Request for Designation of Chamber*, para 4.

<sup>9</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on Mr Bemba's Claim for Compensation and Damages, International Criminal Court, ICC-01/05-01/08-3694 (18 May 2020) [hereinafter *Bemba Claim Decision*].



compensation for spoliation of assets.<sup>10</sup> PTC II further held that ‘the responsibility for the proper execution of a cooperation request emanating from the Court rests primarily with the requested States’<sup>11</sup> and that ‘[t]o the extent that any damage to Mr Bemba’s assets might have arisen in connection with or as a result of the conduct of operations of those States, the Chamber finds that it is not competent to adjudicate the matter’.<sup>12</sup> On 1 October 2020, PTC II maintained this position in dismissing Mr Bemba’s request to appeal the May 2020 decision,<sup>13</sup> holding that because it had dismissed the claim based on lack of jurisdiction, ‘the Chamber has never rendered ‘a final determination of the question of whether [Mr Bemba’s] fundamental human rights have been violated by the seizure and destruction of his property’’ which could qualify as an interlocutory decision appealable under Article 82(1)(d).<sup>14</sup>

PTC II in its May 2020 decision highlighted above appears to have taken its cue from Trial Chamber III (TC III) which, in dismissing an earlier (2018) request by Mr Bemba for the partial unfreezing of his assets,<sup>15</sup> resorted to a rather circular interpretation of Articles 57(3)(e) and 93(1)(k), holding that<sup>16</sup>

[A]ctions directed at freezing or seizure are pursued exclusively through the cooperation regime of Part 9 of the Statute, including such action taken under Article 57(3)(e) of the Statute and Article 93(1)(k) of the Statute. Therefore, the Court itself does not order the freezing or seizure of assets, but rather orders that cooperation requests be sent to States for them to do so. The State then decides to either directly enforce the Court’s request for freezing or seizure if so permitted under domestic law, or to use the information provided in the Court’s request to initiate domestic proceedings to preserve the assets. Irrespective of which approach the State applies, the assets are ultimately frozen or seized on the basis of actions taken by that State under its domestic law.

By the same token, the lifting of coercive measures, including the unfreezing of assets, must be done under domestic law. The Chamber thus notes that ... it is not the competent body to order the lifting of any such orders.

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<sup>10</sup> *Bemba Claim Decision*, paras 53–64.

<sup>11</sup> *Bemba Claim Decision*, para 57.

<sup>12</sup> *Bemba Claim Decision*, para 58.

<sup>13</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Request for Leave to Appeal the ‘Decision on Mr Bemba’s Claim for Compensation and Damages’, International Criminal Court, Pre-Trial Chamber II, ICC-01/05-01/08-3697 (1 October 2020) [hereinafter *Bemba Leave to Appeal Decision*].

<sup>14</sup> *Bemba Leave to Appeal Decision*, para 16.

<sup>15</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Public Redacted version of ‘Decision on Mr Bemba’s Preliminary Application for Reclassification of Filings, Disclosure, Accounts, and Partial Unfreezing of Mr Bemba’s Assets and the Registry’s Request for Guidance’, 18 October 2018, International Criminal Court, Trial Chamber III, ICC-01/05-01/08-3660-Red2 (20 November 2018) [hereinafter *Bemba Partial Unfreezing Decision*].

<sup>16</sup> *Bemba Partial Unfreezing Decision*, paras 11–12.

Because PTC II had rejected his claim on the basis that it did not have jurisdiction, Mr Bemba subsequently requested the Court's Presidency on 3 November 2020 specifically to constitute a Pre-Trial Chamber with express jurisdiction 'to issue Requests for Assistance to the relevant authorities of the States to discharge all remaining freezing, protective or charging orders over Mr. Bemba's assets and properties that are still in place; and ... to adjudicate a claim for damages resulting from the freezing of Mr. Bemba's assets'.<sup>17</sup> The Presidency rejected the request,<sup>18</sup> holding that it had no capacity to constitute a chamber for this specific purpose as it was not a purpose provided for in the Rome Statute<sup>19</sup> and that since TC III and PTC II had already disposed of the issue, Mr Bemba's request appeared designed 'to circumvent either the outcome of a leave to appeal decision [or] the failure to pursue such leave to appeal in the first place'.<sup>20</sup> As demonstrated in the discussion in the subsequent section, the above approach by the Court (TC III and PTC II) is circular, internally inconsistent and problematic especially when considered in light of the cooperation obligations of state parties under the Rome Statute.

### 3 Analysing Articles 57(3)(e) and 93(1)(k) in Light of the Rome Statute's Cooperation Regime

Article 86 of the Rome Statute imposes a general obligation on state parties to cooperate, providing that, 'States Parties *shall*, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.'<sup>21</sup> While the statute does not define what constitutes 'cooperate fully' within the meaning of Article 86, the Appeals Chamber of the Court in *Jordan Referral re Al-Bashir Appeal*<sup>22</sup> clarified that this 'encompasses all those obligations that States Parties owe to the Court and that are necessary for the effective exercise of jurisdiction by the Court'.<sup>23</sup> The general cooperation obligation in Article 86 is couched in mandatory terms, and as TC III itself acknowledged in the above-mentioned *Bemba* decision:<sup>24</sup>

Part 9 of the Statute establishes a unique vertical relationship between the Court and States by imposing an *unqualified* obligation on States to 'cooperate fully with the

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<sup>17</sup> *Bemba* Request for Designation of Chamber, para 44.

<sup>18</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Public Redacted Version of 'Decision on 'Mr. Bemba's Request for the Designation of a Pre-Trial Chamber Pursuant to Regulation 46(3) of the Regulations of the Court' dated 30 October 2020 (ICC-01/05-01/08-3698-Conf-Exp)', International Criminal Court, Presidency, ICC-01/05-01/08-3701-Conf-Exp) (09 December 2020) [hereinafter *Bemba* Presidency Decision].

<sup>19</sup> *Bemba* Presidency Decision, para 24.

<sup>20</sup> *Bemba* Presidency Decision, para 27.

<sup>21</sup> Emphasis added.

<sup>22</sup> *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, International Criminal Court, Appeals Chamber, ICC-02/05-01/09-397-Corr (06 May 2019) [hereinafter *Jordan Referral re Al-Bashir Appeal*].

<sup>23</sup> *Jordan Referral re Al-Bashir Appeal*, para 143.

<sup>24</sup> *Bemba* Partial Unfreezing Decision, paras 9–10 [emphasis added].

Court in its investigation and prosecution of crimes within the jurisdiction of the Court’.

The Court issues requests to States specifying the required cooperation and States implement the request by providing the specified cooperation pursuant to Article 86 of the Statute. The determination of how it will meet its obligation to cooperate with the Court is entirely up to the State.

While indeed, and as recognised by the Court above, the Rome Statute’s cooperation regime gives state parties a margin of appreciation to determine the specific methodologies of such cooperation, the statute does not leave any room for state parties to determine whether or not to cooperate with or assist the Court. As the Appeals Chamber of the Court confirmed in *Jordan Referral re Al-Bashir Appeal*, ‘The extent of the obligation of States Parties to cooperate fully must be understood in the context of the Statute as a whole and bearing in mind its object and purpose ... to exercise jurisdiction ‘over persons for the most serious crimes of international concern’ and ... ‘put an end to impunity for the perpetrators of these crimes’.’<sup>25</sup> As such, all relevant provisions of the Rome Statute must be read together in order to fully appreciate the nature and scope of the statute’s cooperation regime which is a fundamental element in reinforcing the Court’s exercise of its jurisdiction and in discharging its object and purpose.<sup>26</sup> It follows, therefore, that the terms ‘cooperation’ and ‘request’ as used in Articles 57(3)(e) and 93(1)(k) are not to be understood colloquially, but rather as imposing legally binding obligations on state parties.

Seen in this light, the balance of authority tilts in favour of the Court which has the power to issue such binding requests for assistance, and as against state parties who are then legally bound to assist or cooperate through domestic procedures that they deem appropriate. Contrary to what the Court implies in the *Bemba* Case, the ultimate freezing or seizure of assets is therefore taken on the basis of a binding request for assistance issued by the Court and implemented through domestic procedural law. In other words, state parties can only move to freeze or seize assets when in receipt of a binding request for assistance directed to them by the Court. It logically follows, therefore, that when the legal basis for the Court’s request for assistance ceases to exist, such as in the event of a final acquittal, the Court has a corresponding obligation to communicate this fact to the concerned state in order to facilitate the return or unfreezing of the assets.

It may very well be the case that this obligation to communicate is discharged, as the Court held in *Bemba*, when the Registry notifies the concerned state of the closure of investigations or termination of prosecution or acquittal.<sup>27</sup> However, where a state fails to return or unfreeze assets seized or frozen due to a binding request from the Court upon being notified of the closure of investigations or termination of prosecution or

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<sup>25</sup> *Jordan Referral re Al-Bashir Appeal*, para 121.

<sup>26</sup> *Jordan Referral re Al-Bashir Appeal*, paras 122–123.

<sup>27</sup> *Bemba* Partial Unfreezing Decision, paras 13–15.

acquittal, it logically follows, and contrary to the Court's conclusion in *Bemba*, that the Court is competent and does indeed have an obligation, in its capacity as the originator of the request that initiated the process of seizing or freezing the assets in the first place, to issue a binding request for assistance to the concerned state to return or unfreeze the assets. This would not be an order specifically for the lifting of the restrictions on the assets – which the Court does not in any case have authority to issue. Rather, it would be a binding request for cooperation and assistance similar to the one issued by the Court pursuant to which the domestic legal process of freezing or seizing the concerned assets was undertaken. To argue otherwise – as the Court does in *Bemba* – is to shift all responsibility to states while absolving the Court of any responsibility for a process that would never have commenced and pertained were it not for the Court's binding requests for assistance. The question of responsibility for frozen and seized assets and attribution of conduct (by the Court and by states) in furtherance of the Court's Article 93(1)(k) requests must therefore be analysed from the position of international law on responsibility of states and of international organisations.

#### **4 Engaging the Responsibility of the Court and of State Parties for Accused Persons' Assets**

The powers and obligations under articles 57(3)(e) and 93(1)(k) raise the important question of the responsibility of the Court and of state parties under international law, including attribution of relevant conduct. As discussed in Section 3, while the processes and specific actions to freeze or seize accused persons' assets are undertaken in accordance with domestic procedural laws, these processes and actions are initiated pursuant to a binding request for assistance issued by the Court. In other words, these are acts of the state undertaken to execute or implement the Court's binding request. As such, these acts are performed by states at the request of and on behalf of the Court, an international organisation, thereby resulting in complex attribution between the Court and states. In order to avoid 'responsibility for management and maintenance of the value of frozen assets ... falling into a "black hole"',<sup>28</sup> it is important to analyse the question of responsibility in respect of assets frozen or seized pursuant to the Court's requests. Beyond the general power under Article 57(3)(e) and the obligations under Article 93(1)(k), the Rome Statute is largely silent on the allocation of responsibility as between the Court and states in relation to frozen or seized assets. Regardless, this article argues that the question of allocation of responsibility can be approached from two possible angles: from the position of general international law on the question of responsibility of states and responsibility of international organisations; and reading Articles 57(3)(e) and 93(1)(k) alongside other relevant provisions of the Rome Statute.

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<sup>28</sup> Aaron Moss, 'Asset Preservation, State Cooperation and the International Criminal Court' (2021) 22 (Advance Copy) MJIL 1, 39.

#### 4.1 Position of general international law on responsibility and attribution

The silence of the Rome Statute on the specific responsibility of the Court and of state parties with respect to accused persons' assets frozen or seized pursuant to the Court's Article 93(1)(k) requests is not unique. As the East African Court of Justice noted in *Hon. Dr. Margaret Zziwa v The Secretary General of the East African Community*, because many '[t]reaties usually do not prescribe the international responsibility of parties thereto or created thereby, or the consequences of breach of that responsibility ..., the principles of law applicable are found in the body of law known as state responsibility or the responsibility of international organizations ... [that is] those expressed by the International Law Commission (ILC) in its Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011'.<sup>29</sup> The ILC's Draft Articles on the Responsibility of International Organisations (ARIO) are therefore instructive.

##### 4.1.1 Attribution for acts of an organ or agent of the Court

Two lines of responsibility are possible under Article 6 of ARIO which provides as follows

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.
2. The rules of the organization apply in the determination of the functions of its organs and agents.

Firstly, the responsibility of the Court would be engaged for the conduct of its organs, an 'organ' being defined under Article 2(c) ARIO as 'any person or entity which has that status in accordance with the rules of the organization'. The Court's four organs as listed in Article 34 of the Rome Statute are: Presidency; Chambers (Appeals Division, Trial Division and Pre-Trial Division); Office of the Prosecutor (OTP); and Registry. It would, therefore, be arguably uncontroversial to engage the Court's responsibility for the conduct of any of these organs in relation to the property of an accused person. For instance, in *Bemba Case*, Mr Bemba claimed that the Registry failed to keep proper records of his assets that were seized and/or frozen pursuant to requests for assistance from the Court.<sup>30</sup> In particular, the Registry confirmed receiving € 2,067,982 from Cape Verde, money belonging to Mr Bemba that had been seized pursuant to an Article

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<sup>29</sup> East African Court of Justice, Appeal No. 2 of 2017, Judgment, 25 May 2018, para 38.

<sup>30</sup> *Bemba* Request for Designation of Chamber, para 11; *The Prosecutor v Jean-Pierre Bemba Gombo*, Public Redacted version of 'Response to Redacted version of the Registry's Observations on Mr. Bemba's Request for Reclassification of Information Relating to Mr Jean-Pierre Bemba Gombo's Assets', International Criminal Court, ICC-01/05-01/08-3657-Red (30 October 2018) para 7.

93(1)(k) request.<sup>31</sup> Additionally, Mr Bemba claimed that Portugal grounded and seized his Boeing 727-100 plane in 2008 and handed over its keys and air certificates to the OTP,<sup>32</sup> thereby giving the Court exclusive access to the plane and possession of its relevant documents. However, in 2010 the Registry confirmed that it could not trace the keys, but these keys somehow resurfaced in 2018 after Mr Bemba's acquittal when the OTP handed them over. During this period, the plane had deteriorated from absolute neglect and had accumulated massive unpaid parking fees at the airport in Portugal where it was grounded in 2008.<sup>33</sup> In such cases where states hand over full control or exclusive (means of) access to and/or possession of accused persons' property and assets to the Court, Article 6 ARIO would apply and acts of omission and commission in respect of these assets or properties would be attributable to the Court.

Secondly, the responsibility of the Court could be engaged for the conduct of its agents, an 'agent' being defined under Article 2(d) ARIO as 'an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts'. Implicated in this regard would be the conduct of organs of state parties through which the state parties implement the Court's request for assistance. However, this line of attribution is complicated by the ILC's Commentary to Articles 6 and 7 ARIO, thereby making it unlikely to apply to the Court. While acknowledging that a state organ may indeed be considered an agent of an international organisation if seconded by the state to the organisation,<sup>34</sup> it nonetheless argues for a restrictive understanding of 'agent' in relation to states by insisting that attribution of the state organ's conduct to the organisation would only be possible under Article 6 ARIO if the state organ is fully seconded to the organisation.<sup>35</sup> As I have noted elsewhere, rather than being fully seconded to the Court, state organs implementing the Court's requests for assistance issued under Articles 57(3)(e) and 93(1)(k) of the Rome Statute remain at all relevant times the organs of the concerned state and act as organs of that state acting in accordance with domestic procedural law to fulfil that state's international obligations.<sup>36</sup>

#### 4.1.2 *Attribution for acts of state organs placed at the Court's disposal*

Engaging the Court's responsibility for the (mis)management of seized or frozen assets may also be explored based on Article 7 ARIO – and arguably much more strongly than under Article 6 ARIO – particularly for those assets that states retained full or partial control over. Article 7 ARIO provides that–

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<sup>31</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Public Redacted Version of Registry's Observations on the Defence Request for Reclassification of Information relating to Mr Jean-Pierre Bemba Gombo's Assets, 3 September 2018, International Criminal Court, ICC-01/05-01/08-3656-Red2 (7 December 2018) para 13.

<sup>32</sup> *Bemba Claim*, para 129.

<sup>33</sup> *Bemba Claim*, para 131.

<sup>34</sup> ILC Commentary to Article 6 ARIO, para 6.

<sup>35</sup> ILC Commentary to Article 7 ARIO, para 1.

<sup>36</sup> Owiso Owiso (n 3).

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

As discussed above, the Court does not itself seize or freeze accused persons' assets. This is done by domestic authorities upon receiving an Article 93(1)(k) request to do so from the Court. Practically, therefore, in implementing Article 93(1)(k) requests, the relevant domestic authorities can be considered to be placed at the disposal of the Court for this specific purpose. While performing such function, it is not the case that the domestic authorities become organs of the Court. Rather, and as confirmed by the Commentary to Article 7 ARIO, they are still organs of the relevant state performing national functions even though the functions in question are performed at the behest of the ICC. Article 7 ARIO is reinforced by Article 15 ARIO which provides that

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

Article 7 ARIO read together with Article 15 ARIO therefore suggests that *prima facie*, the acts of the relevant national authorities would be attributable to the Court. However, the Article 7 ARIO threshold is very high. For the state organ's conduct to be attributable to the Court under Article 7 ARIO, the Court must have 'exercise[d] effective control over that conduct'. In other words, Article 7 ARIO applies the so-called effective control test in determining an international organisation's responsibility. This test, first formulated by the International Court of Justice (ICJ) in *Case Concerning Military and Para-military Activities in and against Nicaragua (Nicaragua v. United States of America)*<sup>37</sup> and applied consistently since,<sup>38</sup> is very strict, and would require evidence that the Court had effective control over the specific acts resulting in a violation of an international obligation. In other words, it would have to be established that the Court exercised control over the specific acts in relation to the assets which resulted in spoliation. The general action of issuing a legally binding request for assistance to state parties would therefore not suffice for such acts to be attributable to the Court. Admittedly, the question confronting the ICJ in *Nicaragua* Case was that of state responsibility rather than

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<sup>37</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p.14, 27 June 1986, paras 114–115.

<sup>38</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, I.C.J. Reports 2007, p. 43, 26 February 2007, paras 398–400; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Merits, Judgment, I.C.J. Reports 2005, p. 168, 19 December 2005, para 160.

responsibility of an international organisation. However, and as Amerasinghe has argued, because ‘much of what applies to a State, in regard to responsibility, could easily apply to a collection of States, even though the collection has its own international personality’,<sup>39</sup> it is trite to consider that ‘there are some distinct similarities between the law of state responsibility in general and the law relating to the responsibility of international organizations’.<sup>40</sup> Hence, effective control within the meaning of Article 7 ARIO is fundamentally the same as what the ICJ formulated in *Nicaragua* Case.

As discussed above, it is indeed the case that the process of seizing or freezing assets commences as a result of a binding request to a state party from the Court. Therefore, it is arguably uncontroversial to consider that for the purpose of responsibility, instructions to seize and freeze assets come from the Court, regardless of this being worded as a request to cooperate or assist. However, and with the effective control test in Articles 7 and 15 ARIO in mind, the questions to be answered would be whether the Court exercised control of the implementation of its Article 93(1)(k) requests, the extent of that control, and whether the Court was aware of the effect that the implementation had or was having on the assets. Factual evidence of the Court’s role beyond issuing binding requests to the state will therefore be instrumental in determining the nature and extent of control that the Court exercised, including individual roles performed by the Court and states and roles jointly performed.<sup>41</sup> While a full picture of such evidence may not readily be available to the public as much of the relevant material would either be confidential or in possession of states, a glimpse can nonetheless be gleaned from proceedings before the Court, as the *Bemba* Case above illustrates.

#### 4.2 Other relevant provisions of the Rome Statute

Section 3 argued that the Court’s authority over and responsibility for an accused person’s assets does not end with issuing requests for assistance in seizing and freezing assets. Another possible angle within the Rome Statute framework which reinforces the view advanced in Section 3 is to consider Articles 93(1)(l) and 96 of the Rome Statute. Article 93(1)(l) specifically empowers the Court to request from states ‘[a]ny other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court’ and states are obligated to comply with such requests. Additionally, Article 96(3)–(4) empowers the Court, both on its own initiative or upon being requested by a

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<sup>39</sup> Chittharanjan Felix Amerasinghe, ‘Comments on the ILC’s Draft Article on the Responsibility of International Organizations’ (2012) 9 IOLR 29, 29.

<sup>40</sup> Amerasinghe (n 39) 29.

<sup>41</sup> For an in-depth discussion on allocation of responsibility between multiple actors with varying degrees of contribution, that is, shared responsibility, see André Nollkaemper and Dov Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 MJIL 359; André Nollkaemper, Ilias Plakokefalos and Jessica Schechinger (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press 2014); André Nollkaemper, Ilias Plakokefalos and Jessica Schechinger (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017).



concerned state, to consult with the concerned state regarding the implementation of the Court's requests for assistance. As Birkett has convincingly argued, these provisions can be interpreted to allow the Court to exercise diligence and supervisory functions over the management of assets seized or frozen by states upon the Court's request by (i) issuing further requests for assistance to states requesting them to dutifully and diligently manage the assets in their possession, and (ii) engaging in consultation with these states to ensure that these processes run smoothly.<sup>42</sup> To this argument, this paper adds that such interpretation of these provisions would indeed 'facilit[e] the investigation and prosecution of crimes within the jurisdiction of the Court' as envisioned in Article 93(1)(1) since, as argued in subsequent sections, the proper management of an accused person's assets would ensure that they are in a position to properly exercise their right to fair trial including retaining legal representation, a fundamental element in facilitating the investigation and prosecution of crimes within the Court's jurisdiction.

## 5 Why Does This Matter?

From the Court's jurisprudence discussed above,<sup>43</sup> it is evident that the Court has so far not only failed to provide sufficient, clear and convincing guidance (to states) on management of assets seized and frozen pursuant to Articles 57(3)(e) and 93(1)(k) of the Rome Statute and on the attendant question of responsibility but has also washed its hands of any responsibility. The Court is assertive that its responsibilities end with the issuing of legally binding requests to states for assistance in identifying, freezing and seizing assets. The Court insists that as far as it is concerned, states bear all responsibility for the actions they undertake to effect these requests and for the status of these assets during and after the period of seizure/freezing. As argued in preceding sections, this paper considers these positions not only to be erroneous, but also detrimental to the development of sound jurisprudence and practice. This section highlights some of the implications of the position adopted by the Court, specifically in relation to the rights of accused persons, rights and expectations of victims, and cooperation with state parties.

### 5.1 Implications for the accused person

As provided in Article 67(1)(d) of the Rome Statute, an accused person has a right to a fair trial which includes the right to be afforded adequate facilities for preparing their defence and to have legal assistance at the Court's expense if they are impecunious.<sup>44</sup> In the event that the assets of an accused person with sufficient means are frozen or seized pursuant to the Court's request, it is therefore imperative that the entity in possession or with access to these assets – be it the Court's organs or state parties – manages them in such a manner that they can be utilised to defray the costs to be incurred by the accused person in preparing their defence. Failure to do so would result in the Court having to

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<sup>42</sup> Daley J. Birkett, 'Managing Frozen Assets at the International Criminal Court: The Fallout of the Bemba Acquittal' (2020) 18 JICL 765, 784.

<sup>43</sup> Admittedly so far only in the one case of Mr Bemba.

<sup>44</sup> See also Rome Statute, art 55(2)(c).

cover this cost from its legal aid fund. For instance, because Mr Bemba had no access to his assets during his (pre-)trial and because most of these assets were frozen or seized by state parties at the Court's request, the Court had to advance Mr Bemba money.<sup>45</sup> As claimed in Mr Bemba's 2019 Claim, he was still unable to repay the Court some of the advanced sum after his acquittal because most of his assets had been mismanaged, devalued or destroyed and he still did not have access to them.

A proper framework governing the management of these assets is therefore not only in the interests of the accused person as this would enable the accused person to cover their legal costs but is also in the interests of the already cash-strapped Court as it would then not have to cover the legal costs of an accused person who would, were it not for the mismanagement of their assets, be able to cover their own costs. Further, in the event that a person accused of core Rome Statute crimes is convicted of these offences or separately for offences against the administration of justice, the Court may impose a fine in accordance with Articles 77 and 70(3) of the Rome Statute, as was imposed on Mr Bemba in a separate conviction for witness interference. Further still, the Court can order forfeiture of property upon conviction for core crimes. If the person's assets earlier frozen or seized by states pursuant to the Court's requests are properly managed, they can quite easily be used to satisfy the fines or orders for forfeiture.

The consequentialist arguments above aside, it is imperative to emphasise that the purpose of the Article 57(3)(e) protective measures and Article 93(1)(k) requests is not to punish the accused person. Despite their status as persons accused of Rome Statute crimes, these persons remain human beings with obligations to self and possibly to dependants. As such, Article 57(3)(e) measures and Article 93(1)(k) requests should not be such as to unjustifiably deny the accused person their right to a family life or arbitrarily and permanently deprive them of their property and assets. Mismanaging their assets and properties to such an extent that their dependants are deprived of their rightful assistance cannot possibly be what the drafters of the Rome Statute envisaged when drafting Articles 57(3)(e) and 93(1)(k). Further, upon final acquittal, the former accused person should ideally be in a position to resume the *status quo ante* in respect of their property, that is, they should be able to regain control of their assets without unreasonable delay or hurdles. The legal basis for seizing and freezing the former accused person's assets ceases to exist upon their final acquittal. As such, the persistence of circumstances preventing the person from regaining control of their assets and/or the fact that these assets have depreciated or lost value due to mismanagement constitutes a violation of the internationally-recognised right to respect for private and family life<sup>46</sup> and also amounts to arbitrary deprivation of property and denial of peaceful enjoyment

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<sup>45</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Summary of the Decision on Legal Assistance for the Accused, International Criminal Court, Trial Chamber III, ICC-01/05-01/08-568 (20 October 2009) para 16.

<sup>46</sup> International Covenant on Civil and Political Rights, arts 17 & 23; International Covenant on Economic, Social and Cultural Rights, arts 10–11; American Convention on Human Rights, art 11; African Charter on Human and Peoples' Rights, arts 18, 27 & 29; European Convention for the Protection of Human Rights and Fundamental Freedoms, art 8.

thereof.<sup>47</sup> As Article 21(3) of the Rome Statute emphasises, the Court is bound to ensure that its application and interpretation of applicable law is consistent with ‘internationally recognised human rights’. The Court has in fact reiterated that the requirements of Article 21(3) apply to its requests to states and the modalities by which states choose to honour those requests, that is, these requests and the measures for giving effect to the requests, must not be contrary to internationally recognised human rights.<sup>48</sup>

Whichever argument one finds convincing, an accused persons’ right to have their assets managed responsibly and their value preserved is, as Birkett has noted, ‘a highly important yet ostensibly overlooked aspect of the protective measures process under Article 57(3)(e) ICC Statute’.<sup>49</sup> For this reason, and for the reason that there exists no independent mechanism exercising oversight over the handling of human rights of accused persons before international criminal courts,<sup>50</sup> it is all the more pertinent that the Court acts as guarantor, enforcer and guardian of accused persons’ rights.

## 5.2 Implications for Victims

The relevant legal provisions make express and implicit reference to the underlying purpose of taking protective measures against accused persons’ assets, that is, to be eventually utilised upon final conviction in remedying, to the extent possible, the harm caused to victims. Article 57(3)(e) expressly states that the measures are ‘for the purpose of forfeiture, in particular for the ultimate benefit of victims’, while Article 93(1)(k) uses the phrase ‘for the purpose of eventual forfeiture’. Article 75 of the Rome Statute which enshrines the Court’s power to order reparations in favour of victims and against a convicted person provides that in issuing a reparations order against a convicted person, the Court may order protective measures against the convicted person’s property in order to effect the reparations order. From the phrasing of these provisions, it is evident

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<sup>47</sup> American Convention on Human Rights, art 21; African Charter on Human and Peoples’ Rights, art 14; Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art 1.

<sup>48</sup> *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Public Redacted Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the Decision of Trial Chamber VII Entitled ‘Judgment Pursuant to Article 74 of the Statute’, International Criminal Court, Appeals Chamber, ICC-01/05-01/13 A A2 A3 A4 A5 (08 March 2018) para 319; *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on the ‘Requête en Appel de la Défense de Monsieur Aimé Kilolo Musamba Contre la Décision de la Chambre de Première Instance VII du 17 novembre 2015’, International Criminal Court, Appeals Chamber, ICC-01/05-01/13 OA 12 (23 December 2015) para 16. For a general discussion of the human rights implications of the Court’s asset freezing and seizure regime, drawing on experience from the European and Inter-American human rights systems, see Daley J. Birkett, ‘Asset Freezing at the European and Inter-American Courts of Human Rights: Lessons for the International Criminal Court, the United Nations Security Council and States’ (2020) 20 HRLR 502.

<sup>49</sup> Birkett (n 42) 780–781.

<sup>50</sup> Joris van Wijk and Barbora Holá, ‘Acquittals in International Criminal Justice: Pyrrhic Victories?’ (2017) 30 LJIL 241, 259.

that measures taken against the property or assets of accused persons are so taken to, among other reasons, preserve their value during the pendency of the case against the accused person with the expectation that should the accused person be finally convicted, these assets could be utilised to satisfy victims' reparative needs.<sup>51</sup> While it would definitely be incorrect to suggest the existence of a right of victims here, it is however reasonable to posit that these provisions gravitate in favour of victims having a legitimate expectation that the value, worth and viability of any assets seized and/or frozen pursuant to the Court's request for assistance should at a minimum be maintained or, more ambitiously, should be enhanced, with a possible reparations order in mind.

It is, however, not clear what measures, if any, victims can take to ensure the proper management of these assets. It appears from a reading of Rule 99 of the Court's Rules of Procedure and Evidence that victims may themselves request the Trial Chamber to take protective measures against an accused person's or convicted person's property. However, once the Court issues these protective measures including the request for cooperation in enforcing them, the only available avenue for victims to raise concerns over the management of these frozen assets is at the reparations stage which only commences upon conviction by the Trial Chamber. Further, Article 75(3) which provides the legal basis for victims' participation in reparations proceedings does not avail this possibility as a matter of right, but as a discretionary power of the Court, that is, victims can only make representations to the Court in this regard upon the court's invitation.<sup>52</sup> While the Court's practice so far points to a consistent pattern of inviting such representations, this remains a discretionary power. Therefore, victims do not apparently have any avenue for intervening over the (mis)management of frozen or seized assets during the (pre-)trial process. They can only intervene, at the discretion of the Court, at the last stage of the judicial process when most of the spoliation of frozen or seized property shall have long occurred.

### 5.3 Implications for State Party cooperation

Because the Court lacks independent enforcement capability, state cooperation forms the bedrock of the Court's enforcement abilities. As discussed in Section 3, the Court emphatically laid full responsibility (and blame) at states' door for the proper execution of the Court's requests for the seizure and freezing of an accused person's assets, emphasising that this responsibility primarily lies with states. This position may result in at least three possible scenarios. Firstly, in managing frozen or seized assets in order to preserve their value, prohibitive management costs are likely to be incurred and there is always the possibility of incurring legal liability for management. By absolving itself

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<sup>51</sup> See also Carla Ferstman, 'Cooperation and the International Criminal Court: The Freezing, Seizing and Transfer of Assets for the Purpose of Reparations' in Olympia Bekou and Daley Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill 2016).

<sup>52</sup> See Binxin Zhang, 'Recognizing the Limits of Victims Participation: A Comparative Examination of the Victim Participation Schemes at the ECCC and the ICC' in Simon M. Meisenberg and Ignaz Stegmüller (eds), *The Extraordinary Chambers in the Courts of Cambodia - Assessing their Contribution to International Criminal Law* (TMC Asser Press 2016).

of much of the responsibility for these assets, the Court has signalled to states that they alone are responsible for the management of these assets. States may not be very enthusiastic by themselves to incur all the costs of management and possible legal liability. Secondly, by insisting that states bear primary responsibility, the Court has effectively opened the door to aggrieved persons, armed with the Court's jurisprudence, to take legal action for spoliation against states in domestic courts or in regional (human rights) courts. Thirdly, it would not be surprising, therefore, if a state whose national is aggrieved either by the spoliation of their property resulting from actions taken by another state pursuant to the Court's Articles 57(3)(e) and 97(1)(k) requests or who is deprived of such property even after final acquittal due to the latter state's failure to release such property (and the Court's failure to issue a request to that state to release such property) were to exercise its right of diplomatic protection on behalf of its national as against the 'offending' state. This may result in unpleasant diplomatic haggling between the concerned states or at worst, inter-state dispute before competent judicial fora.

Indeed, in dismissing Mr Bemba's spoliation claim on the basis of lack of jurisdiction, PTC II emphasised that this 'is without prejudice to Mr Bemba's right to pursue other procedural remedies and avenues which might otherwise be open to him with a view to seeking redress for damages allegedly suffered in connection with his assets targeted by freezing orders and other similar measures undertaken by States in connection with the implementation of the Court's orders'.<sup>53</sup> While the Court did not provide any indication of what it considers these 'other procedural remedies and avenues' to be, it is plausible that domestic litigation and inter-state dispute settlement undertaken on the basis of diplomatic protection are such avenues. The effect of these possibilities – incurring management costs, exposure to legal liability, being sued domestically or regionally, being subject to inter-state disputes – may be to dampen state parties' appetite for implementing the Court's requests for assistance in tracing, freezing or seizing an accused person's assets, with significant consequences for the Rome Statute's cooperation regime. As Moss aptly observes, state cooperation and support remain 'the biggest impediment[s] to the effective functioning of the Court's asset preservation regime, and its cooperation regime more broadly'.<sup>54</sup> As such, it is manifestly unwise and counterproductive for the Court to exacerbate this already-tenuous situation by purporting to shirk all responsibility in respect of frozen or seized assets and scapegoating states on whose support and cooperation it depends.

## 6 Conclusion

While, as Ferstman has argued, the Court's legal framework regarding asset freezing and seizure is vague particularly on the obligations of states,<sup>55</sup> it is evident from the analysis above that this framework nonetheless provides a point of departure for asset freezing

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<sup>53</sup> *Bemba Claim Decision*, para 64.

<sup>54</sup> Moss (n 28) 41. *See also* Ferstman (n 51) 230–231.

<sup>55</sup> Ferstman (n 51) 230 & 232.

and seizure. However, the paper concludes that the problems plaguing the Court's practice in this regard stem partly from the Court's approach to its Rome Statute powers, specifically in its narrow and evasive interpretation of Articles 57(3)(e) and 93(1)(k) and its failure to provide necessary guidance on the application of these provisions. In this regard, the paper partly disagrees with Moss' conclusion that 'the problems facing the asset preservation regime seem to result neither from the Court's own actions, nor deficiencies in its legal foundations'.<sup>56</sup> It is possible, as Birkett speculates, that the Court's evasiveness in *Bemba* was informed, on the one hand, by a desire to avoid the reputational 'damage' implicit in having to admit liability for spoliation and pay compensation to Mr Bemba, and on the other hand, by a desire to avoid harming its cooperation relationship with states.<sup>57</sup> Without prejudice to these and other possible explanations, the Court's evasive and narrow approach in the interpretation and application of Articles 57(3)(e) and 93(1)(k) could also be attributed to the dearth of expertise or specific knowledge among ICC judges on asset tracing and seizure. Implicitly acknowledging this shortcoming, the Independent Expert Review Report 2020 recommended training for judges on, *inter alia*, 'law relating to the tracing, seizure and forfeiture of assets'<sup>58</sup> to be designed by taking into account the experiences of domestic courts. Whichever the explanation, the Court's approach leaves a lot to be desired regarding its approach to management of frozen or seized assets. By divesting itself of jurisdiction, in a series of poorly-argued decisions no less, the Court has missed an opportunity to provide much-needed guidance on an important and contentious issue. Even assuming, for the sake of argument, that PTC II was correct in observing that the Rome Statute does not expressly confer upon it jurisdiction to entertain Mr Bemba's claim, the Court, as Tladi has observed, 'is no stranger to procedural innovation, when it felt that it was needed ... as an expression of its implied or inherent powers'.<sup>59</sup> This may very well have been a case for such procedural innovation.

