

PARTICIPATION IN SERIOUS CRIMES IN INTERNATIONAL LAW:  
LESSONS FROM THE UNITED NATIONS' AD HOC TRIBUNALS

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## DECLARATION BY CANDIDATE

I, Anzanilufuno Munyai, declare that the dissertation is my original research work and that all sources I have used have been indicated and acknowledged by means of a complete reference.

.....

Anzanilufuno Munyai

.....

Date

## DECLARATION BY SUPERVISOR

I, Dr Avitus Agbor, hereby declare that this dissertation by Anzanilufuno Munyai for the degree Masters of Laws in Public Law be accepted for examination.

.....

Dr Avitus Agbor

.....

Date

## DEDICATION

*“When I wanted to climb higher you became my ladder. When I wanted some support you both came together. When I wanted to fly high you became my hot air balloon. When everything felt cursed you appeared as my boon. I rested on your shoulders when I wanted a better view. To parents who’ve done everything, I want to say thank you”*

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## LIST OF ABBREVIATIONS

ECCC	Extraordinary Chambers in the Courts of Cambodia
ICC	International Criminal Court.
ICTR	International Criminal Tribunal for Rwanda.
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
JCE	Joint Criminal Enterprise
SCSL	Special Court of Sierra Leone
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
WWII	Second World War



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Draft Code of Offences against Peace and Security of Mankind, 1954

Rome Statute of the International Criminal Court

Statute of the Extraordinary Chambers in the Courts of Cambodia

Statute of the International Criminal Tribunal for the former Yugoslavia

Statute of the International Criminal Tribunal of Rwanda

Statute of the Iraqi Special Tribunal

Statute of the Special Court for Lebanon

Statute of the Special Court for Sierra Leone

## ABSTRACT

In criminal law, the imposition of individual criminal responsibility is based on the premise that such an individual would have, through some conduct (a positive act or an omission) brought about a result which is prohibited by the criminal law. In other words, such an individual would have committed a crime. Couched in legal parlance as participation, an individual's role in the commission of a crime may take place prior to, during, or after, the commission of the crime. Different legal systems have developed a series of principles on how to categorise the different kinds of participation for which responsibility would be imposed and a sentence if convicted. However, in cases of a multiplicity of individuals who see to the planning and ordering of, or preparation for, the commission of crimes, it becomes a little bit complicated: how can responsibility be assigned to the different participants so that each and every individual who partook, in some form, is held accountable.

While domestic legal systems seem to have overcome such a challenge in the attribution of criminal responsibility when there are multiple parties to a crime, international criminal law is still uncertain on how to surmount this legal conundrum. Even though the modes of participation that exist in domestic legal systems have been recognized and applied by international tribunals and courts, answers are still being sought as to what really can be considered participation in international criminal justice, and what is the exact scope of the applicability of the rules of participation. The fact that mass atrocities were perpetrated by numerous individuals, yet, an established tribunal or court limited itself to the masterminds or remote actors (those who planned, prepared or ordered the commission of these crimes) does not mean that they are the only individuals who bear responsibility.

Beyond the International Military Tribunal for Nuremberg, two situations resulting in the establishment of two United Nations *ad hoc* Tribunals occurred in the former Yugoslavia and Rwanda. The Statutes of these *ad hoc* Tribunals, in addition to stipulating the crimes over which they would have jurisdiction, spelt out the modes of participation for which individual criminal responsibility would be imposed. In the years that have followed, the Trial and Appeal Chambers have construed these modes of participation, identifying and building the differentiating features between them. At times, the Trial and Appeal Chambers approached the situations by applying the doctrine of joint criminal enterprise in order to properly grasp the historical landscape within which different actors, at various times, played significant roles towards the mayhem that befell these States.

As these *ad hoc* Tribunals are gradually winding down, it becomes imperative to identify and evaluate the soundness of the distinguishing principles, especially when it comes to participation in the perpetration of serious crimes in international law. It is hoped that this dissertation will examine the jurisprudence of the Trial and Appeal Chambers, and will ultimately serve as a useful guide to international criminal law scholars and practitioners as they borrow from this jurisprudence for future use.

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Introduction

This chapter sets out the conceptual framework of this dissertation. It gives the background to the study, the definitions of recurrent concepts, central research questions, the aim and objectives of the research, a review of the existing literature on the subject, the methodology to be used in finding answers to the central questions, the scope, limitations and structure of the dissertation.

#### 1.2 Background of the Study

Even though a relatively newer area of law, international criminal law and domestic criminal law share some common features. One of these features is in the modes of participation in the commission of crimes.

Generally speaking, in criminal law, participation may take place prior to, during, or after, the commission of a crime.<sup>1</sup> Recognised traditional modes of participation include ordering, planning, soliciting, instigating, committing, and aiding and abetting. In some legal systems, the mode of participation as well as the stage of participation would be key factors in determining the way to characterise the defendant: principal, co-offender, accessory, aider and abettor, joint criminal enterprise, principal in the first degree, principal in the second degree, etc.

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<sup>1</sup> See generally David Ormerod and Karl Laird, *Smith and Hogan's Text, Cases, and Materials on Criminal Law* (11<sup>th</sup> edn, OUP 2014) 214-300; CR Snyman, *Criminal Law* (4th edn, LexisNexis Butterworths 2007) 253-78; and Gerhard Kemp *et al*, *Criminal Law in South Africa* (OUP 2012) 231-263.



Participation prior to the commission of a crime could take the form of ordering, planning, soliciting, procuring or inciting its commission.<sup>2</sup> With regards to participation at this stage, very little complications arise. Participation during the commission of the crime would render the participant as a principal offender,<sup>3</sup> a joint or co-offender,<sup>4</sup> or an aider and abettor.<sup>5</sup> These three categories of participants need some elaboration: a principal offender is the one who, with the requisite *mens rea* for a specific crime, would commit the material elements of that crime.<sup>6</sup> In the offence of murder, he is the individual who, with the intent to bring about the death of the victim, pulls the trigger of the gun resulting in the victim's death. In the crime of burglary, he is the person who, with intent to enter into a premises unlawfully, gains access thereto through breaking. In the crime of rape, he is the person who, with the intent to have sexual intercourse without the consent of the victim, has sexual intercourse with him or her. The key criteria here are the commission of the material elements (*actus reus*) of the specific crime with the requisite *mens rea*.<sup>7</sup> A joint offender is an individual who, with the requisite *mens rea* for a particular crime, commits with the principal offender any or all of the material elements of that crime.<sup>8</sup> There is the implicit element of an agreement between the principal offender and the joint or co-offender as they both share the same criminal purpose: that is, with regards to accomplishing their intent.<sup>9</sup> In the offence of murder, he is the individual who, with intent to cause the death of the victim, assists the principal offender by tying the victim's hands while the principal offender inflicts the fatal injury. In the offence of burglary, he is the individual who breaks the door or window for the other participants to gain access into the premises. In the offence of rape, he is the individual who,

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<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ormerod and Laird (n 1) 217.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

knowing that the victim does not consent to the act of sexual intercourse, binds the victim's hands and mouth with a duct tape while the principal offender penetrates her vagina. The last category of participation that takes place during the commission of a crime is aiding and abetting. Roughly construed, it simply means rendering assistance to the principal and joint offenders.<sup>10</sup> In the offence of murder, he is the individual who is on the lookout while the victim is killed by the principal or joint offenders. In burglary, he is the individual who drives the principal and joint offenders to and from the scene of the crime. The key distinguishing feature of aiding and abetting is that there is no commission of any of the material elements of the crime.<sup>11</sup> In other words, such participation is limited to aiding and abetting only. If, for example, the individual were to assist in the breaking of the door, or assault on the victim in order to render him helpless so that a fatal wound is inflicted, or she is raped, then, such participation crosses the border of aiding and abetting. The commission of any of the material elements of these crimes alters the participation from aiding and abetting to principal offender or joint offender.<sup>12</sup>

Participation after the commission of an offence usually takes the form of rendering assistance to the perpetrator like sheltering, concealment of the proceeds of the crime, or facilitation of escape. The jurisprudential jargon assigned to this mode of participation at this stage is accessory after the fact.<sup>13</sup>

In addition to these generally acceptable principles of participation in domestic criminal law, there is participation through a joint criminal enterprise. A joint criminal enterprise refers simply to the commission of a crime or series of crimes by a multiplicity of persons.<sup>14</sup> Also referred to as common purpose, domestic legal systems allocate responsibility

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<sup>10</sup> See generally academic views on this, corroborated by case-law discussed by leading experts on this: Ormerod and Laird (n 1) 222-24; Kemp *et al* (n 1) 232-50.