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<sup>56</sup> Moss (n 28) 43. Birkett also concluded that, '[T]he Court's approach to protective measures is praiseworthy'. See also Daley J. Birkett, 'Pre-Trial "Protective Measures for the Purpose of Forfeiture" at the International Criminal Court: Safeguarding and Balancing Competing Rights and Interests' (2019) 32 LJIL 585, 602. Notably, however, this article was published in 2019 before the Bemba debacle fully unfolded. See also Kip Hale and Santiago Vargas Niño, 'Unexploded Ordinance [Updated]' *OpinioJuris* (10 April 2019) <http://opiniojuris.org/2019/04/10/unexploded-legal-ordnance/> accessed 10 February 2022, whose conclusions and analysis on jurisdiction and responsibility the paper almost totally disagrees with. Notably, this blog post was published in 2019 before PTC II and the Presidency issued their decisions, though it is clear from the corrigendum to the post that the authors strongly maintain their position on the issues even subsequent to these decisions.

<sup>57</sup> Birkett (n 42) 789.

<sup>58</sup> Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report (30 September 2020) para 346, 763–766 & 778 [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf) accessed 15 May 2021.

<sup>59</sup> Dire Tladi, 'Is Sudan an Indispensable Party in the Al-Bashir Immunity Appeal? A monetary Gold Question for the ICC' *OpinioJuris* (29 August 2018) <http://opiniojuris.org/2018/08/29/is-sudan-an-indispensable-party-in-the-al-bashir-immunity-appeal-a-monetary-gold-question-for-the-icc/> accessed 01 February 2022.

The Court's powers under Articles 57(3)(e) and 93(1)(k) 'hold the potential to be amongst the most potent protective measures in the Court's arsenal ... [p]rovided they are well crafted and appropriately managed'.<sup>60</sup> Therefore, without clear guidance and clarification on the question of (division of) responsibility for these assets during the period when the Court's requests are in force, it is likely – and as the *Bemba* Case has shown – that the purpose of Articles 57(3)(e) and 93(1)(k) will be defeated, to the detriment of the accused person, victims of international crimes, the Court's relationship with states, and the Court's integrity and credibility. The urgency of providing solid guidance on Article 57(3)(e) powers and Article 93(1)(k) obligations and the resultant responsibilities cannot be emphasised enough. While the issue of frozen or seized assets may not arise in the Court's current active cases as they relate to indigent accused persons, its currently 'dormant' cases of *The Prosecutor v Saif Al-Islam Gaddafi*, *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, *The Prosecutor v Ahmad Muhammad Harun* and *The Prosecutor v Abdel Raheem Muhammad Hussein*, as well as its current preliminary examinations in Nigeria and Guinea<sup>61</sup> and ongoing investigations in Afghanistan, Bangladesh/Myanmar, Georgia, Palestine, Sudan and The Philippines, Venezuela and Ukraine<sup>62</sup> are likely to implicate state and non-state actors with considerable financial means. Without proper judicial guidance, the Court is hurtling fast down a cliff that will test its integrity, credibility and efficacy and which will potentially engage the international responsibility of the Court and of state parties and have significant adverse impact on accused persons and victims of international crimes.

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<sup>60</sup> Moss (n 28) 3.

<sup>61</sup> International Criminal Court, 'Preliminary Examinations' <https://www.icc-cpi.int/pages/pe.aspx> accessed 13 February 2022.

<sup>62</sup> International Criminal Court, 'Situations under Investigation' <https://www.icc-cpi.int/pages/situation.aspx> accessed 13 February 2022.

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## **ALTERNATIVES TO THE INTERNATIONAL CRIMINAL COURT**



# THE KOSIAH CASE: A SWISS TALE OF UNIVERSAL JURISDICTION

By C. Sophia Müller\*

## Abstract

On 3 December 2020, the Swiss Federal Criminal Court started the trial proceedings against Mr Alieu Kosiah, a former commander of the United Liberation Movement of Liberia for Democracy. On 18 June 2021, Mr Kosiah was convicted of war crimes committed between 1993 and 1995 in the context of the First Liberian armed conflict. The Kosiah case is significant, as it marked the first time that Switzerland tried an accused for international crimes in a non-military criminal court. This paper's objective is two-fold: first, it seeks to offer preliminary observations on the Kosiah case; and second, it aims to analyse the Swiss legal framework for the prosecution of international crimes, including Switzerland's understanding of the concept of universal jurisdiction, with a view to examining its implications for future universal jurisdiction cases in Switzerland.

## 1 Introduction

On 3 December 2020, the Swiss Federal Criminal Court started the trial proceedings against Mr Alieu Kosiah, a former commander of the United Liberation Movement of Liberia for Democracy (ULIMO) in the First Liberian Civil War and convicted him of war crimes on 18 June 2021. The trial of Mr Alieu Kosiah was the first of its kind for three reasons. Firstly, it marked the first time that an accused was tried in Switzerland for international crimes since the adoption of major revisions of its legal framework concerning international criminal law. Secondly, it was the first trial of war crimes before the Swiss Federal Criminal Court: whereas two previous war crimes trials had been held in Switzerland, namely the *Fulgence Niyonteze* case and the *Goran Grabez* case, these two individuals were tried and convicted in Switzerland's *military* courts according to the previous legal framework.<sup>1</sup> Thirdly, Mr Kosiah was also the first individual to be arrested and tried for war crimes committed in the context of the Liberian non-international armed conflict known as the First Liberian Civil War, which lasted from 1989 to 1996/7.

Thus far, no war crimes trial regarding the First Liberian Civil War have taken place in Liberia. Furthermore, while Mr Mohammed Jabateh, a fellow ULIMO commander who had also committed war crimes in the First Liberian Civil War, was tried in the United States *before* Mr Kosiah was tried in Switzerland, Mr Jabateh was 'only' charged with and

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\* Associate Legal Officer at the International Criminal Court and a PhD candidate at Tilburg University. The views expressed are those of the author and do not necessarily reflect the views of the International Criminal Court. I would like to thank Alain Werner, Emmanuelle Marchand, and the legal team at Civitas Maxima for their valuable feedback; any potential errors remain my own.

<sup>1</sup> See Swiss Military Court of Appeal, Division 1A, *Fulgence Niyonteze* case, Decision of 26 May 2000; Swiss Military Court of Appeal, Division I, *Goran Grabez* case, Decision of 18 April 1997.

convicted for fraud and perjury in relation to his immigration proceedings where he had denied his involvement in crimes.<sup>2</sup> Mr Jabateh was not charged with war crimes or any other international crimes. In addition, the United States' courts had jurisdiction based on the principle of territorial jurisdiction given that Mr Jabateh committed the charged crimes on the territory of the United States (by falsely filling in his immigration documents and lying to an immigration officer). Regarding the *Kosiah* case, on the other hand, neither the territoriality principle nor the active (or passive) nationality principle was applicable: the crimes had been committed in Liberia against Liberian victims and Mr Kosiah is of Liberian nationality. Therefore, the case was brought before Swiss courts based on the principle of universal jurisdiction, as enshrined in the Swiss domestic legal framework.

This paper seeks to shed some light on the background of, and to offer preliminary observations on, the *Kosiah* case. It further seeks to analyse the Swiss legal framework for the prosecution of international crimes, including Switzerland's understanding of the concept of universal jurisdiction, with a view to examining its implications for future universal jurisdiction cases in Switzerland.

The paper first addresses the procedural background of the *Kosiah* case (section 2) and its historical context (section 3). After that, section 4 examines the concept of universal jurisdiction and the applicable Swiss legal framework: it first offers some general remarks on the concept of universal jurisdiction (section 4.1); it then analyses Switzerland's interpretation of universal jurisdiction based on a dispatch by the Federal Council and the implementation of the concept in Swiss criminal law (section 4.2); and further examines the legal basis for the *Kosiah* case in a bit more detail. Section 5 provides an overview of those revisions in Swiss criminal law that have made it possible to prosecute international crimes in Switzerland, with a view to assessing its implications for future universal jurisdiction cases. Lastly, section 6 discusses the current and expected further developments in Switzerland and beyond.

## 2 The *Kosiah* Case: The Procedural Background

Mr Alieu Kosiah, a Liberian national and former commander of an organised armed group in the context of the First Liberian Civil War, moved to Switzerland after the end of the armed conflict and obtained permanent residence there.<sup>3</sup> The case against him was initially brought to the attention of the Swiss Office of the Attorney General (OAG) by Civitas Maxima on behalf of several Liberian nationals who filed complaints against Mr Kosiah between July and August 2014. In August 2014, the OAG opened an

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<sup>2</sup> United States Court of Appeals for the Third Circuit, *United States of America v. Mohammed Jabateh a/k/a Jungle Jabbah*, No. 18-1981 (8 September 2020); see also Indictment, In the United States District Court for the Eastern District of Pennsylvania, *United States of America v. Mohammed Jabateh, a/k/a 'Jungle Jabbah'*.

<sup>3</sup> Trial International, 'Alieu Kosiah' (21 June 2021), <<https://trialinternational.org/latest-post/alieu-kosiah/>> accessed 28 February 2022.

investigation,<sup>4</sup> and the Swiss authorities arrested Mr Kosiah on 10 November 2014.<sup>5</sup> However, a number of practical challenges arose, which resulted in the comparatively long pre-trial detention of Mr Kosiah. From his arrest in 2014 until the commencement of his trial, Mr Kosiah was in pre-trial detention for over six years.<sup>6</sup> The Swiss OAG's investigation itself took around five years: it only officially indicted Mr Kosiah on 22 March 2019. Mr Kosiah was charged with 25 counts of war crimes that he was alleged to have committed in his capacity as a member of the organised armed group ULIMO in Lofa County (Liberia) from 1993 to 1995.<sup>7</sup> More specifically, Mr Kosiah was alleged, *inter alia*, to have ordered and to have directly participated in the killing and cruel treatment of civilians; to have repeatedly raped a woman; and his unit to have pillaged villages and institutions.<sup>8</sup> As legal basis for these charges, the OAG referred to Articles 108 and 109 of the former Swiss Military Criminal Code in connection with common Article 3 of the four Geneva Conventions of 1949, as well as Article 4 of the Additional Protocol II to the Geneva Conventions.<sup>9</sup>

The trial was set to start in April 2020 but was postponed twice (and partially postponed a third time on 23 November 2020), in particular due to the Covid-19 pandemic.<sup>10</sup> Further delays were caused by arranging travels of victims who had to travel to Switzerland in order to testify. The crimes in this case were committed decades ago, and – due to a lack of material evidence – the Prosecution heavily relied on the testimony of witnesses and victims.<sup>11</sup> Therefore, it was not only a question of desirability of victims being *able* to follow the proceedings but, given that attempts to enable the victims to testify via video-

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<sup>4</sup> Cf. Statement of the Office of the Attorney General of Switzerland, 'International criminal law: first indictment filed in the context of the Liberian civil war' (26 March 2019) <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-74457.html>> accessed 28 February 2022.

<sup>5</sup> See for example the specific page for the *Kosiah* case on the webpage of Civitas Maxima <<https://civitas-maxima.org/legal-work/our-cases/alieu-kosiah/>> accessed 28 February 2022. Civitas Maxima's work was critical in bringing the case to the attention of the Swiss authorities and representing victims in the case.

<sup>6</sup> See for example Thomas Knellwolf, 'Hat der Kommandant das Herz eines Opfers gegessen?' *Tagesanzeiger* (3 December 2020) <<https://www.tagesanzeiger.ch/hat-der-kommandant-das-herz-eines-opfers-gegessen-473455757691>> accessed 28 February 2022.

<sup>7</sup> Civitas Maxima, 'Alieu Kosiah case: verdict date announced' (18 May 2021), <<https://civitas-maxima.org/2021/05/18/alieu-kosiah-case-verdict-date-announced/>> accessed 28 February 2022.

<sup>8</sup> Knellwolf (n 6).

<sup>9</sup> Cf. OAG Statement (n 4).

<sup>10</sup> Civitas Maxima, 'COVID-19: Alieu Kosiah's trial postponed' (16 March 2020) <<https://civitas-maxima.org/2020/03/16/covid-19-alieu-kosiahs-trial-postponed/>> accessed 28 February 2022; Civitas Maxima, 'Alieu Kosiah's Trial Postponed until the End of 2020' (8 July 2020) <<https://civitas-maxima.org/2020/07/08/alieu-kosiahs-trial-postponed-until-the-end-of-2020/>> accessed 28 February 2022; Civitas Maxima, 'New dates set for Alieu Kosiah Trial in 2020' (21 August 2020) <<https://civitas-maxima.org/2020/08/21/new-dates-set-for-alieu-kosiah-trial-in-2020/>> accessed 28 February 2022; Civitas Maxima, 'The Trial of Alieu Kosiah Will Begin Next Week, but Is Partially Postponed' (23 November 2020) <<https://civitas-maxima.org/2020/11/23/the-trial-of-alieu-kosiah-will-begin-next-week-but-is-partially-postponed/>> accessed 28 February 2022.

<sup>11</sup> Knellwolf (n 6).



link from Liberia were unsuccessful,<sup>12</sup> also a certain *need* for their presence. In this regard, it should also be noted that the Swiss authorities did not go to Liberia, unlike the Finnish authorities in a similar case (the *Massaquoi* case), which even conducted parts of the hearings in Sierra Leone and Liberia.<sup>13</sup> The trial eventually started on 3 December 2020. In December 2020, the court dealt with preliminary questions. The remainder of the trial was held from 15 February to 5 March 2021.<sup>14</sup> Mr Kosiah pleaded not guilty and, in the course of the trial, Mr Kosiah answered questions by the Presiding Judge, the Prosecutor, and the Defence, denying all accusations against him and stating that he did not know the victims.<sup>15</sup> According to the Defence, Mr Kosiah had not even been in Lofa County at the relevant time.<sup>16</sup> The Federal Prosecutor requested a sentence of 20 years imprisonment.<sup>17</sup> On 18 June 2021, the Swiss Federal Criminal Court (FCC) announced its verdict in a public hearing and convicted Mr Kosiah of 21 of the 25 charged war crimes.<sup>18</sup> Whereas Mr Kosiah was acquitted of some of the charges, the FCC convicted him of the war crimes of killing of civilians and persons *hors de combat* (direct perpetration and by ordering the commission of these crimes), rape, cruel treatment, outrages upon personal dignity, and pillaging.<sup>19</sup> The FCC further followed the Prosecutor's request to sentence Mr Kosiah with 20 years imprisonment and indicated that there were no mitigating factors.<sup>20</sup> Moreover, Mr Kosiah was ordered to pay reparations to the seven private plaintiffs (victims).<sup>21</sup> The written verdict is yet to be published.<sup>22</sup> Accordingly, this paper merely offers a *prima facie* commentary on the case, including on its historical context and its legal basis within the applicable Swiss legal framework.

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<sup>12</sup> See Human Rights Watch, 'Q&A: Swiss Trial for Liberia Atrocities: Universal Jurisdiction Paves Path for Justice' (12 February 2021) <<https://www.hrw.org/news/2021/02/12/qa-swiss-trial-liberia-atrocities-universal-jurisdiction-paves-path-justice>> accessed 28 February 2022.

<sup>13</sup> See for example Civitas Maxima, 'The Massaquoi trial Q&A' (11 March 2021) <<https://civitas-maxima.org/2021/03/11/the-massaquoi-trial-qa/>> accessed 28 February 2022.

<sup>14</sup> Civitas Maxima, Partial Trial Postponement (n 10).

<sup>15</sup> Antoine Harari, 'Kosiah: « Mettez-moi en prison pour un millier d'années, je n'ai peur de personne »' *JusticeInfo* (10 December 2020) <<https://www.justiceinfo.net/fr/46207-kosiah-mettez-moi-prison-millier-annes-peur-personne.html>> accessed 28 February 2022.

<sup>16</sup> Knellwolf (n 6).

<sup>17</sup> Civitas Maxima, Verdict date (n 7).

<sup>18</sup> Mr Kosiah was acquitted of four charges, including a charge concerning the recruitment of a child soldier. For further details and the corresponding reasoning, please consult the written verdict once it is available.

<sup>19</sup> Press statement of the FCC, 'Bundesanwaltschaft gegen Alieu Kosiah (SK.2019.17) - Die Strafkammer des Bundesstrafgerichts eröffnete am 18. Juni 2021 ihr Urteil gegen Alieu Kosiah, ehemaliges Mitglied der liberianischen Rebellenfraktion ULIMO' (18 June 2021) <<https://www.bstger.ch/en/media/comunicati-stampa/2021/2021-06-18/1173.html>> accessed on 28 February 2022.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> The verdict has been announced at a public hearing on 18 June 2021 but, at the time of writing (February 2022), it is yet to be published (in anonymised form). See also FCC Press Statement (n 19). In general, for decisions of the Swiss Federal Criminal Court, see <[https://bstger.weblaw.ch/?size=n\\_20\\_n](https://bstger.weblaw.ch/?size=n_20_n)> accessed on 28 February 2022.

### 3 The Case's Historical Context: The Liberian Armed Conflict(s)

As mentioned above, Mr Kosiah was convicted of war crimes that he committed between 1993 and 1995 in his capacity as commander of the organised armed group ULIMO in the context of the First Liberian Civil War. This section provides a very brief overview of this context.

The First Liberian Civil War started in December 1989, when Charles Taylor led an organised armed group, the National Patriotic Front of Liberia (NPFL), and invaded Liberia in an attempt to overthrow the country's government under Samuel Doe.<sup>23</sup> Initially, the NPFL fought Doe's Armed Forces of Liberia. However, NPFL splinter groups emerged, most notably the Independent National Patriotic Front of Liberia led by Prince Yormie Johnson, which was the splinter group responsible for the killing of former President Doe in 1990.<sup>24</sup> Further organised armed groups became involved in the conflict, including the ULIMO and the Revolutionary United Front (RUF).<sup>25</sup> In essence, whereas the ULIMO was fighting the NPFL, the RUF was allied with the NPFL.<sup>26</sup> Later, the ULIMO split into two factions, ULIMO-J and ULIMO-K.<sup>27</sup> ULIMO-J was led by Mr Roosevelt Johnson and ULIMO-K was under the leadership of Mr Alhaji Kromah.<sup>28</sup> Mr Kosiah had the role of a commander within the ULIMO-K faction.

In 1993, the Liberia Peace Council (LPC), another organised armed group, engaged in armed hostilities against NPFL.<sup>29</sup> The Economic Community of West African States (ECOWAS) led peace mediations efforts and a number of peace agreements were signed between 1991 and 1995, including the 1991 Lomé Agreement,<sup>30</sup> the 1993 Cotonou

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<sup>23</sup> See also United States Court of Appeals for the Third Circuit, *United States of America v. Mohammed Jabateh a/k/a Jungle Jabbah*, No. 18-1981 (8 September 2020) 4.

<sup>24</sup> *Ibid.*

<sup>25</sup> The RUF originated in Sierra Leone and was primarily engaged in armed hostilities in that country in the context of Sierra Leone's civil war, which lasted from 1991 until 2002.

<sup>26</sup> Marcus Cowper and Chris McNab (eds), *The Encyclopedia of Warfare* (Amber Books Ltd London 2014) 909.

<sup>27</sup> OAG Statement (n 4).

<sup>28</sup> See also United States Court of Appeals for the Third Circuit, *United States of America v. Mohammed Jabateh a/k/a Jungle Jabbah*, No. 18-1981 (8 September 2020) 4-5. See further Alpha Sesay, 'Judges Grant Prosecution Request, Cross-Examination Of Witness DTC-190 Set For Monday June 21, 2010' *International Justice Monitor* (10 June 2010) <<https://www.ijmonitor.org/2010/06/judges-grant-prosecution-request-cross-examination-of-witness-dtc-190-set-for-monday-june-21-2010/>> accessed 28 February 2022.

<sup>29</sup> Cf. Thomas de Saint Maurice, 'Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea (1980-2005)' <<https://casebook.icrc.org/case-study/case-study-armed-conflicts-sierra-leone-liberia-and-guinea-1980-2005>> accessed 28 February 2022.

<sup>30</sup> Agreement on Cessation of Hostilities and Peaceful Settlement of Conflict between the Armed Forces of Liberia and the National Patriotic Front of Liberia and the Independent National Patriotic Front of Liberia (Lomé Agreement) (13 February 1991).

Agreement,<sup>31</sup> the 1994 Akosombo Agreement,<sup>32</sup> and the 1995 Abuja Agreement.<sup>33</sup> As early as 1993, the UN Security Council urged all conflict parties to respect the rights of the civilian population and requested the Secretary-General to conduct a 'full and thorough investigation' into a specific massacre of 6 June 1993.<sup>34</sup> In this context, the Security Council further warned that 'those found responsible for *such* serious violations of international humanitarian law will be held accountable for such crimes'.<sup>35</sup> This warning was not immediately put into practice given that, as mentioned in the Introduction, the *Kosiah* case was the first trial of war crimes committed in the First Liberian Civil War. Eventually, based on the peace agreements, a transitional government was established, and presidential elections were held.<sup>36</sup> Charles Taylor won the presidential elections held in July 1997 and the violence initially decreased. However, less than two years later, in April 1999, a new armed conflict started, sometimes referred to as the 'Second Liberian Civil War'. Since it is not relevant for the *Kosiah* case, the latter conflict will not be discussed further.

#### 4 The Concept of Universal Jurisdiction and the Applicable Swiss Legal Framework

In light of the nationality of the perpetrator and the place of the committed crimes, the *Kosiah* case is based on the principle of universal jurisdiction, as enshrined in Swiss domestic legislation. Under specific conditions, the Swiss criminal codes allow for the prosecution of international crimes even if these did not take place in Switzerland and if the perpetrator and the victim(s) are not Swiss. This section first provides some background on the concept of universal jurisdiction, including its interpretation and implementation in Switzerland, and then analyses the legal provisions that formed the basis for the *Kosiah* case within the applicable Swiss legal framework.

##### 4.1 The concept of universal jurisdiction: preliminary remarks

The concept of universal jurisdiction is based on the idea that states can prosecute certain crimes, in particular those which are 'considered to be of extreme gravity and concern the international community', without meeting the typical national jurisdictional requirements (such as the territoriality principle or the nationality principle).<sup>37</sup> Despite there being no accepted definition of universal jurisdiction, this lack of other jurisdictional nexus is present in most proposed definitions. For example, van Sliedregt

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<sup>31</sup> Cotonou Agreement (25 July 1993).

<sup>32</sup> Akosombo Agreement (12 September 1994).

<sup>33</sup> Abuja Agreement to Supplement the Cotonou and Akosombo Agreements as subsequently clarified by the Accra Agreement, (19 August 1995).

<sup>34</sup> UN Security Council, 'Note by the President of the Security Council', S/25918 (9 June 1993).

<sup>35</sup> *Ibid.* (emphasis added).

<sup>36</sup> See for example Part II, Section A and Section D of the Abuja Agreement and Articles 6 and 14 of the Akosombo Agreement; see also Articles 14(2), 15 and 16(3) of the Cotonou Agreement.

<sup>37</sup> André Nollkaemper, 'Universality', in *Max Planck Encyclopedias of International Law* (OUP 2011) para. 25.

defines universal jurisdiction as 'jurisdiction over conduct that cannot be linked to a state's territory, the offender's or victim's nationality or protection of certain state interests'.<sup>38</sup>

Historically, the concept dates back to the criminalisation of piracy and slavery in the 19<sup>th</sup> and 20<sup>th</sup> centuries and the customary rule that these crimes could be prosecuted before any national courts.<sup>39</sup> With regard to piracy,<sup>40</sup> this customary rule was eventually laid down in treaty law.<sup>41</sup> As Bantekas points out, the rationale of universal jurisdiction for the crime of piracy differs from the rationale of universal jurisdiction for other crimes, such as grave breaches of the 1949 Geneva Conventions. For the crime of piracy, universal jurisdiction proved necessary due to the location where these crimes were typically committed, namely the high seas, ie, outside of the criminal jurisdiction of states.<sup>42</sup> Over the last decades, the concept of universal jurisdiction was mainly discussed in relation to two famous cases: the *Pinochet* case and the *Arrest Warrant* case.<sup>43</sup> With regard to the *Arrest Warrant* case, the discussions focused on whether universal jurisdiction may be exercised *in absentia*.<sup>44</sup> However, it is only recently that the concept has received renewed impetus due to an array of universal jurisdiction cases. Among

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<sup>38</sup> Elies van Sliedregt, 'International Crimes before Dutch Courts: Recent Developments' (2007) 20 (4) LJIL 903. See also the Princeton Principles on Universal Jurisdiction, Principle 1(1) defining universal jurisdiction as 'criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the victim, or any other connection to the state exercising such jurisdiction'.

<sup>39</sup> Beth Van Schaak, Ron Slye, 'A Concise History of International Criminal Law' <<https://digitalcommons.law.scu.edu/facpubs/626/>> accessed 28 February 2022, 9-12.

<sup>40</sup> The question whether there was/is universal jurisdiction for the crime of slavery is more controversial, in particular with regard to relevant treaty-law such as the 1890 General Act of Brussels or Article 6 of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Cf. Rahim Hesenov, 'Universal Jurisdiction for International Crimes – A Case Study' (2013) 19 EJCP 275, 275-276; Van Schaak et al. (n 39) 11-12.

<sup>41</sup> See the Convention on the High Seas (Geneva, 29 April 1958), in particular Articles 15 and 19. See also the Declaration Respecting Maritime Laws (Paris, 16 April 1856). Article 105 of the UN Convention on the Law of the Sea (UNCLOS) now states that: '[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith'. See also Article 101 UNCLOS for the definition of piracy.

<sup>42</sup> Ilias Bantekas, 'Criminal Jurisdiction of States under International Law', in *Max Planck Encyclopedias of International Law* (OUP 2011) para. 23; see also Van Schaak et al. (n 39) 10. Cf. Claus Kreß, 'Universal Jurisdiction over International Crimes and the Institut de Droit international' (2006) 4 (3) JICJ 561, 569.

<sup>43</sup> ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Judgment) [2002] ICJ Rep 3.

<sup>44</sup> For an analysis of the separate and dissenting opinions of the Judges and a general discussion of this topic, see Roger O'Keefe, 'Universal Jurisdiction, Clarifying the Basic Concept' (2004) 2 (3) JICJ 735; Kreß (n 42). This paper does not discuss the question of the legality of *in absentia* trials based on universal jurisdiction.

them are the *Ahmad Al K* case in the Netherlands, the *Gibril Massaquoi* trial<sup>45</sup> in Finland, the cases against *Eyad A.*, and *Khedr A. K. et al.* in Germany, and indeed the *Kosiah* case in Switzerland, to name a few.

Despite the recent rise of cases based on the concept of universal jurisdiction, fundamental legal questions remain. For example, do states have a right or duty to exercise universal jurisdiction? Assuming there is a right to exercise universal jurisdiction, is this right limited to situations where international law explicitly permits or mandates universal jurisdiction? If there is a duty to exercise universal jurisdiction, what is the scope of this duty? Related to these questions and, specifically in the context of universal jurisdiction, there is still some legal uncertainty concerning the distinction between the states' jurisdiction to *prescribe*, ie, their power to criminalise certain behaviour, and the states' jurisdiction to *enforce*, ie, their right to arrest, prosecute, adjudicate etc.<sup>46</sup> Whereas it is beyond the scope of this paper to deal with all of the above questions in detail, the following preliminary observations may be made.

Firstly, some have argued that there is a need for an explicit *authorisation or mandate* under international law for a state to be allowed to exercise universal jurisdiction.<sup>47</sup> Here, it is argued that there is no need for an explicit *mandate* under international law for states to be allowed to (a) criminalise specific conduct in their national legislation and to introduce corresponding jurisdictional principles<sup>48</sup> (prescriptive jurisdiction); and to (b) actually exercise such jurisdiction – on their territory – based on that domestic legislation (enforcement jurisdiction). This general rule follows from the *Lotus* principle, ie, that a lack of prohibition in international law regarding the exercise of states' (extraterritorial) jurisdiction means that such jurisdiction is lawful.<sup>49</sup> However, arguably, as put by van Sliedregt, '[a]sserting universal jurisdiction over international crimes [further] requires [...] linking it to international rules comprising universal values'.<sup>50</sup> In addition, she argues that the 'identification of a *permissive* rule in (customary) international law, or at least a positive predisposition in state practice, is still necessary'.<sup>51</sup> Thus, states have at the very least a *right* to exercise universal jurisdiction if (a) the crimes in question entail universal values and (b) international law permits such exercise of universal jurisdiction.

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<sup>45</sup> At the time of writing, this trial is ongoing; accordingly, the accused benefits from the presumption of innocence.

<sup>46</sup> See van Sliedregt (n 38) 900; O'Keefe (n 44) 736; Aisling O'Sullivan, *Universal Jurisdiction in International Criminal Law, The Debate and the Battle for Hegemony* (Routledge 2017) 83-103.

<sup>47</sup> For example, in a universal jurisdiction case before Dutch courts, the defence argued along those lines. For an analysis of this case, see van Sliedregt (n 38) 900. Cf. also O'Keefe (n 44) 741.

<sup>48</sup> Encompassing extraterritorial jurisdictional principles such as the passive nationality principle and universal jurisdiction.

<sup>49</sup> PCIJ, S.S. '*Lotus*' (*France v. Turkey*) PCIJ Series A No 10; cf. Bantekas (n 42) para. 22; van Sliedregt (n 38) 902-904. However, it is noted that reliance on the *Lotus* principle is controversial in the context of universal jurisdiction.

<sup>50</sup> Van Sliedregt (n 38) 904.

<sup>51</sup> Van Sliedregt (n 38) 904 (emphasis added).

Secondly, it may be argued that, under certain conditions, states are even under a *duty* to exercise universal jurisdiction. Such a duty can theoretically be based on treaty law, customary international law, or general principles of international law. Such a duty can also follow from the *aut dedere aut iudicare* principle, when the suspected perpetrator of a serious crime is present on the state's territory and extradition is impossible (eg, due to the *non-refoulement* principle). In both doctrine and practice, the existence of a duty to exercise universal jurisdiction appears to be the least controversial concerning grave breaches of the Geneva Conventions (if the suspect is present on the state's territory).<sup>52</sup> This is due to the existence of treaty law that uses mandatory language stating that

[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention [...]. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.<sup>53</sup>

The first part relates to the states' prescriptive jurisdiction, whereas the latter concerns their enforcement jurisdiction. Accordingly, there may be a duty of states to exercise universal jurisdiction over grave breaches of the Geneva Conventions. However, no corresponding provision exists for other IHL violations, including war crimes committed in non-international armed conflicts.<sup>54</sup>

Thirdly, according to the Princeton Principles on Universal Jurisdiction, with regard to serious crimes under international law, such as war crimes, crimes against humanity, genocide, piracy, slavery, and torture, domestic courts are even allowed to rely on universal jurisdiction in the absence of corresponding national legislation.<sup>55</sup> Yet, even if the state in question followed the monist approach to international law, such a broad understanding of universal jurisdiction may be problematic considering the common criminal law principle of *nullum crimen sine lege*.<sup>56</sup>

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<sup>52</sup> See for example Roger O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction' (2009) 7 (4) JICJ 814-817, with further references. Cf., with regard to the crime of genocide, ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, (Judgment) [2007] ICJ Rep 43, para. 442.

<sup>53</sup> Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention, and Article 146 of the Fourth Geneva Convention of 1949.

<sup>54</sup> Article 49 of the First Geneva Convention merely states that '[e]ach High Contracting Party shall take measures necessary for the *suppression* of all acts contrary to the provisions of the present Convention other than the grave breaches' (emphasis added).

<sup>55</sup> See the Princeton Principles on Universal Jurisdiction, Principle 3. See also Principle 2 defining serious crimes under international law as *including* (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.

<sup>56</sup> See also Kreß (n 42) 564.

## 4.2 Switzerland's interpretation and implementation of universal jurisdiction

It is critical to assess how the concept of universal jurisdiction is understood and implemented in domestic law and practice. This is particularly relevant considering the recent increase in, and range of universal jurisdiction cases currently being tried simultaneously in different legal systems with potentially diverging interpretations of this concept. This section seeks to clarify, to the extent possible, how Switzerland interprets the concept of universal jurisdiction and how it is implemented in its domestic law.

In its 2008 dispatch on the revision of Swiss federal laws for the purpose of implementing the Rome Statute into the national legal framework,<sup>57</sup> the Swiss Federal Council stated:

According to the principle of universality, a country may exercise its criminal jurisdiction regardless of where the crime was committed (on national territory or abroad) and regardless of the nationality of the perpetrator and the victim. While there are cases in which States parties are *obliged* to initiate criminal proceedings (eg, against perpetrators of grave breaches of the 1949 Geneva Conventions or the 1984 Convention against Torture), there are other situations in which international law does not compel them to intervene [...]. [...] Most international treaties recognise jurisdiction based on the link to the territory (territoriality principle), the nationality of the perpetrator (active personality principle) or the victim (passive personality principle). Under certain circumstances, states still have the *right* to exercise their jurisdiction even if there is only a minor link or no link to the state in question. In such cases, states may make the exercise of jurisdiction subject to conditions that require the alleged perpetrator to have a closer link to the state in question (eg, presence on the national territory or permanent residence). Particularly with regard to genocide, crimes against humanity and war crimes, public opinion is very sensitive, and these crimes must not go unpunished. It is essential that perpetrators are prevented from seeking refuge in places where they are immune from criminal prosecution because they are protected by the government or because the government is not in a position to prosecute them.<sup>58</sup>

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<sup>57</sup> Federal Council, 'Botschaft über die Änderung von Bundesgesetzen zur Umsetzung des Römer Statuts des Internationalen Strafgerichtshofs' (adopted on 23 April 2008; published on 27 May 2008), BBl 2008 3863 <<https://www.fedlex.admin.ch/eli/fga/2008/807/de>> accessed on 28 February 2022, 3892-3893. The Federal Council's documents are available in German, French, and Italian. Pinpointed references to the specific pages of the Federal Council's documentation in the footnotes of this paper refer to the German version, unless otherwise indicated.

<sup>58</sup> *Ibid.* Unofficial translation by the author. The French version reads as follows: 'Selon le principe de l'universalité, un pays peut exercer sa juridiction pénale indépendamment du lieu où le crime a été commis (sur le territoire national ou à l'étranger) et quelle que soit la nationalité de l'auteur et de la victime. S'il existe des cas dans lesquels les États parties sont obligés d'engager des poursuites pénales (p. ex. contre les auteurs de violations graves des conventions de Genève de 1949 ou de la convention de 1984 contre la torture), il est d'autres situations dans lesquelles le droit international ne les contraint pas à intervenir sans restrictions ou à mener des investigations en dehors des frontières nationales. [...] Dans

In light of the Federal Council's dispatch, it appears that Switzerland is of the view that (a) states have a *right* to exercise universal jurisdiction 'under certain circumstances'; (b) states have a *duty* to exercise universal jurisdiction with regard to torture and grave breaches of the 1949 Geneva Conventions; and (c) states have the right to make their jurisdiction dependent on a link to their country (such as by requiring the presence of the suspect on their territory). According to the Federal Council, the objective is to prevent impunity for genocide, crimes against humanity, and war crimes 'at all costs'.<sup>59</sup>

A look at the Swiss Criminal Code (SCC) and the former Swiss Military Criminal Code (fSMCC) shows how Switzerland implemented the principle of universal jurisdiction into its domestic legal system. Under the previous legal framework, Article 9(1) fSMCC allowed for the exercise of universal jurisdiction over specific crimes committed abroad in the context of an armed conflict by foreign nationals, when these foreign nationals (a) were present on Swiss territory, (b) had a *close* link to Switzerland, and (c) could not be extradited or surrendered to an international criminal tribunal.<sup>60</sup> This provision proved controversial, due to its close-link requirement to Switzerland, which meant that the temporary presence of a suspect was not sufficient basis to prosecute in Switzerland. Instead, some genuine connection to Switzerland was required. On the one hand, the close-link requirement would be met, for example, for people seeking residence in Switzerland, including refugees; people seeking stationary medical treatment in Switzerland; people with close family ties to Switzerland and who would have visited these relatives regularly; or owners of real estate. On the other hand, people with a Swiss bank account and those present in Switzerland on a temporary basis without further 'emotional ties' to Switzerland (such as family members) would not meet this requirement.<sup>61</sup> The close-link requirement was initially intended to prevent a 'vague de plaintes' (a 'flood of lawsuits') based on universal jurisdiction, like the one Belgium

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certaines circonstances, les États ont le droit d'étendre leur juridiction à des affaires sans lien direct avec leur territoire lorsque le rapport avec eux ne peut pas être qualifié d'étroit. Ils peuvent toutefois subordonner leur compétence à des conditions en exigeant que l'auteur ait un lien concret avec eux (p. ex. qu'il réside sur leur territoire). [...] Le génocide, les crimes contre l'humanité et les crimes de guerre sont des violations du droit auxquelles l'opinion publique est très sensible et qui ne sauraient rester impunies. Il faut à tout prix éviter que leurs auteurs puissent trouver refuge dans des lieux où ils sont à l'abri de toute poursuite pénale parce qu'ils bénéficient de la protection du gouvernement ou parce que celui-ci n'est pas en mesure de les poursuivre'.