<sup>11</sup> Ibid.

<sup>12</sup> Ormerod and Laird (n 1) 222-24.

<sup>13</sup> Snyman (n 1) 274-78; Kemp *et al* (n 1) 249-51.

<sup>14</sup> Ormerod and Laird (n 1) 256-86; Snyman (n 1) 260-68; Kemp *et al* (n 1) 234-45.

to persons who, with a common purpose being the commission of crimes, they play different roles towards the fulfilment of this objective. In such cases, specific principles have been developed on the allocation of criminal responsibility. Treated like the law of agency, every member acts as a representative of the other. In fact, in cases of joint criminal enterprise, criminal responsibility is shared and not divided.<sup>15</sup>

In some instances, participation in the commission of a crime does not require, or is not limited to, a positive act. In such circumstances, mostly where there is a duty to act, the failure to act, leading to the commission of a crime, would lead to the imposition of criminal responsibility. In legal parlance, this is referred to as participation through omission. The foregoing paragraphs are a compendious stipulation of what constitute participation in domestic legal systems.

Given this background, international criminal law has not been so different. In fact, a perusal of participation in international criminal law would reveal that there is plenty of resemblance in the modes of participation, and at times, tribunals have consulted with the different jurisdictions just to comprehend the meaning of a particular mode of participation. For example, the Trial Chamber in the case of *The Prosecutor v Jean-Paul Akayesu*<sup>16</sup> consulted Rwandan jurisprudence in order to properly define some of the modes of participation contained in the Statute of the ICTR.<sup>17</sup>

At the inception of international criminal justice in 1945, the Allied Powers who had crafted the Charter of the International Military Tribunal (IMT), Nuremberg, stipulated the modes of participation. The Charter of the IMT, Nuremberg, stipulated as follows:

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.<sup>18</sup>

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<sup>15</sup> Ibid.

<sup>16</sup> *The Prosecutor v Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, T. Ch. I, 22 September 1998.

<sup>17</sup> *Akayesu* (n 16) paras 480-86, 496.

<sup>18</sup> Charter of the IMT, Nuremberg, Article 6(c).

About a year later, the same sequence of words was regurgitated in the Charter of the International Military Tribunal for the Far East (IMTFE), Tokyo. Participation was provided for in the following words:

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.<sup>19</sup>

Significant developments occurred in the aftermath of the Nuremberg trials that would affect the substantive content of serious crimes in international law as well as the modes of participation in these crimes. For example, the International Law Commission (ILC) which developed two important instruments (Draft Codes of Offences against the Peace and Security of Mankind in 1954 and Draft Code of Crimes against the Peace and Security of Mankind in 1996).<sup>20</sup> These instruments detailed what would be considered to be serious crimes against the peace and security of mankind, and the modes of participation therein. Article 2 of the 1954 Draft Code of Offences against the Peace and Security of Mankind defined participation in the following words:

- (3) The preparation...
- (4) The organization, or the encouragement of the organization, ...for incursions into the territory of another State, ..., as well as direct participation in or support of such incursions.
- (5) The undertaking or encouragement by the authorities of a State ...
- (6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or ... to carry out terrorist acts in another State....
- (11) Inhuman acts...committed...by the authorities of a State or by... individuals acting at the instigation or with the toleration of such authorities.

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<sup>19</sup> Charter of the IMTFE, Tokyo, Article 5(c).

<sup>20</sup> The International Law Commission is a body that was established by the United Nations (UN) for the specific purpose of promoting 'the progressive development of international law and its codification': UN General Assembly Resolution 174(II), UN GAOR, 2<sup>nd</sup> Session, 123<sup>rd</sup> Meeting, UN Doc. A/RES/174(II) of 21 November 1947. Per UN General Assembly Resolution 177(II), the International Law Commission was mandated to formulate 'the principles of international law' that were recognised in the Charter of the IMT, Nuremberg, and 'in the judgment of the Tribunal'. See the UN General Assembly Resolution 177(II), UN GAOR, 2<sup>nd</sup> Session, 123<sup>rd</sup> Meeting, UN Doc. A/RES/177(II) of 21 November 1947.

In 1996, the Draft Code of Crimes against the Peace and Security of Mankind outlined the different modes of participation in Article 2 as follows:

3. An individual shall be responsible for a crime...if that individual:
  - (a) Intentionally commits such a crime;
  - (b) Orders the commission of such a crime which in fact occurs or is attempted;
  - (c) Fails to prevent or repress the commission of such a crime...
  - (d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
  - (e) Directly participates in planning or conspiring to commit such a crime which in fact occurs;
  - (f) Directly and publicly incites another individual to commit such a crime which in fact occurs;
  - (g) Attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

Despite the prolonged travails of the International Law Commission, unfortunately, there was never an opportunity for any of these Draft Codes to be adopted by the United Nations General Assembly. As such, very little could be drawn from these works, except for the fact that there was growing recognition of these modes of participation in international criminal law.

The early 1990s witnessed a serious turn of events in international criminal justice. With the horrendous atrocities occurring in the former Yugoslavia and Rwanda respectively, the United Nations Security Council responded to these by creating two *ad hoc* international criminal tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>21</sup> and the International Criminal Tribunal for Rwanda (ICTR).<sup>22</sup> With jurisdiction over serious crimes in international law such as war crimes,<sup>23</sup> genocide,<sup>24</sup> and crimes against humanity,<sup>25</sup>

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<sup>21</sup> Statute of the International Criminal Tribunal for the former Yugoslavia (hereinafter referred to as the ICTY), annexed to United Nations Security Council Resolution 827, U. N. SCOR, 3217<sup>th</sup> meeting, U.N. Doc. S/RES/827 (1993).

<sup>22</sup> Statute of the International Criminal Tribunal for Rwanda (hereinafter referred to as the ICTR), annexed to United Nations Security Council Resolution 955, U. N. SCOR, 3453<sup>rd</sup> meeting, U.N. Doc. S/RES/955 (1994).

<sup>23</sup> See for example the Statute of the ICTY, Article 2, which defines the offence of Grave breaches of the Geneva Conventions of 1949, and Article 3 which speaks of Violations of the laws or customs of war, and Article 4 of the Statute of the ICTR (Violations of Article 3 common of the Geneva Conventions and of Additional Protocols II).

the Statutes of these two *ad hoc* tribunals spelt out the modes of participation which would lead to the imposition of criminal responsibility: first, the Statute of the ICTY which defined the imposition of criminal responsibility in the following words:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.<sup>26</sup>

The Statute of the ICTR, the second UN *ad hoc* Tribunal, introduced nothing new as it stipulated in Article 6(1) the imposition of criminal responsibility. Article 6(1) of the Statute of the ICTR is as follows:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

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<sup>24</sup> Statute of the ICTY, Article 4; Statute of the ICTR, Article 2.

<sup>25</sup> Statute of the ICTY, Article 5; Statute of the ICTR, Article 3.

<sup>26</sup> Statute of the ICTY, Article 7(1).

A common perusal of the Statutes of these two *ad hoc* tribunals would indicate that the recognised traditional modes of participation in the crimes over which the Tribunals have jurisdiction are similar: ordering, planning, instigating, committing, aiding and abetting at the planning, preparation or execution of a crime.

Participation, however, is not limited to these traditional modes which require some positive act (that is, taking part through planning, ordering, instigating, aiding and abetting). As mentioned earlier, at times, an individual may participate in the commission of a crime through failure to act.<sup>27</sup> The law specifically defines the circumstances in which criminal responsibility would be imposed in such circumstances.<sup>28</sup> Both Statutes of the *ad hoc* tribunals impose criminal responsibility for failure to act, and specify the circumstances in which an individual would incur criminal responsibility. Article 7(3) and 6(3) of the Statutes of the ICTY and ICTR respectively, state as follows:

The fact that any of the acts referred to in ... the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

To the ordinary reader, these words may be so easy to interpret. However, as evidenced by the jurisprudence of the *ad hoc* tribunals, these words would often be construed differently by the different Trial and Appeal Chambers of both the ICTY and ICTR.

Even though major developments have happened in the domain of international criminal justice leading to different agreements like the Rome Statute of the International Criminal Court (ICC)<sup>29</sup> and the Statute of the Special Court for Sierra Leone (SCSL),<sup>30</sup> the

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<sup>27</sup> See generally Omerod and Laird (n 1) 69-96.