<sup>59</sup> *Ibid.*

<sup>60</sup> Article 9(1) fSMCC read as follows:

1 Le présent code est applicable aux infractions commises en Suisse et à celles qui ont été commises à l'étranger.

1bis Il est applicable aux personnes visées à l'art. 2, ch. 9, qui sont *étrangères* et qui *commettent à l'étranger*, à l'occasion d'un *conflit armé*, des infractions au droit des gens (art. 108 à 114), lorsqu'elles:

a. *se trouvent en Suisse*;

b. *ont un lien étroit avec la Suisse*;

c. *ne peuvent être ni extradées ni livrées à un tribunal pénal international*.

<sup>61</sup> BBl 2008 3863 (n 57) 3897.



initially experienced.<sup>62</sup> However, this provision was criticised by the United Nations, NGOs and academics alike, as it substantially limited Switzerland's ability to exercise universal jurisdiction.<sup>63</sup> Further, the above-mentioned duty to exercise universal jurisdiction concerning grave breaches of the Geneva Conventions means that this provision may even have been in violation of international law. In any case, the close-link requirement was ultimately abolished.<sup>64</sup>

The current legal framework is mainly laid out in Articles 6, 7 and 264m of the Swiss Criminal Code. First, Article 6(1) SCC first stipulates the conditions under which crimes committed abroad may be prosecuted under the Code where Switzerland is obliged to prosecute them pursuant to an international treaty, namely: (a) either the double criminality rule is met or 'no criminal law jurisdiction applies at the place of commission', and (b) the suspect remains in Switzerland and is not extradited. This could, for example, refer to Switzerland's obligation under the Geneva Conventions to prosecute grave breaches. Second, Article 7 SCC enables Swiss courts to try other crimes that were committed abroad when: (a) either the double criminality rule is met or 'the place of commission is not subject to criminal law jurisdiction', (b) the suspect is either in Switzerland or is extradited to Switzerland, and (c) extradition is permitted but the suspect is not extradited. Paragraph 2 of the same provision further states that:

[i]f the person concerned is not Swiss and if the felony or misdemeanour was not committed against a Swiss person, paragraph 1 is applicable only if:

- a. the request for extradition was refused for a reason unrelated to the nature of the offence; or
- b. the offender has committed a *particularly serious felony that is proscribed by the international community*.<sup>65</sup>

This suggests that the Swiss interpretation of universal jurisdiction is in line with van Sliedregt's argument that asserting universal jurisdiction may require 'linking it to international rules comprising universal values' and additionally requires a certain level of 'seriousness' of the alleged crime. Third, Article 264m(1) SCC provides that a person who commits genocide, crimes against humanity or war crimes while abroad is 'guilty of an offence if he is in Switzerland and is not extradited to another State or delivered to an international criminal court whose jurisdiction is recognised by Switzerland'. Further, pursuant to Article 264m(2) SCC:

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<sup>62</sup> *Ibid.*, 3899 (3495 in the French version). Belgium later adopted a more restrictive approach to universal jurisdiction, see for example Amina Adanan, 'Reflecting on the Genocide Convention in its Eighth Decade, How Universal Jurisdiction Developed over Genocide' (2021) 19 (5) JICJ 1039, 1061-1062.

<sup>63</sup> See Swissinfo, 'UNO mahnt zur Härte gegen Kriegsverbrecher' (28 January 2006) <<https://www.swissinfo.ch/ger/uno-mahnt-zur-haerte-gegen-kriegsverbrecher/4983466>> accessed 28 February 2022.

<sup>64</sup> Cf. BBl 2008 3863 (n 57) 3899.

<sup>65</sup> Article 7(2) SCC (emphasis added).

[w]here the *victim* of the act carried out abroad is *not Swiss* and the *perpetrator* is *not Swiss*, the prosecution, with the exception of measures to secure evidence, *may be abandoned or may be dispensed with* provided:

- a. a foreign authority or an international criminal court whose jurisdiction is recognised by Switzerland is prosecuting the offence and the suspected perpetrator is extradited or delivered to the court; or
- b. the suspected perpetrator is no longer in Switzerland and is not expected to return there.<sup>66</sup>

Accordingly, the SCC not only lays down the conditions upon which prosecutions of international crimes based on the universal jurisdiction principle may proceed but also the conditions upon which such prosecutions may be abandoned. The conditions themselves are noteworthy: firstly, whereas condition (a) may be reasonable regarding foreign authorities and *some* international criminal tribunals, the logic does not necessarily follow with respect to the International Criminal Court due to the principle of complementarity; secondly, it is noteworthy that prosecutions *that have already been initiated* may be ‘abandoned’ simply because the suspect leaves the Swiss national territory and is not expected to return. This could also pose a major practical challenge for victims and organisations that act on their behalf: they may have to ‘follow’ the suspect to different jurisdictions and file new complaints in another country, simply because the suspect did not stay long enough.

Finally, it might appear that Articles 6, 7, and 264m SCC are the only relevant provisions in the context of universal jurisdiction. However, Switzerland does not interpret universal jurisdiction as limited to the typical catalogue of international or transnational crimes (such as genocide, war crimes etc.). Instead, Switzerland also introduced this jurisdictional principle in relation to other crimes. For example, Article 5 of the SCC establishes jurisdiction over a catalogue of crimes against minors committed abroad.<sup>67</sup> The Swiss *travaux préparatoires* and commentaries leave no doubt that this provision was intended to be based on the concept of universal jurisdiction (as interpreted by Switzerland).<sup>68</sup> Pursuant to Article 5 (SCC), the only conditions are that the alleged

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<sup>66</sup> Article 264m(2) SCC (emphasis added).

<sup>67</sup> Specifically, Article 5 provides that the Swiss Criminal Code ‘also applies to any person who is in Switzerland, is not being extradited and has committed any of the following offences abroad: trafficking in human beings (Art. 182), indecent assault (Art. 189), rape (Art. 190), sexual acts with a person incapable of proper judgment or resistance (Art. 191) or encouraging prostitution (Art. 195) if the victim was less than 18 years of age; *ab* sexual acts with dependent persons (Art. 188) and sexual acts with minors against payment (Art. 196); sexual acts with children (Art. 187) if the victim was less than 14 years of age; aggravated pornography (Art. 197 para. 3 and 4) if the items or performances depict sexual acts with minors. [...]’.

<sup>68</sup> See for example the Federal Council’s ‘Message portant approbation du Protocole facultatif du 25 mai 2000 se rapportant à la Convention relative aux droits de l’enfant, concernant la vente d’enfants, la prostitution des enfants et la pornographie mettant en scène des enfants et sur la modification correspondante de la norme pénale relative à la traite d’êtres humains’ (adopted on 11 March 2005;

perpetrator is in Switzerland and is not extradited to another country (or international tribunal). The same holds true for the crimes of female genital mutilation (Article 124 SCC), forced marriage, and forced registered partnership (Article 181a SCC), as well as enforced disappearance (Article 185bis SCC), among others.<sup>69</sup> Therefore, it can be concluded that, on the one hand, Switzerland has adopted a broad understanding of the concept of universal jurisdiction in terms of the crimes that may be tried under this principle. On the other hand, it has maintained criteria that establish a certain link to Switzerland (albeit no close-link requirement), such as the requirement of the presence of the suspect on its territory, which may still limit its own ability to try such crimes.<sup>70</sup> Furthermore, Switzerland has introduced factors according to which such prosecutions may be abandoned.

### 4.3 The legal basis for the *Kosiah* case

Pursuant to the currently applicable legal framework, international crimes are laid out in Titles Twelve<sup>bis</sup>, Twelve<sup>ter</sup>, and Twelfth<sup>quater</sup> of the SCC: genocide in Article 264, crimes against humanity in Article 264a, war crimes in Articles 264b to 264j SCC, and common provisions on specific modes of liabilities, immunities and jurisdiction in Articles 264k to 264n SCC. Further, Article 101 SCC stipulates that there is no statute of limitations for these crimes. However, as mentioned above, the *Kosiah* case was based on Articles 108 and 109 of the *former Swiss Military Criminal Code* in connection with Common Article 3 of the four Geneva Conventions of 1949, as well as Article 4 of the Additional Protocol II to the Geneva Conventions. Therefore, in order to understand the applicable law in this case it becomes necessary to undertake a small excursion into Swiss legal history.

Switzerland incorporated war crimes – to a certain extent – into the (former) Swiss Military Criminal Code (fSMCC) in 1968.<sup>71</sup> War crimes used to be under the exclusive jurisdiction of the Swiss military courts, including if the perpetrator was a civilian.<sup>72</sup> According to Article 108(1) fSMCC, the war crimes section was primarily applicable in cases of international armed conflict (between two or more states). However, paragraph 2 of Article 108 fSMCC also foresaw that ‘the violation of international agreements is also punishable if the respective agreements provide for a wider scope of application’,<sup>73</sup>

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published on 3 May 2005), FF 2005 2639 <<https://www.fedlex.admin.ch/eli/fga/2005/433/fr>> accessed 28 February 2022, 2656.

<sup>69</sup> See also Article 19(4) of the Federal Act on Narcotics and Psychotropic Substances. In this regard, cf. Swiss Federal Tribunal, *Urteil der II. öffentlichrechtlichen Abteilung vom 21. Dezember 1979 i.S. König gegen Bundesanwaltschaft und Eidg. Justiz- und Polizeidepartement (Einsprache gemäss Auslieferungsgesetz)*, 105 Ib 294, 297.

<sup>70</sup> However, many states require the presence of the suspect on their territory to exercise universal jurisdiction. See Adanan (n 62) 1065.

<sup>71</sup> See BBl 2008 3863 (n 57) 3932.

<sup>72</sup> *Ibid.*, 3901.

<sup>73</sup> Unofficial translation by the author; the original Article 108(2) fSMCC read as follows: ‘[I]a violation d’accords internationaux est aussi punissable si les accords prévoient un champ d’application plus étendu’.

thereby potentially broadening the scope of application to non-international armed conflicts. Under the fSMCC, the most important substantive provision was Article 109 fSMCC, which was drafted broadly to function as a catch-all clause. Pursuant to this provision, anyone who violated (a) provisions of international conventions on the conduct of war and on the protection of persons and property, or (b) any other recognised laws and customs of war, was to be punished by imprisonment.<sup>74</sup> Accordingly, this provision simply contained a general reference to applicable international treaties – such as the Geneva Conventions of 1949 – and customary international law. Except for five other provisions laying down specific war crimes,<sup>75</sup> Article 109 fSMCC was the only substantive provision under domestic law upon which war crimes trials could be based.

Over time, the provision was criticised for not upholding the required standard of precision under the principle of legality.<sup>76</sup> However, a more detailed catalogue of war crimes was only introduced in 2011, both in the revised Swiss Criminal Code and the revised Swiss Military Criminal Code.<sup>77</sup> With regard to the *Kosiah* case, the crimes had taken place between 1993 and 1995. Articles 108 and 109 fSMCC therefore constituted the applicable law at the time of the commission of these crimes. Further, by 1993, the Additional Protocols had also entered into force (they were adopted in 1977 and entered into force in 1978). Considering that the First Liberian Civil War may be characterised as a non-international armed conflict, Common Article 3 to the Geneva Conventions and Additional Protocol II formed the applicable legal framework under international humanitarian law. Therefore, and in light of the principles of legality and of *lex mitior*,<sup>78</sup> Mr Kosiah was charged under, and convicted of, crimes pursuant to Articles 108 and 109 fSMCC in connection with Common Article 3 to the Geneva Conventions and Article 4 of Additional Protocol II. Due to recent revisions, which endowed jurisdiction over most international crimes to the Federal Criminal Court,<sup>79</sup> Mr Kosiah was tried before that Court. Pursuant to Article 3(1)(9) of the (revised) Swiss Military Criminal Code, the military courts now only have jurisdiction over civilians and military personnel that are alleged to have committed genocide, crimes against humanity or war crimes abroad *against a member of the Swiss army*.

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<sup>74</sup> In its original version, Article 109(1) fSMCC read as follows: ‘Celui qui aura contrevenu aux *prescriptions de conventions internationales sur la conduite de la guerre ainsi que pour la protection de personnes et de biens*, celui qui aura violé d’autres lois et coutumes de la guerre reconnues, sera, sauf si des dispositions plus sévères sont applicables, puni de l’emprisonnement. Dans les cas graves, la peine sera la réclusion’ (emphasis added).

<sup>75</sup> There are five specific crimes foreseen in section six of the fSMCC, among them ‘Abus d’un emblème international’ (Article 110) and ‘Actes d’hostilité contre des personnes et des choses protégées par une organisation internationale’ (Article 111).

<sup>76</sup> BBl 2008 3863 (n 57) 3881-3882, 3932-3933.

<sup>77</sup> Cf. *ibid.*, 3933.

<sup>78</sup> See Articles 1 and 2 of the Swiss Criminal Code.

<sup>79</sup> See Article 23(1)(g) of the Swiss Criminal Procedural Code.

Given that the *Kosiah* case was based on the former Swiss Military Criminal Code (in conjunction with Common Article 3 of the Geneva Conventions and Article 4 of Additional Protocol II), it was (partly) based on a provision that had been criticised for being unprecise, and potentially not being in compliance with the principle of legality (*nullum crimen sine lege certa*). However, at least from an international law point of view, there appears to be a consensus that universal jurisdiction over war crimes in non-international armed conflicts, in particular serious violations of Common Article 3 to the Geneva Conventions, are *permissible* under international law.<sup>80</sup> As the Federal Criminal Court convicted Mr Kosiah on this legal basis, it further appears that the Court was of the same view. However, it remains to be seen to what extent the Court will elaborate on the legal basis, the principle of legality and *lex mitior*, as well as the concept of universal jurisdiction in its written version of the verdict.

## 5 The Swiss Legal Framework: Implications for Future Cases

This section provides an overview of the recent revisions in Swiss criminal law that were adopted in the context of the implementation of the Rome Statute. As will be seen, the delay of the incorporation of international crimes into the Swiss legal framework may entail legal consequences for future universal jurisdiction cases. Legally, it would have been more challenging to try a case like the *Kosiah* case in Switzerland if he had been accused of crimes against humanity, rather than war crimes, even if the alleged crimes had been committed in 2010.

Following the adoption of the Rome Statute in 1998, a series of amendments of the Swiss legal framework were adopted to implement Switzerland's duties under the Statute. In 2001, the Swiss Federal Council published its dispatch on 'the Rome Statute of the International Criminal Court, the federal law on cooperation with the International Criminal Court and the revision of criminal law',<sup>81</sup> envisaging amendments to take *two steps* pursuant to the following reasoning:

If a State feels that it is able to initiate investigations and criminal prosecutions in accordance with the criteria set out in Article 17 [of the Rome Statute], it is not obliged to transpose the provisions of the Statute into its [domestic] law [...]. However, if [...] it considers that there are genuine gaps in terms of criminal responsibility, these must be filled. [...] *With the inclusion of the crime of genocide in the [SCC] and the introduction of a broad description of war crimes in the Military Criminal Code, Switzerland is well equipped for two of the three categories of crimes for which the Court has material jurisdiction. More problematic is the absence of crimes against humanity in our national law.*

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<sup>80</sup> Van Sliedregt (n 38) 905-906, with further references.

<sup>81</sup> Unofficial translation by the author. The title of the original dispatch is 'Botschaft über das Römer Statut des Internationalen Strafgerichtshofs, das Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof und eine Revision des Strafrechts' or 'Message relatif au Statut de Rome de la Cour pénale internationale, à la loi fédérale sur la coopération avec la Cour pénale internationale ainsi qu'à une révision du droit pénal', in its German and French versions, respectively (see also footnote 82 below).

An analysis of our national law shows that, as a general rule, the crimes defined in Article 7 of the Statute are also subject to punishment in one way or another and that, taking into account any applicable grounds for aggravation, they are generally subject to sufficiently severe penalties to meet the criteria of Article 17 of the Statute. Thus, there is no immediate need for Switzerland to take measures to adapt its substantive criminal law at the national level. However, it is not claimed here that the inclusion of the category of crimes against humanity in our law is not desirable or that, or even required in light of status under customary international law [...]. The Federal Council would like to advance this work as quickly as possible, without, however, delaying the ratification project.<sup>82</sup>

Therefore, despite identifying a potential gap due to the lack of an explicit provision for crimes against humanity (as a stand-alone category of crimes) in the applicable domestic legal framework, the Federal Council recommended the adoption of corresponding amendments only in a second step, ie, at a later stage. Instead, the idea of the first round of amendments was to focus on those amendments that are 'strictly necessary' for the ratification of the Rome Statute. Specifically, among the amendments deemed strictly necessary according to the Federal Council, were those required by Article 70(4) of the Rome Statute.<sup>83</sup> In this regard, the Federal Council declared that, 'a draft Federal Law on Cooperation with the International Criminal Court and a draft federal law amending the Swiss Criminal Code and Military Criminal Code (*with amendments exclusively focusing on offences against the administration of justice*) will be submitted to the Federal Assembly simultaneously with the ratification project'.<sup>84</sup> The Federal Council added that all remaining work on the transposition of the Rome Statute into Swiss national law that was *not absolutely essential*, was to be submitted to the Federal Assembly in a second round.<sup>85</sup> Therefore, crimes against humanity as a separate category of crimes was only incorporated into the Swiss Criminal Code in the second round of amendments, which entered into force on 1 January 2011.<sup>86</sup> It is questionable to what extent the Federal Council's analysis, that explicit provisions on crimes against humanity were *not* strictly necessary, was correct. Due to the late revisions of Swiss laws, any case that entails crimes

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<sup>82</sup> Federal Council, 'Botschaft über das Römer Statut des Internationalen Strafgerichtshofs, das Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof und eine Revision des Strafrechts' (adopted on 15 November 2000; published on 20 February 2001), BBl 2001 391 <<https://www.fedlex.admin.ch/eli/fga/2001/133/de>> accessed 28 February 2022, 451 (emphasis added).

<sup>83</sup> Article 70 of the Rome Statute deals with offences against the administration of justice and paragraph 4 reads as follows:

'4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals; (b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively'.

<sup>84</sup> BBl 2001 391 (n 82) 452 (emphasis added).

<sup>85</sup> *Ibid.* (emphasis added).

<sup>86</sup> Article 264a SCC. See also Article 109 of the Swiss Military Criminal Code.

against humanity could only be tried in Switzerland – based on domestic laws – if the alleged crimes were committed after 2011. It would appear that the only potential legal basis for cases before 2011 would be customary international law (or regular domestic crimes).

On this matter, the case against Mr Ousman Sonko could become insightful. The former Gambian Minister of the Interior was arrested in 2017 in relation to alleged crimes against humanity committed between 2006 and 2016.<sup>87</sup> The suspect has repeatedly challenged his long pre-trial detention. In this context, he also challenged that Switzerland had jurisdiction over the alleged crimes. On 1 September 2021, the Federal Criminal Court rejected this challenge by reference to the fact that the investigations against him *also include* incidents that fall into the period *after* the provisions of Titles Twelfth<sup>bis</sup> and Twelfth<sup>quater</sup> of the SCC came into force.<sup>88</sup> This suggests, *a contrario*, that if only incidents that occurred before the revision of these titles had been charged, Swiss courts would not have had jurisdiction. It will be interesting to follow the further developments in this case to ascertain to what extent and on what legal basis Swiss courts deem that they have jurisdiction over crimes against humanity when they were committed *before* the revisions on crimes against humanity entered into force in 2011. A recent decision by the FCC (concerning another case) offers some guidance on how this legal reasoning may look like: the FCC held that, in light of Article 101(3) SCC,<sup>89</sup> the crimes for which there is no statute of limitations under this provision (including crimes against humanity) are an exception to the principle of *lex mitior*.<sup>90</sup> The Court further held that Article 101 SCC enshrines a ‘limited retroactivity of the rules on the non-applicability of the statute of limitations to crimes which, on the day the rule is adopted, are not already time-barred’, making it possible to ‘reconcile the principle of non-retroactivity of criminal laws within the meaning of [Article 2 SCC] and the political considerations in favour of the non-applicability of the statute of limitations to crimes with a historical dimension, such as genocide and crimes against humanity’.<sup>91</sup> This decision appears to open the door for prosecutions of international crimes that occurred *before* the entry into force of the Swiss provisions to the extent that the conditions under Article 101 SCC are met.

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<sup>87</sup> Federal Criminal Court, Decision of 1 September 2021 (BH.2021.2, BP.2021.72).

<sup>88</sup> *Ibid.*, para. 5.9.

<sup>89</sup> Article 101 SCC reads as follows:

‘1 There is no statute of limitations for the offences of: a. genocide (Art. 264); b. crimes against humanity (Art. 264a para. 1 and 2); c. war crimes (Art. 264c para. 1–3, 264d para. 1 and 2, 264e para. 1 and 2, 264f, 264g para. 1 and 2 and 264h); d. [...]; e. [...].

2 [...].

3 Paragraphs 1 letters a, c and d and paragraph 2 apply if the right to prosecute or execute the sentence had not become time barred by 1 January 1983 in accordance with the law applicable until that point in time. Paragraph 1 letter b applies if the right to prosecute or execute the penalty has not become time barred under the previous law when the Amendment of 18 June 2010 to this Code comes into force. [...].’

<sup>90</sup> Federal Criminal Court, Decision of 23 September 2021 (BB.2021.141), para. 2.1.3.

<sup>91</sup> *Ibid.* (unofficial translation by the author).

With regard to the crime of genocide, the above-cited 2001 dispatch by the Federal Council mentions that this crime had already been incorporated into Swiss criminal law. Indeed, the crime of genocide was incorporated into Article 264 SCC in 2000,<sup>92</sup> almost fifty years after the Convention on the Prevention and Punishment of the Crime of Genocide entered into force (in 1951). Switzerland only acceded to the treaty in 2000. The Federal Council's dispatch from 1999 on the corresponding amendments in the Swiss Criminal Code acknowledges that the International Court of Justice and the international community 'agree that the prohibition of genocide has customary value'.<sup>93</sup> Further, the dispatch argued, that 'recent events in the former Yugoslavia and Rwanda' have given the Convention new relevance and that there is '*no longer any justification for Switzerland not to be a state party to the [Genocide] Convention, especially in view of its active human rights policy, and even less so since, due to the customary nature of the norms contained in the Convention, Switzerland is already under an obligation to punish genocide, as defined by the Convention*'.<sup>94</sup> Similar considerations as for crimes against humanity apply: alleged perpetrators of genocide may, as a matter of principle, only be brought before Swiss courts if the alleged crimes occurred after 2000; however, the recent FCC decision and Article 101(3) SCC appear to suggest that, exceptionally, such prosecutions are possible to the extent that the alleged crimes were not time-barred by 1 January 1983.<sup>95</sup>

## 6 Further Developments in Switzerland and Beyond

The OAG has a special unit dedicated to the prosecution of international crimes and has dealt with over fifty 'cases'/complaints, yet no suspect has been tried – with the exception of Mr Kosiah.<sup>96</sup> However, the *Kosiah* trial will also not be the last case of its kind before Swiss courts. For example, between 2 and 4 February 2022, the OAG conducted final hearings of Mr Khaled Nezzar.<sup>97</sup> Mr Nezzar, the former Algerian Minister of Defence

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<sup>92</sup> See the Federal Council's 'Message relatif à la Convention pour la prévention et la répression du crime de génocide, et révision correspondante du droit pénal' (adopted on 31 March 1999; published on 20 July 1999), FF 1999 4911 <[https://www.fedlex.admin.ch/eli/fga/1999/1\\_5327\\_4911\\_4611/fr](https://www.fedlex.admin.ch/eli/fga/1999/1_5327_4911_4611/fr)> accessed 28 February 2022.

<sup>93</sup> *Ibid.*, 4912 (unofficial translation by the author). The original reads as follows: '[I]a Cour internationale de Justice et la communauté internationale s'accordent à reconnaître à l'interdiction du génocide une valeur coutumière. Les récents événements survenus en Ex-Yougoslavie et au Rwanda ont conféré à la Convention une actualité nouvelle. *Il ne se justifie plus que la Suisse n'y soit pas Partie*, notamment au vu de sa politique active en matière de droits de l'homme, et ce d'autant moins qu'en raison de la nature coutumière des normes contenues dans la Convention, la Suisse se trouve déjà dans l'obligation de réprimer le génocide, tel qu'il est défini par la Convention' (emphasis added).

<sup>94</sup> *Ibid.*

<sup>95</sup> Federal Criminal Court, Decision of 23 September 2021 (BB.2021.141), para. 2.1.3.

<sup>96</sup> Sarah Fluck, 'Kriegsverbrecher bleiben in der Schweiz ungestraft' *Tagesanzeiger* (3 September 2018) <<https://www.tagesanzeiger.ch/schweiz/standard/kriegsverbrecher-haben-in-der-schweiz-ihre-ruhe/story/18665948>> accessed 28 February 2022.

<sup>97</sup> Trial International, 'The way is now paved for the trial in Switzerland of General Khaled Nezzar' (8 February 2022) <<https://trialinternational.org/latest-post/the-way-is-now-paved-for-the-trial-in-switzerland-of-general-khaled-nezzar/>> accessed 28 February 2022.



and member of the country's High Council of State, allegedly committed international crimes in the context of the Algerian armed conflict between 1992 and 1994.<sup>98</sup> With the conclusion of the OAG's investigations, he could be sent to trial before the Federal Criminal Court in due course. Further, in its annual report of 2020, the OAG states that '[s]ince 2011, over 70 cases [concerning international crimes] have been submitted to the OAG' and that these 'cases' relate to 'incidents that have taken place in a total of 28 countries, in particular Syria, Afghanistan, Bosnia, the Democratic Republic of Congo, Gambia, Iraq, Kosovo, Algeria, Liberia, Libya and Sudan'.<sup>99</sup> In this regard, the OAG does report challenges: according to the Office, both the specific location of the crimes and the fact that considerable time has elapsed since the commission of some of the alleged crimes 'can hamper the gathering of evidence', rendering it 'in some cases [...] even impossible'.<sup>100</sup> The OAG nevertheless reports that it is 'conducting more than twenty preliminary investigations and criminal proceedings in relation to war crimes, genocide and/or crimes against humanity'.<sup>101</sup> Further, the OAG stresses the significance of 'international judicial cooperation'/international legal assistance in the field of international criminal law. In this regard, it should be noted that there are efforts underway by Argentina, Belgium, Mongolia, the Netherlands, Senegal, and Slovenia to 'set up a modern procedural multilateral treaty on mutual legal assistance and extradition which would facilitate better practical cooperation between States investigating and prosecuting [international] crimes' (the so-called MLA Initiative).<sup>102</sup>

In any case, further trials for international crimes may reasonably be expected in Switzerland. For these future trials, it will be critical that there are sufficient resources – both for NGOs filing complaints on behalf of the victims and for the state's responsible units. Considering that the rise of universal jurisdiction cases also means that national authorities are dealing with uncharted territory, it is further relevant that there is sufficient expertise, ideally through the creation of specialised units such as the one created within the OAG.<sup>103</sup> Finally, it is crucial for states to share information, to the extent possible, and develop common denominators in their understanding of the concept of universal jurisdiction and the prosecution of international crimes in domestic courts. This is particularly relevant when different states are exercising jurisdiction over alleged co-perpetrators or crimes that are otherwise linked.<sup>104</sup> Without sharing of

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<sup>98</sup> *Ibid.*

<sup>99</sup> OAG, 'Report of the Office of the Attorney General of Switzerland on its activities in 2020 for the attention of the supervisory authority' (January 2021) <<https://www.bundesanwaltschaft.ch/mpc/en/home/taetigkeitsberichte/taetigkeitsberichte-der-ba.html>> accessed 28 February 2022, 21-22. See also OAG Statement (n 4).

<sup>100</sup> *Ibid.*

<sup>101</sup> OAG Report 21 (n 96).

<sup>102</sup> For further information, see the webpage of the *Centrum voor Internationaal Recht* (Centre for International Law of the Dutch Ministry of Foreign Affairs) <<https://www.centruminternationaalrecht.nl/mla-initiative>> accessed 28 February 2022.

<sup>103</sup> Adanan (n 62) 1058-1059.

<sup>104</sup> In this regard, the upcoming trial against Mr Kunti K. will be insightful. Mr Kunti K. is alleged to have committed crimes against humanity and torture in his capacity as former ULIMO commander and was

information and knowledge among the states, the current situation bears the risk of a complete fragmentation of international criminal law as understood by the different domestic legal institutions.

## 7 Conclusion

Despite the available legal framework, which allows for the prosecution of international crimes (including crimes against humanity since 2011), the trial of Mr Kosiah was the first of its kind. The analysis of the concept of universal jurisdiction, the Swiss legal framework, and the *Kosiah* case has shown that controversies and challenges in the domestic prosecution and trial of international crimes persist. Yet, the recent rise in cases based on universal jurisdiction also means that each of these cases and the respective states' declarations and *travaux préparatoires* can contribute to the development of state practice and *opinio iuris* in this field. Considering that the written verdict is yet to be published, this paper merely sought to offer preliminary observations on the *Kosiah* case, its background, and the Swiss legal framework for universal jurisdiction cases. This paper first provided an overview of the procedural background and historical context of the *Kosiah* case, then discussed fundamental questions concerning the concept of universal jurisdiction, such as whether states have a right or a duty to exercise universal jurisdiction, and further analysed the applicable Swiss legal framework. With regard to the latter, Switzerland appears to interpret the concept of universal jurisdiction broadly in terms of the crimes that may be tried under this concept but has also maintained criteria that require a certain link to Switzerland before jurisdiction may be exercised in order to prevent floods of lawsuits. The paper also examined the Swiss legal basis of the *Kosiah* case, in particular Articles 108 and 109 fSMCC: provisions that have been criticised in light of the principle of legality. The last two sections of this paper dealt with the implications of the late revisions of Swiss criminal law, in particular with regard to crimes against humanity and the crime of genocide, as well as the current and expected developments in Switzerland and beyond.

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allegedly active in the same region as Mr Kosiah. His trial is set to begin on 10 October 2022. See Civitas Maxima, 'Kunti K.' <<https://civitas-maxima.org/legal-work/our-cases/kunti-k/>> accessed 28 February 2022; Civitas Maxima, 'ULIMO Commander Kunti K. Will Face Trial in France for Crimes Against Humanity' (2 April 2021) <<https://civitas-maxima.org/2021/04/02/ulimo-commander-kunti-k-will-face-trial-in-france-for-crimes-against-humanity/>> accessed 28 February 2022.

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# FROM NUREMBERG TO THE HAGUE ... TO KOBLENZ? INTERNATIONAL CRIMES IN THE SYRIAN WAR BEFORE GERMAN COURTS

By Kilian Wegner\*

## Abstract

*The article deals with the prosecution of international crimes in the Syrian Civil War by nation states and especially Germany, which has conducted numerous criminal proceedings in recent years. The paper will show which practical problems and which legal issues these proceedings have raised, as far as this might be of interest for international legal practice and jurisprudence. This concerns the handling of difficulties of evidence in so-called foreign fighter / Islamic State of Iraq and the Levant (ISIL) returnee cases, the debate about the immunity of defendants belonging to the Syrian state apparatus and the communication between the German courts and the Syrian public. The appendix contains a (non-exhaustive) list of 83 criminal proceedings conducted in Germany in relation to the Syrian civil war.*

## 1 Introduction

For almost a decade now, an armed conflict has been raging in Syria, which many observers consider having frightening parallels with Europe's Thirty Years War from 1618-1648.<sup>1</sup> One reason for this comparison is the complex geostrategic background of the hostilities, that has turned what was initially a regionally limited conflict into a religiously charged wildfire which has already spread to large parts of the *Levant*, and which is being fuelled again and again by numerous major and regional powers. The second reason is – and that shall be the topic of this contribution – the great brutality of the war and the multitude of atrocities committed against the civilian population that recall the horrors of 1618-1648. In the 17th century, the criminal liability of violations of *the ius in bello* was already being discussed (*Hugo Grotius, Pierino Belli et. al.*), but no international legal norms in this respect had yet emerged. This is different today: There is overwhelming evidence that numerous combatant parties – be it the Syrian Army, be it one of the armed opposition groups like the Free Syrian Army or be it extremist groups such as the *Al-Nusra* Front or ISIL – all of them have committed acts that *clearly* violate international criminal law (ICL). Practically, however, these crimes are not prosecuted at the supranational level. This article will first explain the reasons for this inactivity of the

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\* Junior Professor of Criminal Law and Criminal Procedure, European University Viadrina, Frankfurt (Oder), Germany. The contribution is based on a presentation given by the author at the VIII. AIPD International Symposium for Young Penalists on June 11 2021 online. The oral presentation style has been preserved in part.

<sup>1</sup> *Pars pro toto* Herfried Münkler, *Der Dreißigjährige Krieg – Europäische Katastrophe, Deutsches Trauma 1618-1648* (Rowohlt 2017) 825-843.



international criminal justice system (2.) and then focus on the prosecution efforts by nation states, especially Germany (3.).

## **2 Roadblocks to the Prosecution of International Crimes in the Syrian War and Possible Ways Out**

International crimes committed in the Syrian Civil War are not tried by international courts simply because the Syrian Arab Republic is not a signatory to the Rome Statute of International Criminal Court (ICC) and is therefore not originally subject to the jurisdiction of the ICC. A ('collective') Preliminary Examination against foreign fighters from states under the jurisdiction of the ICC was rejected by the Prosecutor of the ICC, in 2015.<sup>2</sup> Nevertheless, there is the possibility that the United Nations (U.N.) Security Council, through a measure under Chapter 7 of the U.N. Charter, could confer jurisdiction over the Syrian Arab Republic on the ICC (Art. 13 lit. b Rome Statute) or establish an *ad-hoc* regional tribunal (as for Former Yugoslavia for example). However, such advances have so far been blocked by the Russian Federation and the People's Republic of China as veto powers in the Security Council. Against this background, the Netherlands and – following them – Canada have recently initiated an attempt to establish the jurisdiction of international courts by a circumvention. In September 2020, the Dutch Government notified the Syrian Arab Republic of its intention to hold the Syrian government accountable for torture under the U. N. Convention against Torture that the Syrian Arab Republic is a party to.<sup>3</sup> The Canadian government officially joined this initiative in March 2021.<sup>4</sup> Both governments invoke Art. 30 of the Convention, which states that any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the International Court of Justice.

According to the Dutch and the Canadian governments, the legal dispute referred to in Article 30 relates to the fact that (diplomatically speaking) the Syrian Arab Republic is not doing enough to prevent torture on its territory. If the Syrian Arab Republic does not respond to the initial request for negotiations on this question, or if those talks are not successful within a reasonable timeframe, Canada and the Netherlands plan to submit a request for arbitration and – if necessary – to refer the case to the International Court of

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<sup>2</sup> Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS from 8 April 2015 < <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1> > accessed 11 February 2022.

<sup>3</sup> Statement of the Government of the Netherlands from 18 September 2020 <<https://www.government.nl/latest/news/2020/09/18/the-netherlands-holds-syria-responsible-for-gross-human-rights-violations>> accessed 11 February 2022.

<sup>4</sup> Statement of the Government of Canada from March 12 2021 <<https://www.canada.ca/en/global-affairs/news/2021/03/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-their-cooperation-in-holding-syria-to-account.html>> accessed 11 February 2022.

Justice. Given the fact that the Syrian Arab Republic has not entered any reservation to opt out of this jurisdiction,<sup>5</sup> this approach seems to have a certain merit. With *Belgium v Senegal*<sup>6</sup>, there is also a precedent decision that explicitly states that the convention triggers obligations *erga omnes*. Even states that have no connection to the disputed event can therefore insist bilaterally on compliance with the Convention. It is therefore certainly worthwhile to keep a close eye on further developments in the Dutch-Canadian advance. Last but not least, it also remains to be considered whether the integration of the ICC is desirable at all or whether it would create more problems than it solves.<sup>7</sup>

### 3 Proceedings before National Courts and Particularly in Germany

Until now however, there is a yawning void at the international level when it comes to prosecuting international crimes. In recent years, this void has increasingly been filled by certain nation states – in particular but not exclusively in Europe<sup>8</sup> – which have begun to prosecute the macro-criminality of the Syrian civil war before their domestic criminal courts. Often these domestic cases do not deal with international crimes *stricto sensu* but rather focus on anti-terror charges or laws criminalizing participation in foreign wars (so called ‘foreign fighter’-crimes).<sup>9</sup> Such rather abstract accusations are often the only ones that can be proven from a distance of several thousand kilometres to the crime scene. The defendants in those cases are mostly fighters of groups like ISIL or the *Al-Nusra* Front. They are often citizens of the persecuting state who have returned home after a ‘deployment’ as a foreign fighter and are now perceived as a threat by their home state. This explains why jurisdiction in such cases is often based on the active personality principle or on *aut dedere aut judicare* in case of foreign nationals who for example entered the country as refugees. Universal jurisdiction is only rarely relied upon.

When looking at sheer numbers, Germany has taken the lead prosecuting crimes related to the Syrian War. According to my research by end of August 2021 at least 72 cases, which are listed in tabular form in the appendix, reached a stage, where either an arrest warrant has been issued, an indictment was filed, a main trial is ongoing, or a sentence

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<sup>5</sup> U.N. Treaty Collection Chapter IV No. 9

<[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en)> accessed 11 February 2022.

<sup>6</sup> [2012] ICJ GL No 144.

<sup>7</sup> Expressing doubt about this Beth van Schaack ‘Imagining Justice for Syria’ [2020] Chapter 5, exploring alternatives in the following chapters. See also Karol Nowak ‘National Criminal Procedure Shoehorned into a Global Procedure Shoe when Trying Crimes Against Humanity’ [2021] ICLR 1 seq. who argues that a global court like the ICC is not suitable for gaining the trust of those it rules over and that the procedure used when trying crimes against humanity is a poor fit as it is to a large extent based on national procedural codes. He suggests that a split of the ICC into several regional bodies with common procedural rules (amended if need be) would be beneficial for the court’s credibility.

<sup>8</sup> A (far from complete) overview of extra-European criminal proceedings related to the Syrian war is provided by Beth Van Schaack, ‘National Courts Step Up: Syrian Cases Proceeding in Domestic Courts’ [2019] 8-16 and 30-35, available at SSRN: <<http://dx.doi.org/10.2139/ssrn.3327676>> accessed 11 February 2022; see also van Schaack (n 7) Chapter 7.

<sup>9</sup> On this and the following paragraph, see the detailed analysis by Van Schaack (n 8).

has already been rendered. Some hundred more cases are being investigated. The majority of the cases analysed are ‘foreign fighter’ cases (often supplemented by accusations concerning the illegal handling of weapons of war), while some also deal with international crimes in a strict sense, especially various kinds of war crimes. The most spectacular cases so far were the so called ‘Al-Khatib’ proceedings at the Higher Regional Court of Koblenz. The accused in those trials were high-ranking officers of the Syrian Secret Service being charged to be responsible for torture and unlawful killings in the infamous ‘Al-Khatib’-Prison in Syria. The first of the accused was sentenced to a prison term of four years and six months in February 2021, the second one – a former colonel of the General Intelligence Service of the Syrian Arab Republic – was sentenced to life imprisonment in January 2022. What was special about this trial – which attracted broad attention from international media – is not only the comparatively high rank of the defendants within the Assad regime, but also that the court relied on the principle of universality here.<sup>10</sup> The principle of universality was also applied in the proceedings against Alaa M. (inter alia regarding the torture acts proven against him) and against Taha Al-J. (inter alia convicted for genocide, see Annex).

### 3.1 ICL-architecture in Germany

The high intensity of prosecution of crimes related to the Syrian war in Germany is based to a large extent on the ICL architecture in Germany, which resembles the successful model of states such as the Netherlands.<sup>11</sup> The investigative work is controlled by the Central Office for Combating War Crimes (COCWC) at the Federal Criminal Police Office, which cooperates with other authorities such as the Federal Public Prosecutor, the Federal Office of Justice, the State Protection Services of the State Criminal Police Offices and at the Federal Police, the Federal Office for Migration and Refugees, and the Federal Office for the Protection of the Constitution.<sup>12</sup> The Federal Office for Migration and Refugees has a key role to play in intra-German interagency cooperation, as it collects indications of crimes directly from refugee admissions hearings, forwarding them to COCWC. At the Office of the Federal Attorney General, two units are specialized in investigations of violations of ICL. At the international level, there is involvement in

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<sup>10</sup> A summary of the proceedings is provided by Lina Schmitz-Buhl ‘Enforced disappearances in Syria and the Al Khatib trial in Germany: Qualifying the alleged acts as enforced disappearance as a distinct crime against humanity is imperative’ (Völkerrechtsblog, 27 January 2021) <<https://voelkerrechtsblog.org/enforced-disappearances-in-syria-and-the-al-khatib-trial-in-germany/>>. A detailed documentation of the proceedings, compiled by the non-governmental organization Syria Justice and Accountability Centre in cooperation with the International Research and Documentation Centre War Crimes Trials (ICWC) of Philipps University Marburg, can be found online at <<https://syriaaccountability.org/topic/trial-monitoring/updates/>> accessed 11 February 2022.

<sup>11</sup> On the historical development of the German ICL system see Andreas Schüller ‘The Role of National Investigations in the System of International Criminal Justice – Developments in Germany’ (2013) 31 (4) SF 226, 227 seq.

<sup>12</sup> For details about the structure and history of the COCWC see Klaus Zorn ‘Die Zentralstelle für die Bekämpfung von Kriegsverbrechen und weiteren Straftaten nach dem Völkerstrafgesetzbuch’ [2017] ZIS 762.

transnational networks such as the International Criminal Police Organization (INTERPOL), the European Union Agency for Law Enforcement Cooperation (EUROPOL) and the 'Genocide Network' hosted by the European Union Agency for Criminal Justice Cooperation (EUROJUST). An increasingly important role is also played by non-governmental organizations such as the Commission for International Justice and Accountability,<sup>13</sup> Syria Justice and Accountability Centre, European Center for Constitutional and Human Rights or the Syrian Archive which raise awareness of criminal proceedings among the national and international public, document the trials, and in some cases even gather evidence.

### 3.2 Problems and controversies

It should hardly come as a surprise that the criminal proceedings conducted in Germany concerning the war in Syria involve a whole series of problems that are the subject of heated legal and political debate. These range from criticism of the selection of defendants and witnesses in individual proceedings<sup>14</sup> to fundamental problems that arise in a multitude of proceedings. For the purposes of this article, I have selected three particularly actively debated issues that may also be of interest to legal scholars outside Germany.

#### 3.2.1 *Public access to criminal proceedings*

One issue that has accompanied the Syria trials conducted in Germany from the very beginning has been the criticism of the lack of accessibility of the trials for the international public and especially the Syrian public. Since live coverage of criminal proceedings is prohibited in Germany, the publicity of the proceedings is ensured only by the audience in the courtroom. The broader public is therefore dependent on journalists and other observers to mediate what is happening in the process. In this regard, one could occasionally observe petty-seeming disputes, such as over the question of whether Syrian journalists in the 'Al-Khatib' trial should be granted access to the audio track of the Arabic interpreters in the Koblenz Higher Regional Court. The Federal Constitutional Court had to intervene in this conflict and allow the journalists access by way of an injunction. In doing so, the Constitutional Court emphasized the special responsibility of the German courts vis-à-vis the world public, especially when it comes to the exercise of universal jurisdiction:

It must be taken into account that these are criminal proceedings which [...] attract an unusually large amount of public attention and thus obviously also attract the interest of media representatives who do not speak German. This applies all the more in view of the fact, emphasized by the complainants, that the Federal Republic is claiming

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<sup>13</sup> The controversies around this organization are described by Roger Lu Phillips 'Book Review of Beth van Schaack, *Imagining Justice for Syria*' [2021] ICLR 1, 4.

<sup>14</sup> Using the example of the 'Al-Khatib'-trial Merlina Herbach 'Der Anfang ist gemacht!: Zwischenfazit nach einem Jahr 'Al-Khatib-Prozess' in Koblenz (Völkerrechtsblog.org 22 April 2021) <<https://voelkerrechtsblog.org/der-anfang-ist-gemacht/>> accessed 11 February 2022.

jurisdiction for itself here which would not exist according to general principles, but which is due precisely to the special character of the criminal acts in question, which affects the international community as a whole.<sup>15</sup>

The preliminary solution of offering accredited Arabic-speaking journalists access to Arabic interpretation also continues to be criticized in view of the sometimes lengthy and bureaucratic accreditation procedures and the generally uncooperative way some courts treat trial observers.<sup>16</sup> A remarkable example for this problematic relationship between German Criminal Justice and trial observers could be seen in the beginning of 2022, when Higher Regional Court of Frankfurt am Main banned viewers from taking notes on the trial of Alaa M., a former doctor in a Syrian military intelligence prison. The court justified the ban by declaring trial observation a danger to the establishment of the truth. The aim was to prevent transcripts from being made available to witnesses who had not yet been heard. According to the court, these witnesses might use a transcript to adapt their statements to the testimony of other witnesses already heard in the trial. The court did not, however, apply the ban on note-taking to traditional media because, according to the court, it is not common practice for journalists to reproduce witness statements in detail. Apart from this example, there are also tendencies for courts to take seriously the Federal Constitutional Court's admonition cited above. The Higher Regional Court in Koblenz, for example, lately published its press releases in criminal proceedings related to Syria in Arabic language without any further ado.

### 3.2.2 *Problems of evidence in the case of so-called 'ISIL returnees'/'foreign fighters'*

Considerable legal challenges are posed to the judiciary in dealing with so-called 'ISIL' returnees. These are German citizens who fought as 'foreign fighters' in the ranks of ISIL (or a comparable group) and then returned to Germany.<sup>17</sup> It is often not possible to prove that these persons participated in specific criminal acts, so that the authorities often can only resort to the catch-all offense 'membership in or support of a terrorist organization' according to Sec. 129a, 129b German Criminal Code.<sup>18</sup> Even this offense is difficult to establish, however, if the persons concerned did not actively participate in the fighting but, for example, performed household and child-rearing tasks as the wife of a fighter. While the Office of the Attorney General originally classified even such activities, which

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<sup>15</sup> German Federal Constitutional Court, Decision of 18 August 2020 – 1 BvR 1018/20, para 11 (Translation by me).

<sup>16</sup> Alexander Dünkelsbühler, Alexander Suttor Lea Borger 'Universal jurisdiction without universal outreach?: The Al Khatib trial in Koblenz and the limits of domestic criminal procedure in the adjudication of international crimes' (Völkerrechtsblog.org, 13 January 2021) <<https://voelkerrechtsblog.org/universal-jurisdiction-without-universal-outreach/>> accessed 11 February 2022.

<sup>17</sup> On this phenomenon, which has also occurred in numerous other countries, see in detail Julia Geneuss 'The Legal Limbo of Counter-Terrorism Criminal Law and Armed Conflict: Anti-Regime and Anti-IS (Foreign) Fighters Before European Courts' (2020) 10 EuCLR 338 seq.

<sup>18</sup> A detailed introduction to the German legal framework is provided by Julia Geneuss (n 16) 343 seq. See also Julia Geneuss '§ 129a Abs. 1 Nr. 1 StGB als völkerstrafrechtliches Organisationsdelikt' (2021) 133 (4) ZStW 1001 seq. for a detailed criticism of the increasing confusion of terrorism law and international criminal law.

in themselves are socially adequate, as criminal participation, the Federal Court of Justice in one of its first decisions on this subject has put a stop to this and stated, that merely living in a family with an ISIL member in the 'caliphate' or bearing children 'for' a fighter is not sufficient for punishment.<sup>19</sup> However, the court deviated from this just a few months later in a case with only slightly different facts<sup>20</sup> and in its latest decisions on the subject found a whole new rationale for punishment:

The court now considers the fact that the defendants lived in apartments that were forcibly seized by ISIL (or similar groups) not only as support for terrorism but also as a war crime according to Sec. 9 German ICL-Code ('War crimes against property and other rights'), which essentially matches Art. 8 Nr. 2 lit b) (xiii) Rome Statute of the ICC.<sup>21</sup>

### 3.2.3 Immunity for state officials in ICL-cases?

Another topic that has been much discussed in Germany recently concerned the question of the extent to which the prosecution of war criminals is precluded by immunity under international law if the defendants are public officials.<sup>22</sup> The Federal Supreme Court had to decide a case in which an officer of the Afghan army was charged with various war crimes (including torture).<sup>23</sup> The outcome of the trial was awaited with great anticipation, as similar questions arose in many Syria-related trials (such as the 'Al-Khatib' trial already mentioned several times, where the defendants were intelligence officers).

The question to be answered by the Federal Supreme Court as to whether serving or former state officials can be prosecuted for violations of ICL performed in an official

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<sup>19</sup> German Federal Supreme Court, Decision of 22 March 2018 – StB 32/17.

<sup>20</sup> German Federal Supreme Court, Decision of 28 June 2018 – StB 11/18: *'In contrast to the facts on which the court's decision of March 22, 2018 [...] was based, the circumstances described above prove the defendant's integration into the IS. The defendant traveled alone to the territory of the IS, married a higher-ranking IS member there and had accommodations and money allocated to her by the IS. Throughout the entire period, she complied with the instructions of her husband, who was vested with command authority, and other local commanders. Identifiable as a Western European, she demonstrated on the ground in Syria and Iraq her conscious decision to expand IS's 'nationhood.' With her blog entries - monitored by IS - [...] the defendant called on like-minded people in Europe to also enter IS territory and join this association. All of this suggests consensual affiliation with the IS. Against this background, even 'legal' activities of the defendant in themselves are to be considered acts of participation in favor of the association [...]. The actions of the complainant clearly went beyond everyday activities in living together with her husband according to Islamic law, which is shown not only by her blog entries, but also by her declared willingness to attack enemy fighters with explosive belts as well as her advocacy of handling firearms ('my babies').'* (Translation by me); for a similar decision see German Federal Supreme Court, Decision of 17 Oktober 2019 – StB 26/10.

<sup>21</sup> German Federal Supreme Court, Decision of 4 April 2019 – 12/19; Decision of 15 May 2020 – AK 22/19; Decision of 9 Juni 2020 – AK 12/20; Decision of 9 February 2021 – AK 5/21.

<sup>22</sup> For details see Aziz Epik 'No Functional Immunity for Crimes under International Law before Foreign Domestic Courts: An Unequivocal Message from the German Federal Court of Justice' [2021] *Journal of International Criminal Justice* 19 (5) pp. 1263 seq.; for the position of Germany's Federal Public Prosecutor General on this issue see Claus Kreß, Peter Frank and Christoph Barthe 'Functional Immunity of Foreign State Officials Before National Courts: A Legal Opinion by Germany's Federal Public Prosecutor' (2021) 19 (3) *JICJ* 697 seq.

<sup>23</sup> German Federal Supreme Court, Decision of 28 January 2021 – 3 StR 564/19.

capacity by the criminal justice system of a foreign state has been controversial for decades.<sup>24</sup> A very far-reaching (preliminary) position has recently been taken by the International Law Commission, which completely excludes immunity *ratione materiae* for international crimes regardless of the rank of the accused and whether he is still in office at the time of prosecution.<sup>25</sup> While this position is widely supported among scholars,<sup>26</sup> it has also been sharply criticized by many who doubt, among other things, that it reflects *lex lata* under international law.<sup>27</sup> In its decision of January 28, 2021, the Federal Court of Justice attempted to steer around the shallows of this debate as far as possible by merely stating that at least *subordinate foreign officials* do not enjoy immunity *ratione materiae* under customary international law when it comes to prosecuting them for *war crimes* committed in their official capacity. While the reasoning of the judgment suggests that this also applies to other core crimes (insofar, the Court in paragraph 23 speaks of ‘certain other offenses affecting the world community as a whole’), it leaves open whether subordinate state officials can invoke immunity *ratione materiae* under customary international law *at all* (ie, at least in cases of ‘simple’ non-ICL criminality). It is also left open how high-ranking state organs are to be dealt with and, in particular, whether a differentiation must be made in this context according to whether the accused is still in office at the time of the criminal prosecution.

#### 4 Conclusion

The article has shown that the considerable efforts of the German judiciary to prosecute criminal offenses in the Syrian civil war have brought with them many problems. It is – for example – self-evident that criminal proceedings, which take place thousands of kilometres away from the scene of the crime, often struggle with gathering evidence. Especially in proceedings against so called ‘ISIL returnees’/‘foreign fighters’ this has led German courts to somewhat dubious legal circumvention strategies. The courts have also partly circumnavigated the shallows of the debate in international law about the immunity of state actors who commit international crimes, here, however, with a result worthy of support: At least low-ranking state officials cannot invoke immunity if they are suspected of committing ICL core crimes. A major challenge remains the courts’ communication with the Syrian public, as does dealing with the international

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<sup>24</sup> For a broad overview of the discussion see Christopher Gosnell and Paola Gaeta, in *Cassese’s International Criminal Law* (3d edn, Oxford University Press 2013) 240 seq. and Antonio Cassese, ‘When May Senior State Officials be Tried for International Crimes?’ (2002) 13 EJIL 853.

<sup>25</sup> ILC Draft Article 7 on Immunity of State officials from foreign criminal jurisdiction [2017] A/CN.4/L.893.

<sup>26</sup> See *pars proto* Claus Kreß in Ambos, *Rome Statute of the ICC* (4th edn, C. H. Beck 2022), Art. 98 Paras. 22-83 with many more references.

<sup>27</sup> Cf. for instance Sean D. Murphy, ‘Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?’ (2018) 112 AJIL Unbound 4-8; Qinmin Shen, ‘Methodological Flaws in the ILC’s Study on Exceptions to Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction’ (2018) 112 AJIL Unbound 9-15; Rosanne van Alebeek, ‘The ‘International Crime’ Exception in the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction: Two Steps Back?’ (2018) 112 AJIL Unbound 27-32.

expectations placed on the German criminal justice system (e. g. by some victims groups and NGOs) that in many regards far exceed its capabilities.

Taking all this into account, I would still say: Better than nothing. International criminal justice may be in crisis (again), but ICL is alive and well, perpetrators of international crimes cannot be sure of impunity for their actions. This is the signal that emanates from the national courtrooms that try international crimes, be it in Koblenz or elsewhere. Apart from that, it would be wrong to say that the international level is completely paralyzed by the blockade of the Security Council when it comes to Syria. One only must think, for example, of the establishment of the Impartial and Independent Mechanism by the UN General Assembly in December 2016.<sup>28</sup> In my view, such developments would hardly take place without the political momentum and the know-how deriving from national ICL proceedings. In my view, therefore, the national efforts to prosecute international crimes in the Syrian war have – with all their shortcomings – done more good than harm.

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## **Annex: Non-exhaustive list of criminal proceedings conducted in Germany on international crimes committed during the Syrian Civil War**

**1. Abdelkarim E. B** was sentenced to 10 years in prison by the Higher Regional Court Frankfurt (Main) with judgement of 8 November 2016 (File no. 5-3 StE 4/16 – 4 – 3/17) for participation as a member in a terrorist organization abroad ("ISIL") and war crimes against individuals (cruel and inhuman treatment of a person to be protected under international humanitarian law).

**2. Abdul Jawad A. K., Abdoulfatah A., Abdulrahman A. A., Abdalfatah H. A.** were sentenced to life imprisonment (one defendant) / long prison sentences by the Higher Regional Court Stuttgart by judgement of 13 January 2020 (File no. 5 – 2 StE 5/17-4) inter alia for participation as a member in a terrorist organization abroad ("Jabhat al-Nusra"), war crimes against individuals (inter alia killing of a person to be protected under international humanitarian law), murder and causing an explosive detonation). The Federal Supreme Court confirmed the judgement with decision of 10 August 2021 (file no. 3 StR 394/20).

**3. Abdulmalk A., Anas Ibrahim A. S.** were indicted for participation as a member in a terrorist organization abroad ('Jabhat al-Nusra' and 'ISIL') at the Higher Regional Court Berlin. The main trial started on 1 March 2018; the further course of proceedings is unknown.

**4. Ahmad A. A.** was sentenced to 2 years and 6 months in prison by the Higher Regional Court Dresden (File no. 4 St 1/18) for participation as a member in a terrorist organization abroad ('Jabhat al-nusra').

**5. Ahmed K., Sultan K. and Mustafa K.** were sentenced to 1 year and 9 months in prison (Sultan K.), 2 years and 9 months in prison (Mustafa K.) with judgement of 13 December 2018 by the Higher Regional Court Celle (file no. 5 StS – 1/18) for participation as a member in a terrorist organization abroad ('Jabat al-Nusra') (original charges of violation of the War Weapons Control Act, war crimes against individuals and war crimes against property could not be proven in the main trial). Ahmed K. was acquitted. The judgement against Mustafa K. confirmed by Decision of the Federal Supreme Court by 16 October 2019 (file no. 3 StR 262/19).

**6. Alaa M. (Doctor in a Syrian Military Intelligence Prison)** is indicted for crimes against humanity, murder, manslaughter, and dangerous physical assault (file no. 5-3 StE 2/21 – 4 – 2/21). The main trial started in January 2022 at the Higher Regional Court of Frankfurt (Main).

**7. Ali R.** was sentenced to an unknown sanction with judgement of 27 April 2017 by the Higher Regional Court Munich (file no. 8 St 2/16) inter alia for participation as a member in a terrorist organization abroad ('ISIL').

**8. Andrea B.** was sentenced to 1 year and 6 months in prison with judgment of 25 February 2015 by the Higher Regional Court Munich (file no. 2 KLS 111 Js 139461/14) for abduction of minors (original charge of preparation of a serious act of state-endangering violence could not be proven in main trial). The judgement was confirmed by decision of the Federal Supreme Court of 27 October 2015 (file no. 3 StR 218/15).

**9. Anil O.** was sentenced to a prison term on probation (leniency in exchange for cooperation in solving other crimes) with judgement of Spring 2017 by the Higher Regional Court Düsseldorf (file no. unknown) for participation as a member in a terrorist organization abroad ('ISIL').

**10. Anwar Raslan** (former colonel of the General Intelligence Service of the Syrian Arab Republic) was sentenced to life imprisonment by the Higher Regional Court Koblenz with Judgement of 13 January 2022 (file no. 1 StE 9/19) for crimes against humanity by means of a widespread and systematic attack on the civilian population and, in this context, murder, rape and aggravated sexual assault (part of the so-called 'Al-Khatib' trials).

**11. Aria L.** was sentenced to 2 years in prison with judgement of 12 July 2016 by the Higher Regional Court Frankfurt (Main) (file no. 5 – 3 StE 2/16 – 4 – 1/16) for war crimes against individuals (Serious degrading or humiliating treatment of a person to be protected under international humanitarian law). The judgement was confirmed by decision of the Federal Supreme Court of 28 July 2017 (file no. 3 StR 57/17).

**12. B. / H. B.** were sentenced to four years and three months in prison (B.) and to three years in prison (H. B.) with judgement of 7 December 2015 by the Higher Regional Court Celle (file no. 4 – 1/15, 4 – 1/15 – 2 StE 6/15 – 3) for participation as a member in a terrorist organization abroad ('ISIL/ISI/ISIS').

**13. Bilel T.** is tried before the Higher Regional Court Celle (file no. 5 StS 2/21) for inter alia participation as a member in a terrorist organization abroad ('ISIL'), starting 10 February 2022.

**14. Carla-Josephine S.** was sentenced to 5 years and 3 months in prison with judgement of 29 April 2020 by the Higher Regional Court Düsseldorf (file no. unknown) for participation as a member in a terrorist organization abroad ('ISIL'), violation of the War Weapons Control Act, abduction of minors, physical assault, sexual assault and war crimes against individuals (recruitment of child soldiers).

**15. Derya Ö.** was sentenced to 2 years and 9 months in prison with judgement of 17 December 2019 by the Higher Regional Court of Düsseldorf (file no. 5 StS 2/19) for participation as a member in a terrorist organization ('ISIL'), war crimes against property and violation of the War Weapons Control Act.

**16. Eyad Al-Gharib** was sentenced to 4 years 6 months with judgement of 24 February 2021 by the Higher Regional Court Koblenz (file no. 1 StE 3/21) for aiding and abetting a crime against humanity (part of the so-called 'Al-Khatib' trials).

**17. Fadia S.** was sentenced to 4 years in prison with judgement of 1 July 2021 by the Higher Regional Court Düsseldorf (file no. unknown) for participation as a member in a terrorist organization abroad ('ISIL'), violation of the duty of childcare and education and war crimes against property.

**18. Fares A. B.** was sentenced to 12 years in prison with judgement of 19 November 2020 by the Higher Regional Court Stuttgart (file no. 5 – 3 StE 6/19) for participation as a member in a terrorist organization abroad ('ISIL'), war crimes against individuals (killing and cruel and inhuman treatment of a person to be protected under international humanitarian law) and violation of the War Weapons Control Act. The judgement was confirmed by decision of the Federal Supreme Court of 10 August 2021 (3 StR 212/12).

**19. H. P.** was sentenced to 11 years in prison with judgement of 15 July 2015 by the Higher Regional Court Munich (file no. 7 St 7/14 [4]) for inter alia participation as a member in a terrorist organization abroad ('Junud al-Sham') and aiding and abetting to attempted murder.

**20. Hamad A.** was sentenced to 4 years in prison with judgement of 24 July 2019 by the Higher Regional Court Stuttgart (file no. 7 – 2 StR 1/19) for participation as a member in a terrorist organization abroad ('Jabhat al-Nusra').

**21. Harry S.** was sentenced to 3 years in prison with judgement of July 2016 by the Higher Regional Court Hamburg (file no. 3 St 2/17) participation as a member in a terrorist organization abroad ('ISIL') (original charge of murder and war crimes against individuals could not be proven in court; a second trial was declined by court decision due to *ne bis in idem*).

**22. I. I. / M. A. / E. I.** were sentenced to 4 years and 6 months in prison (I. I.), 2 years and 9 months in prison (M. A.) and 3 years in prison (E. I.) with judgement of 27 March 2015 by the Higher Regional Court Stuttgart (file no. 6 – 2 StE 4/14) for participation as a member in a terrorist organization abroad ('JAMWA') and support of a terrorist organization abroad.

**23. Jamil Hassan** is wanted by arrest warrant of the Federal Supreme Court of June 2018 for alleged crimes as Head of the Syrian Air Force Intelligence Service.

**24. Jennifer W.** was sentenced to 10 years in prison with judgement of 25 October 2021 by the Higher Regional Court Munich (file no. unknown) for participation as a member in a terrorist organization abroad ('ISIL') in connection with aiding and abetting to attempted murder as well as to attempted war crimes, for crimes against humanity and for slavery resulting in death. The decision was appealed on reasons of law ('Revision') by the Federal Attorney General, the appeal proceedings are ongoing.

**25. Kamel T. H. J., Azad R.** were sentenced to 4 years in prison (Kamel T.) and 2 years in prison (Azad R.) with judgement of 19 September 2017 by the Higher Regional Court Munich (file no. unknown) for participation as a member in a terrorist organization abroad ('Ahrar al-Sham') and violation of the War Weapons Control Act.

**26. Khaled A.** was sentenced to 2 years in prison (execution of the sentence suspended on probation) with judgement of 4 May 2021 by the Higher Regional Court Berlin (file no. unknown) for participation as a member in a terrorist organization abroad ('Ahrar al-Tabka' and 'Ahrar al-Sham'), violation of the War Weapons Control Act and war crimes against property.

**27. Khedr A. K., Sami A. S.** were sentenced to imprisonment for life (Khedr A.) and 9 years in prison (Sami A.) with judgement of 22 August 2021 by the Higher Regional Court Düsseldorf (file no. III-6 StS 2/20) for participation as a member in a terrorist organization abroad and support of this organization ('Jabhat al-Nusra'), war crimes against individuals (killing of a person to be protected under international humanitarian law) and murder.

**28. Kim Teresa A.** was sentenced to 4 years in prison with judgement of 29 October 2021 by the Higher Regional Court Frankfurt (Main) (file no. 5-2 OJs 29/20-1/21) for participation as a member in a terrorist organization abroad ('ISIL'), war crimes against property, and violation of the War Weapons Control Act.

**29. Leonora M.** was indicted for participation as a member in a terrorist organization abroad ('ISIL'), crimes against humanity (human trafficking) and violation of weapons regulations. The main trial at the Higher Regional Court Naumburg started on 25 January 2022.

**30. Lisa R.** was sentenced to 2 years in prison (execution of the sentence was suspended on probation) with judgement of 3 March 2021 by the Higher Regional Court of Koblenz (file no. 4 StE 6 OJs 9/19) for participation as a member in a terrorist organization abroad.

**31. Lorin I.** was sentenced to 1 years and 9 months in prison (execution of the sentence was suspended on probation) judgement of 20 August 2020 by the Higher Regional Court Celle (file no. 5 StS 1/20) for participation as a member in a terrorist organization abroad ('ISIL') and Violation of the War Weapons Control Act.

**32. Mahir Al-H., Mohamed A, Ibrahim M.** were sentenced to prison terms ranging from 3 years and 6 months to 6 years and 6 months judgement of 12 March 2018 by the Higher Regional Court Hamburg (file no. 3 St 1/17) for inter alia participation as a member in a terrorist organization abroad ('ISIL').

**33. Majed A.** was indicted for participation as a member in a terrorist organization abroad ('Owais AI Qorani' and 'Ahrar al-Sham') and violation of the War Weapons Control Act on 17 Mai 2018. The proceedings were to be held at the Higher Regional Court of Hamburg. The further course of the proceedings is unknown.

**34. Marius A.** was sentenced to 3 years and 3 months in prison with judgement of 7 December 2021 by the Higher Regional Court Düsseldorf (file no. unknown) for participation as a member in a terrorist organization abroad ('Jabhat-al-Nusra').

**35. Mine K.** was sentenced to 2 years and 9 months in prison with judgement of 17 December 2019 by the Higher Regional Court Düsseldorf (file no. III-2 StS 2/19) for participation as a member in a terrorist organization abroad ('ISIL'), war crimes against property, Violation of the War Weapons Control Act.

**36. Mohamad K.** was sentenced to 4 years and 6 months in prison with judgement of 4 April 2019 by the Higher Regional Court Stuttgart (file no. 3-3 StE 5/18) for war crimes against individuals (cruel and inhuman treatment of a person to be protected under international humanitarian law).

**37. Mohamed A.G.** was indicted for participation as a member in a terrorist organization abroad ('ISIL') but fully acquitted with judgement of 16 March 2020 by the Higher Regional Court Frankfurt (Main) (file no. 5 – 2 OJs 32/17 – 1/19).

**38. Mohammed Rafea Yaseen Y., Mutaqil Ahmed Osman A., Hasan Sabbar Khazaal O.** were sentenced to 4 years and 3 months in prison (Mohammed Y.) / 2 years and 6 months in prison (Muqatil A. and Hasan K.) with judgement of 3 June 2020 (Mohammed Y.) / 16 March 2020 (Muqatil A. and Hasan K.) (file no. III-6 StS 2/19) for inter alia participation as a member in a terrorist organization abroad ('ISIL'), war crimes against individuals (killing of a person to be protected under international humanitarian law), murder and violation of the War Weapons Control Act.

**39. Nadia B.** was sentenced to 3 years and 4 months in prison with judgement of 16 July 2021 by the Higher Regional Court Berlin (file no. 8 – 1/21) for inter alia participation as a member in a terrorist organization ('ISIL'), violation of the duty of childcare and education and abduction of minors.

**40. Nasim A.** was sentenced to a juvenile sentence of 2 years in prison (execution of the sentence suspended on probation) with judgement of 28 March 201 by the Higher Regional Court Frankfurt (Main) (file no. 5 – 2 OJs 24/19 – 4/20) for participation as a member in a terrorist organization abroad ('ISIL'), war crimes against property and violation of the War Weapons Control Act.

**41. Nasser A.** was sentenced to 1 year and 10 months in prison (execution of the sentence suspended on probation) with judgement of 4 December 2017 by the Higher Regional Court Dresden for participation as a member in a terrorist organization abroad ('Jabhat al-nusra').

**42. Nils D. (First Trial)** was sentenced to 4 years and 6 months in prison with judgement of 4 March 2016 by the Higher Regional Court Düsseldorf (file no. of the first trial III – 6 StS 5/15; the opening of a second trial with file no. III-6 StS 5/18 was declined by court decision of 10 October 2018 due to *ne bis in idem*) for participation as a member in a terrorist organization abroad ('ISIL'), murder and war crimes against individuals (killing and inhumane treatment of a person to be protected under international humanitarian law).

**43. Nils D. (Second Trial)** was sentenced to 10 years in prison with judgement of 26 November 2021 by the Higher Regional Court Düsseldorf (file no. unknown) for murder, war crimes against persons and participation as a member in a terrorist organization abroad. The sentenced from the first trial was included in this sentence.

**44. Nurten J.** was sentenced to 4 years and 3 months in prison with judgement of 21 April 2021 by the Higher Regional Court Düsseldorf (file no. unknown) for participation as a member in a terrorist organization abroad ('ISIL'), aiding and abetting a crime against humanity (enslavement), war crimes against property, violation of the duty of childcare and education, violation of weapon regulations and deprivation of liberty.

**45. Omaima A. (Widow of Denis Cuspert) First Trial** was sentenced to 3 years and six months in prison with judgement of 2 October 2020 by the Higher Regional Court Hamburg (file no. 3 St 1/20) for participation as a member in a terrorist organization ('ISIL'), violation of the duty of childcare and education, exercise of effective control over weapons of war, aiding and abetting a crime against humanity (enslavement) and deprivation of liberty. The judgement was confirmed by the Federal Supreme Court with decision of 9 March 2021 (file no. 3 StR 26/21).

**46. Omaima A. (Widow of Denis Cuspert) Second Trial** was sentenced to 4 years in prison (including the sentence of the first trial) with judgement of July 2021 by the Higher Regional Court Hamburg (file no. unknown) for aiding and abetting a crime against humanity (enslavement) and deprivation of liberty.

**47. Rabih O.** was tried before the Higher Regional Court Celle in 2021 for supporting ISIL, a judgment is pending.

**48. Romiena S.** is tried before the Higher Regional Court Celle (file no. 4 StS 3/21) for inter alia participation as a member in a terrorist organization ('ISIL'), war crimes, abduction of minors and violation of the duty of childcare and education, starting 2 March 2022.