<sup>28</sup> Ibid.

<sup>29</sup> Rome Statute of the International Criminal Court, U. N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 (1998) (hereinafter referred to as the Rome Statute of the ICC).

<sup>30</sup> Statute of the Special Court for Sierra Leone (hereinafter referred to as the SCSL), annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for

jurisprudence of the *ad hoc* tribunals on the interpretation of these modes of participation is invaluable. With the ICC, very few cases have been finalised. The jurisprudence is still to be developed and often, reference is made to the jurisprudence of the *ad hoc* tribunals. The situation is not so different with the Special Court for Sierra Leone.

This research focuses on the jurisprudence of the *ad hoc* tribunals on the construction of these modes of participation in the commission of serious crimes in international law. In doing so, excessive reliance is made on the case-law in which the relevant portions of the Statutes were interpreted.

### 1.3 Definition of Concepts and Other Key Words

In this paper, some concepts and key words may appear frequently. These shall be used to mean the following:

- a) The International Military Tribunal (IMT), Nuremberg: this refers to the Tribunal established by the Allied Powers ‘for the just and prompt trial and punishment of the major war criminals of the European Axis’.<sup>31</sup>
- b) Joint Criminal Enterprise (JCE): This is a mode of participation involving a multiplicity of persons with a common objective/purpose – the commission of a crime.<sup>32</sup> It is a mode of criminal participation that would attract the imposition of criminal responsibility when the established ingredients are proved. These ingredients include the existence of an agreement that is made by numerous persons for the commission of a crime or series of crimes. In international criminal law, some Trial Chambers of the ICTY and ICTR used the JCE as an approach towards the imposition of criminal responsibility for the crimes committed.

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Sierra Leone pursuant to United Nations Security Council Resolution 1315, U. N. SCOR, 4186<sup>th</sup> meeting, U.N. Doc. S/RES/1315 (2000).

<sup>31</sup> Charter of the IMT, Nuremberg, Article 1. The Charter of the IMT, Nuremberg, was attached to the London Agreement of 1943.

<sup>32</sup> See generally Ormerod and Laird (n 1) 256-86; Kemp *et al* (n 1) 236-45; Snyman (n 1) 260-68.



c) Planning entails an act or series of acts by individual(s) whereby they voluntarily design the commission of a crime, either at the preparatory or execution stage,<sup>33</sup> with the intention that the crime be perpetrated.

d) Aiding and abetting: This is a mode of participation by someone who carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a crime. For this to qualify as a mode of participation, the support rendered must have a substantial effect on the commission of the crime.<sup>34</sup>

e) Instigating: for an accused to be liable for instigation, he must have encouraged, urged, or otherwise prompted another, by positive act or culpable omission to commit a crime.<sup>35</sup> The jurisprudence of the *ad hoc* tribunals shows that the act(s) of instigation, like every other mode of participation, must have substantially contributed in the commission of a crime.<sup>36</sup>

f) Ordering: This exists where there is a hierarchical relationship (in other words, someone who has the necessary authority, either *de jure* or *de facto* authority) and the person in a superior position instructs the subordinate or someone in an inferior position to commit a crime.<sup>37</sup> This implies the existence of a formal superior-subordinate relationship. However, should the person giving orders not have the necessary authority, it must be proven that the

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<sup>33</sup> *The Prosecutor v Sylvester Gacumbitsi*, Judgment, Case No. ICTR-2001-64-T, T. Ch. III, 17 June 2004, Para 271.

<sup>34</sup> *The Prosecutor v Duško Tadić* Judgment, Case No. IT-94-1-A, Appeal Chamber, 15 July 1999, Para 229.

<sup>35</sup> Avitus A Agbor, *Instigation to Crimes Against Humanity: The Flawed Jurisprudence of the Trial and Appeal Chambers of the International Criminal Tribunal for Rwanda (ICTR)* (Martinus Nijhoff Publishers 2013) 73. *Akayesu* (n 16) Para 482; *The Prosecutor v Laurent Semanza*, Judgment, Case No. ICTR-97-20-T, T. Ch. III, 15 May 2003, Para 381; *The Prosecutor v Mikaeli Muhimana*, Judgment, Case No. ICTR-95-1B-T, T. Ch. III, 28 April 2005, Para 504; *The Prosecutor v Tharcisse Muvunyi*, Judgment, Case No. ICTR-00-55A-T, T.Ch. III, 11 February 2010 Para 464; and; *The Prosecutor v Ildéphonse Hategekimana*, Judgment, Case No. ICTR-00-55B-T, T.Ch. II, 6 December 2010, Para 644.

<sup>36</sup> See, for example, the following cases: *Hategekimana* (n 35) Para 644; *The Prosecutor v Callixte Kalimanzira*, Judgment, Case No. ICTR-05-88-T, T. Ch. III, 22 June 2009, Para 512; *The Prosecutor v Juvénal Kajelijeli*, Judgment, Case No. ICTR-96-44-T, T. Ch. II, 1 December 2003, Para 759; *Semanza* (n 35) Para 379; *The Prosecutor v Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Judgement, Case No. ICTR-96-17-T, T. Ch. I, 21 February 2003, Para 787; *Clément Kayishema and Obed Ruzindana v The Prosecutor*, Judgement, Case No. ICTR-95-1A, Appeal Chamber, 1 June 2001, Paras 186; *The Prosecutor v Ignace Bagilishema*, Judgement, Case No. ICTR-95-1-A, T. Ch. I, 7 June 2001, Paras 30, 33; *The Prosecutor v Alfred Musema*, Judgment, Case No. ICTR-96-13-T, T. Ch. I, 27 January 2003, Para 115; *The Prosecutor v Georges Rutaganda*, Judgment, Case No. ICTR-96-3-T, T. Ch. I, 6 December 1999, Para 43; *The Prosecutor v Clément Kayishema and Obed Ruzindana*, Judgment, Case No. ICTR-95-1-T, T. Ch. I, 21 May 1999, Paras 199 – 207; *Akayesu* (n 16) para 477.

<sup>37</sup> Roger O’Keefe, *International Criminal Law* (OUP 2015) 186.

words of such a person was perceived as authoritative.<sup>38</sup> The person in an authoritative position who issues an unlawful order may be liable where he intended the order to be carried out and having the knowledge that the order was unlawful or ‘manifestly illegal’.<sup>39</sup>

g) Committing: This mode of participation does not only include the physical perpetration of the crime but also engendering a culpable omission in violation of criminal law. This mode of participation requires the commission of the material elements of the crime and such commission of the material elements must be accompanied by the requisite *mens rea* (mental element).<sup>40</sup>

h) The International Criminal Court (ICC): This is established by the Rome Statute of the ICC – a permanent judicial institution with jurisdiction to try persons responsible for the commission of serious crimes in international law. These crimes include genocide,<sup>41</sup> crimes against humanity,<sup>42</sup> war crimes,<sup>43</sup> and the crime of aggression.<sup>44</sup> The Rome Statute of the ICC defines these crimes, and also stipulates the different modes of participation that would lead to the imposition of criminal responsibility.<sup>45</sup> The ICC, even though a treaty body, has different mechanisms for referral of situations to it.<sup>46</sup> These are major distinguishing features between the ICC and the UN *ad hoc* tribunals (which were established under Chapter VII powers of the United Nations Security Council).

i) Serious Crimes in International Law: This phraseology is used to refer to crimes whose gravity are of a level that offend the substantive content of treaty and customary

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<sup>38</sup> Mohamed Elewa Badar, ‘Participation in crimes in the Jurisprudence of the ICTY and ICTR’ in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011).

<sup>39</sup> Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell, *Cassese’s International Criminal Law* (3<sup>rd</sup> edn, Oxford University Press 2013) 204.

<sup>40</sup> Schabas and Bernaz (n 38).

<sup>41</sup> Rome Statute of the ICC, Article 6.

<sup>42</sup> Rome Statute of the ICC, Article 7.

<sup>43</sup> Rome Statute of the ICC, Article 8.

<sup>44</sup> Rome Statute of the ICC, Article 5(1)(d) and (2).

<sup>45</sup> Rome Statute of the ICC, Article 25.