**49. S. A. H.** was sentenced to 10 years in prison with judgement of 26 March 2020 by the Higher Regional Court Düsseldorf (file no. 6 StS 1/19) for the manufacture of a biological weapon, preparation of a serious act of state-endangering violence and preparation of a serious act of state-endangering violence.

**50. Stefanie A.** was indicted inter alia for participation as a member in a terrorist organization, aiding and abetting war crimes against individuals and violation of the duty of childcare and education. The main trial at the Higher Regional Court Hamburg started on 12 January 2022 (file no. 3 St 2/21).

**51. Sabine Ulrike Sch.** was sentenced to 5 years in prison with judgement of 5 July 2019 by the Higher Regional Court Stuttgart (file no. 5 – 2 StR 11/18) for participation as a member in a terrorist organization abroad ('ISIL'), war crimes against property and violation of the War Weapons Control Act.

**52. Saleh A. Hamza C.** was acquitted from the allegation of inter alia participation as a member in a terrorist organization abroad („Liwa Owais Al Qorani’ and ‘Jabhat al-Nusra’) and manslaughter by decision of the Higher Regional Court Düsseldorf of 31 January 2018 (file no. III-6 StS 1/17). The further course of proceedings against the other defendant, **Mahood B.**, is unknown.

**53. Samoil D.** was sentenced to 3 years in prison with judgement of 28 June 2021 by the Higher Regional Court Düsseldorf (file no. unknown) for participation as a member in a terrorist organization abroad (‘Junud al-Sham’).

**54. Sarah O. / Ahmed S. / Perihan S.** were sentenced to 6 years and 5 months in prison (Sarah O.), 4 years and 6 months in prison (Perihan S.), 3 years in prison (Ahmet S.) with judgement of 16 June 2021 by the Higher Regional Court Düsseldorf (file no. III-7 StS 3/19) for participation as a member in a terrorist organization abroad (‘ISIL’), war crimes against property, crimes against humanity (i. a. rape), human trafficking and deprivation of liberty.

**55. Shahid Ilgar Oclu S.** was indicted for participation as a member in a terrorist organization abroad (‘ISIL’) in March 2016. The file no. at the Higher Regional Court Düsseldorf is III – 6 StS 4/16. The further course of the proceeding is unknown.

**56. Sibel H.** was sentenced to 3 years in prison with judgement of April 2020 by the Higher Regional Court Munich (file no. unknown) for participation as a member in a terrorist organization abroad (‘ISIL’), war crimes against property and violation of the War Weapons Control Act.

**57. Suliman Al-S.** was sentenced to 4 years and 9 months in prison with (appeal) judgement of 23 January 2019 by the Higher Regional Court Stuttgart (file no. 5-3 StE 4/16 – 4 – 3) for inter alia participation as a member in a terrorist organization abroad (‘Jabhat al-Nusra’), aiding and abetting kidnapping and war crimes against humanitarian operations (UNDOF).

**58. Taha Al-J.** (former husband of Jennifer W.) was sentenced to life imprisonment with Judgement of 30 November 2021 by the Higher Regional Court of Frankfurt (Main) (file no. 5-3 StE 1/20 – 4 – 1/20) for genocide, crimes against humanity, war crimes against persons, trafficking in persons for the purpose of labor exploitation and murder. Large parts of the trial dealt with events in Iraq.

**59. Tarik S.** was sentenced to 5 years in prison with judgement of 6 April 2017 by the Higher Regional Court Düsseldorf (file no. III-6 StS 5/16) for inter alia participation as a member in a terrorist organization abroad (‘ISIL’).

**60. Tassilo M.** is tried before the Higher Regional Court Celle since 14 October 2021 (file no. 5 StS 4/21) for supporting and financing a terrorist organization abroad (‘Hai’ at Tahrir al-Sham’).



**61. An unknown person** was sentenced to 3 years and 3 months in prison with judgement of 29 April 2020 by the Higher Regional Court Celle (file no. 4 StS 2/20) for participation as a member in a terrorist organization abroad ('ISIL') in combination with aiding and abetting the preparation of a serious act of violence endangering the state through organizing departures to Syria.

**62. An unknown person** was sentenced to 8 years and 6 months in prison with judgement of 9 November 2016 by the Higher Regional Court Frankfurt (Main) (file no. 5 – 3 StE 4/16 – 4 – 3/16) for participation as a member in a terrorist organization abroad ('ISIL/ISI/ISIS'), violation of the War Weapons Control Act and war crimes against individuals (killing of a person to be protected under international humanitarian law).

**63. An unknown person** was sentenced to 5 years in prison with judgement of 12 June 2020 by the Higher Regional Court Düsseldorf (file no. 5 StS 6/19) for support of a terrorist organization abroad ('ISIL').

**64. An unknown person** was indicted for participation as a member in a terrorist organization ('ISIL'), murder and war crimes against individuals (killing and cruel and inhuman treatment of a person to be protected under international humanitarian law) by the Higher Regional Court of Düsseldorf declined to open the main trial by decision of 10 October 2018 (file no. III-6 StS 5/18).

**65. An unknown person** was sentenced to 7 years in prison with judgement of 26 January 2021 by the Higher Regional Court Düsseldorf (file no. 6 StS 4/20) for participation as a member in a terrorist organization ('ISIL') and violation weapon regulations.

**66. An unknown person** was sentenced to imprisonment for life with judgement of 24 September 2018 by the Higher Regional Court Düsseldorf (file no. III-5 StS 3/16, 5 StS 3/16) for extortionate kidnapping, war crimes against individuals (torture and killing of a person to be protected under international humanitarian law) and murder.

**67. An unknown person** was sentenced to 2 years in prison with judgement of 12 July 2016 by the Higher Regional Court Frankfurt (Main) (file no. 5 – 3 StE 2/16 – 4 – 1/16) for serious degradation of a person to be protected under international humanitarian law.

**68. An unknown person** was sentenced to 1 years and 6 months in prison (execution of the sentence suspended on probation) with judgement of 23 November 2018 by the Higher Regional Court Stuttgart (file no. 3-33 OJs 26/18) for support of a foreign terrorist organization ('Jabhat al-nusra').

**69. An unknown person** was sentenced to 5 years and 3 months in prison with judgement of 2 August 2018 by the Higher Regional Court Munich (file no. 9 St 7/17) for soliciting supporters for a foreign terrorist organization, attempted incitement to commit the crime of manslaughter and physical assault.

**70. An unknown person** was sentenced to 3 years in prison with judgement of 29 April 2020 by the Higher Regional Court Munich (file no. 7 St 9/19 [4]) for participation as a member in a terrorist organization abroad, war crimes against property and violation of the War Weapons Control Act.

**71. An unknown person** is tried before the Higher Regional Court Stuttgart for supporting a terrorist organization abroad ('ISIL') starting 29 July 2021 (file no. 6 – 36 OJs 51/18).

**72. An unknown person (female)** was sentenced to 3 years and 9 months in prison with judgement of 4 December 2019 by the Higher Regional Court Düsseldorf (file no. 2 StS 2/19 2 StE 2/19) for participation as a member in a terrorist organization abroad ('ISIL') and war crimes against property.

**73. An unknown person (female)** was sentenced to 5 years and 3 months in prison with Judgement of 29 April 2020 by the Higher Regional Court Düsseldorf (file no. 7 StS 4/19) for participation as a member in a terrorist organization abroad ('ISIL'), deprivation of minors, war crimes against individuals (killing of a person to be protected under international humanitarian law) and violation of the War Weapons Control Act.

**74. Two unknown persons** were sentenced to 1 year and 8 months in prison (Unknown 1) / 2 years in prison with judgement of 8 October 2021 by the Higher Regional Court Stuttgart (file no. 6 – 36 OJs 51/18) for participation as a member in a terrorist organization abroad ('ISIL') and financing of terror.

**75. Two unknown persons** were sentenced to 6 years and 3 months in prison (Unknown 1) / 4 years and 6 months in prison (Unknown 2) with Judgement of 22 April 2016 by the Higher Regional Court Düsseldorf (file no. 7 StS 1/15) for participation as a member in a terrorist organization abroad ('ISIL').

**76. Two unknown persons** are tried before the Higher Regional Court Stuttgart (file no. 6 – 2 StE 12/21) for inter alia participation as a member in a terrorist organization abroad ('ISIL'), starting 26 January 2022.

**77. Two unknown persons** were sentenced to 5 years and 3 months in prison (Unknown 1) and 3 years and 6 months in prison (Unknown 2) with judgement of 19 January 2019 by the Higher Regional Court Düsseldorf (file no. 7 StS 5/17) for participation as a member in a terrorist organization abroad, violation of the War Weapons Control Act and preparation of a serious act of state-endangering violence.

**78. Two unknown persons** are tried inter alia for financing and supporting a terrorist organization abroad ('Hai'at Tahrir al-Sham', 'Malhama Tactical' and 'Junud al Sham') at the Higher Regional Court Stuttgart, starting 18 October 2021 (file no. 7 - 2 StE 8/21).

**79. Volkan L.** was sentenced to 3 years and 6 months in prison with judgement from 19 March 2020 by the Higher Regional Court of Hamburg (file no. unknown) for participation as a member in a terrorist organization abroad ('ISIL').

**80. Wesam A.** was sentenced to 3 years and 6 months in prison with Judgement of 13 March 2020 by the Higher Regional Court Celle (file no. 4 StS 1/19) for participation as a member in a terrorist organization abroad ('Liwa Al-Izza Lil-lah') and violation of the War Weapons Control Act.

**81. A woman from Leverkusen** was sentenced to 4 years and 3 months in prison with judgement of 21 April 2021 by the Higher Regional Court Düsseldorf (file no. III-7 StS 2/20) for participation as a member in a terrorist organization ('ISIL'), violation of duty of care and education to a person under sixteen years of age, war crimes against property, violations of weapon regulations and aiding and abetting a crime against humanity (enslavement), deprivation of liberty.

**82. Zeynep G.** was sentenced to 2 years and 10 months in prison with judgement of 23 April 2021 by the Higher Regional Court Berlin (file no. 6 – 2 /20) for participation as a member in a terrorist organization abroad ('ISIL') and Violation of the War Weapons Control Act (original charge of war crimes against property could not be proven in court).

**83. Zoher J.** was sentenced to 7 years in prison with judgement from 21 March 2019 by the Higher Regional Court Munich (file no. unknown) for participation as a ringleader in a terrorist organization abroad ('ISIL').

# CORPORATIONS' WRONGDOINGS AT THE PROOF OF THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM: MISSION IMPOSSIBLE OR INTERNATIONAL NEED?

By Maria Giovanna Brancati\*

## Abstract

*For some time, the commission of atrocity crimes by corporate actors has been increasing at both national and international levels, also due to the changing balance of power between public and private actors. Their involvement in situations that to all intents and purposes can be defined as international crimes (eg, forced labour, slavery, serious environmental crimes, war crimes) is thus under public attention. Therefore, questions have been raised about the need of making corporations accountable at the International Criminal Court (ICC). This contribution is offering a double perspective for addressing this issue: first, several existing possibilities in the context of the ICC regulation for improving the individual responsibility of business leaders will be investigated. Then, the introduction of an explicit punishability clause for juridical persons in the Rome Statute, enlightening advantages as well as caveats of this approach, will be considered. Lastly, several alternatives to the ICC and, more generally, to criminal justice will be suggested, pointing out that the ICC system of justice may better remain an 'extrema ultima ratio'.*

## 1 Introduction

Traditionally, international criminal law has largely been concerned with holding individual defendants responsible for mass atrocities. Increasingly today, yet, the commission of atrocity crimes involves the participation of groups of people gathered under the aegis of corporations. This did not come up in modern times from anywhere: companies have played a critical role in extracting or selling natural resources from conflict zones since colonial times. There, practices such as using forced labour to extract natural resources were justified by moral and technological supremacy and by the promise of access to free trade. During World War II, and in contemporary conflicts, companies have played a major role in supporting and facilitating warfare.<sup>1</sup>

At a later stage, the attention to the involvement of corporations in situations that can be defined as international crimes has been pumped up by the impact of NGOs and

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\* Ph.D. candidate in Criminal Law at the University of Perugia. Ph.D. candidate in Law and Social Sciences at the School of Advanced Studies in Social Sciences of Paris.

<sup>1</sup> See Andrea Reggio, 'Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen For 'Trading with The Enemy' of Mankind' (2005) 5 ICLR 623, 624-628; for a more general discussion, see also Erik Lakomaa, 'The History of Business and War: Introduction' (2017) 65 (3) SEHR 224-230.

accountability movements in the field of a sustainable economy, as well as to growing attention at the supranational and international level community.<sup>2</sup>

They bring to the public attention the fact that corporate actors are being involved in violations in several ways: as a direct perpetrator of violations, through the supply of goods that fuel international crimes, as providers of information or services that facilitate crimes, through investments in conflict, etc. Nowadays, the myth of international criminal law as a system without a space for corporate crimes is falling, and different scenarios arise. Some forms of corporate involvement in criminal activities lend themselves well to being framed in the form of aiding and abetting,<sup>3</sup> while others require a different rethinking of the criteria for attributing responsibility in the panorama of international criminal justice.<sup>4</sup>

There is, therefore, rising consideration for the possibility of exploring new punitive identities for the International Criminal Court (ICC), when corporations are involved in the commission of atrocities.

Even in national legislation,<sup>5</sup> there is a strong tension between two different pathways concerning how to link wrongdoings to corporations: crimes committed by corporations are likely to be seen as the result of the joint conduct of several people belonging to the company or, rather, as an expression of the responsibility of the same company as an entity. This difference, albeit subtle, can significantly change how liability – especially criminal liability – is attributed to an act committed in the context of business activity. Likewise, there are two different approaches for strengthening the role of the ICC in addressing corporations' misconducts: reconsidering the instruments of individual responsibility to make business leaders accountable for their corporations' involvement in atrocities; or, prosecuting the corporate themselves through a corporate responsibility model.

But above all, a question arises: would the ICC be the right place for assessing these issues?

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<sup>2</sup> For a theoretical analysis of the topic see Alex Batesmith, 'Corporate Criminal Responsibility for War Crimes and Other Violations of International Humanitarian Law: The Impact of the Business and Human Rights Movement', in Caroline Harvey, James Summers and Nigel D. White (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* (Cambridge University Press 2014) 285 ff.

<sup>3</sup> See Reggio (n 1) 623.

<sup>4</sup> This statement is especially conceivable when the involvement of corporations in crimes goes beyond complicity: see, eg, Michael J. Kelly, 'Grafting the Command Responsibility Doctrine onto Corporate Criminal Liability for Atrocities' (2010) 24 (2) EILR 671-696.

<sup>5</sup> According to Joanna Kyriakakis there still arises a question on 'what exactly is the status of corporate criminal liability within various national legal systems today': see Joanna Kyriakakis, 'Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare' (2008) 19 CLF 115; see also Brent Fisse, John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 SLR 468.

In this contribution, I will briefly explore two different possibilities in the context of the existing ICC regulation: the co-perpetration doctrine and the Superior Responsibility. Then, I will shift to the second point of view, critically considering the reasons that have historically been behind the failure to introduce an explicit punishability clause for juridical persons in the Rome Statute; on the other hand, I will enlighten some advantages as well as *caveats* of this approach. Concluding, I will suggest several alternatives to criminal responsibility, leaving the floor open for further discussion.

## 2 Rethinking Individual Patterns of Responsibility before the ICC

### 2.1 The legacy of Joint Criminal Enterprise in the Rome Statute between co-perpetration and common purpose

The real core of the Joint Criminal Enterprise (JCE) doctrine was rejected by the Rome Statute, which established the ICC, as well as by the subsequent jurisprudence. More precisely, the drafting of the Rome Statute was completed before the International Criminal Tribunal for the former Yugoslavia (ICTY) had well-articulated the doctrine of JCE,<sup>6</sup> and the case law of the ICC then struggled to interpret the Rome Statute in such a way that it was clear that the JCE doctrine was not part of it. Thus, there has going on a huge debate since 1999 regarding what extent is it possible to affirm that drafters of the Statute had chosen not to include the JCE doctrine in the Court's responsibility patterns. In brief, in the *Lubanga* Case,<sup>7</sup> the Pre-Trial Chamber first interpreted Article 25(3)(a) of the Statute as a category of co-perpetration, in which principals to a crime include not only those who physically perpetrate the objective elements of a crime but 'also (...) those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.'<sup>8</sup> Therefore, only those who have 'control over the commission of the offence—and are aware of having such control'<sup>9</sup> can be defined as principal perpetrators. It follows that those who do not have this control can only be held responsible indirectly, as accomplices. Instead, in the JCE as developed by the ICTY those with the 'shared intent to commit the crime' can be considered 'principals to the crime, regardless of the level of their contribution to the commission.'<sup>10</sup> The Pre-Trial Chamber further distinguished Article 25(3)(a) from (3)(d), 'which is closely akin to the concept of joint criminal enterprise or common purpose doctrine adopted by the jurisprudence of the ICTY', by concluding that Article 25(3)(d) applies only to accessorial liability and a 'residual form

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<sup>6</sup> Pamela J. Stephens, 'Collective Criminality and Individual Responsibility: The Constraints of Interpretation' (2014) 37 FILJ 501, 517.

<sup>7</sup> *Prosecutor v. Lubanga* [2007] ICC-01/04-01/06, Decision on the Confirmation of Charges.

<sup>8</sup> *ibid* [321]; the Chamber refers to German law and literature or case law to support his decision: see, eg, *ibid* [346-48] text and accompanying notes.

<sup>9</sup> *ibid* [332].

<sup>10</sup> *ibid* [329]; some have argued, 'this conclusion by the Pre-Trial Chamber ('PTC') does not seem adequate to recognize the required *actus reus* for JCE in its various forms and thus presents an overly simplified view of that doctrine. It is not all clear that the application of JCE precludes a finding of accessorial liability in a given case': see Stephens (n 6) 521 accompanying notes.

of accessory liability' applicable only if 25(3)(b) or (c) does not apply. In addition, some emphasized that the provision does not demonstrate a will to encompass and regulate JCE in the Statute, since the expression 'common purpose' is not intended only to be referring to, but it addresses 'a different mode of responsibility.'<sup>11</sup> Indeed, JCE provides responsibility for participants in a common plan where all are co-perpetrators (ie, principal perpetrators), and asks for JCE intent for the crime committed, or intent to further the common criminal objective, but not intent to the actual crime committed,<sup>12</sup> while Article 25(3)(d) provides derivative liability for accomplices, ie, for those who have no control over the crime, whose only constraint is to have the aim to further the criminal activity or purpose of the group (i) or to have the knowledge (awareness) of the group's intention to commit the crime (ii).

However, even if the Pre-Trial Chamber I has dismissed JCE in their first decisions on the confirmation of charges in the *Lubanga* case,<sup>13</sup> and despite the valuable opinions shared by scholars, it is quite legitimate to note that both Article 25(3)(a) and Article 25(3)(d) share a common ground with JCE, considering that, after all, if one can be charged for aiding and abetting 'a group of persons with a common purpose' who commits a crime, there should be a joint (criminal) venture who wants to pursue that crime. In plan words, *the application of Article 25(3)(d) assumes the existence of a JCE*. Besides, the commission 'jointly with another' does not automatically imply – as the Pre-Trial Chamber stated – that they altogether must have control over the crime; it simply requires that each of the perpetrators acts as a perpetrator, ie, according to the requirements for the commission of the crimes demand by the Statute (ie, *actus reus* and mental element). Incidentally, under the ICC Statute, to be charged for aiding or abetting someone who commits a crime, it is required intent if the crime is committed by a single person, while knowledge is sufficient if the aider or abettor supports a group of people with a common criminal purpose, which *de facto* is a joint criminal enterprise.<sup>14</sup> This seems to be an unreasonable differentiation, especially since an offence committed by a group of persons generally requires more accuracy than one committed by a single person. However, we may suppose that in the second case, knowledge of the intent is sufficient as it is considered that those who help the criminal venture know the criminal nature of its conduct and therefore need a lower degree of awareness than the individual criminal conduct requires.

If one acts plus others pursuant to Article 25(3)(a), they may result in a joint criminal venture and share the same mental element of the JCE doctrine, even if they are not required to be part of any kind of criminal group. This latter topic had pushed the abovementioned jurisprudence to see in Article 25(3)(a) a different form of responsibility

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<sup>11</sup> Antonio Cassese, *International Criminal Law* (Oxford University Press 2008).

<sup>12</sup> On the three forms of JCE see Gideon Boas, et al., *International Criminal Law Practitioner Library, Forms of Responsibility in International Criminal Law* (Vol. 1, Cambridge University Press 2008) 33-84.

<sup>13</sup> Prosecutor v. Lubanga (n 7) [329].

<sup>14</sup> Reggio (n 1) 646-647.

if compared to the JCE.<sup>15</sup> It is worth noting, though, that the JCE that Article 25(3)(d) assumes as existing (ie, the group of persons acting with a common purpose), and provides responsibilities for who are aiding or abetting it, could consist of the persons who commit the offence *jointly* pursuant to Article 25(3)(a). Thus, the existence of the JCE is an indispensable element in the logic of both Article 25(3)(a) and Article 25(3)(d) and it seems to respond to different situations, not just residual cases where the other forms are not applicable. As a matter of fact, whilst Article 25(3)(a) approaches the rationale of the basic and systematic JCE,<sup>16</sup> Article 25(3)(d) matches perfectly with the extended JCE doctrine,<sup>17</sup> as for the latter being part of the group is not a prerequisite, nor sharing the intent of the group itself.

As Powels affirmed,

To be liable for conspiracy, the accused must have intended the crime which was the subject matter of the agreement committed. It is submitted that if Article 25(3)(d) was intended as an alternative, compromise basis of liability to conspiracy, it may not have been the intention of the drafters to include a basis of liability that could render an accused guilty even if he did not intend the ultimate outcome of his actions pursuant to the common purpose. Accordingly, it remains to be seen whether the ICC will interpret Article 25(3)(d) as giving rise to liability similar to the third category of joint criminal enterprise as articulated in *Tadić*, for which only a foreseeable risk and no such intent to commit the specific crime is required.<sup>18</sup>

The common ground of all these options is the question of whether to criminalise conspiracy or not.<sup>19</sup> Each of them affirmatively addresses the issue but with variable degrees of intensity, implicitly considering different to be part of a criminal group or to help the group in its criminal activities.

This discussion suggests that the drafters of the Statute did not deliberately exclude JCE from the ICC model of responsibilities;<sup>20</sup> rather, they did not carefully consider the possibility of distinguishing between being a member of a group of persons acting with a common purpose and being an aider or abettor of a group of persons acting with a common purpose.<sup>21</sup>

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<sup>15</sup> See n 7 and accompanying text.

<sup>16</sup> In both cases, shared intent for the crime is required; see Boas et al. (n 12) 51-52 and 57-68.

<sup>17</sup> *ibid* [51-83].

<sup>18</sup> Steven Powles, 'Joint Criminal Enterprise – Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?' (2005) 2 JICJ 606, 617.

<sup>19</sup> *ibid* [617].

<sup>20</sup> Indeed, JCE is recognized under international law and the ICC also applies international law; see Article 21(1)(c) of the Rome Statute.

<sup>21</sup> *Reggio* (n 1) 647.



## 2.2 Corporations' responsibilities beyond aiding and abetting

Why is the discussion somehow interesting for this article? Let's consider a typical scenario where a corporation is manufacturing smartphones were to source natural resources, such as coltan, from a provider that obtained the supplies from African local traders in the extractive industries. Depending on the concrete circumstances, the corporation may find itself an accomplice to gross violations against humanity perpetrated in extracting coltan,<sup>22</sup> as prohibited under Article 7 of the Rome Statute. For instance, there could be an illegal controlling of the mining site, or the security forces protecting it could commit widespread or systematic abuses towards the employees, such as torture, sexual violence, or cruel, inhuman, or degrading treatment.<sup>23</sup>

The typical response of the Prosecutor Office is to charge them (ie, their business leaders) for having aided or abetted the commission of the crime. Yet, Article 25(3)(c) requires that the accomplice must have aided or abetted *to facilitate the commission of such a crime*. This means that the prosecution of those who only had knowledge of the atrocities occurring is not conceivable, at least if we want to carefully respect the words of the Statute.

Despite that there could have been human rights violations, contributions might not be sufficient to cross the line from a human rights violation to a criminal act. The elaborated criteria for accessorial liability include the risk increasing, where the contribution of the corporate agent must have amplified the risk concerning the commission of such crimes.<sup>24</sup> A taxonomy was developed by The International Commission of Jurists, that aims at directing the interpretation of the relevant contributions.<sup>25</sup>

Some argued, 'the key problem is that the primary purpose of business activity is mostly to make economic gain, rather than to commit crimes',<sup>26</sup> and indeed, in many standard situations, the difficulty of applying the aiding and abetting doctrine lies in proving that business leaders had intended to enhance the commission of the crime.

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<sup>22</sup> Coltan is a mineral from which the precious metals columbium and tantalum are extracted to be used especially in the production of electronic devices; see generally, Géraud de Ville, 'An Outline of Trade Flows of Legally and Illegally Extracted Natural Resources from the Fragile States: The Case of Coltan in the Kivus, DRC' (Institute for Environmental Security, December 2009) <<https://www.envirosecurity.org/publications/an-outline-of-trade-flows-of-legally-and-illegally-extracted-natural-resources-from-fragile-states-the-case-of-coltan-in-the-kivus-drc>> accessed 19 July 2021.

<sup>23</sup> Organisation for Economic Co-Operation and Development, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (3rd edn, OECD Publishing, 2016) <<http://dx.doi.org/10.1787/9789264252479-en>> accessed 20 July 2021.

<sup>24</sup> Kai Ambos, *Treatise on International Criminal Law, Foundations and General Part* (Vol. 1, Oxford University Press 2014) 165.

<sup>25</sup> See Carsten Stahn, 'Liberals vs. Romantics: Challenges of An Emerging Corporate International Criminal Law' (2018) 50 CWRJIL 91, 111 text and accompanying notes.

<sup>26</sup> *ibid* [113].

Yet, by framing the perpetrators of the crime as responsible pursuant to Article 25(3)(a) and considering the corporation as a JCE, its business leaders could be charged as accomplices under Article 25(3)(d) as discussed above, and the scheme of attributing responsibilities would be simplified. Thus, it would be easier to recognise the corporation's contribution to the atrocity.

### 2.3 Superior Responsibility: a residual avenue of responsibility for business leaders

Article 28(b) of the Statute is intended to make a superior liable for a failure to act and prevent criminal misconduct of his/her subordinates. More precisely, the superior is punished both for the lack of control (his/her failure: direct liability) and the danger resulting from crimes committed by subordinates (indirect liability). The prerequisite for being charged under the Article 28(b) rule is that the person who commits the crime is linked to the superior with a relationship included in a hierarchy. However, the key element of their relationship is the effective control exercised by the superior over his/her subordinate. Even if a 'private' relationship or an isolated command cannot thus be reconducted to the doctrine of Superior Responsibility, since the control is supposed to be part of a legal relationship recognised by the law, the scope of Article 28(b) also extends to *de facto* control,<sup>27</sup> ie, when someone can exercise a power of control over someone else, even if they are not their hierarchical superiors.

Article 28(b) entails the knowledge of the misconduct perpetrated by the subordinate. It is necessary to distinguish actual knowledge from constructive knowledge. According to Article 30(3) of the Rome Statute, the former could be defined as 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'; it means that positive knowledge must be rebuilt on the basis of circumstantial evidence which suggest that superior was in the condition to know. But there are no allowed presumptions of knowledge. As for the latter, international case law has developed different standards: the 'should have known' standard<sup>28</sup> and the 'reason to know' standard. Both imply that the superior has sufficient and relevant information to assume that subordinates are going to commit a criminal offence.<sup>29</sup>

According to the jurisprudence of the ICTY, it corresponds to the state of the consuetudinary law to recognise negligence in any case in which the superior possessed information such that 'would have put him on notice of offence committed by

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<sup>27</sup> Antonio Cassese, Paola Gaeta, *The Rome Statute of International Criminal Court: A Commentary* (Vol. 1, Oxford University Press 2002) 857-61.

<sup>28</sup> It was unsuccessfully proposed by the International Committee of the Red Cross (ICRC) during the negotiations of the Protocol Additional I to the Geneva Convention; see *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva 1974-1977, Volume I, 1978).

<sup>29</sup> Cassese and Gaeta (n 27) 863-66.

subordinates.<sup>30</sup> Negligence is distinguished from other forms of *mens rea*, where there is not a state of awareness.<sup>31</sup>

It should be noted that Article 28(b)(i) demands a more specific standard for civilian superiors compared to military ones: not only acting negligently but it is also required that the superior 'consciously disregarded information which indicates that the subordinates were committing or about to commit such crimes.' It seems to echo the wilfully blind criterion known from common law and war crimes trials.<sup>32</sup> Here, therefore, a higher degree of culpability is needed to consider a civilian officer liable for crimes committed by his/her subordinates.

In a business context, there could be two different scenarios where the Superior Responsibility doctrine could be implemented. On the one hand, it could happen that employees materially perpetrate the action that fits into criminal conduct under ICC Statute; on the other, there could be a company B, which depends on company A. The first one is the most explored pattern in the international criminal law debate.<sup>33</sup> Basically, in a situation such as the one abovementioned,<sup>34</sup> even employees may be accomplices for atrocities committed while they work extracting coltan. They may be seen as taking part in a general plan which includes torture or inhuman treatment or, at least, they materially contribute to the perpetuation of the joint action which ends up aiding or abetting the international offence. But they may have acted in a situation such that they were 'damned if they do, damned if they don't',<sup>35</sup> being under their superior's control. This conduct might have two consequences, both unsatisfactory from the point of view of international crime repression: punish them as perpetrators, provided they had more than knowledge of the criminal plan; or let such conduct get unpunished where it cannot be proved that there was a JCE that they would have aided or abetted. Both are unsatisfactory as, on the one hand, sometimes 'the influence at issue in a superior-subordinate command relationship often appears in the form of psychological pressure.'<sup>36</sup> For this reason, even if they had had more than knowledge, it would be inappropriate to consider them direct perpetrators since they may not have escaped.

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<sup>30</sup> Prosecutor v. Delalić, Mucić, Delić and Landžo [2001] ICTY IT-96-21-A, Judgement [241].

<sup>31</sup> Model Penal Code (American Law Institute) [1985] Vol. I, 2.02(2)(d).

<sup>32</sup> William G. Eckhardt, 'Command Criminal Responsibility: A Plea for a Workable Standard' (1982) 97 MLR 1; see also Cassese and Gaeta (n 27) 828-70.

<sup>33</sup> See, eg, Hans Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8 JICJ 851, 869-872 text and accompanying notes.

<sup>34</sup> Text to n 22.

<sup>35</sup> This expression comes from Marilyn Frye, *The Politics of Reality: Essays in Feminist Theory* (Crossing Press 1983).

<sup>36</sup> *Prosecutor v. Musema* [2001] ICTR-96-13-A, Judgment, Trial Chamber [140]; Alfred Musema, owner of the Gisovu Tea Factory near the city of Kibuye, was found guilty of genocide and crimes against humanity (extermination and rape). However, this verdict was imposed for personally attacking Tutsi and raping a Tutsi woman, ordering his employees to kill Tutsi, and aiding and abetting in other killings, not for his business activities.

On the other hand, some serious human rights violations still could have happened. Instead, there may be space for holding the superior had exercised *de iure* authority and *de facto* control over the employees while they were engaged in their respective professional duties, forcing them to further the plan.

The second situation may occur seems to be more complicated since it calls up to dealing with the hierarchy between entities. However, in each economic context where corporations usually work through long supply chains, it is crucial to attempt a systematisation of the possible implications. This is the case for multinational corporations (MNC),<sup>37</sup> whose headquarters are generally located in one State while operating business activities in other States through subsidiaries, partnerships, or joint ventures.<sup>38</sup> In the phenomenology of their business activity, headquarters generally corresponds to the beating heart of the same business, in the sense that it remains unchanged over time, while the sub-entities change rapidly and often disappear only to reappear under another legal shape. Therefore, it may be difficult to reconstruct the chain of responsibility and to identify a liable person once the company is dissolved (perhaps filing for bankruptcy, thus what it follows in terms of victims' satisfaction). Besides, it might be unfair to punish only the arm and not even the mind for these bad commercial operations.

If the business leader of the main MNC had *de facto* control over the actions perpetrated by the person in charge of the subsidiary, there might be room for a residual criterion of attribution of responsibility to the main business leader, which could compete with or replace those seen above depending on the concrete circumstances.

In conclusion, business leaders might be considered liable if they have had some information that put them on notice of the risk of criminal offences that could have occurred, claiming for further investigation to ascertain whether crimes have been committed, but they blameworthy ignored such information.

What has been discussed so far, though, only partly solves the problem, as it could open the door to greater accountability of top managers, reducing the scope for impunity in the business environment and increasing victims' satisfaction. However, the question of corporate responsibility as such remains unresolved and, according to some,<sup>39</sup> it deserves

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<sup>37</sup> A multinational corporation is a commercial entity that is engaged in business activities in more than one State: Peter Fischer, 'Transnational Enterprises' in Rudolf Bernhardt (eds), *Encyclopaedia of Public International Law* (NHPC 1985 Vol. VII) 515.

<sup>38</sup> Michael Likosky, 'Contracting and Regulating Issues in the Oil and Gas and Metallic Minerals Industries' (2009) 18(1) TC 1, 4; see also Mo Yamin, Hsin-Ju Tsai and Ulf Holm, 'The Performance Effects of Headquarters. Involvement in Lateral Innovation Transfers in Multinational Corporations' (2011) 51 MIR 157, 157-77; regarding the differences between the various forms of businesses see Paul Latimer, *Australian Business Law* (30th edn, CCH Australia Limited 2011), 9-140 and Andy Gibson and Douglas Fraser, *Business Law* (5th edn, Pearson 2011) 749.

<sup>39</sup> Carsten Stahn defines them as 'liberals' and contrasts them with the 'romantics', who support enhancing businesses' leaders' responsibility: according to this view, the liberal wing faces several

reflection, irrespective of what can be achieved by strengthening individual responsibility instruments.

### 3 Joint-Individual vs. Corporate: Which Way to Step Inside?

#### 3.1 Preliminary consideration: why the Rome Statute did not include juridical persons in the jurisdiction of the ICC?

During the negotiations of the Rome Statute, the idea of introducing corporate criminal responsibility was discussed.<sup>40</sup> Many arguments were on the table: some rejected the idea on the ground that ‘there was no criminal responsibility which could not be traced back to individuals’;<sup>41</sup> others supported it. The well-known French attempt<sup>42</sup> to reach a compromise between the opposing ideas was then dismissed. There was a huge concern regarding the conformity to the principle of complementarity set out in Article 17,<sup>43</sup> partly because at that time, the concept of (criminal) corporate liability was not universally recognised, and many States did not provide for it under their domestic legal regimes.<sup>44</sup> Thus, the Court would not have been able to judge on matters that the same States did not consider to be subject to their jurisdiction. It was also claimed, the provision of collective liability would have been a diversion of the Court from its jurisdictional focus, which is on individuals.<sup>45</sup> Besides, some has argued, the criminal responsibility of collective entities, such as corporations, contrasts with the generally recognised theory of juridical personality under international law.<sup>46</sup>

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fundamental constraints with the latter vision, assuming that criminal corporate responsibility is necessary; see Stahn (n 25) 119-120.

<sup>40</sup> See Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, Volume III, 1998) [6], note 71 (‘deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute’); Joanna Kyriakakis, ‘Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge’ (2009) 56 NILR 333, 336-39.

<sup>41</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (Vol. II, UN Doc. A/Conf.183/13, 16 June 1998) 136.

<sup>42</sup> For an in-depth analysis see Andrew Clapham, ‘The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court’, in Menno Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (KLI 2000) 139 ff.

<sup>43</sup> On this point see Otto Triffterer and Kai Ambos, *A Commentary to The Rome Statute of The International Criminal Court* (3rd edn, C.H. Beck, Hart, Nomos 2016) 986; see also Caroline Kaeb, ‘The Shifting Sands of Corporate Liability Under International Criminal Law’ (2016) 49 GWIR 351, 353.

<sup>44</sup> Donna Minha, ‘The Possibility of Prosecuting Corporations for Climate Crimes before the International Criminal Court: All Roads Lead to the Rome Statute?’ (2020) 41 MJIL 491, 499.

<sup>45</sup> Triffterer and Ambos (n 43) 986.

<sup>46</sup> The French proposal stated that ‘corporations [are entities] whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body or organization registered, and acting under the national law of a State as a non-profit organization’: text of the United Nations Diplomatic Conference on the Establishment of an International Criminal Court (ICC), *Report of the*

Many of these issues – if not all – can be considered outdated today, or at least weakened. Indeed, over the subsequent twenty years, more and more legal systems have recognised the principle of corporate criminal liability for atrocity crimes worldwide, establishing domestic instruments for fighting them.<sup>47</sup> On the other hand, some international instruments, such as international treaties, aimed at holding corporations accountable through provisions on corporate criminal liability have followed,<sup>48</sup> as well as other developments in the international community which suggest a similar trend.<sup>49</sup>

Almost all legislations, even those with a civil law tradition, now have a system of liability for juridical persons. Some are criminal liability, for others, it is a kind of hybrid between criminal liability and administrative liability.

In the current legal debate among scholars, the international law personality argument has lost more and more significance both because some argue that the concept of ‘subject’ in international law can be interpreted to include corporations in its meaning and because international criminal case-law has begun to use various expedients to prosecute corporations in any case.

Nonetheless, some scepticism on the appropriateness of collective criminal responsibility under the ICC is still outstanding. Especially the liberal wing of criminal lawyers believes that the involvement of corporations in atrocity crimes results from the interaction of self-determined individuals in collective structures and specific situational factors related to individual agency. It would be risky to broaden the standards of attribution in punishment and give rise to excessive use of criminal law as an instrument to seek corporate compliance with the law.<sup>50</sup>

This argument is still standing, even if the ‘romantic approach’<sup>51</sup> is more and more pervasive since the growing influence of human rights tradition. It relies on the premise that corporations enjoy a degree of functional autonomy that allows them to determine their objectives, organisational structure, and social identity and to make choices about the law. In criminal law in a broad sense, this perspective has strong reasons that are worth considering. One wonders, yet, whether this also applies to the law of the ICC.

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*Preparatory Committee* (UN Doc. A/Conf.183/C.1WGCP/L.5/Rev.2, 14 April 1998); see also Clapham (n 42) 150-151.

<sup>47</sup> Kaeb (n 43) 351-52; see also Brief of Ambassador David J. Scheffer, Northwestern University School of Law as amicus curiae in support of the petitioners No. 10-1491, 20 December 2011, 6.

<sup>48</sup> Kaeb (n 43) 352.

<sup>49</sup> Minha (n 44) 500-3; see also *New TV S. A. L. and Khayat*, Case No. STL-14-05/PT/AP/AR126.1, Appeals Judgment, para. 67 (Special Trib. Lebanon 2 October 2014).

<sup>50</sup> Stahn (n 25) 101.

<sup>51</sup> George P. Fletcher, ‘The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt’ (2002) 111 YLJ 1499.

### 3.2 Models of collective responsibility: a brief exploration

Seriously thinking about amending the Rome Statute and providing for a corporate responsibility under the ICC jurisdiction would also imply a careful reflection on the kind of collective responsibility to be built. Certainly, criminal liability of juridical persons could not have the same criteria as natural persons' one.

Two main patterns are often used. The 'attribution model' ascribes<sup>52</sup> the conduct of agents to the entity as a juridical person; criminal responsibility is thus derived from the criminal acts committed by corporate officers and senior managers, mainly following the scheme of apical-juridical person identification.<sup>53</sup> The main drawback of this approach consists of the proper implication in terms of causality, as it does not help in the context of shared responsibilities and decentration of powers.

The organisational model,<sup>54</sup> instead, aims at forcing corporations to put in place adequate structures to prevent illicit conduct and escape from criminal responsibility, since responsibility is tied to risk-taking and organisational failures, such as lack of proper organisation or control, as well as the existence of a corporate culture that facilitates violations. For some time now, it has been admitted that agents' behaviour somewhat depends on corporate cultures and collective decision-making processes. Here *mens rea* of the juridical person is inferred from the aggregated knowledge of its agents.<sup>55</sup>

Thus, the corporation is invited to adopt an organisational model that enables it to prevent the commission of illicit acts within its normal occupation. The corporation's failure to adequately prevent is equal to its criminal willingness.

Beyond the different nuances, the main distinction between these two approaches is that the former focuses on the actions of individuals employed by the corporation, while the latter is based on the corporation itself, which is supposed to have its autonomy.

## 4 Alternatives to the ICC: An Overview

### 4.1 Enhancing different criminal forums

The foregoing discussion on how corporate activity may be relevant to the commission of an atrocity crime helps us to understand that the prosecution of a corporation for an international crime does not necessarily pass through the formal introduction of collective responsibility within the Rome Statute. Other jurisdictional forums may address corporate complicity in international crimes generally. These include domestic jurisdictions applying national criminal legislation; *ad hoc* international tribunals or

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<sup>52</sup> The criteria used for attribution differ, for an overview see Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and the Search for Self-Identity' (2000) 4 BCLR 641.

<sup>53</sup> See Thomas Weigend, '*Societas Delinquere Non Potest*: A German Perspective' (2008) 6 JICJ 927.

<sup>54</sup> Stahn (n 25) 96.

<sup>55</sup> On the 'aggregation model', see Lederman (n 52) 661.

special courts established on the model of the ICTY and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

Each of these instruments would require a further in-depth analysis that could not be carried out in this article.<sup>56</sup> Nonetheless, the general overview only serves to draw attention to additional routes that may compensate for the lack of criminal liability of juridical persons under the ICC jurisdiction.

Some scholars have pointed out that the major problem with domestic jurisdiction is its hard implementation. This is particularly true in the case of MNCs working in a conflict zone. In a typical scenario, jurisdiction may be exercised by both the host and the home States. However, while the former does even not have the institutional resources to hold a trial and apply criminal sanctions,<sup>57</sup> the latter seems to be reluctant,<sup>58</sup> as the State weighs the consequences of any domestic economic and political fallout that is likely to result from prosecutions concerning corporate misconduct for crimes perpetrated in a country that is seemingly far away.<sup>59</sup> Thus, the main issue appears to have a political nature.<sup>60</sup> It follows that the ICC should be better able to respond to the demand for protection, assuming that if there were the liability of juridical persons in the Rome Statute, it would certainly exercise its jurisdiction over corporations. Though, this statement does not seem to be supported by any logical reasoning, nor does it consider that even the ICC is embedded in a system of international political balances where pursuing a corporation might be inconvenient.

In short, solutions to political problems should not be technical-legal, as well as technical-legal amendments should not be supported by (exclusively) political causes. This is basically because it does not give a real solution but bypasses the trouble.

Plus, many of the acts included in the criminal conduct of international crimes are themselves punished as crimes in national jurisdictions, as international law does not provide the burden between criminal and non-criminal, but rather it draws the line between crimes under domestic law and crimes under international law – which affect the whole international community as such.

One can say, yet that States often lack the appropriate investigative measures to prosecute international crimes. Even if most countries have implemented the provisions

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<sup>56</sup> For a general picture of them and their jurisprudence, see Fabián O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff Publishers 2008).

<sup>57</sup> This is a typical situation when the host State is in conflict-affected areas or weak-governance zones, for example in Africa.

<sup>58</sup> On reluctance to apply criminal sanctions to corporations for human rights abuses, see generally, Celia Wells, Juanita Elias, 'Catching the Conscience of the King: Corporate Players on the International Stage' in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005) 143.

<sup>59</sup> FAFO, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004) 14, 22.

<sup>60</sup> Robert Cryer, et al., *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 57.



of the Rome Statute into their domestic legal systems<sup>61</sup> following its ratification in order to extend domestic criminal law jurisdiction to prosecute international crimes, it still, lack the adequately trained staff and infrastructures to investigate and prosecute crime perpetrated through a complex organisation and in different countries.<sup>62</sup> Over the past years, a huge contribution to enhancing transnational cooperation in criminal proceedings has been given by the adoption of international documents aimed at combating organised crime, terrorism, human trafficking, and corruption.<sup>63</sup> Perhaps, it is worth further pursuing this avenue to strengthen the capacity of States in prosecuting transnational crimes.

As regards *ad hoc* Tribunals and special courts, of course, they are unsuitable to deal with all the situations involving the complicity of corporations in atrocities, as their jurisdiction is limited by temporal and territorial factors. Furthermore, they are limited by completion strategies. But they still play an important role in the interpretation of the concepts of general international criminal law and, ultimately, in ‘making the incoherent coherent.’<sup>64</sup>

## 4.2 Alternatives to criminal justice

Shifting away from the criminal law system, some options may be offered by other jurisdictional avenues, as well as by soft law.

It is controversial whether regional courts, such as the African Court on Human and Peoples’ Rights or the European Court of Human Rights and Inter-American Court of Human Rights, would be in a position to deal with the ongoing problem of corporate complicity in atrocity crimes or not, particularly where an MNC perpetrates (or start to) such crimes within their jurisdiction. Of course, human rights courts do not have the power or competence to prosecute none, as they are not criminal tribunals. They are intended to provide a forum for subjects of law – both individual and collective – to enforce their rights rather than have obligations imposed on them.<sup>65</sup> Indeed, the perspective should be inverted: regional courts are called upon to give protection to natural persons abused by corporations’ misconducts. Anyway, there are several difficulties related to each tribunal functioning, for instance, they generally work on a

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<sup>61</sup> Mark Taylor, Deputy Managing Director, FAFO, ‘Companies Should Obey the Law in Lawless Lands’ (2008) The Lawyer.com <<http://www.thelawyer.com/cgi-bin/item.cgi?id=132799>> accessed on 20 July 2021; see also Mark Taylor, Deputy Managing Director, FAFO, ‘Commentary: The Corporate Accountability Evolution’ (2008) Red Flag <<http://www.redflags.info>> accessed 20 July 2021.

<sup>62</sup> On how MNCs operate see, Georgios I. Zekos, *Economics, Finance and Law on MNEs* (1st edn, Nova Science Publishers 2007) 23.

<sup>63</sup> See, for example, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Practical considerations, good practices and challenges encountered in the area of transfer of criminal proceedings as a separate form of international cooperation in criminal matters (Working paper, CTOC/COP/WG.3/2017/2, 2017).

<sup>64</sup> Stephens (n 6) 537.

<sup>65</sup> Jan Wouters and Leen Chanut, ‘Corporate Human Rights Responsibility: A European Perspective’ (2008) 6 (2) NJIHL 262, 263.

State voluntarily adoption basis, or most of them do not expressly recognise corporations as possible subjects under their jurisdiction, thus a problem of interpretation arises again.

A more realistic chance comes from tort law and consumer law. One of the main arguments supporting the introduction of corporate criminal liability in the ICC is linked to victims' satisfaction. The French proposal, for instance, was primarily guided by the functional objective of increasing the chances of victims obtaining compensation through the ICC reparation regime. Beyond the weakness of this regime, which suggests not implementing a new pathway of punishability on its basis, this seems to be a task of civil justice. Corporations might be considered responsible for tort directly committed or even for complicity in someone else's wrongdoing. A corporation may enter a joint venture<sup>66</sup> with a government agency; the corporation would be held responsible for torts committed by the government agency as the tortfeasor, if those torts were carried out to further a joint plan, such as mining extraction activities.<sup>67</sup> Here standards of evidence are different from joint criminal enterprise since it is not necessary to prove the willingness or even the awareness of the committed offence. It is solely needed to be part of the joint venture that perpetrates the wrongdoing based on a general common plan.

Some have argued that it would be possible to bring a civil lawsuit against a corporation based on consumer law principles, alleging false advertisement when a corporation that is involved in the commission of harm against humanity has broken a code of conduct guaranteeing respect for human rights in its business practices.<sup>68</sup>

This led us to the next point. A large number of soft law instruments have proliferated in recent times, aiming at rendering corporations accountable for their unethical behaviour during business activity. The question is whether these measures are truly thus 'soft' or instead – even if are not binding – they anyhow have the potential for compelling corporations in practice. Self-regulation was initially implemented to avoid more severe regulatory actions by governments.<sup>69</sup> However, this was still perceived as insufficient in the international community and needed to be reinforced by the adoption of 'soft law' instruments. An overarching framework for business conduct was provided by the Sustainable Development Goals (SDGs), the UN Guiding Principles on Business and Human Rights (UNGPs) and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The SDGs set out 17 goals and 169 targets to achieve economic and social prosperity while protecting the environment; the UNGPs established principles for States and companies to ensure the protection of

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<sup>66</sup> Joint ventures are created to undertake a specific task at a specific time: see Gibson and Fraser (n 38) 749.

<sup>67</sup> International Council of Human Rights, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002), 123 <<http://www.ichrp.org>> accessed 20 July 2021.

<sup>68</sup> Reingard Zimmer, *Soziale Mindeststandards und ihre Durchsetzungsmechanismen Sicherung intentionaler Mindeststandards durch Verhaltenskodizes?* (Nomos 2008) 239-321; Eva Kocher, 'Unternehmerische Selbstverpflichtungen im Wettbewerb' (2005) 8 GRUR 647, 647-52.

<sup>69</sup> Rhys Jenkins, 'Codes of Conduct: Self Regulation in a Global Economy' (UN Research Institute for Social Development: Technology, Business and Society Programme 2001) 9.

internationally recognised human rights individually and jointly.<sup>70</sup> The ILO Declaration closes the circle as provides several principles and targets that MNCs should respect with reference to employment, training, and conditions of work.<sup>71</sup> Corporations are now forced to balance the fulfilment of economic requirements in businesses and the protection of fundamental human rights. The weakness is that their implementation ultimately depends on the will of corporations. Nonetheless, we do have various attempts to improve their potential. In some national legislation, UNPGs are being turned from soft to hard law, through their inclusion in binding legal acts for natural persons and enterprises: the UK Modern Slavery Act, the French Duty of Vigilance Law, the Dutch Child Labour Due Diligence Act are examples. On the other hand, the European Union is considering adopting specific legislation on human rights and due diligence obligations for European companies as part of the EU's Covid-19 recovery package and the European Green Deal.<sup>72</sup>

Broadly, there has been a great spread of these instruments, whose practical scope is becoming more and more impressive. Perhaps, instead of worrying about how to force companies to adopt them through coercive rules, we may be more concerned with strategies to get consumers to demand that companies implement relevant codes of conduct. And since the economy responds to their needs, this is where the key lies.

## 5 Conclusion

The failure to prosecute business leaders and profiteers who often finance and benefit from atrocity crimes has been considered one of the fragilities of international criminal justice. This has led scholars and practitioners straight forward on the way of strongly promoting corporate liability under the ICC jurisdiction. However, corporate criminal responsibility should not be seen as a panacea.

The idea that crimes can be committed by abstract legal entities has started to be re-considered recently, and nowadays we admit that corporate ethos is frequently a significant part of the conduct of individual agents. Some wrongdoings thus might not have occurred, had the individuals not been placed into a specific context by their organisation. Therefore, punishing and removing the person at the top of it does not solve the problem, while it only pushes towards a turnover of the perpetrators of the crimes.

Corporate wrongdoings thus exceed the ones committed by its individuals. Attributing the blame alone to business leaders might produce judgments that do not correspond to the right criteria for sharing and distributing collective responsibility among

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<sup>70</sup> John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton & Company 2013).

<sup>71</sup> ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (5th edn, Geneva, International Labour Office 2017).

<sup>72</sup> Draft Report with Recommendations to the European Commission on Corporate Due Diligence and Corporate Accountability (INL) 2020/2129 (European Parliament's Committee on Legal Affairs) [2020].

individuals.<sup>73</sup> On the other hand, '[p]utting the blame exclusively on the corporation entails the risk that at the end of the day no one is guilty but the office. This may hamper the prosecution of cases in which governments are involved in an abstract entity.'<sup>74</sup>

Certainly, holding corporations directly accountable would be an effective remedy from the point of view of repairing victims, as it may offer a new pathway to award an individual or collective reparation that is more commensurate to the harm caused. Even though it seems to be too weak an argument to support the need for criminal intervention, especially if we consider that repairing the harm that occurred is the natural outcome of tort law. The plans in rules-making seem to be reversed here: criminal instruments should not be introduced (or extended) to benefit from a system – restorative justice – which for criminal justice is alternative and residual. The reason that supports the choice of criminal justice must have different nature, then one can ask what the best executive strategy would be to make criminal remedies effective. If, on the other hand, the scope is to repair victims, it is perhaps worth seeking ways of strengthening the existing instruments designed for that purpose.

In conclusion, this paper was intended to show that a balance between the individual and collective is needed, critically considering the arguments supporting the need for corporate criminal liability under the ICC. It might be convenient to follow a strategy of prosecuting corporate criminal responsibility in conjunction with individual criminal responsibility. Nonetheless – it is worth bearing in mind –, criminal liability is not always the best choice for corporations' misconducts, nor even ICC is the best forum. Indeed, when the distance between the crime scene and the juridical (but also physical) spot where the crime is judged becomes excessive, the risk that the criminal threat is not perceived as it should be is high. In some cases, other special courts (closer to the 'crime scene') might work better.

We should also consider the real scope of the ICC, that in the criminal justice panorama sees to work as '*extrema ultima ratio*', ie, where other instruments – even criminal, but domestic – fails. Thus, although it is not contrary to the principle of complementarity to introduce corporate criminal liability into the Rome Statute,<sup>75</sup> it still risks serving as a shortcut for those States that do not want to tackle the issue.

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<sup>73</sup> Harmen van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 CJIL 43, 73.

<sup>74</sup> *ibid* [74].

<sup>75</sup> Ambos said that 'the absence of corporate criminal liability in many States would render the complementarity concept unworkable': Kai Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 CLF 1, 7; however, the reasoning of complementarity is that ICC could intervene where national States are somewhat prevented to exercise their jurisdiction: even if, for instance, this impossibility depends on their lack of proper legal frameworks to prevent and fight those crimes, such as not providing for a criminal responsibility of juridical persons; on this regard, Cassese argued that an inability to act includes cases where the national court is 'unable to try a person not because of a collapse or malfunctioning of the judicial system, but on account of legislative impediments, such as an amnesty law, or a statute of limitations, making it impossible for the national judge to commence proceeding

Besides, holding companies accountable as collective entities may serve as a corrective from a retributive perspective, but it does not help in developing a new culture of businesses more respectful of people's fundamental rights.

Then, business agents are even more likely than other perpetrators of international crimes to consider the risks of criminal prosecution in their cost-benefit analysis: the deterrent effect of the criminal sanction may not operate on them as it does on natural persons. Human rights strategies, such as naming and shaming or transparency of violations, may have more immediate effects than criminal justice.

Concluding, criminal corporate responsibility should be seriously reconsidered to attune criminal justice to contemporary reality. However, the ICC, not only it is not a panacea, but in some cases, it could be detrimental. The risk is to hide the reality of a way of 'doing business' behind the prosecution of corporate actors, relieving domestic governments of responsibility they must assume, including through non-criminal measures. Thus, the Statute would be amended, but the problem would not be solved, as the political prejudice of prosecuting corporations would be the same or perhaps even superior at the ICC.

It suggests that more arguments theoretically supporting the introduction of the punishability clause should be brought up. Otherwise, using all available avenues to pursue business leaders and, at the same time, seeking strategies outside the international criminal law may be a choice more consistent with the rationale of the ICC system.

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against the suspect or the accused', see Cassese (n 11) 352; for similar arguments see also Joanna Kyriakakis (n 5) 127.

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# PROSECUTING CORPORATIONS FOR INTERNATIONAL CRIMES: IN SEARCH OF NEW PERSPECTIVES?

By Rossella Sabia\*

## Abstract

*In international criminal law, the possibility of investigating and punishing corporations is currently excluded. Nevertheless, the advocates of the thesis focused on individual liability have long been opposed by those who believe that the 'collective' component and the role that corporations often play in the commission of international crimes cannot be neglected. This contribution outlines the essential terms of the long-standing debate on corporate criminal liability for international crimes, highlighting the main arguments in support of the opportunity to (re)consider such a perspective – in the context of a broader global regulatory trend that makes corporate accountability a crucial element of modern strategies of prevention and repression.*

## 1 Introduction

Traditionally, international criminal law has focused on the liability of individuals, while the possibility that legal persons could be tried for the commission of international crimes has remained somewhat in the background.

In fact, despite corporate criminal liability having seen an impressive spread at the regulatory level in recent decades in several countries,<sup>1</sup> its inclusion in the jurisdiction of international criminal tribunals has so far always been excluded. Indeed, art. 25(1) of the Statute of the International Criminal Court (ICC) specifies that the Court shall only have jurisdiction over natural persons, and similar provisions exist in the statutes of ad hoc tribunals.<sup>2</sup>

At present, the involvement of corporations in the commission of international crimes may be relevant at most indirectly, insofar as the possibility of investigating and prosecuting individuals – corporate officers and business leaders – who are responsible for such crimes is admitted.<sup>3</sup> The punishment of corporations as such is not contemplated, and no input of reform in this direction seems to be on the horizon.

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\* Adjunct Professor in Cybersecurity & Cybercrimes, Luiss University; Post-doctoral Global Fellow, NYU School of Law.

<sup>1</sup> For a comparative overview of the phenomenon across several jurisdictions, see Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability. Emergence, Convergence, and Risk* (Springer 2011).

<sup>2</sup> See art. 6 of the statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY); art. 5 of the statute of the International Criminal Tribunal for Rwanda (ICTR); art. 3(1) of the statute of the Special Tribunal for Lebanon (STL); art 6(5) of the statute of the Special Court for Sierra Leone (SCSL).

<sup>3</sup> On this topic, see Stefano Manacorda, Angelo Marletta and Giulio Vanacore (eds), *Individual Liability for Business Involvement in International Crimes (International Colloquium Section I, Buenos Aires, 20-23 March 2017)* (Maklu 2017); Vincenzo Militello, 'Individual Liability for Business Involvement in International Crimes. The Crucial Issue of (so-called) 'Neutral Acts' (2021) 91(2) RIDP 73ff.

The question, however, is by no means uncontroversial. The divergence between the practicability of prosecuting corporations under domestic law in many jurisdictions, and the clear denial of such option in international criminal law – together with the fact that latterly ‘the rise of business and human rights movement has contributed to create a thicker accountability structure’<sup>4</sup> – have fueled an intense scholarly debate on the matter.<sup>5</sup>

In this area, two opposing visions have clashed over time: on the one hand, the one of the advocates of a ‘liberal’ conception, according to which international criminal law concerns ‘individual agency and abstracts individual wrong from collective action’; on the other hand, the ‘romantic’ theory, which recognises that ‘international crimes are [...] by their very nature committed in collectivities’ and therefore connected to collective will.<sup>6</sup>

This article intends to focus on the opportunity to rethink the issue of prosecuting corporations for international crimes, taking into account that the current legal framework places corporations at the centre of obligations and related sanctions in case of non-compliance in many sectors, and that in this context business increasingly takes on certain social and stakeholders’ expectations. Moreover, some recent – albeit timid – developments in international criminal law practice must be seriously examined and interpreted with a view to bring greater attention back to this issue; an issue which – although still representing a ‘challenge’ for international criminal law – may constitute an ‘alternative’ solution<sup>7</sup> in a legal panorama based on the paradigm of individual liability, but where organisations often play a key role.

The present contribution will be structured as follows. First, it will briefly outline the background as to contextualise the topic of corporate liability under international

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<sup>4</sup> Carsten Stahn, ‘Liberals vs Romantics: Challenges of an Emerging Corporate International Criminal Law’ (2018) 50 CWRJIL 93.

<sup>5</sup> Among the many contributions on the subject, see Kai Ambos, ‘International Economic Criminal Law. The Foundations of Companies’ Criminal Responsibility Under International Law’ (2018) 29 CLF 499ff; Andrew Clapham, ‘The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court’ in Menno T Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (Kluwer 2000) 139ff; Alexandra García, ‘Corporate Liability for International Crimes: A Matter of Legal Policy since Nuremberg’ (2015) 24(1) TJICL 97ff; Caroline Kaeb, ‘The Shifting Sands of Corporate Liability Under International Criminal Law’ (2016) 49(2) GWILR 351ff; Stahn (n 4) 91ff; Bert Swart, ‘International Trends Towards Establishing Some Form of Punishment for Corporations’ (2008) 6 JICJ 947ff; Larissa van den Herik, ‘Corporations as Future Subjects of the International Criminal Court: An Exploration of the Counterarguments and Consequences’ in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010) 350ff; Celia Wells and Juanita Elias, ‘Catching the Conscience of the King: Corporate Players on the International Stage’ in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005) 141ff.

<sup>6</sup> Stahn (n 4) especially 99.

<sup>7</sup> Reference is made here to the title of the VIII AIDP Symposium for Young Penalists ‘Contemporary Challenges and Alternatives to International Criminal Justice’ held on 10-11 June 2021 and hosted by the Faculty of Law of Maastricht University, where this paper was presented.

criminal law, focusing on its emergence with the Nuremberg Trials and the subsequent legacy left by the Rome Conference (section 2). The work will then address some novelties in the field – namely, the famous decision by the Special Tribunal for Lebanon in the *Al-Jadeed* case and the Malabo Protocol – that have revitalised the debate (section 3). The last part will be dedicated to the possible future role of international criminal law in the light of the broader corporate accountability landscape (sections 4 and 5).

## **2 The Origins of the Debate on Corporate Liability under International Criminal Law**

Even though in the current scenario no international criminal tribunal has jurisdiction over legal entities, there have been attempts to conceptualise and frame this form of liability in the international criminal law setting.<sup>8</sup>

In particular, legal scholars discuss the Nuremberg Trials as the first historic precedent linked to the recognition of corporate involvement in the commission of international crimes.<sup>9</sup>

The issue is quite complex and some distinctions are needed. First of all, it should be recalled that the prosecution of German war criminals after the Second World War at Nuremberg marked the beginning of increased focus on individual criminal responsibility and a departure from the idea that only States were responsible for gross human rights violations.<sup>10</sup> This aspect is clearly stated by the International Military Tribunal (IMT) in a well-known part of its judgment:

It was submitted that international law is concerned with the actions of sovereign states and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state. In the opinion of the Tribunal, both these submissions must be rejected. [...] Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.<sup>11</sup>

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<sup>8</sup> This subject is covered also by international criminal law textbooks. See for instance Rosario Salvatore Aitala, *Diritto internazionale penale* (Mondadori Education 2021) 97 f.; Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4<sup>th</sup> edn, Cambridge University Press 2019) 557 (considering corporate liability for criminal conduct in the chapter on ‘the future of international criminal law’).

<sup>9</sup> Anita Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon – An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations’ (2002) 20 BJIL 91ff.

<sup>10</sup> Ole Kristian Fauchald and Jo Stigen, ‘Corporate Responsibility Before International Institutions’ (2009) 40 GWILR 1035.

<sup>11</sup> Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, vol 22 (1948) 464f <[https://avalon.law.yale.edu/subject\\_menus/imt.asp](https://avalon.law.yale.edu/subject_menus/imt.asp)> accessed 20 February 2022.

This reasoning has been seen by some as an unequivocal, express rejection of the possibility of considering legal entities as subjects of international criminal law. It is a reflection of the well-settled *societas delinquere non potest* principle and it has informed the jurisdiction of all subsequent international criminal tribunals.<sup>12</sup>

Indeed, at Nuremberg no legal person has been tried as such, although art. 9 of the Nuremberg Charter authorised the IMT to declare certain organisations criminal, such as the Gestapo, as to punish individual membership.<sup>13</sup> In addition, although there was a ‘strong determination’ among the Allied Powers to prosecute German industrialists together with Nazi War Criminals, the plan did not succeed and the IMT ended without prosecuting a single German industrialist.<sup>14</sup> A series of trials was then carried out between 1946 and 1949 in the German Occupation Zones on the basis of Control Council Law No. 10<sup>15</sup> and was known as the ‘Subsequent Nuremberg Trials’. Among them, some were defined as the ‘Industrialist Trials’<sup>16</sup> and were brought against directors and executives of major German heavy industries who had supported the German war effort. Some of these managers were sentenced guilty for various international crimes, including war crimes and crimes against humanity, crimes which also comprise the use of slave-labor and the plundering and spoliation of occupied territories.<sup>17</sup>

Especially *IG Farben* – a conglomerate known for the invention and manufacture of Zyklon B, the poison gas used in concentration camps – is often cited for its conclusions, some commentators believing that in this case the United States (US) military tribunal recognised *Farben*, as a corporation, ‘to have violated the laws and customs of war’, revealing ‘an acceptance of the notion that in some cases the corporation itself committed the war crime and its directors were being convicted for belonging to the organization that had committed the criminal act’.<sup>18</sup>

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<sup>12</sup> Jonathan Kolieb, ‘Through the Looking-Glass: Nuremberg’s Confusing Legacy on Corporate Accountability Under International Law’ (2015) 32(2) AUILR 570.

<sup>13</sup> Fauchald and Stigen (n 10) 1035. Art. 9 of the Charter of the International Military Tribunal states that ‘[a]t the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization’.

<sup>14</sup> Kolieb (n 12) 581.

<sup>15</sup> Art. III Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (20 December 1945) <<https://avalon.law.yale.edu/imt/imt10.asp>> accessed 20 February 2022.

<sup>16</sup> This concerns the trials against *Flick*, *Krupp* and *IG Farben*. On the topic see Matthew Lippman, ‘War Crimes Trials of German Industrialists: The “Other Schindlers”’ (1995) 9 TICLJ 173ff. See also Ambos (n 5) 506ff.

<sup>17</sup> Kolieb (n 12) 584.

<sup>18</sup> Andrew Clapham, ‘The Complexity of International Criminal Law: Looking Beyond Individual Responsibility to the Responsibility of Organizations, Corporations and States’ in Ramesh Thakur and Peter Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University Press 2004) 238f. The part of the *Farben* judgement cited by the Author (footnote 14) is the following: ‘The result was the enrichment of *Farben* and the building of its greater chemical empire through the medium of occupancy at the expense of the former owners. Such

It is also worth mentioning that, in the same context after Nuremberg, several trials were undertaken by the Allies in the Pacific sphere, such as the one against some staff members of the Japanese Kinkaseki Nippon mining company before the British Military court in Hong Kong for the forced labour of prisoners.<sup>19</sup> However, only recently they have been subject to a level of interest in the West similar to those in European sphere.<sup>20</sup>

Therefore, some observers noticed that even if in all these cases only natural persons stood trial for their involvement in the crimes of the Nazi regime (and no company has been formally in the dock), ‘the – at least moral – responsibility of the German economy as a whole and some companies in particular was also at stake’, meaning that the collective responsibility of leading German corporations was the ‘subtext of the trials against their representatives’.<sup>21</sup> Some interpretations go further, considering that one of the lessons of Nuremberg is that the criminality of German corporations was recognised and they were punished for their crimes,<sup>22</sup> and so that legal persons can commit international crimes under international law.<sup>23</sup>

If Nuremberg can be seen as the first, fundamental occasion in which the direct involvement of corporations in the commission of international crimes was acknowledged, another cornerstone in this respect could be found in the attempt, made by the French delegation at the Rome Conference in 1998, of including corporations in the ICC jurisdiction.

Under such proposal,<sup>24</sup> corporate criminal liability was made dependent on individual criminal liability, as the conviction of a company agent for acts carried out ‘on behalf of

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action on the part of Farben constituted a violation of the Hague Regulations. It was in violation of the rights of private property, protected by the Laws and Customs of War’ (IG Farben Trial, US Military Tribunal, Nuremberg, 14 August 1947 – 29 July 1948, Law Reports of Trials of War Criminals, vol X, 50).

<sup>19</sup> Ambos (n 5) 506.

<sup>20</sup> Cryer, Robinson and Vasiliev (n 8) 125.

<sup>21</sup> This is the interpretation given by Ambos (n 5) 506.

<sup>22</sup> Kiobel (n 12) 587.

<sup>23</sup> Clapham (n 18) 234.

<sup>24</sup> See ‘Working Paper on Article 23, Paragraphs 5 and 6’, UN Doc. A/CONF. 183/C.1/WGPP/L.5/Rev.2, 251f <<https://digitallibrary.un.org/record/260092>> accessed 20 February 2022:

‘5. Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute.

Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgement over a juridical person for the crime charged, if:

(a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and

(b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and

(c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and

(d) The natural person has been convicted of the crime charged.

For the purpose of this Statute, “juridical person” means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State

and with the explicit consent' of the company was required. The envisaged model of liability could be referred to the identification theory,<sup>25</sup> as only individuals 'in a position of control within the juridical person' could trigger the liability of the entity. There is a clear influence of the provisions of the French Criminal Code, although the reference to the corporate agents in that case is broader (organs or representatives); but the basic paradigm chosen for the liability of legal persons is by and large the same (liability *par ricochet*).

It is well known that the proposal in question was rejected, and a number of reasons were offered for this non-inclusion. First of all, lots of different countries took part in the negotiations, each with its own rules concerning the possibility of admitting corporate criminal liability. The first challenge was to find a shared model of attribution of criminal liability to corporations, politically acceptable for all States present.<sup>26</sup> Also, at that time corporate criminal liability was not as widespread as it is today, and there was an insufficient number of countries that held corporations criminally liable.<sup>27</sup>

Linked to that the complementarity issue has been highlighted, as this principle depends on compatible criminal law in the jurisdictions of the States parties. In a situation where only some States provided for corporate criminal liability at the domestic level and others did not, structural differences between countries would have put at risk the functioning of the mechanism laid down in arts. 17-19 of the Statute.<sup>28</sup>

Further problems concerned the possibility of adapting to legal persons gathering of evidence, due process rights, physical presence of the defendant, state cooperation requirements and penalties.<sup>29</sup> The limited capacity of the newly established Court was also taken into consideration, as it would have risked being overburdened with conducting a large number of investigations against corporations often operating internationally.<sup>30</sup>

Moreover, many underline the fact that negotiations took place over a limited period, and so another important reason was that there would not have been time to discuss the

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authority, a public international body or an organization registered under the national law of a State as a non-profit organization.

6. The proceedings with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The Prosecutor may file charges against the natural and juridical persons jointly or separately. The natural person and the juridical person may be jointly tried.

If convicted, the juridical person may incur the penalties referred to in article 76. These penalties shall be enforced in accordance with the provisions of article 99'.

<sup>25</sup> On this model, see *infra* paragraph 3.

<sup>26</sup> Garcia (n 5) 121.

<sup>27</sup> David Scheffer, 'Corporate Liability Under the Rome Statute' (2016) 57 HILJOS 38.

<sup>28</sup> Kaeb (n 5) 353, 378.

<sup>29</sup> Scheffer (n 27) 39.

<sup>30</sup> Ambos (n 5) 519.

proposal in depth.<sup>31</sup> In this regard, it has been noted that if there had been the political will to establish the jurisdiction of the ICC in relation to legal persons, the issue could have been passed on to a working group, as was done with the crime of aggression.<sup>32</sup>

In any case, as clarified by the chairman of the working group on general principles of criminal law of the Conference, ‘all delegations had recognized the great merits of the relevant proposal, but some had felt that it would perhaps be premature to introduce that notion’.<sup>33</sup>

This episode was considered like a tombstone on the possibility of extending the jurisdiction of the Court also to legal persons. However, more than twenty years later, in the current socio-economic environment, is this still the case? This is the question that leads us to the next step of our analysis.

### 3 Recent Developments in the Current International Criminal Law Practice

Although being a fundamental part of the international criminal law framework, the Rome Statute is not the only context where the subject of corporate criminal liability should be assessed. In recent times, there have been some interesting developments in international criminal law practice that have, once again, brought this matter to the fore.