<sup>46</sup> Rome Statute of the ICC, Article 13.

international law.<sup>47</sup> Over the decades, it has been construed to mean crimes like genocide, war crimes, crimes against humanity, torture. Serious crimes in international law are distinguishable from international crimes: international crimes require the existence of a cross-border element in terms of planning and commission of the crime, and examples include human trafficking, terrorism, piracy, drug trafficking, trans-border movement of hazardous wastes, corruption, trafficking in human organs, cyber criminality and counterfeit medicine.<sup>48</sup> Serious crimes in international law are rendered unique by their gravity and may well be committed within the borders of a State.

j) *Ad Hoc* Tribunals: These refer to the Tribunals established by the UN Security Council under Chapter VII powers to hold accountable persons who bear responsibility for the commission of serious crimes in the former Yugoslavia and Rwanda in 1992 and 1994 respectively. Even though the Statutes of these tribunals bear plenty of similarities, it is important to note that the definition of crimes against humanity as stipulated in the Statute of the ICTY was radically changed by the same body (UNSC) when it defined crimes against humanity in the Statute of the ICTR.

#### 1.4 Problem Statement

The Statutes of the UN ad hoc tribunals define different modes of participation. However, the interpretation of these Statutes by both the Trial and Appeal Chambers of the ICTR and ICTY show degrees of consistency, inconsistency, and incertitude. These modes of participation (planning, instigating, ordering, committing or otherwise aiding and abetting) in any of the crimes under the jurisdiction of the tribunal have been construed differently. At

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<sup>47</sup> Examples of serious crimes in international law include genocide, crimes against humanity, war crimes, slavery and torture. Except for crimes against humanity, most of these serious crimes are the subject of specific multilateral United Nations' treaties. It is important to note that even though the jurisprudential nomenclature is construed as explained above, the attitude of, and approach by, many legal scholars and practitioners is to use these phrases interchangeably, and often, the focus is to identify the meaning of them within a particular context.

<sup>48</sup> See generally Neil Boister, *An Introduction to Transnational Criminal Law* (OUP 2012).

times, this leads to inconsistency as well as uncertainty. The jurisprudence of the Trial and Appeal Chambers, in all modesty, appear to be problematic given the differences in construing these modes of participation. Instances of such inconsistencies and consistencies can only be identified if one peruses the judgments of the Trial and Appeal Chambers of these *ad hoc* Tribunals.

### 1.5 Aim and Objectives of the Study

Given the evolution of international criminal justice which has been marked by different formulations as to the modes of participation, the aim of this dissertation is to look into these different modes of participation as first stipulated in international instruments, and secondly, interpreted by the *ad hoc* tribunals. In addition to this overall aim, the dissertation hopes to achieve the following objectives:

- a) Look at the evolution of modes of participation in the commission of serious crimes in international law;
- b) Examine the jurisprudence of the *ad hoc* tribunals on the interpretation of these modes of participation.

In fulfilling these objectives, this research will find answers to a number of research questions.

### 1.6 Research Questions

In examining the evolution of modes of participation in the commission of serious crimes in international law as well as the contributions from the UN *ad hoc* tribunals, questions need to be answered, some of which are:

- a) How have the modes of participation in serious crimes in international law evolved over time (more specifically, from 1945 with the Charter of the IMT, Nuremberg, to 1994, with the Statute of the second UN *ad hoc* Tribunal, the ICTR)?
- b) The modes of participation that were stipulated in Articles 7 and 6 of the Statutes of the ICTY and ICTR respectively seem to bear plenty of resemblance in terms of their wording. Have both Tribunals been consistent in their interpretation of these modes of participation?
- c) Are there any instances of overlap between these modes of participation and the prescribed punishable acts of any of these crimes? For example, while Article 7(1) and 6(1) of the Statutes of the ICTY and ICTR speak of instigating the planning, preparation or execution of any of the crimes over which the Tribunal has jurisdiction, both Statutes make direct and public incitement to commit the crime of genocide punishable. Are these modes of participations exclusive to each other? How have the Tribunals interpreted such situations given the possibility of an incitement to commit genocide qualifying as instigation under Article 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively?

To find answers to these questions, it is important that I highlight the current literature published by legal scholars in this discipline. The importance of this is to show that my research is original as it seeks to find answers to these central questions.

## 1.7 Literature Review

In what would evolve to be the birthplace of international criminal justice, colossal developments have occurred, both in shaping the philosophy behind international criminal justice, the crimes that constitute serious crimes in international law and the modes of participation in the commission of serious crimes in international law.

Academics, however, have remained split on the legacy of the Nuremberg Tribunal. According to Professor Douglass Cassel, it was mankind's best response to its worst excesses.<sup>49</sup> On the other hand, Professor Makua Mutau opines as follows:

Nuremberg was a patchwork of political convenience, the arrogance of military victory over defeat, and the ascendancy of American, Anglo-Saxon hegemony over the globe ... Thus, Nuremberg can be seen as an orchestrated and highly manipulated forum intended... primarily to impress on the Nazi leadership who the victors were and to discredit them as individuals as well as their particular brand of the philosophy of racial supremacy.<sup>50</sup>

Over the decades, the global community has witnessed how the commission of horrendous crimes involves both formal and informal structures with the involvement of top cabinet personnel. There is usually a common design to bring about these crimes, and such a design is made part of the official policy of the state. It becomes a question of systematicity.

In Drumbl's view, international criminal law provides that individuals are to be responsible for mass crimes such as genocide and that this area of law and system of justice emerged at Nuremberg where it was accepted that the commission of international crimes was not by abstract entities, but 'crimes of men', and therefore, only the individuals who commit such crimes shall incur responsibility.<sup>51</sup>

According to Scharf, Grotian Moment is a term denoting a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance; usually during 'a period in world history that seems analogous at least to the end of European feudalism....'<sup>52</sup> The author points out that Nuremberg was a 'prototypical Grotian Moment', and in explaining this submission, he

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<sup>49</sup> Douglass W Cassel Jr, 'Judgment at Nuremberg: A Half-century Appraisal' (Cover Story), *The Christian Century*, 6 December 1995.

<sup>50</sup> Makau Mutua, 'From Nuremberg To The Rwanda Tribunal: Justice or Retribution' (2000) 6 *Buffalo Human Rights Law Review* 77, 79-82.

<sup>51</sup> Mark A. Drumbl, 'Collective Responsibility and Post Conflict Justice' in Tracy Isaacs & Richard Vernon (eds), *Accountability for Collective Wrongdoing* (Cambridge University Press 2011).

<sup>52</sup> Michael P. Scharf, 'Joint Criminal Enterprise, the Nuremberg Precedent, and the Concept of "Grotian Moment"' in Tracy Isaacs & Richard Vernon (eds), *Accountability for Collective Wrongdoing* (Cambridge University Press 2011) 123.

extensively lays out the events leading to the formation and significance of Nuremberg. He looks at the establishment of the Nazi Regime between 1933 and 1940, the invasion of countries such as Poland, Holland, Norway, and how the Allied Powers, after the Second World War ended, were faced with the challenge of deciding on what to do with the surviving Nazi leaders who were responsible for the atrocities at the time. In addition to this, Scharf is of the view that the Nuremberg judgment paved way for the prosecution of other German political, military leaders, businessmen, doctors and Jurists under the Allied Control Council No. 10.<sup>53</sup>

In the discussion on what constitutes a joint criminal enterprise, Scharf asserts that the principle of individual responsibility and punishment was recognised in Nuremberg as the ‘cornerstone of international criminal law’.<sup>54</sup> In respect to this, he submits that the judgment of the IMT, Nuremberg, does not make any reference to the doctrine of joint criminal enterprise but argues that on close analysis of the judgment, the latter reveals a concept analogous to the doctrine of joint criminal enterprise (also known as the ‘common purpose’ mode of liability).

Manacorda and Meloni address the problem of the establishment of individual criminal responsibility in the commission of serious crimes in international law.<sup>55</sup> With respect to criminal responsibility for high-level perpetrators, they contend that in order for international criminal justice to meet its goals, it must be centred on the minds and actions of individuals allegedly responsible for breaches of norms protecting the highest value of humanity. In addition, the parties who stand trial before criminal tribunals must be those who took decisions at the highest levels. This is based on the fact that the principle of command responsibility exists to hold superiors liable in the absence of their active involvement in the

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid 135.