One of the most cited cases in this respect refers to the decisions rendered in 2014 by the Special Tribunal for Lebanon (STL),<sup>34</sup> where corporations (together with the responsible natural persons) have been charged with contempt of court and obstructing justice. Therefore, the most interesting aspect of these judgments is the fact that they mark the first time a hybrid criminal tribunal held a corporation criminally liable for the abovementioned offences.<sup>35</sup>

The issue brought to the Court concerned the publication of names of undercover witnesses in other STL proceedings by two media companies, a news station and a daily newspaper. In particular, in the *Al-Jadeed* case,<sup>36</sup> the Appeals Chamber overturned the Contempt Judge’s decision that the Tribunal did not have jurisdiction over legal persons and instead stated that corporations can be held liable for contempt charges under the STL.

It is necessary to clarify the terms of this complex question. Given that the STL has jurisdiction only over natural persons, pursuant to art. 3 of STL Statute (‘individual criminal responsibility’), in this case the main discussion has focused on the obstruction

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<sup>31</sup> *ibid* 519. See also Scheffer (n 27) 38.

<sup>32</sup> See Ambos (n 5) 519.

<sup>33</sup> As reported in Garcia (n 5) 120 and Kaeb (n 5) 378.

<sup>34</sup> The cases are *Al Jadeed S.A.L. & Ms Khayat* (STL-14-05) and *Akhbar Beirut S.A.L. & Mr Al Amin* (STL-14-06). For a comment see Nadia Bernaz, ‘Corporate Criminal Liability: The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon’ (2015) 13(2) JICJ 313ff.

<sup>35</sup> Stahn (n 4) 98.

<sup>36</sup> See footnote 37.



offences and it has been stated that, as to protect the good functioning of the Court, it would be within its “inherent power” to effectively prevent offences of this type, capable of hindering the administration of justice – even if concerned with legal persons. This assumption is based on Rule 60 *bis* of the Procedural rules of the Court (‘Contempt and Obstruction of Justice’) which, in referring to ‘those’ who knowingly and willfully interfere with the administration of justice by the Special Tribunal, should also include legal persons.<sup>37</sup>

It can be understood that this decision is certainly symbolic in a context such as that of international criminal law which, as said, appears to be ‘reluctant’ to admit the possibility of recognising the liability of legal persons. As noted, the reception given by scholars to this case is an expression of the two opposing approaches mentioned above: on the one hand, those who consider the conclusions by the STL a step forward in the right direction; on the other, those who minimise its significance, reducing it to a new example of international criminal law’s ‘dream factory’.<sup>38</sup>

However, it is also necessary to point out that the Court’s reasoning is actually confined to the abovementioned crimes – and hence it does not address international crimes *stricto sensu* –, with the consequence that these decisions might have the limited effect of representing ‘precedents establishing corporate criminal responsibility in general international law’.<sup>39</sup>

Another relevant example to be analysed when examining the state-of-the-art in the field of corporate criminal liability for international crimes is the adoption of the so called ‘Malabo Protocol’<sup>40</sup> by the African Union in 2014.

The Protocol provides for an additional criminal jurisdiction for the African Court of Justice and Human Rights, alongside the general affair and human rights jurisdiction. It

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<sup>37</sup> The case is illustrated in these terms by Ambos (n 5) 521f. For details see *Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, New TV S.A.L. and Al Khayat* (STL-14-05/PT/AP/AR126.1), Appeals Panel, 23 January 2015, §91 <[https://www.stl-tsl.org/crs/assets/Uploads/20141002\\_F0012\\_PUBLIC\\_AP\\_Dec\\_on\\_InteLoc\\_Appl\\_Jurisdic\\_Cont\\_Proceed\\_EN\\_AR\\_FR\\_Joomla.pdf](https://www.stl-tsl.org/crs/assets/Uploads/20141002_F0012_PUBLIC_AP_Dec_on_InteLoc_Appl_Jurisdic_Cont_Proceed_EN_AR_FR_Joomla.pdf)> accessed 20 February 2022.

<sup>38</sup> See Stahn (n 4) 103 (also footnotes 53 and 54 for references).

<sup>39</sup> Ambos (n 5) 521.

<sup>40</sup> Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Malabo, 27 June 2014, and Annex (Statute of the African Court of Justice and Human and People’s Rights). For a comprehensive analysis of the Malabo Protocol see Charles C Jalloh, Kamari M Clarke and Vincent O Nmeihle (eds), *The African Court of Justice and Human and Peoples’ Rights in Context. Development and Challenges* (Cambridge University Press 2019); Larissa van den Herik and Elies van Sliedregt, *International Criminal Law and the Malabo Protocol – About Scholarly Reception, Rebellion and Role Models* (2017) Grotius Centre Working Paper 2017/066-ICL; Gerhard Werle and Moritz Vormbaum (eds), *The African Criminal Court. A Commentary on the Malabo Protocol* (Springer 2017).

is a significant extension, covering a range of crimes wider than the statutes of any other international and hybrid court previously did.<sup>41</sup>

More in detail, the Annex to the Malabo Protocol explicitly makes a distinction between individual criminal liability (art. 46B) and corporate criminal liability (art. 46C),<sup>42</sup> thus including, for the first time, a reference to ‘legal persons’ as subjects of international criminal law – in response to the impunity that many foreign corporations enjoyed in relation to human rights violations on the continent<sup>43</sup> and as a recognition of the ‘devastating impact’ of corporate misconduct in Africa.<sup>44</sup>

As a matter of fact, art. 46C(1) states that ‘[...] the Court shall have jurisdiction over legal persons, with the exception of States’. ‘In one simple sentence, by extending the power to adjudicate over legal entities’ this Section admits ‘corporate criminal liability [...] for international and transnational crimes’, taking international criminal law ‘to another level’.<sup>45</sup>

This provision has several aspects of interests, most notably the imputation criteria for attributing the liability to the collective entity, and it makes a distinction between the attribution of mental states of intent and knowledge.

Preliminarily, it should be noted that, among the possible models for attributing liability to legal persons, the one included and accepted by the article in question seems in line with the organisational model<sup>46</sup>: the focus is not on the natural person who commits the predicate-crime (and, therefore, on the act and *mens rea* of the natural person), but directly on the corporate blameworthiness. The corporation is considered a separate entity from its agents. This approach – being indifferent that a natural person is held responsible for the criminal conduct or not – is opposite to the one which was proposed during the Rome Conference.

Hence, as far as the attribution of the corporate intent to commit an offence is concerned, art. 46C(2) requires that it should be ‘established by proof that it was the policy of the corporation to do the act which constituted the offence’.

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<sup>41</sup> Cryer, Robinson and Vasiliev (n 8) 187f. See art. 28A(1) of the Annex, according to which the Court shall have power to try persons for the crime listed therein, including – among the others and next to the traditional core crimes – transnational offences like piracy, terrorism, corruption and money laundering.

<sup>42</sup> See Joanna Kyriakakis, ‘Article 46C: Corporate Criminal Liability at the African Criminal Court’ in Charles C Jalloh, Kamari M Clarke and Vincent O Nmehielle (eds), *The African Court of Justice and Human and Peoples’ Rights in Context. Development and Challenges* (Cambridge University Press 2019) 793ff; Chantal Meloni, ‘Modes of Responsibility (Article 28N), Individual Criminal Responsibility (Article 46B) and Corporate Criminal Liability (Article 46C)’ in Gerhard Werle and Moritz Vormbaum (eds), *The African Criminal Court. A Commentary on the Malabo Protocol* (Springer 2017) 151ff.

<sup>43</sup> Stahn (n 4) 104. For an articulate examination of the background to the provision of corporate criminal liability in the context of the African Court, see Kyriakakis (n 42) 799ff.

<sup>44</sup> Matiangai Sirleaf, ‘The African Justice Cascade and the Malabo Protocol’ (2017) 11 IJTJ 76.

<sup>45</sup> van den Herik and van Sliedregt (n 40) 9.

<sup>46</sup> See also *infra* in this paragraph.

The element that characterises corporate intent is expressly identified in the ‘policy of the corporation’, and scholars have immediately focused on the meaning to be attributed to the notion of ‘policy’. There is a convincing argument that the Court should not limit itself to considering only written policies of a formal nature but should take a substantive view to include also informal, daily policies of the corporation.<sup>47</sup>

Article 46C(3) explains that ‘[a] policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation’. The introduction of the ‘reasonableness’ requirement entails answering the question of what is generally perceived as reasonable and can be interpreted as a choice aimed at circumscribing liability.<sup>48</sup>

Section 4 addresses corporate knowledge, which can be attributed to the corporation ‘by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation’, while Section 5 clarifies that such ‘knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel’.

This is the aggregation of knowledge, which is a well-known theory in some common law jurisdictions where the holistic approach to corporate criminal liability is embraced. Australia (where the organisational model finds a place in the Federal corporate criminal liability laws) can be mentioned, but also United Kingdom (UK) courts have, in some cases, critically discussed the theory of aggregation in the corporate context.<sup>49</sup>

It should also be noted that this provision, when referring to aggregation, mentions both actual knowledge and constructive knowledge (whereas in international criminal law the level of knowledge required is actual knowledge in most of the cases). The presence of this lower standard has been criticised because it would entail the risk to ‘criminalize a company that is not aware of wrongdoing at a level relevant to avoiding the kind of harm suffered, irrespective of reasonable oversight systems’ unless, as a corrective measure, the Court is given the possibility of ‘separately considering due diligence issues at the sentencing stage’.<sup>50</sup>

This brief analysis has shown that, despite the undeniable innovative scope of this article, several problems still remain – all the more so if one considers the circumstance that no definition of ‘legal person’ is given and that there is no ad hoc provision concerning penalties for legal persons.<sup>51</sup>

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<sup>47</sup> Kyriakakis (n 42) 817f.

<sup>48</sup> van den Herik and van Sliedregt (n 40) 11.

<sup>49</sup> For further references see James Gobert, ‘Corporate Criminality: Four Models of Fault’ (1994) 14 LS 403ff.

<sup>50</sup> See Kyriakakis (n 42) 820, where the Author also notes that this choice ‘may reflect an expectation that corporate liability is more likely to be in the form of complicity, for which constructive knowledge is sufficient under customary international law’.

<sup>51</sup> van den Herik and van Sliedregt (n 40) 13f.

Against this background, it is possible to try to make a preliminary assessment of our investigation. In this regard, it is important to take care not to draw substantive conclusions from the cases outlined above. The decision of the STL had a very limited scope, in the sense that it only concerned specific offences and it did not involve any of the substantial crimes for which the Court has been established. Moreover, leaving apart the shortcomings mentioned above, the future of the Malabo Protocol appears quite uncertain, as it will enter into force only thirty days after the deposit of ratification instruments by fifteen member States and, at present, there are no ratifications.<sup>52</sup>

At the same time, it is equally important not to disregard the role that such developments in international criminal law can play as points of emergence of a tendency that has in fact always pervaded this matter. Furthermore, the fact that such evolution at the supranational level has been accompanied by very relevant changes in domestic legislation concerning the criminal liability of legal persons makes it even more significant.

Indeed, the idea that corporations cannot commit crimes is a relic of the past. Corporate criminal liability – which has long been a feature of the US and other common law countries – has spread to Europe and Latin-America<sup>53</sup> in recent years – although, as known, national legal systems diverge in their approaches.

It is not possible here to illustrate in detail this multifaceted evolution path, but it is worth noting that essentially two macro models of imputation<sup>54</sup> for corporate criminal liability have been consolidated. Very roughly, there is a first model of *derivative* liability, where criminal liability results from the criminal acts of agents, ie senior managers and employees: if the ‘triggering person’ could be only a senior manager – defined as the ‘directing mind and will’ of the company – this theory will be referred to as ‘identification’. For example, this model is widely adopted both in the UK and (as noted above) in France. If, on the other hand, the liability of the legal person arises from the commission of an offence by any agent, including low level employees, it will be referred to as vicarious liability, a doctrine which is at the basis of the US system of corporate criminal liability, but it is also present elsewhere (again, for example, for certain offences in the UK).

The second macro-model is fundamentally based on the assumption that the company itself is accountable for its own wrongful conduct (organisational model). Then, depending on the possible variations that this model shows in the different legal systems, to hold a corporation criminally liable under this approach it will be necessary to refer to

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<sup>52</sup> See the ‘status list’ available on the website of the African Union <<https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>> accessed 20 February 2022.

<sup>53</sup> See the various contributions in Antonio Fiorella, Alfredo Gaito and Anna Salvina Valenzano (eds), *La responsabilità dell’ente da reato nel sistema generale degli illeciti e delle sanzioni anche in una comparazione con i sistemi sudamericani* (Sapienza Università Editrice 2018) 175ff.

<sup>54</sup> For a discussion of the topic see Cristina De Maglie, ‘Models of Corporate Criminal Liability in Comparative Law’ (2005) 4 WUGSLR 554ff.

a criminal policy of the company (corporate culture), or to find in the collective structure some gaps or organisational deficiencies (organisational fault). In several jurisdictions, this second approach also provides for corporations to be called to put in place adequate preventive plans and protocols, such as compliance programs, which, depending on the case, may allow the entities to avoid the criminal liability or, at least, to have more lenient sanctions applied.<sup>55</sup> In this scenario criminal compliance, prevention and due diligence are becoming key for corporations in many fields; in particular, this trend is visible in the way in which a real metamorphosis has taken place in recent years in relation to the architecture of companies' human rights obligations.

#### **4 Business and Human Rights: A 'Wind of Change' Impacting also International Criminal Law?**

The combination 'business' and 'human rights' has long been synonymous with protection measures adopted by corporations on a voluntary basis in the broader context of so-called corporate social responsibility (CSR) policies.

In that respect, the main feature has traditionally been the spontaneity of the adoption of good practices aimed at the protection of super-individual interests – to name a few, environment, corruption, and indeed human rights – developed by multinational companies. This is, of course, in close correlation with the fact that multinational companies usually operate on a large scale, through supply chains, also in countries where human rights legislation is often lacking; therefore, the development of 'responsible business conduct' is a way through which large businesses can mitigate their adverse impacts.

Such trend has gone hand in hand with the development of greater awareness of consumers and stakeholders, to the point that – since these measures were adopted without any imposition of obligations from public sources – the main negative consequence for multinationals in the event of failure to comply with such social expectations has long been reputational, since there were no proper legal enforcement tools.

However, the state of affairs has changed considerably in recent times. This situation, based primarily on guidelines and similar soft law instruments, has seen increasing

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<sup>55</sup> For instance, within the Italian system of *ex crimine* liability of entities set forth by the Legislative Decree No. 231 of 2001, the adoption and efficient implementation of a compliance program before the commission of the predicate crime may lead – if the other legal requirements are met – to the non-application of the sanctions; while if the compliance program is adopted *ex post*, a mitigation of the sanctions is admitted (see arts. 12 and 17 of the Decree). On the Italian model, see Cristina De Maglie, 'Italy' in James Gobert and Pascal Ana-Maria (eds), *European Developments in Corporate Criminal Liability* (Routledge 2011) 252ff. For an analysis of the issue of liability of legal entities for international crimes with a link to the Italian context and the Legislative Decree No. 231 of 2001, see Andrea Sereni 'Il problema della responsabilità degli enti nel diritto penale internazionale' in Antonio Fiorella, Roberto Borgogno and Anna Salvina Valenzano (eds), *Prospettive di riforma del sistema italiano della responsabilità dell'ente da reato anche alla luce della comparazione tra ordinamenti* (Jovene 2015) 19ff.

attention also from national and supranational legislators, driven by the penetrating scrutiny of the international community and the call for more effective corporate accountability mechanisms.

The effect was the proliferation of regulations targeting multinationals and supply chains, with the basic aim of imposing specific obligations on them. Especially among the various domestic regulations – although there are many differences in approach, eg with regard to the level of intensity of such obligations – the main novelty is (at least in some cases) a requirement for businesses to adopt effective measures to prevent human rights abuses by subsidiaries and suppliers, as an essential part of their responsible business strategy.<sup>56</sup>

This phenomenon has been very effectively defined as the ‘hardening of soft law’<sup>57</sup> in the area of corporate human rights obligations, as to underline that there is a shift from traditional soft law instruments to binding regulatory provisions, often complemented with sanctions. In this framework, as far as the latter is concerned, the predominant role continues to be played by the reputational stigma, linked to the disclosure of the corporate policies in place to ensure the respect for human rights and so to increased transparency. Sometimes, civil sanctions have also appeared on the scene.

Criminal law remained essentially absent until now – as is it obvious given the features of the sector at stake. However, the real new element is that sanctions with a *punitive* nature are also beginning to be taken into some consideration.<sup>58</sup>

In order to better clarify this point, it is useful to give some examples that allow to frame the regulatory models that are emerging at national level in the field of business and human rights, and that can be classified in two major typologies.<sup>59</sup>

Firstly, there are statutes that require companies to improve transparency, through reporting mechanisms that expose them to the evaluation of the stakeholders. Limiting the analysis to the European landscape, the most significant ‘disclosure law’ is the UK Modern Slavery Act 2015.<sup>60</sup> Secondly, and conversely, there are regulations, such as the French law on the duty of vigilance of 2017,<sup>61</sup> that go far beyond the demand for

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<sup>56</sup> Rossella Sabia, ‘The Accountability of Multinational Companies for Human Rights Violations, Regulatory Trends and New Punitive Approaches Across Europe’ (2021) 1 ECLR 38. See also the recent work by Vincenzo Mongillo, ‘Imprese multinazionali, criminalità transfrontaliera ed estensione della giurisdizione penale nazionale: efficienza e garanzie ‘prese sul serio’’ (2021) 170(2) GDLRI 179ff.

<sup>57</sup> Justine Nolan, ‘Hardening Soft Law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights?’ (2018) 15(2) RDI 65ff.

<sup>58</sup> Sabia (n 56) 57ff.

<sup>59</sup> Indeed, according to Nolan (n 57) 68ff, it is possible to identify ‘corporate disclosure laws’ and ‘laws that expressly incorporate a due diligence requirement alongside their mandated social disclosures’. For a broader analysis and a proposal in this respect, see further Sabia (n 56) 40ff.

<sup>60</sup> For an overview see Virginia Mantouvalou, ‘The UK Modern Slavery Act 2015 Three Years On’ (2018) 81(6) MLR 1017ff.

<sup>61</sup> Elsa Savourey and Stéphanie Brabant, ‘The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption’ (2021) 6(1) BHRJ 141ff.

transparency, requiring corporations to adopt substantive human rights due diligence, thus representing examples of ‘mandatory human rights due diligence law’.

This divergence is also linked to the degree of severity of the sanctions: fundamentally reputational in the first case, much more intrusive in the second case. The French law, indeed, is emblematic because one of the sanctions introduced by the legislator, although qualified as a civil fine (*amende civile*), was censured by the French Constitutional Court as a sort of ‘hidden penalty’, in breach of the principle of legality of criminal offences and criminal sanctions.<sup>62</sup>

Disclosure laws are the expression of a model of weak State interference in the promotion of respect for human rights by multinational companies, while the current movement towards mandatory human rights due diligence – as several countries have introduced or are considering introducing similar legislation<sup>63</sup> – gives evidence of the increasing space that public regulation and hard law sources are gaining in this area.

As noted, ‘CSR and RBC have evolved from a set of ethical standards for market and business morality into relevant standards for corporate liability’<sup>64</sup> and the emergence of *punitive* sanctions – although in a very initial and uncertain fashion – in a sector that has always relied only on voluntary standards is a sign of a change of perspective not to be underestimated.

Even when looking at supranational legislation, there are developments that deserve close attention. For instance, in the European landscape, it is possible to mention the non-financial reporting Directive (2014/95/EU)<sup>65</sup> and the related sanctions – requiring companies of a certain size and turnover to report on ‘environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters’.

This Directive is inspired by the principle ‘comply or explain’ and currently it could be seen as an intermediate model<sup>66</sup> among the other two because, even if it does not introduce specific sanctions for non compliance, it leaves to Member States the option to

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<sup>62</sup> French Constitutional Court, Decision No. 2017-750 DC of 23 March 2017 (Law on the duty of oversight of parent companies and commissioning enterprises), available in English at <<https://www.conseil-constitutionnel.fr/en/decision/2017/2017750DC.htm>> accessed 20 February 2022.

<sup>63</sup> For instance, Germany has just passed a long-awaited mandatory due diligence law (‘Act on Corporate Due Diligence in Supply Chains’, published in the Federal Law Gazette on 23 August 2021). For details on the legislative process see Business & Human Rights Resource Centre ‘German parliament passes mandatory human rights due diligence law’ <<https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/>> accessed 20 February 2022.

<sup>64</sup> John A E Vervaele, ‘Corporate Compliance and the Criminal Liability of Corporations in the Light of Corporate Social Responsibility and Human Rights Obligations’ (2021) 91 (2) RIDP 420.

<sup>65</sup> Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. For a comment see Olga Martín-Ortega and Johanna Hoekstra, ‘Reporting as a Means to Protect and Promote Human Rights? The EU Non-Financial Reporting Directive’ (2019) 44(5) ELR 622ff.

<sup>66</sup> Sabia (n 56) 52ff.

make domestic legislation more effective by doing so. It is interesting to underline that this piece of legislation is now under revision: in April 2021, the Commission presented its proposal for a Corporate Sustainability Reporting Directive (CSRD), with the aim of strengthening the existing rules and to bring, over time, sustainability reporting on a par with financial reporting.<sup>67</sup>

This process of moving towards the ‘stronger’ model that focuses on mandatory due diligence measures can also be observed in the European Parliament resolution<sup>68</sup> calling upon the Commission to submit legislative proposals for EU-wide ‘mandatory supply chain due diligence’ and setting out suggestions as to what that legislation should contain. The proposal only refers to ‘effective, proportionate and dissuasive’ sanctions which shall take into account the severity of the infringements committed and whether the infringement has taken place repeatedly or not.<sup>69</sup> However, at an early stage of the proceeding, the European Parliament’s Committee on Legal Affairs had published a draft report including the text of a proposed Directive, requiring – among other things – that ‘a repeated infringement by an undertaking of the national provisions adopted in accordance with this Directive constitutes a criminal offence, when committed intentionally or with serious negligence’ and that Member States ‘shall take the necessary measures to ensure that these offences are punishable by effective, proportionate and dissuasive criminal penalties’.<sup>70</sup>

It remains to be seen how this discussion will evolve, but the above review underlines the existence of a movement aimed at – to some extent – sanctioning companies for non-compliance with human rights obligations. In other words, it should be recognised that the discussion of a possible criminal liability of corporations for human rights violations is no longer taboo. To clarify the link with the core topic of this investigation, it should be highlighted that it is becoming increasingly difficult not to acknowledge that such changes at a global scale are intended to have an impact also on international criminal law.

## 5 Conclusions

[W]e instinctively think that it is inconceivable’ that a multinational company ‘would be capable of engaging in war crimes or crimes against humanity’ and ‘it is difficult to imagine penalizing [...] [it] for such conduct if it did occur. One important question

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<sup>67</sup> For the legislative schedule of the proposal, see <<https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-review-of-the-non-financial-reporting-directive>> accessed 20 February 2022.

<sup>68</sup> European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) <[www.europarl.europa.eu/doceo/document/TA-9-2021-0073\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html)> accessed 20 February 2022.

<sup>69</sup> See art. 18 of the Annex to the Resolution.

<sup>70</sup> European Parliament, Committee on Legal Affairs, Draft report with recommendations to the Commission on corporate due diligence and corporate accountability, 2020/2129(INL), 11 September 2020 <[https://www.europarl.europa.eu/doceo/document/JURI-PR-657191\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf)> accessed 20 February 2022. In particular, see art. 19 of the proposed Directive annexed to the draft report.



to ask therefore, is if the actions of German or Japanese corporations during the Second World War occurred today, how would we respond?.<sup>71</sup>

This provocative question clearly sums up the doubts raised by a part of the scientific community who support the idea of paving the way for a serious reflection on the criminalisation of collective behaviour also for the commission of international crimes.

Trying to review the indications that can be drawn from the developments of corporate criminal liability in the international criminal law practice since Nuremberg, it seems possible to identify some key elements which could be the starting for a prospective debate that deserves to gain space and to be brought outside the academic environment. This applies all the more in the light of the current, general focus on the theme of corporate accountability, as shown by the ongoing changes in the human rights field.

As seen, the matter of corporate liability under international criminal law has been considered on quite a few occasions over time – something which is not insignificant, as we are addressing a concept that simply does not exist *as such* in international criminal law. The emergence of this topic is due not only to historical or cultural contingency – aspects which, however, have some value, as happened at the Rome Conference for the proposal made by France, a country familiar with corporate criminal liability which is included, since 1994, in the *Code Pénal* –, but it testifies that the problem of the commission of atrocity crimes in collective form is a phenomenon which has its roots on a criminological plan. Nowadays, the involvement of large corporations and multinational companies in the commission of very serious crimes that might amount to international crimes is an empirical reality, and many studies have tried to outline a conceptual framework as well – as for the responsibility of corporations for genocide,<sup>72</sup> or for the case of large-scale environmental destruction as a core crime.<sup>73</sup>

Nevertheless, a widespread consensus on the inclusion of legal persons among the subjects of international law was never reached, for several reasons. With regard, in particular, to a proper ICC jurisdiction, the road to establishing it still seems very narrow. On a formal level, the adoption of an amendment to the Rome Statute on which the consensus could not be reached requires a two-thirds majority of States Parties;<sup>74</sup> but even more, on matters of substance, concepts from domestic law cannot be automatically transposed in the international criminal law arena. What is clear from the abovementioned episode of the Rome Conference, but also from the analysis carried out with reference to the Malabo Protocol, is that there are many challenges ahead and that they are connected with the need for a strong political will to move in this direction. But even where such a will exists – and currently there are no signs of this – it would not be

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<sup>71</sup> Ramasastry (n 9) 104.

<sup>72</sup> See Michael J Kelly, 'Prosecuting Corporations for Genocide Under International Law' (2012) 6 HLP 339ff.

<sup>73</sup> For a recent analysis see Megumi Ochi, 'Large-Scale Environmental Destruction by Corporate Activity as a Core International Crime' (2021) 91(2) RIDP 375ff.

<sup>74</sup> Scheffer (n 27) 39.

enough, because it would be necessary to shape the foundations of criminal liability for international crimes, starting from the imputation criteria.

Where should we start in this hypothetical search for dogmatic solutions? It could be possible to look at the (already existing) frameworks of corporate criminal liability developed in the various national jurisdictions, and to choose the one most consistent with the aims and characteristics of international criminal law. But a series of critical issues would immediately come to light. Would it be preferable to link the liability of the corporation to the derivative model, or to that of organisational fault? And in the first case, is identification or vicarious liability better suited to the specificities of the corporation? If we opt for the corporate blameworthiness model, which paradigm should we refer to, among the many possible approaches (aggregation, corporate culture, failure to prevent model; and with or without the possibility of a due diligence defence)?

Moreover, the objective criteria of imputation – eg having acted in the interest or for the benefit of the corporation (which could be found both in the vicarious liability and in systems based on the organisational model, such as the Italian one)<sup>75</sup> – are better matched with economic crime, and much less with other crimes (eg ideologically motivated ones). It should be also said that in some countries corporate criminal liability is general, ie the commission of any offence could serve as a trigger mechanism, while others have adopted a system inspired by the principle of specialty, with a narrower selection of the predicate crimes.

It is then no coincidence that, according to some, corporate accountability for international crimes may be more pragmatically accomplished in other ways, such as investigating corporate officers under existing Rome Statute powers and through the further development of national criminal legislation covering corporate commission of (or complicity in) international crimes.<sup>76</sup>

We do not deny these difficulties and indeed, given the specificities of international criminal law, we think that it would be very complex to pick a national model of corporate criminal liability and transplant it directly into the context under consideration. However, we do believe that it is outdated, in the current scenario, to continue to firmly exclude corporations from the horizon of international criminal law. It might be appropriate to find a compromise solution, although that is not easy, eg by developing ad hoc models that, on specific aspects, build on concepts and rules that already exist and have been tested.

Hence, the discussion should probably be shifted towards verifying *how* the result can be achieved. Then, while waiting for the formation of some political will in that respect, the theoretical and academic reflection in the field has a lot of work to do. Corporate criminal liability is not a panacea for corporate misconduct but, in a long-term

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<sup>75</sup> See art. 5 of the Legislative Decree No. 231 of 2001.

<sup>76</sup> This is the position expressed, among others, by Scheffer (n 27) 39.

perspective, it could become more desirable also under international criminal law and more deterrent than national fragmented approaches.

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# BEYOND ECOCIDE: EXTRATERRITORIAL OBLIGATIONS OF DUE DILIGENCE AS AN ALTERNATIVE TO ADDRESS TRANSNATIONAL ENVIRONMENTAL DAMAGES?

By Anna Carolina Canestraro\* and Túlio Felipe Xavier Januário\*\*

## Abstract

*The aim of the present essay is to analyse whether extraterritorial obligations of due diligence in environmental matters could be an effective alternative when dealing with the phenomenon of the 'relocation of dangerous companies'. In other words, since environmental damages caused outside a state of war are still not considered international crimes and an eventual inclusion of ecocide in this list faces serious difficulties, we will explore if and to what extent due diligence procedures imposed by the home state have the potential to achieve the intended purposes of penalties applied to international crimes.*

## 1 Introduction

The regulation of activities that may affect directly or indirectly the environment and the prevention of their potential damages are undeniably in the current agenda of national and supranational legal systems. These facts became even clearer after the forest fires in the Amazon Rainforest in 2019<sup>1</sup>, whose effects crossed borders of Brazil and relighted the discussions about the ineffectivity of national policies and the possible need of interference from International Courts.

However, if on the one hand the efforts of some countries to reinforce their preventive-regulatory framework on environmental matters are visible, on the other, they go against the economic interests of some corporations, which, even though having their head offices in developed countries, decide to invest in subsidiaries in developing ones, aiming to escape from higher standards concerning human rights and environmental

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\* PhD Student in Criminal Procedure at the University of São Paulo - USP, M.Sc. in Law by the University of Coimbra, with a research internship of the 'ERASMUS+' Program at the Georg-August-Universität Göttingen. Had Graduate Studies in Economic Criminal Law and Crime's Theory at the University of Castilla-La Mancha, Graduate Studies in Compliance and Criminal Law at IDPEE - Coimbra and Graduate Studies in Criminal Procedural Law at IBCCRIM/IDPEE - Coimbra. Holds a Bachelor's Degree in Law by the Universidade Presbiteriana Mackenzie. Is currently a Lawyer.

\*\* PhD Student in Law at the University of Coimbra, with a fellowship from the *Fundação para a Ciência e a Tecnologia* - FCT, M.Sc. in Law by the University of Coimbra, with a research internship of the 'ERASMUS+' Program at the Georg-August-Universität Göttingen. Had Graduate Studies in Economic Criminal Law and Crime's Theory at the University of Castilla-La Mancha, Graduate Studies in Compliance and Criminal Law at IDPEE - Coimbra and Graduate Studies in Criminal Law - General Part at IBCCRIM/IDPEE - Coimbra. Holds a Bachelor's Degree in Law by the Universidade Estadual Paulista - UNESP.

<sup>1</sup> See Leonardo Simões Agapito, Matheus de Alencar e Miranda and Túlio Felipe Xavier Januário, 'A Political Agenda in Conflict with Environmental Protection: A Critical Policy Essay from Brazil' (2022) *International Criminology* <<https://doi.org/10.1007/s43576-021-00041-y>> accessed 10 February 2022.



protection, consequently reducing production costs. In other words, as pointed by Gert Vermeulen, in the current globalized world, dislocation of polluting or environmentally substandard activities to regions with lower and fewer standards is an unethical, but logical choice to transnational corporations.<sup>2</sup>

The seriousness of this situation is compounded if we observe that its eventual confrontation by the International Criminal Court (ICC) is hampered by the inexistence of international criminal liability of corporations and the current lack of international responsibility for environmental damages when disassociated from a state of war. Moreover, fundamental changes in the issues mentioned above – such as the inclusion of ecocide as the fifth international crime – still depend on major doctrinal discussions, besides facing resistance from states interested in attracting foreign investments.

That being said and seeking to identify more immediate – but not exclusive – alternatives to the increasing environmental issues, the aim of the present essay is to analyse to what extent extraterritorial application of due diligence obligations could help to face the phenomenon of ‘relocation of dangerous companies’.<sup>3</sup> In other words, after a brief explanation of the obstacles encountered by international criminal law in the fight against environmental damages, we will analyse what we mean by due diligence obligations and how they are imposed by some legislations. At the end of the article, we

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<sup>2</sup> Gert Vermeulen, ‘International Environmental Norms and Standards: Compliance and Enforcement. Promoting Extensive Territorial Jurisdiction, Corporate Chain Responsibility and Import Restrictions’ (2016) 87(1) RIDP 37, 38. As an example of the various situations of extraterritorial environmental damage, we can mention the case *Vedanta v. Lungowe*, recently judged by the United Kingdom Supreme Court. The English company Vedanta Resources Plc was sued, under tort law, to fully repair damages caused by its subsidiary, Konkola Copper Mines Plc. It was alleged that the Nchanga Copper Mine in the Chingola District of Zambia was discharging ‘toxic emissions into the watercourses used by exceptionally poor members of local rural farming communities for drinking, irrigation and other essential purposes’. See Samvel Varvastian and Felicity Kalunga, ‘Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after *Vedanta v. Lungowe*’ (2020) 9 Transnational Environmental Law 323 and *Vedanta Resources Plc and Anor v. Lungowe and Ors* [2019] UKSC 20. Another notable case is that of Royal Dutch Shell, a parent company, and Shell Petroleum Development Company (SPDC), a Nigerian subsidiary, which were sentenced in the Netherlands by the Hague Court of Appeal for damages caused to four farmers by oil spills in Niger Delta. See *Oguru and others v. Royal Dutch Shell and others* (2021) GHDHA 1825. See also Wubeshet Tiruneh, ‘Holding the Parent Company Liable for Human Rights Abuses Committed Abroad: The Case of the Four Nigerian Farmers and Milieudefensie v. Shell’ (*EJIL: Talk!*, 19 February 2021) <<https://www.ejiltalk.org/holding-the-parent-company-liable-for-human-rights-abuses-committed-abroad-the-case-of-the-four-nigerian-farmers-and-milieudefensie-v-shell/>> accessed 12 February 2022 and Lucas Roorda and Daniel Leader, ‘Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court’ (2021) 6 BHRJ 368.

<sup>3</sup> This term refers to situations in which multinationals, mostly based in developed countries, invest abroad, attracted by very low or non-existent standards of protection of human and environmental rights, carrying out harmful activities in these places, which are often countries under development. See Ana Sofia Barros, *Multinacionais e a Deslocalização de Indústrias Perigosas: Ensaio sobre a Proteção dos Direitos Humanos perante o Dano Ambiental* (Coimbra Editora 2012) 16. For a comprehensive analysis of this issue and its possible solutions, see also Anabela Miranda Rodrigues, *Direito Penal Económico: Uma Política Criminal na Era Compliance* (2nd edn, Almedina 2020) 123-129.

will seek to demonstrate which purposes of environmental crimes persecution through international criminal law can be achieved applying these instruments, and also their insufficiencies and difficulties to overcome.

## 2 On the Difficulties of Facing Environmental Damages under International Criminal Law

Due to the insufficiency of the current main instruments of environmental protection, several specialists sustain the need of a new and autonomous international crime, recognizing the environment as a fundamental interest to the international community. If included in the Rome Statute, the so-called 'ecocide' would be the fifth international crime, alongside with genocide, crimes against humanity, war crimes and aggression.<sup>4</sup>

According to Rosario de Vicente Martínez, environmental damages gather all the conditions observed in crimes that threaten the peace, security and well-being of the world, what would justify their inclusion in the catalog of international crimes. Besides that, from the moment that a multinational corporation endangers the environment, the situation is no longer exclusively local but becomes of interest of the international sphere.<sup>5</sup>

Highlighting the length of this discussion, the International Association of Penal Law already stated the need to recognize serious environmental damages as international crimes in 1994, in its XVth International Congress on Criminal Law.<sup>6</sup>

However, this eventual criminalization faces some difficulties that must be pointed out. A first obstacle is the lack of consensus on the definition of 'ecocide'. Even though there is not so much divergence about the need to protect the environment from huge damages, the controversies are in how to do it. As presented by Liemertje Sieders, the definitions differ from proposal to proposal.<sup>7</sup> For example, in the 'Higgins Proposal',

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<sup>4</sup> Rosario de Vicente Martínez, 'Hacia un Derecho Penal Internacional Medioambiental: Catástrofes Ambientales y "Ecocidio"' in Eduardo Demetrio Crespo and Adán Nieto Martín (dirs), Manuel Maroto Calatayud and Maria Pilar Marco Francia (coords), *Derecho Penal Económico y Derechos Humanos* (Tirant lo Blanch 2018) 260ff.