<sup>55</sup> Stefano Manacorda and Chantal Meloni, ‘Indirect perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?’ (2011) 9 *Journal of International Criminal Justice* 159.

crimes committed by their subordinates. The authors identify two approaches (the Omar al-Bashir approach and the Milosevic approach) adopted by the international criminal justice system as practical efforts to define the imposition of criminal responsibility of high-level participants in the commission of serious crimes in international law.<sup>56</sup>

Osiel is of the view that the foremost question must be asked when prosecuting those of highest level or rank: 'On what basis may the acts of the lowliest subordinate be fairly ascribed to the most elevated superior, from whom they are so distant in space and time?'<sup>57</sup> Osiel argues that the challenge of prosecuting serious crimes involving mass atrocities is that prosecutors lack direct evidence that these atrocities were expressly ordered from above.<sup>58</sup> This is usually so because these officials have been careful not to have any record of their orders. Due to this challenge, the ICTY, for instance, has allowed itself to infer the existence of criminal commands from circumstantial facts only if no other inference were possible. International criminal justice has ensured that at least high-level perpetrators of serious crimes in international law be held liable for their participation, whether direct or indirect. This development can be seen in a number of international instruments on individual criminal responsibility for serious crimes under international law such as the Statutes of the ICTY and the ICC.<sup>59</sup>

Osiel further contends that there exist two doctrines which help both national courts and international tribunals in answering the question on 'how to tie the big fish to the smaller fry'.<sup>60</sup> In his view, these doctrines are, first, superior responsibility, and secondly, participation in a joint criminal enterprise. In his discussion, he goes further to examine some

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<sup>56</sup> The Omar al-Bashir approach emerges from ICC case-law, and focuses on indirect perpetration. It considers indirect participation as a sophisticated mode of participation. On the other hand, the Milosevic Approach focuses on the doctrine of joint criminal enterprise. This approach uses this doctrine as a tool to prosecute top level individual perpetrators through mutual attribution of acts among a plurality of persons acting in pursuance of a common plan despite the fact that these persons did not perform the *actus reus* of the crime.

<sup>57</sup> Mark Osiel, *'Making sense of Mass Atrocity'* (Cambridge University Press 2009) 16.

<sup>58</sup> Ibid 16.

<sup>59</sup> Ibid 16-17.

<sup>60</sup> Ibid 17.



complex incarnations of the problem regarding organisational crimes. He sees the commission of such serious crimes in international law as designed in a manner that the organisers ensure that no single individual satisfies all the elements of the crimes. The issue is that the division of labour might have been deliberately arranged in order to meet this end. Therefore, Osiel contends that in order to avoid such situations, ‘the law seeks a defensible way to link up the requisite elements of the offense to contributions by multiple participants, so that all may be held responsible for the resulting wrong’.<sup>61</sup> He further examines what the ICTY has done in answering the question of shared responsibility, particularly based on the fact that the Tribunal has made it too easy to convict defendants in a joint criminal enterprise as compared to superior responsibility.<sup>62</sup>

Oriel further argues that superior responsibility is a form of culpable omission by a superior leading to subordinates violating international criminal and humanitarian law.<sup>63</sup> On the other hand, Danner and Martinez are of the view that Articles 7(3) and 6(3) of the Statutes of the ICTY and ICTR respectively provide for a form of accessorial liability. According to these authors, any person who possesses command authority may be held responsible for crimes committed by his subordinates where, first, the superior failed to prevent the commission of the crimes, and secondly, the superior failed to punish the subordinates for the crimes committed by them.<sup>64</sup> In essence, this means that any person, whether as a civilian or military leader, may be liable for criminal acts of the subordinates where it is proven that such a leader had effective control over the subordinates (that is, the superior must have been in a position to exercise such control),<sup>65</sup> and the crime must have been committed (this is

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<sup>61</sup> Ibid 23-24.

<sup>62</sup> Ibid 29.

<sup>63</sup> Ibid 33-34.

<sup>64</sup> Allison Marston Danner and Jenny S. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law’ (2004) 93 *California Law Review* 75. Schabas and Bernaz (n 38).

specifically relevant where the superior failed to punish the subordinates).<sup>66</sup> Osiel entertains the view that control may mean that the superior chooses the subordinate(s) who will perform the criminal act(s), determines which offences the subordinate(s) will commit and the conditions thereof, or control might also mean that the superior chooses persons whom the subordinates will victimise.<sup>67</sup>

According to Cassese *et al* and Cryer *et al*, the civilian leader does not have to possess the same kind of control as that of a military superior. What is considered an important factor here is that there must have been a ‘similar *degree* of effective control’.<sup>68</sup> In the case of *The Prosecutor v Alfred Musema*,<sup>69</sup> the accused was indicted for directing armed individuals to attack the Tutsis. He was found to be individually criminally responsible under Article 6(1) together with Article 6(3) of the Statute of the ICTR in that the accused, instead of fulfilling his legal obligation to prevent the acts of his subordinates, failed to do so. This was construed by the Trial Chamber as abetting the commission of the crimes committed by his subordinates.<sup>70</sup>

In defining what constitutes an act, or acts, of planning as a mode of participation, Gallmwtzer and Klamberg, and Badar, are of the view that it implies that a person, or several persons, designed the preparatory and execution phases of a crime with the intention that the crime be committed.<sup>71</sup> In addition, Cryer *et al* contend that the act of planning must have

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<sup>66</sup> Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmschurst, *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup> edn Cambridge University Press 2014) 387.

<sup>67</sup> Osiel (n 57) 35.

<sup>68</sup> Emphasis added. Antonio Cassese, Guido Acquavia, Mary Fan, and Alex Whiting, *International Criminal Law: Cases and Commentary*. (Oxford University Press 2011) 437-438; Cryer *et al* (n 66) 387.

<sup>69</sup> *Musema*, (n 36).

<sup>70</sup> *Musema* (n 36) Para 894, 905, 914, 924; and Yael Ronen, ‘Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings’ (2010) 43 *Vanderbilt Journal of Transnational Law* 313, 328.

<sup>71</sup> Schabas and Bernaz (n 38); Reinhold Gallmwtzer and Mark Klamberg, ‘Individual Responsibility for Crimes under International Law: The UN Ad Hoc Tribunals and the International Criminal Court’ [2007] *Grotius Centre for International Legal Studies* 60.

substantial effect on the commission of the crime even though planning does not have to relate to the commission of a particular offence.<sup>72</sup>

Ohlin is of the view that the purpose of co-perpetration is for individuals to assist each other in the perpetration of a crime because the anticipated scale of victimisation may be so large that it is practically difficult, if not, impossible, for only one individual to perpetrate it. The notion of co-perpetration implies the participation of individuals in a criminal endeavour. These co-perpetrators share control over the operation of the endeavour. The role of a co-perpetrator is necessary, but not sufficient in completing the criminality.<sup>73</sup> However, when it comes to joint criminal enterprise liability, Cassese *et al* are of the view that co-perpetration based on joint control over the crime focuses on the criminal acts of the parties rather than their mental element. This mode of participation, according to Cassese *et al* and O’Keefe, stems from German legal theory and has been applied by the ICC when interpreting Article 25(3)(a) of the Rome Statute of the ICC. As the Pre-Trial Chamber explained in the case of *The Prosecutor v Thomas Lubanga Dyilo*,<sup>74</sup>

principals to a crime are not limited to those who physically carry out the objective element of the offence, but also include 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>75</sup>

Instigation is another mode of participation that is provided for in the Statutes of the ICTY and ICTR. Even though very little difficulty was experienced by the *ad hoc* tribunals on construing the meaning of instigation, the challenge with this mode of participation stems from the fact that one of the punishable acts of genocide (direct and public incitement to

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<sup>72</sup> Cryer *et al* (n 66) 379.

<sup>73</sup> Jens D. Ohlin, ‘The Co-Perpetrator Model of Joint Criminal Enterprise’ (2008) *Cornell Law Faculty Publications Paper* 775. See also Schabas and Bernaz (n 38).

<sup>74</sup> *The Prosecutor v Thomas Lubanga Dyilo*, Judgment, Case No. ICC-01/04-01/06, 14 March 2012.

<sup>75</sup> Cassese *et al* (n 39) 176; O’Keefe (n 37) 177.

commit genocide) is also stipulated in the both Statutes, especially under the crime of genocide.<sup>76</sup>

There has been some confusion on this, especially the jurisprudence of the ICTR. Instigation as a mode of participation under Article 6(1) has been construed to require that it must substantially contribute to the commission of the crime.<sup>77</sup> On the other hand, direct and public incitement to commit genocide under Article 2(3)(c) of the Statute of the ICTR has been construed to be an inchoate offence: in other words, responsibility would be imposed irrespective of whether such a call for genocide actually resulted in the commission of genocide.<sup>78</sup> Under Article 2(3)(c) of the Statute of the ICTR (very similar to the Statute of the ICTY), such incitement must be ‘direct’, and ‘public’.<sup>79</sup>

If construed correctly, then, it becomes obvious that there is the possibility of an overlap of these two provisions, that is, Article 6(1) and Article 2(3)(c) of the Statute of the ICTR. Although such instances of overlap were ignored by the Trial and Appeal Chambers of the ICTR, in the case of *The Prosecutor v Callixte Kalimanzira*,<sup>80</sup> the Trial Chamber developed a set of guidelines which I refer to as the ‘Kalimanzira Guideline’s:

- Incitement resulting in the commission of a genocidal act is punishable under the combination of Articles 2(3)(a) and 6(1) of the Statute as Genocide by way of Instigation;
- Incitement resulting in the commission of a genocidal act and which may be described as ‘direct’ and ‘public’ is punishable under either Article 2(3)(c) of the Statute as Direct and Public Incitement to Commit Genocide, or under the combination of Articles 2(3)(a) and 6(1) of the Statute as Genocide by way of Instigation;

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<sup>76</sup> Statute of the ICTY, Article 4(3)(c) and Statute of the ICTR, Article 2(3)(c).

<sup>77</sup> *Hategekimana* (n 35) Para 644; *Kalimanzira* (n 36) Para 512; *Kajelijeli* (n 36) Para 759; *Semanza* (n 35) Para 379; *Ntakirutimana et al* (n 36) Para 787; *Kayishema et al* (AC) (n 36) Paras 30, 33; *Musema* (n 36) para 115; *Rutaganda* (n 36) para 43; *Kayishema et al* (TC) (n 36) Paras 199 – 207; *Akayesu* (n 16) para 477.

<sup>78</sup> *Kalimanzira* (n 36) Para 515; *The Prosecutor v Simon Bikindi*, Judgment, Case No. ICTR-01-72, T. Ch. III, 2 December 2008, Para 419; *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v The Prosecutor*, Appeal Judgment, Case No. ICTR-99-52-A, Appeal Chamber, 28 November 2007, Paras 678 – 79; *Kajelijeli* (n 36), Para 855; *The Prosecutor v Eliézer Niyitegeka*, Judgment, Case No. ICTR-96-14-T, T. Ch. I, 16 May 2003, Para 431; *Musema* (n 36) Para 120; *Rutaganda* (n 36), Para 38; and, *Akayesu* (n 16), Para 562.

<sup>79</sup> Statute of the ICTR, Article 2(3)(c).

<sup>80</sup> *Kalimanzira* (n 36), Para 516.

- Incitement not resulting in the commission of a genocidal act but which may be described as ‘direct’ and ‘public’ is only punishable under Article 2(3)(c) of the Statute; and,
- Incitement not resulting in the commission of a genocidal act, and which may not be described as ‘direct’ and ‘public’, is not punishable under the Statute.

Agbor is of the view that the ‘Kalimanzira Guidelines’ are flawed.<sup>81</sup> He argues that under the ‘Kalimanzira Guidelines’, incitement is limited to the crime of genocide only. As a result, the possibility of an accused being charged with incitement to commit crimes against humanity is overlooked. He argues that Article 6(1) of the Statute of the ICTR provides that liability may be imposed where one assumes any of the five traditional modes of participation, at any of the stages (planning, preparation or execution) of any of the crimes which the ICTR has jurisdiction (genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II). Therefore, limiting incitement to the crime of genocide is not consonant with a strict and logical construction of Article 6(1) of the Statute of the ICTR.<sup>82</sup>

Furthermore, Agbor argues that the ‘Kalimanzira Guidelines’ make repeated use of the phrase ‘resulting in the commission of’. The use of this phrase, in his view, emanates from the ‘substantial contribution’ requirement established by the jurisprudence of the ICTR: the Trial and Appeal Chambers have construed the wording of Article 6(1) of the Statute of the ICTR to mean that for any individual to be criminally responsible under Article 6(1) of the Statute of the ICTR, it must be shown that the his or her mode of participation substantially contributed to the commission of any of the crimes over which the Tribunal has jurisdiction.<sup>83</sup> This, in Agbor’s view, is completely wrong because Article 6(1) of the Statute of the ICTR makes mention of different modes of participation that may result in any of the stages (planning, preparation or execution) of any of the crimes under the Tribunal’s

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<sup>81</sup> Agbor (n 35) 135-38

<sup>82</sup> Ibid 137.

<sup>83</sup> These crimes include genocide (Article 2), crimes against humanity (Article 3) and violations of the Geneva Conventions and of Additional Protocol (Article 4) of the Statute of the ICTR.

jurisdiction. He contends that the ‘substantial contribution’ requirement as seen in the jurisprudence of the ICTR requires that the conduct of an accused which must take the form of any of the modes of participation must substantially contribute to the commission of the crime.<sup>84</sup> To Agbor this requirement does not ‘square’ with the wording of Article 6(1) of the Statute of the ICTR.<sup>85</sup> This makes it wrong because Article 6(1) of the Statute of the ICTR is not limited to a specific crime but extends to all the crimes over which the ICTR has jurisdiction.

Under the Statutes of the UN *ad hoc* Tribunals, ordering is one of the modes of participation.<sup>86</sup> In O’Keefe’s view, ordering must be distinguished from the doctrine of command and other superior responsibility.<sup>87</sup> According to Bantekas and Nash, a superior issues an order to a subordinate irrespective of whether a formal relationship exists between the parties.<sup>88</sup> With reference to the relationship between the superior and the subordinate, Ambos makes reference to the judgment of the Trial Chamber in *The Prosecutor v Jean-Paul Akayesu* where it was held that ‘ordering implies a superior-subordinate relationship whereby the person in a position of authority uses it to convince (or coerce) another person to commit an offence.’<sup>89</sup> Acts that constitute ordering are not limited to military leaders. In Heller’s opinion, civilians could be held liable for ordering serious crimes in international law.<sup>90</sup> The order issued may require the subordinate to act or not to act (omission). In such cases, the superior must have the intent to have the order implemented. In interpreting Article 7(3) of the Statute of the ICTY, Bantekas and Nash are of the view that the superior who issued an order without knowledge of its unlawfulness, or without knowledge that such an order was

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<sup>84</sup> Agbor (n 35) 135-38.

<sup>85</sup> Ibid.

<sup>86</sup> Statute of the ICTY, Article 7(1) and Statute of the ICTR, Article 6(1).

<sup>87</sup> O’Keefe (n 37) 186.

<sup>88</sup> Ilas Bantekas and Susan Nash, *International Criminal Law* (Routledge 2009) 24.

<sup>89</sup> Kai Ambos, *Treaties on International Criminal Law: Volume 1: Foundations and General Part* (Oxford University Press 2013) 163.

<sup>90</sup> Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origin of International Criminal Law* (Oxford University Press 2011) 273.

manifestly unlawful would not render such a superior criminally liable for any consequence(s) as a result of the implementation of that order.<sup>91</sup> The *raison d'être* behind this line of thinking is that the superior, in such circumstances, would lack the requisite *mens rea*: the desire that the crimes be committed pursuant to the orders given by the superior.

The last mode of participation stipulated in Article 7(1) and Article 6(1) of the Statutes of the ICTY and ICTR respectively is aiding and abetting. According to Boas *et al*, aiding and abetting may include providing assistance to the physical perpetrators, providing any means of assistance, or any promise that certain acts will be performed. Slidregt considers aiding and abetting to not be the same: aiding means any acts of giving assistance to someone while abetting means facilitating the commission of a crime.<sup>92</sup> It is quite a general principle of law that an act of aiding and abetting may occur before, during or after the commission of the crime. In addition, when the aider and abettor performs his role, it is not necessary that the aider and abettor be present when the crime is being executed.<sup>93</sup> What needs to be proved are, first, that the aider and abettor must have lent practical assistance, encouragement, or moral support, secondly, that the support provided must have substantially contributed to the commission of a crime, and, thirdly, the aider and abettor must have been aware of the intention of the principal and/or joint/co-offenders.

In summation, the different modes of participation trigger a sub-categorisation into direct and indirect participation. According to Olasolo, direct perpetration, also referred to as 'committing' as stipulated in the Articles 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively, occurs where an individual, with the requisite *mens rea* for that crime, commits

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<sup>91</sup> Bantekas and Nash (n 88) 24.