<sup>5</sup> Ibid 251 and 264.

<sup>6</sup> '23. Core crimes against the environment affecting more than one national jurisdiction or affecting the global commons outside any national jurisdiction should be recognized as international crimes under multilateral conventions'. See José Luis de la Cuesta, Isidoro Blanco and Miren Odriozola (eds), *Resolutions of the Congresses of the International Association of Penal Law (1926 – 2019)* (Maklu 2020) 137.

<sup>7</sup> According to the Author, 'the absence of a uniform definition of the crime is a thorn in ecocide's foot. With few, if any, authoritative normative instruments to provide guidance, ecocide remains a malleable concept, bearing seemingly as many definitions as there are authors writing about it'. Although some might say that 'the lack of a common definition of ecocide does not affect the emerging common notion that planet safety is a matter of undeniable concern', others 'argue that the lack of uniformity around the definition of the crime constitutes an important obstacle to its recognition and criminalisation, whether in the Rome Statute or elsewhere, as it denotes an uncertainty and lack of consensus that does not sit well with international law. Moreover, it risks flagrantly conflicting with the nullum crimen sine lege

ecocide is understood as 'the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished'.<sup>8</sup> The 'End Ecocide on Earth Amendments' defines it as causing 'significant and durable damage to: (a) any part or system of the global commons, or (b) an ecosystem function relied upon by any human population or sub population'.<sup>9</sup> The 'Neyret Ecocide Convention' presents a list of intentional acts that can configure ecocide, all on the condition of being 'committed in the context of a widespread and systematic action that have an adverse impact on the safety of the planet'.<sup>10</sup> Finally, for the 'Stop Ecocide Foundation', it 'means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts'.<sup>11</sup>

Besides that, the political obstacles on recognizing environmental damages as international crimes are also undeniable.<sup>12</sup> As pointed by Sieders, some of the most polluting states are not States Parties to the Rome Statute and the ones that are probably won't sign any amendments to include ecocide. In other words, approval by State Parties is a major challenge. Once we are in a very polarized scenario, it is very unlikely that two-thirds of State Parties will support this idea in short-term.<sup>13</sup>

Last but not least, we cannot forget that transnational crimes generally involve organizational and financial resources of economic actors.<sup>14</sup> In the specific case of environmental crimes committed overseas, the involvement of huge corporations is a general rule, since these aggressions are majorly linked to the industrial activity itself.<sup>15</sup>

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principle'. For a comprehensive analysis of this issue, see Liemertje Julia Sieders, 'The Battle of Realities: The Case for and Against the Inclusion of 'Ecocide' in the ICC Rome Statute' (2020) 91(1) RIDP 29, 36ff.

<sup>8</sup> On this concept, see Polly Higgins, Damien Short and Nigel South, 'Protecting the Planet: A Proposal for a Law of Ecocide' (2013) 59 Crime Law Soc Change 251, 257ff <<https://doi.org/10.1007/s10611-013-9413-6>> accessed 21 July 2021.

<sup>9</sup> See 'Article 8 *ter*' at: End Ecocide on Earth, 'Ecocide Amendments Proposal' (2016) <<https://www.endecocide.org/en/amending-the-rome-statute/>> accessed 22 July 2021.

<sup>10</sup> Laurent Neyret (sup), *From Ecocrimes to Ecocide: Protecting the Environment through Criminal Law* <<https://iuc.hr/file/1113>> accessed 22 July 2021.

<sup>11</sup> Stop Ecocide Foundation, 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (2021) <<https://www.stopecocide.earth/legal-definition>> accessed 10 February 2022.

<sup>12</sup> De Vicente Martínez (n 4) 254-255.

<sup>13</sup> Sieders (n 7) 45-46. See also Mark A. Drumbl, 'International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?' (2000) 6(2) ILSA Journal of International & Comparative Law, 323ff <<https://nsuworks.nova.edu/ilsajournal/vol6/iss2/5>> accessed 22 July 2021.

<sup>14</sup> Kai Ambos, *Direito Penal Internacional Econômico: Fundamentos da Responsabilidade Penal Internacional das Empresas* (Livraria do Advogado 2019) 24.

<sup>15</sup> De Vicente Martínez (n 4) 267. See also Jacqueline Hellman, 'The Fifth Crime Under International Criminal Law: Ecocide?' in Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann and Joachim Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 277; Raphael Boldt, 'Ecocídio e Responsabilidade Empresarial nos Crimes Ambientais', (2021) 29(175) RBCC 91, 100-103.

However, despite the precedents of the Nuremberg Courts<sup>16</sup> and on the contrary of the AIDP Recommendations from its XIIth and XVth International Congresses,<sup>17</sup> currently no international criminal court or tribunals allows the criminal responsibility of corporations, since international treaties bind only states.<sup>18</sup>

Of course, it is possible to circumvent some of these difficulties by proposing a new treaty and creating a new court with jurisdiction to judge only international environmental crimes. In favor of this solution, we highlight that, even though ICC is an internationally recognized independent body, it is sometimes criticized for being biased depending on the political interests at stake. This could be the case of ecocide, putting in check the perception of independence that it boasts.<sup>19</sup> Besides that, while the incorporation of ecocide into the Rome Statute would avoid the complications of starting a new convention and creating a new court, with all the economic implications of it, the ICC judges and prosecutors are not specialized in environmental cases.<sup>20</sup>

However, the approval of a new treaty and the creation of a new infrastructure, which could minimally attend to the needs imposed by complex transnational environmental crimes, would also take a huge amount of time,<sup>21</sup> and time, as we can see, is something urgent when protecting the environment.

That being said, we believe that, despite the importance of facing the most serious environmental damages through international criminal law, we also need some alternatives that could be taken more immediately in the prevention of transnational environmental damages. Could extraterritorial obligations of due diligence play a relevant role in this toolbox? To what extent? What would be their limitations?

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<sup>16</sup> For a comprehensive analysis on these precedents, with special mention of the cases *Flick, Krupp, I.G. Farben and Zyklon-B*, but also on the precedents from the British Military Trials of Hong Kong, see Ambos (n 14) 28ff.

<sup>17</sup> It is important to highlight that among the Recommendations of the XIIth International Congress on Penal Law (Hamburg 1979), AIDP disposed about the need of penal, civil or administrative liability of corporations for environmental crimes (Section II, Recommendation 6) and that serious and intentional environmental aggressions should be faced by international criminal law (Section II, Recommendation 13). These Recommendations were reinforced in 1994 (Rio de Janeiro), at the XVth Congress (Section I). See De la Cuesta, Blanco and Odriozola (n 6) 89-90, 133ff.

<sup>18</sup> Ambos (n 14) 34-35.

<sup>19</sup> Sieders (n 7) 43. See also Payal Patel, 'Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court's Mandate to Prosecuting Environmental Crimes?' (2016) 14(2) *Loyola University Chicago International Law Review* 175, 176ff <<https://lawecommons.luc.edu/lucilr/vol14/iss2/5>> accessed 22 July 2021.

<sup>20</sup> Sieders (n 7) 43 and Drumbl (n 13) 327.

<sup>21</sup> As pointed by Rosario de Vicente Martínez, international prosecution of environmental crimes could be achieved by two means: I) expanding ICC's competence to cover environmental crimes; II) creating an International Court for the Environment. Both solutions have pros and cons. However, according to the author, the first one is preferable because ICC already have a consolidated infrastructure. Besides that, it would avoid the multiplication of international jurisdictions (and the necessary time to consolidate them). For more details, see De Vicente Martínez (n 4) 274.

### 3 Extraterritorial Due Diligence Obligations

According to the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, due diligence is understood as ‘the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems’. In other words, is the procedure applied by companies, often with the support of artificial intelligence or other technologies, to check whether a business partner would pose risks to the company itself.

In order to do so, when hiring employees, entering into contracts with third parties or carrying out mergers and acquisitions, corporations accomplish an investigation into the third party, analyzing social media, operations and, especially, the existence of legal proceedings it may be involved in. It also analyzes all publicly available information about that particular company and, sometimes, even requests clarification from the legal department, which will respond as satisfactorily as possible, but, of course, respecting professional and commercial secrecy.

Usually, due diligence is conducted with a particular focus on reputational risks, but that should not be all. Indeed, these procedures must go beyond, also addressing risks to human rights, which may involve ‘assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed’.<sup>22</sup>

When talking about human rights’ protection<sup>23</sup>, in addition to a domestic due diligence, it is essential to draw attention to the importance of carrying out also an extraterritorial due diligence<sup>24</sup>. And this is because, for example, in terms of mineral extraction practices or even in the matter of hiring labor, there is sometimes fiscal and economic incentives for hiring companies in foreign territory. In fact, there are multinational companies that develop international supply chains to avoid responsibility for their harmful impacts on

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<sup>22</sup> OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011) 34 <<http://dx.doi.org/10.1787/9789264115415-en>> accessed 02 August 2021.

<sup>23</sup> ‘It is clear that environmental damage is a human rights issue. It has long been recognized that environmental damage can have both direct and indirect impacts on the enjoyment of a wide range of human rights and, in some circumstances, damage to the environment can be a violation of human rights laws. Since all human rights are universal, indivisible, interdependent, and interrelated, a healthy, functioning environment, therefore, is a necessary basis from which most other human rights are possible, including the human rights to development, food, water, health, and even the right to life itself’. See Karen Hulme, ‘Using a Framework of Human Rights and Transitional Justice for Post-Conflict Environmental Protection and Remediation’ in Carsten Stahn, Jens Iverson and Jennifer S. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (OUP 2017) 123.

<sup>24</sup> According to the ‘Principle 14’ of the UN Rio Declaration on Environment and Development, ‘States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health’. See United Nations, ‘Rio Declaration on Environment and Development’ (1992).

local communities, specially by hiding behind the 'corporate veil' and exploiting weak and poorly enforced domestic regulations.<sup>25</sup>

That being said, it is clear that domestic due diligence is not enough to prevent or discourage these highly harmful and dangerous behaviors. To avoid the facilitation, permission or even encouragement of these occurrences at the host State, procedures that overcome the barriers of the home State are necessary.

In this sense, at the international level, the United Nations (UN) Human Rights Council approved in June 2011 the Guiding Principles on Business and Human Rights, written by Professor John Ruggie. With the pillars *protect*, *respect* and *remedy*, the document also provided some principles, which were divided into 'foundational' and 'operational' principles. They were conceived precisely so that companies and states really commit to their implementation and deepen the debate on companies' human rights obligations.<sup>26</sup>

The foundational principle n. 15 stands out, expressly stating that in order to fulfill their responsibility to respect human rights, companies must have appropriate policies and procedures, depending on their size and circumstances. And among the policies and procedures, it is suggested the conduction of 'human rights due diligence process to identify, prevent, mitigate and account for how they address their impact on human rights'.

Regarding the parameters, the document states that the due diligence must include an assessment of the actual (already occurred and must be repaired) and potential (related to mitigation and prevention) impacts of the activities on human rights, besides integrating and acting upon the findings (foundational principle 17).

Thus, human rights due diligence, which has to be continuous and vary in complexity depending on the size, nature, risks and context of business operations, must cover the negative impacts on human rights that were caused by or had the contribution of the company through its activities, or that were directly related to its operations, products or services provided by its commercial relations.

In addition, the document states that due diligence procedures must:

(Principle 18) Draw on internal and/or independent external human rights expertise and involve meaningful consultation with potentially affected groups and other

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<sup>25</sup> Daniel Sharma and Franz D. Kaps, 'Human Rights Due Diligence Legislation in Europe – Implications for Supply Chains to India and South Asia' (DLA Piper, 26 March 2021) <<https://www.dlapiper.com/en/japan/insights/publications/2021/03/human-rights-due-diligence-legislation-in-europe/>> accessed 23 July 2021.

<sup>26</sup> UN. Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights* (United Nations 2011) <[https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf)> accessed 2 August 2021.

relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation; (...)

(Principle 19) (...) integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

(Principle 20) (...) track the effectiveness of their response. (...)

(Principle 29) Provide important feedback on the effectiveness of the business enterprise's human rights due diligence from those directly affected.<sup>27</sup>

Therefore, even though it is not very clear so far to what extent the legal entity and its directors can in fact be held responsible, the principles make it clear that they have an obligation to protect human rights.

Following the same idea, OECD presents in its 'Guidelines for Multinational Enterprises', human rights' due diligence recommendations.<sup>28</sup> Also within the European Union there are some provisions that mentions the need of human rights' due diligence, as is the case, for example, of the Regulation 2017/821, which establishes due diligence obligations in the supply chain for Union importers of tin, tantalum and tungsten, ores and gold originating from conflict-affected and high-risk areas.<sup>29</sup> It is also important to mention the EU Directive 2014/95, about disclosure of non-financial information and information about the diversity, which says:

In order to enhance the consistency and comparability of non-financial information disclosed throughout the Union, certain large undertakings should prepare a non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. Such statement should include a description of the policies, outcomes and risks related to those matters and should be included in the management report of the undertaking concerned. The non-financial statement should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts.<sup>30</sup>

The main problem here, however, is that most of these guidelines still leave it up to the States to establish procedures of extraterritorial due diligence and to sanction non-

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<sup>27</sup> Ibid.

<sup>28</sup> OECD (n 22) 23.

<sup>29</sup> Regulation of the European Parliament and of the Council (EU) 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L130/1.

<sup>30</sup> Directive of the European Parliament and of the Council 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ 330/1.

compliance with due diligence obligations. Also, many of them are not mandatory, having, in fact, a further moral than a legal reach.<sup>31</sup>

That being said, according to Vermeulen, the possibility of the states commanding companies or establishments headquartered within their territory to require from their subcontractors and suppliers located abroad to comply with higher standards and norms is a major help on protecting the environment. It has the potential to prevent or punish deliberate transference of criminal practices or environmentally harmful to states with lower or otherwise more lenient norms and standards.<sup>32</sup>

Although domestic legislations that set out this real extraterritorial obligation and, more importantly, penalties for not carrying out human rights due diligence, are not that numerous, it seems that the scenario is fortunately changing.

An important example is France, which has adopted in 2017 the 'Business Supervision Law'.<sup>33</sup> It enforces companies with more than 5,000 employees (directly or indirectly) with headquarters in French territory or companies with at least 10,000 employees considering their direct or indirect subsidiaries headquartered in France *or abroad*, to implement a surveillance plan, which must include reasonable surveillance measures to identify risks and prevent serious violations against human rights, fundamental freedoms, human health and safety, and environment, arising from the activities of the company and the companies it controls. The Law also established that companies that fail to comply with their due diligence obligations are subject to sanctions and are liable for damages caused by an improperly prepared vigilance plan, even if these damages are directly caused by third parties.

Also, The Netherlands adopted in 2019 the 'Child Labor Due Diligence Act'<sup>34</sup>, which will become effective by 2022 and it will apply to all companies that sell or supply goods or services to Dutch consumers, regardless of where the company is based or registered. The Act also imposes significant administrative fines, criminal sanctions for non-compliance and a reporting obligation to the regulatory body. And, although this Act 'only' mentions human rights violations and not environmental harm of companies' supply chains, it is a really important step for human rights' extraterritorial due diligence.

Finally, more recently, European Parliament presented in March 2021, a resolution with recommendations to the Commission on corporate due diligence and corporate accountability, which considers that, to enforce due diligence, Member States should set

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<sup>31</sup> Ambos (n 14) 40-41.

<sup>32</sup> Vermeulen (n 2) 50.

<sup>33</sup> Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

<sup>34</sup> Eerste Kamer, vergaderjaar 2016–2017, 34 506, A, Voorstel van wet van het lid Van Laar houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid).



up or designate national authorities to share best practices, carry out investigations, supervise and impose sanctions<sup>35</sup>. In addition, the Resolution also mentions that future legislation on due diligence and corporate responsibility for European companies must have extraterritorial effects, which, of course, contributes to achieving the objectives of the Union's policy.

Therefore, given the importance of extraterritorial due diligence in relation to human rights risks and the new global perspective that has been given to this matter, it is important now to analyze the pros and cons of preventing environmental damage through these extraterritorial obligations of due diligence.

#### **4 On the Pros and Cons of Preventing Environmental Damages through Due Diligence Obligations**

What is the purpose of international criminal law? What do we expect when we define an action or omission as an 'international crime' and, also, what to expect from the penalty applied to the ones who commit it? Exploring possible answers to these questions is crucial to ascertain the extent to which extraterritorial due diligence obligations are capable of meeting the purposes of international criminal law and, more specifically, of eventually replacing the inclusion of ecocide as an international crime.

International criminal law is characterized by constituting a response by the international community to behaviors that most seriously affect its fundamental values.<sup>36</sup> It protects the peace, security and well-being of humanity against behaviors bearing an 'internationalizing element', that is, a context of systematic and massive exercise of violence.<sup>37</sup> International crimes thus differ from transnational crimes<sup>38</sup>, because on the latter there is no direct liability under international law, nor can states use universal principle of jurisdiction to prosecute the offenders. However, transnational crimes affect the interests of more than one state, presenting a transnational element that justifies the existence of more than one jurisdiction over them and cooperation agreements between the affected states.<sup>39</sup>

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<sup>35</sup> Resolution of the European Parliament 2020/2129(INL) with recommendations to the Commission on corporate due diligence and corporate accountability [2021].

<sup>36</sup> Héctor Olasolo Alonso, *Derecho Internacional Penal, Justicia Transicional y Delitos Transnacionales: Dilemas Políticos y Normativos* (Tirant lo Blanch 2017) 50.

<sup>37</sup> Gerhard Werle and Florian Jessberger, *Tratado de Derecho Penal Internacional* (3 edn, Tirant lo Blanch 2017) 88-91.

<sup>38</sup> The so-called *treaty crimes* refer to 'provisions of national Law which have their origin in an obligation imposed by an international treaty'. Their purpose is 'effectively fighting and prosecuting cross border criminality'. See, with multiple quotations, Helmut Satzger, *International and European Criminal Law* (C.H. Beck, Hart and Nomos 2012) 184.

<sup>39</sup> Robert J. Currie and Joseph Rickhof, *International & Transnational Criminal Law* (2nd edn, Irwin Law 2013) 19-22. Also on this distinction, see Robert Cryer, 'International Criminal Law' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2018) 521-522.

As well as in national legal systems, international criminal law also accepts as one of the functions of the penalty the idea of (I) *retribution*. This fact became even clearer after the sentences of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). For example, in the case *Prosecutor v. Aleksovski*, it was understood that by retribution one must understand as indignation by the international community with the facts.<sup>40</sup>

However, it is interesting to highlight that one of the alleged positive aspects of the retributive purpose, which is the proportionality between the crime and the punishment, is sometimes contested in international criminal law. Therefore, in face of major atrocities, would it be feasible to apply proportionate measures?<sup>41</sup>

Despite some criticism related to its utilitarian character, (II) *deterrence* is also one of the most consolidated purposes of the punishment. Several precedents from the ICTY, such as *Prosecutor v. Erdemovic*, *Prosecutor v. Tadic* and *Prosecutor v. Furundzija*, expressly mentions it. Besides that, the Preamble of the Rome Statute clearly foresees that one of its purposes is the prevention of international crimes.<sup>42</sup>

The application of negative and positive special preventions (incapacitation and rehabilitation) in the context of international crimes faces some difficulties. Even if recognizing that the prosecution of international crimes has a general deterrent effect, it is important to point out that due to the unique characteristics of international crimes, and their perpetrators, the resocialization may be less accentuated. That is, criminal acts may have been committed in accordance with the system in which they are inserted, demanding not only punishment of the perpetrator, but also an institutional reform.<sup>43</sup> Against these critics, Werle and Jessberger point out that this argument ends up disregarding the possibility of personal continuation in state institutions after an eventual political transition, which may include putting themselves at the service of other regimes that violate human rights, which should be avoided.<sup>44</sup>

In any case, what seems clear to us is that both retributive and preventive ideals undergo a certain re-signification when analysed from the point of view of international criminal law. As pointed by Ambos, 'the tribunals do not seem to understand the importance of retribution and deterrence as a pure demand of the international community for revenge

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<sup>40</sup> Carlos Eduardo Adriano Japiassú, *Direito Penal Internacional* (Editora Tirant lo Blanch 2019) 27-30. See also *Prosecutor v. Zlatko Aleksovski* [2000] ICTY IT-95-14/1-A [185] and William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) 555ff.

<sup>41</sup> About this discussion, see Japiassú (n 40) 29ff.

<sup>42</sup> Ibid 31ff. See also *Prosecutor v. Drazen Erdemovic* [1996] ICTY IT-96-22-T [58], *Prosecutor v. Duško Tadic* [2000] ICTY IT-94-1-A and IT-94-1-A [48] and *Prosecutor v. Anto Furundzija* [1998] ICTY IT-95-17/1-T [288].

<sup>43</sup> For a comprehensive analysis of this issue, see Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (OUP 2013) 68-70 and Naomi Roht-Arriaza, 'Punishment, Redress, and Pardon: Theoretical and Psychological Approaches' in Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (OUP 1995) 14ff. See also Japiassú (n 39) 33-34.

<sup>44</sup> Werle and Jessberger (n 37) 96.

but rather as an expression of its determination not to leave these crimes unpunished'<sup>45</sup>. According to the author, this can demonstrate a certain proximity to an 'integrative prevention'. In fact, due to the limitations faced by traditional theories in this scope, he sees as more convincing those broader and more holistic perspectives that seek to establish and consolidate a legal order of common values, reaching didactic and educational functions<sup>46</sup>.

These didactic and educational purposes could be inserted in a broader finality, which is the (III) *communication between the agents, victims and society*, to understand the nature and circumstances of the crime. However, one possible objection to this goal is pointed by Japiassú, who explains that international criminal law is not a part of the community which it aims to educate and communicate with. Because of that, it would not be able to achieve it.<sup>47</sup>

Despite the alleged difficulties on their effective participation on the trials,<sup>48</sup> (IV) *providing justice for the victims* is also an important function of the international criminal law sanctions. Even though it is undeniably a hard task for the Court, it is expressly determined to go 'beyond mere imprisonment or pecuniary sanctions, to 'make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'.<sup>49</sup>

Some might also say that international trials are an important mechanism of (V) *promoting the historical record of the event*, that is, of assisting the creation of the historical narrative of the facts. As explained by Werle and Jessberger, since those directly involved in repressive systems tend to distort the truth about human rights violations that occurred in a given period of time, the judicial investigation of these facts and the consequent convictions of those responsible can be effective means to contradict the denials presented by them and represent an official recognition of the facts and suffering experienced by the victims<sup>50</sup>.

According to Japiassú, even though this purpose was already pursued by some precedents of international courts<sup>51</sup>, there are doubts about whether a trial for international crimes would be the appropriate occasion to seek the historical record of periods marked by great political differences, especially if we consider that the

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<sup>45</sup> Ambos (n 43) 70.

<sup>46</sup> Ibid 70-71. See also Werle and Jessberger (n 37) 94-95.

<sup>47</sup> Japiassú (n 40) 34-35.

<sup>48</sup> Ibid 35-36.

<sup>49</sup> Ambos (n 43) 72 and Article 75 (2) ICC Statute. For a comprehensive analysis on the victim reparation issue, see M. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Martinus Nijhoff Publishers 2013) 692ff.

<sup>50</sup> Werle and Jessberger (n 37) 96.

<sup>51</sup> See, for example, *Prosecutor v. Krstić* [2004] ICTY IT-98-33-A.

contextual element in which the conducts were practiced will not always be effectively understood in the context of a criminal judgment<sup>52</sup>.

In any case, this goal is directly related to another that is sometimes invoked in international criminal trials, especially in transitional justice contexts: (VI) *the reconciliation*. Briefly, transitional justice encompasses mechanisms that seek to promote justice in societies marked by social, political or ethnical conflicts. Therefore, they presuppose a project of reconciliation between the actors and groups involved in order to implement the ideals of justice and peace<sup>53</sup>. Seeking to materialize the ideal of *no peace without justice*, Latin American experience seems to make clear the inclusion of reconciliation as one of the possible purposes to be pursued by punishment.<sup>54</sup>

Regardless of the numerous controversies about which of these purposes should in fact be pursued by international criminal law, we must ask ourselves whether any of them can, in fact, be achieved by imposing extraterritorial due diligence obligations on environmental matters.

In our view, the purpose of prevention can indeed be enhanced. The fact that major environmental crimes are generally committed in the scope of big transnational corporations certainly increases the difficulties on preventing, investigating and prosecuting these offences.<sup>55</sup> To deal with these cases, an undeniable need for integration

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<sup>52</sup> Japiassú (n 40) 36. Even because, 'a situation of conflict and/or authoritarian regimes cannot be marked by simplification and a linear narrative in order to enable a better comprehension of it, at risk of not offering real solutions to it' (translated by the Authors). See Renata da Silva Athayde Barbosa, 'Anistia no Estado de Direito: entre Justiça de Transição e Direito Penal Internacional' in Francisco Figueroa, Eduardo Saad-Diniz, Manuela Parra, Ayelén Trindade and Hernán Kleiman (eds), *RIDP libri 04: Alternativas al Sistema de Justicia Criminal Latinoamericano* (Maklu 2019) 246.

<sup>53</sup> Marcos Alexandre Coelho Zilli and Maria Thereza Rocha de Assis Moura, (2008) 'A Justiça de Transição na América Latina', 16(187) Boletim IBCCRIM 10, 10, Kai Ambos, 'El Marco Jurídico de la Justicia de Transición' in Kai Ambos, Ezequiel Malarino and Gisela Elsner (eds), *Justicia de Transición: Informes de América Latina, Alemania y España* (Konrad-Adenauer-Stiftung 2009) 23-28, UN Security Council, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of The Secretary-General' (2004), 8 <<https://digitallibrary.un.org/record/527647>> accessed 27 July 2021. According to Miller, 'Transitional justice as both literature and practice offers more than just a set of neutral instruments for the achievement of the goals of justice, truth and reconciliation. It also serves to narrate conflict and peace, voice and silence, tolerable structural violence and intolerable physical atrocity. Ultimately, transitional justice is a definitional project, explaining who has been silenced by delineating who may now speak, describing past violence by deciding what and who will be punished and radically differentiating a new regime in relation to what actions were taken by its predecessor'. See Zinaida Miller, 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice', (2008) 2(3) The International Journal of Transitional Justice 266, 266-267 <<https://doi.org/10.1093/ijtj/ijn022>> accessed 27 July 2021.

<sup>54</sup> Japiassú (n 40) 36-38.

<sup>55</sup> For a detailed analysis on the relationship between corporations and environmental crimes, with an especial focus on the relevance that could be achieved by compliance programs, see Leonardo Simões Agapito, Matheus de Alencar e Miranda e Túlio Felipe Xavier Januário, 'A Ganância Econômica e os Crimes Ambientais: a Sustentabilidade como Parâmetro para o Risco Permitido no Direito Penal Ambiental' in Francisco Figueroa, Eduardo Saad-Diniz, Manuela Parra, Ayelén Trindade and Hernán Kleiman (eds), *RIDP libri 04: Alternativas al Sistema de Justicia Criminal Latinoamericano* (Maklu 2019) 311ff.

between rules and authorities of different countries is observed. That being said, the collaboration of private entities themselves, with their financial and technological resources, can be of great value in preventing environmental damage.

Furthermore, if the host state has no interest or conditions to effectively prevent or prosecute environmental crimes, compliance and due diligence imposed by the home state may be one of the only tools to enforce them. Even because, as pointed by Katharina Haider, as promising as the commitments made in codes of conduct may sound, they run the risk of remaining a 'blunt sword' if they rely solely on corporate goodwill.<sup>56</sup>

In addition, the risk of contract terminations and loss of business partners due to environmental crimes could have a substantial *deterrence* effect, especially in terms of *incapacitation* (although not to the same extent and in the same terms as incarceration) and *rehabilitation*, since changes in the supplier's culture will be required.

Finally, if we consider an eventual imposition of publication of parts from the due diligence reports, these mechanisms could perhaps effectively collaborate with the historical reconstruction of the facts.

However, there are still many uncertainties and deficiencies to be addressed. Firstly, it seems very unlikely that we will be able to construct a linkage between due diligence and the purpose of *retribution*, such as the one pursued by the penalties applied by the ICC.<sup>57</sup> This issue has already been pointed out by Billis, who raised the question whether informal enforcement procedures (such as DPA's and NPA's) could achieve the symbolic function of criminal law to the same extent. The Author responds negatively to this question, especially considering the way in which these agreements are usually made, which is 'behind closed doors and between parties that can afford such a costly 'bail-out''. According to him, the fact of corporations cannot be jailed and their individual members are generally not affected financially or otherwise by the penalties, highlights the importance of symbolism and general prevention, which are put in the background by these agreements.<sup>58</sup>

In addition, do the legislations secure means to guarantee that the purposes of compliance measures, internal investigations, due diligence instruments and similar mechanisms have the unique purpose of 'corporate restabilization, smooth cooperation with the authorities, and compliance with the law, and will not be manipulated to

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<sup>56</sup> Katharina Haider, *Haftung von transnationalen Unternehmen und Staaten für Menschenrechtsverletzungen: Eine Untersuchung der Rechtsschutzmöglichkeiten am Maßstab des Völkerrechts, des Internationalen Zivilverfahrensrechts, des (Internationalen) Privatrechts, des Staatshaftungsrechts und des Strafrechts* (Nomos 2019) 41.

<sup>57</sup> Of course we cannot disregard the fact that the penalties applied in environmental matters, especially those imposed on large companies, also have their ability to fulfill their retributive and preventive purposes quite questioned. See Anna Carolina Canestraro and Túlio Felipe Xavier Januário, 'Acordo de Não Persecução Penal como Instrumento de Promoção de Programas de Compliance?' (2021) 29(344) *Boletim IBCCRIM* 23, 24-25.

<sup>58</sup> Emmanouil Billis, 'On the Limits of Informal Enforcement' (2019) 90(2) *RIDP* 369, 384.

become another 'crime-laundering tool'?', as questioned by Billis?<sup>59</sup> It seems to us that a negative answer to this question is inevitable, at least in most legal systems. Therefore, *leading by example* ends up being fundamental. Corporations with greater capacity and financial resources must develop and scientifically evaluate the standards of ethical behavior in the supply chain and in the contractual networks that they establish.<sup>60</sup>

Furthermore, even though the collaboration from the private parties has the potential to help circumventing institutional cooperation problems<sup>61</sup>, a practical difficulty that is raised is related to the technical feasibility of conducting research related to due diligence. Would the legal systems of the host countries, with all the problems already pointed out, have reliable databases that allow the investigations? The response to this query will obviously vary according to the host country, but we can promptly infer that, in many cases, the available data will not be sufficient.

Finally, even though environmental damages are consubstantiated generally in actions and omissions that affect the environment per se, we shall not forget that these crimes affect also mankind (abstractly speaking) and local populations. That being said, we must wonder: in these informal enforcement mechanisms, is there space for compensation, restorative justice and other instruments orientated to the people affected by environmental disasters?

Presently, it seems to us that the analysed legislations do not allow this possibility, which does not necessarily mean that they are impossible to be achieved. As pointed out by Renata Barbosa, in case of environmental crimes, some exemplary forms of reparations can be quoted, such as: (I) *restitution*, as the restoration of a forest; (II) *compensation*, in cases where restoration is not possible (including the affected population as beneficiaries); (III) *satisfaction*, with public apologies, acknowledgement of the facts and acceptance of responsibilities and (IV) *guarantees of non-repetition*, such as demonstrations of concrete changes on the corporation policies.<sup>62</sup>

With these possibilities in mind and considering that populations affected by environmental crimes are often and unduly obliterated in these cases, we must wonder about how to integrate compliance and due diligence with compensation (not just financial<sup>63</sup>) of the victims, what would make it feasible to reach also the purposes of

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<sup>59</sup> Ibid 375.

<sup>60</sup> See Eduardo Saad-Diniz, *Ética Negocial e Compliance: Entre a Educação Executiva e a Interpretação Judicial* (Thomson Reuters Brasil 2019) 88.

<sup>61</sup> We cannot forget that in the case of multinational and transnational companies, there might exist multiple regulatory and enforcement authorities who claim jurisdiction to the case, creating a very complex landscape 'not designed to guarantee a harmonious institutional cooperation and a clear definition of the aims, scope, methods, and limits of (informal) crime control'. See Billis (n 58) 376.

<sup>62</sup> Renata da Silva Athayde Barbosa, 'Conflict and Environmental Harm: is there Enough (Criminal) Protection in Transitional Measures?' (2020) 91(1) RIDP 53, 59.

<sup>63</sup> As Eduardo Saad-Diniz explains, reparation as a simple financial compensation is unsatisfactory. 'Reparation, beyond financial compensation, must address a broader, deeper and more humanistic historical sense; reparation is reckoning, and, ultimately, the experimentation of new strategies for the

*communication between the agents, victims and society, as well as reconciliation and justice for the victims.*

## 5 Conclusion

As demonstrated throughout the article, the relocation of environmentally dangerous companies, especially to countries where regulatory standards for environmental protection are less stringent, is, unfortunately, a common phenomenon today, which represents a serious risk to the environment.

For this reason, the inclusion of 'ecocide' as a new international crime is a solution that has been increasingly discussed and defended by some scholars. However, despite being very defensible for numerous reasons, this proposal also encounters undeniable obstacles, such as the difficulties in defining what we should understand by 'ecocide', the lack of criminal liability of legal entities in international law and the strong political objections faced by supporters of the creation of this crime. And even if we consider the possibility of approving a new treaty and creating a new court with specific jurisdiction for these crimes, this would be a solution that would require an excessive amount of time.

That being said and without disregarding the importance of including ecocide as an international crime, the question we sought to answer was whether and to what extent extraterritorial due diligence obligations could be considered a solution, albeit partial, but more immediate, for transnational damage prevention.

As noted in topic 3, extraterritorial due diligence obligations are not only being encouraged by OECD and UN Guidelines and EU normative, but also beginning to be imposed by domestic legislations in some countries, such as France and the Netherlands.

These obligations have major potential to help prevent extraterritorial environmental damages, either because of the greater technical and financial capacity of multinational companies to promote the necessary diligences in this complex sector, or because of the changes in the culture of the supply chain that they can generate.

However, it is certain that there are still several risks, difficulties and insufficiencies in these procedures, which still require further reflection and must be overcome so that they fully reach their goals.

For this reason and in conclusion, it seems to us that extraterritorial due diligence obligations have the potential to be an important mechanism in the 'toolbox' of environmental crimes prevention. However, they are not enough, since they do not fulfil all the expected purposes imposed in the context of international crimes, and we are far from solving some of their remaining deficiencies.

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fulfillment of historical memory' (translated by the authors). See: Eduardo Saad-Diniz, 'Justiça de Transição Corporativa: a Nova Geração de Estudos Transicionais' (2020) 28(167) RBCC 71, 103-104.

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**Renata Barbosa** is Researcher and lecturer at Maastricht University, The Netherlands, and member of the AIDP Young Penalists Committee.

**Francesco Mazzacupa** is Researcher in Criminal Law at the University of Parma, Italy, and President of the AIDP Young Penalists Committee.

**Megumi Ochi** is Associate Professor at the College of International Relations and the Graduate School of International Relations of Ritsumeikan University in Kyoto, Japan, and member of the AIDP Young Penalists Committee.

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