<sup>92</sup> Elies van Slidregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012) 120, 122.

<sup>93</sup> Gideon Boas, James L. Bischoff, and Natalie L. Reid, *International Criminal Law Practitioner Library: Volume 1, Forms of Responsibility in International Criminal Law* (Cambridge University Press 2008) 315-316.

the *actus reus* of crime.<sup>94</sup> On the other hand, Marchuk defines indirect perpetration as a mode of participation which involves another committing a crime through another. Such cases include instigating, ordering and planning: the individual who instigates, orders or plans uses another to commit the material elements (*actus reus*) of the crime in question.<sup>95</sup>

## 1.8 Methodology

Given the nature of the topic, this research is purely doctrinal: it examines the modes of participation in serious crimes in international law. As such, the research will rely extensively on primary and secondary data. The primary sources will include international instruments related to the modes of participation in committing serious crimes in international law. These include the Charter of the IMT, Nuremberg, the Charter of the IMTFE, Tokyo, the Allied Control Council Law No. 10, the works of the International Law Commission, the Statutes of the UN *ad hoc* Tribunals, the Rome Statute of the ICC and the Statutes of hybrid courts. However, as its focus is on the lessons learned from the *ad hoc* tribunals, the cases to be examined will be limited to those of the *ad hoc* tribunals, that ICTY and ICTR. In addition to primary data, the research will explore secondary sources such as scholarly works (books, journal articles, etc.).

## 1.9 Limitations of the Study

As suggested by the title, the focus of this study is the modes of participation in the commission of serious crimes in international law, and what lessons could be learned from the jurisprudence of the UN *ad hoc* Tribunals. Even though numerous developments have occurred in this area such as the establishment of the ICC and hybrid courts, this study will

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<sup>94</sup> Hector Olasolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Bloomsbury Publishing 2009) 69.

<sup>95</sup> Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis* (Springer Science & Business Media 2013) 205.



focus only on the *ad hoc* tribunals' construction of the enlisted modes of participation stipulated in their respective Statutes.

Given the fact that the imposition of individual criminal responsibility is based on the fact that an accused would have participated in some way or the other, every accused appearing before any of these tribunals would have participated in some way or the other. As such, this dissertation will examine the indictment of every case already or currently being dealt by these two *ad hoc* tribunals, identify the mode(s) of participation of every accused and see how the Trial and Appeal Chambers of the *ad hoc* Tribunals construed these modes of participation.

#### 1.10 Structure

This research shall be structured into five chapters:

Chapter One: This will be an outline of the context of the study together with its focus, the aims and objectives, central (research) questions which the study intends to answer, literature review on the subject matter, research methodology, and the limitations of the study.

Chapter Two: An Overview of the Traditional Modes of Participation in Criminal Law.

Chapter Three: The Evolution of Modes of Participation in International Criminal Law.

Chapter Four: The Jurisprudence of the Ad Hoc Tribunals on the Modes of Participation.

Chapter Five: Conclusion

#### 1.11 Chapter Summary

Having set out the conceptual framework of this dissertation, it is important to consider the nature of participation in criminal law as it exists in domestic legal systems. The essence of this is to show that the modes of participation that were recognised in international criminal law were not novel: they were in existence in domestic legal systems and what international

criminal law did was to tap from the different legal systems those modes of participations in the commission of crimes at domestic level.

## CHAPTER TWO

### AN OVERVIEW OF PARTICIPATION IN CRIMINAL LAW

#### 2.1 Introduction

The previous chapter outlined the conceptual framework of what constitutes participation in the commission of serious crimes in international law, especially under the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>1</sup> and the International Criminal Tribunal for Rwanda (ICTR).<sup>2</sup> This chapter looks at the notion of participation in criminal law as it exists under common law legal systems. The essence of this is to first, identify the common features of every mode of participation and distinguish them from each other, and secondly, to show that these modes of participation existed prior to the Charter of the International Military Tribunal (IMT), Nuremberg.<sup>3</sup> Given the fact that the Charter of the IMT, Nuremberg, and subsequent international instruments dealing with participation in serious crimes in international law mentioned these modes of participation, it could be argued that international criminal justice did nothing new. It simply imported into the international plane modes of participation recognised in domestic legal systems.

The general principle which most modern legal systems accept is that, the person who commits a crime shall be punished for his or her own conduct. These national legal systems recognise one of two modes of participation, either the Unitarian mode of participation which considers every person as a perpetrator or principal who contributes in a casual way to the

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<sup>1</sup> Statute of the International Criminal Tribunal for the former Yugoslavia (hereinafter referred to as the ICTY), annexed to United Nations Security Council Resolution 827, U. N. SCOR, 3217<sup>th</sup> meeting, U.N. Doc. S/RES/827 (1993).

<sup>2</sup> Statute of the International Criminal Tribunal for Rwanda (hereinafter referred to as the ICTR), annexed to United Nations Security Council Resolution 955, U. N. SCOR, 3453<sup>rd</sup> meeting, U.N. Doc. S/RES/955 (1994).

<sup>3</sup> The Charter of the IMT, Nuremberg, was attached to the London Agreement of 1943.

criminal result or the Differentiated mode of participation which distinguishes between principals and accessories in respect to their contribution to the crime.<sup>4</sup>

The extension of the above-mentioned general principle which most national legal systems accept is that ‘a person who actively associates with the commission of a crime by another person must share in the responsibility for that crime’.<sup>5</sup> For example, in a case of murder, a number of persons may agree to kill another, but the actual killing is carried out by one person. When this occurs, it is important to determine the extent of criminal liability of those who participated in the death of the victim. Therefore, with all this, the issue to be considered is the scope for ‘accomplice liability in any consequence [or result] crime....’<sup>6</sup> In addition, it should be noted that these individuals partook different roles in the killing of the victim – in other words, there is an individual who inflicted the fatal wound, the provider of the murder weapon, and there might also be those who disposed of the body. Therefore, in enforcing the criminal law, all individuals who, in some way contributed to the crime, should be brought to justice.

From all this, it may be construed that participation in a crime can be either before, during or after the commission of a crime. In addition, more than one person may be held criminally responsible for a crime.

## 2.2 Different Modes of Participation in Criminal Law

As indicated above, the person who satisfies the definitional elements of a crime is not necessarily the only one to be held liable. This means that a person can be held liable as an accessory. Generally, the law of secondary parties applies to all offences unless expressly or impliedly excluded. However, it should be noted that helping or encouraging someone to

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<sup>4</sup> Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012) 65-66.

<sup>5</sup> Gerhard Kemp, Shelley Walker, Robin Palmer, Dumile Bagwa, Chris Gevers, Brian Leslie, and Anton Steynberg, *Criminal Law in South Africa* (Oxford University Press 2012) 232.

<sup>6</sup> Jonathan Burchell, *Principles of Criminal Law* (Juta & Co Ltd 2014) 463.

commit an offence is made a principal offence.<sup>7</sup> Even though participation in a crime may take different modes, these modes are broadly classified under two categories: direct and indirect participation.

### 2.2.1 Direct Participation

Direct participation is where the perpetrator acts on his or her own account without any assistance, and directly and personally executes the crime. Under direct participation, the crime is committed by either the principal offender or co-offenders (also known as joint offenders).

#### 2.2.1.1 Principal Offender

Ormerod and Laird define a principal offender as the one whose act is the most immediate cause of the *actus reus*. In a situation where no consequence has to be proved, the principal offender is the one who satisfies the conduct element of the *actus reus*.<sup>8</sup> For example, A breaks into a shop and steals goods. In this case, A satisfies the definitional elements of theft – the unlawful, intentional appropriation of property.

However, should there be a secondary party in the commission of a crime, and such a person, whilst performing acts of assistance commits the offence, shall be classified as a principal offender. For example, A and B break into a shop and together steal the goods. The reason B is considered to be a principal offender is because, with the required *mens rea*, B appropriates the goods.<sup>9</sup>

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<sup>7</sup> David Ormerod and Karl Laird, *Smith and Hogan's Text, Cases and Materials on Criminal Law* (11<sup>th</sup> edn, Oxford University Press 2014) 219-225.

<sup>8</sup> Ibid 217.

<sup>9</sup> Ibid 217-218.

### 2.2.1.2 Joint or Co-Offender

Ambos considers co-perpetration as the division of criminal tasks between two or more persons interrelated by a common plan, or purpose or agreement.<sup>10</sup> In co-perpetration, each party, that is, the individual co-offender or co-perpetrator, performs his or her assigned task that shall later contribute to the crime being committed and without which it would not be possible.<sup>11</sup> For example, A and B decide to rob a bank. A agrees to break into the bank and rob it, whilst B agrees to keep a proper lookout. Taking into account this example, it is evident that more than one person took part in the perpetration of the crime and the element of the *actus reus* of theft has been satisfied.<sup>12</sup> With regard to this mode of participation, many factors may arise which may change the imposition of individual criminal responsibility. If, while committing the robbery, A encountered difficulties, and noticing that, B rushes to A's assistance and helps him overpower the security guard, or force the door open, B becomes a joint or co-offender. This is because he (B), with the requisite *mens rea* (to rob a bank), has committed one (not required to commit all) of the material elements of the offence of robbery.<sup>13</sup>

Co-offenders or joint offenders are held together by an agreement or common plan which binds the parties to contribute to the commission of a crime. The requirements of common purpose are, first, the party must be aware that the crime was or was about to be committed; secondly, they must have the intention to form a common plan or purpose must be present; and thirdly, the participant must have shown his or her intention by performing an act or acts in association with the conduct of others and the necessary *mens rea* must exist in relation to the crime.<sup>14</sup>

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<sup>10</sup> Kai Ambos, *Treaties on International Criminal Law: Volume 1: Foundations and General Part* (Oxford University Press 2013) 149.

<sup>11</sup> Ibid.

<sup>12</sup> Ormerod and Laird (n 7) 217.

<sup>13</sup> Ibid.

<sup>14</sup> Kemp *et al* (n 5) 236.

### 2.2.2 Indirect Participation

The execution of a crime is not limited to those individuals (or principals) who physically perpetrate the definitional elements of such a crime. It is further extended to those individuals who, despite not being present at the scene of the crime or physically carry out the *actus reus*, controlled or masterminded the execution of such a crime. For example, A incites B to break into X's house, D develops the plan on how B will carry out successfully the plan, and C contributes by providing the necessary equipment for B who successfully executes the plan, that is, breaks into the house. A, who incited B (the principal offender), D, who developed the plan, and C, who provided the equipment, all participated indirectly in the commission of B's crime. It could be argued that C, in such situations, could have been used as an instrument by the indirect perpetrators. They are often referred to as remote actors, the mastermind or actors in the background.<sup>15</sup>

In order for a secondary party to be liable, it must be proved that such a person aided, abetted, procured,<sup>16</sup> ordered, incited or instigated, was an accessory after the fact or was a party to a joint criminal enterprise. It is important to note that in order for a secondary party to be liable, the crime must have been committed. Indirect participation takes various forms, some of which will be examined below.

#### 2.2.2.1 Ordering

The role of ordering the commission of a crime is exercised by an individual who is either in a *de facto* or *de jure* position. Such a person uses his or her authority to instruct another person to commit a particular crime. The party who gave the order need not to be at the scene of the crime, and the person ordered must satisfy the definitional elements of the crime in question. For example, A, a senior military official, orders soldiers to kill innocent civilians

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<sup>15</sup> Héctor Olásolo and Ana Pérez Cepeda, 'The Notion of Control of the Crime and Its Application by the ICTY in the Stakić Case' (2004) 4 *International Criminal Law Review* 475.

<sup>16</sup> Ormerod (n 7) 219-236.

in area X. The act of ordering is considered to be the *actus reus* which has to be proved. On the other hand, the *mens rea* element is that, the person who gave the order(s) must have foreseen the likelihood of a crime being committed as a result of the order he or she gave.

#### 2.2.2.2 Instigating or Inciting

Instigating is where a person prompts, urges, or encourages another person or persons to commit a particular crime. It may be understood as a conduct intended to cause another person or persons to either act or omit to act in a particular way. For liability to be imposed, it must be proved that the accused provoked or induced the conduct of another who ended up committing the crime. This means that the conduct of the accused must have been an important factor and the main source of contribution for the crime to be committed. In other words, there must be a causal link between the act of instigating and the crime being committed.<sup>17</sup> The required *mens rea* to be proved is bifurcated: first, the accused must have intended to provoke or induce the commission of a crime or was aware of the substantial likelihood that the crime will be committed, and secondly, the accused possessed the *mens rea* element of the crime.

#### 2.2.2.3 Procuring

Ormerod defines procuring to mean to produce by endeavour. An offence cannot be procured unless a causal link exists between what a person does and the commission of the offence. For example, A adds alcohol into B's drink without the knowledge or consent of B. B drives home and is subsequently arrested. A is said to have procured B's strict liability offence of driving with alcohol in his system only if it can be proved that A knew that B will drive home. A satisfied the *actus reus* of the offence. Because A's act of procuring was done without the

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<sup>17</sup> André Klip and Göran Sluiter (eds), *The International Criminal Tribunal for the Former Yugoslavia 2001* (Intersentia 2005) 326.



knowledge or consent of B, this means that the element of consensus is immaterial as far as procuring is concerned.<sup>18</sup>

#### 2.2.2.4 Aiding and Abetting

Aiding and abetting are not the same thing. Aiding denotes the element of the *actus reus* of a crime in question, whilst abetting, the *mens rea*.<sup>19</sup> Aiding may be understood as an act of giving assistance. According to Ormerod, the acts of aiding a principal offender can be satisfied by any act of assistance before or at the time the offence is committed. For example, A supplies B with a murder weapon.

The role of aiding the commission of a crime does not imply any causal link or connection. For instance, A may assist B and enable B to commit a crime with greater safety, A shall be held guilty even if the offence would have been committed if he had not intervened. Neither does it imply any consensus between the aider and the principal offender, that is, the aider shall be liable despite the fact that his assistance may have been unforeseen or unwanted by the principal offender.<sup>20</sup>

To abet is facilitate the commission of an offence. An example is being on the lookout while the principal or joint offenders carry out a robbery or murder. There must be a connection between abetting and the commission of a crime.<sup>21</sup>

The *actus reus* of this mode of participation is the rendering of any act that facilitates the commission of the crime. Such an act may take place prior to, during, or after, the commission of the crime. The *mens rea* on the other hand is that the aider or the abettor must have had the necessary knowledge or must have been aware that the principal offender may commit the crime.

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<sup>18</sup> Ormerod (n 7) 225-230.

<sup>19</sup> Ibid 222-224.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

#### 2.2.2.5 Accessory after the fact

A person who comes into the picture after the crime has been committed cannot be said to have participated in the direct commission of such a crime. However, criminal responsibility is imposed on such a person if that person engaged in any conduct that would render any assistance to the perpetrator like disposing the body of a murdered victim, keeping the proceeds of a robbery, or sheltering the accused in order to obstruct the pursuit of justice. In all these given examples, such a participant is labelled an accessory after the fact as his or her participation comes into play only after the full crime has been committed.

Snyman postulates a definition of what an accessory after the fact is: a person who, after the commission of a crime, unlawfully and intentionally engages in a conduct that will enable the perpetrator of, or the accomplice in, the crime to escape liability for his crime, or to facilitate in the evasion of liability.<sup>22</sup> The substance of this definition had earlier been articulated by Burchell and Milton that an accessory after the fact cannot be said to have assisted or caused the commission of the crime, and therefore cannot be held liable as an accomplice.<sup>23</sup>

In most jurisdictions, if the accessories after the fact are convicted, they are found guilty of separate offences and not for the conduct of the person who perpetrated the crime. In order for liability to be imposed on an accessory after the fact, it must be proved that such a person had the knowledge of the completed crime and must have conducted himself or herself in an effort to defeat justice or the criminal investigation.<sup>24</sup>

#### 2.2.2.6 Joint Criminal Enterprise (JCE)

Often referred to in criminal jurisprudence as ‘common purpose’, joint criminal enterprise as a mode of participation is where a plurality or multiplicity of persons agree to commit a crime

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<sup>22</sup> CR Snyman, *Criminal Law* (Lexis Nexis 2008) 278.

<sup>23</sup> Jonathan Burchell and John Milton, *Principles of Criminal Law* (Juta & Co Ltd 2005) 611.

<sup>24</sup> Raneta Lawson Mack, *A Layperson's Guide to Criminal Law* (Greenwood Publishing Group 1999) 103.

or series of crimes. The purpose of establishing a joint criminal enterprise is that crimes should be committed. Therefore, the agreement itself that is reached by members of the joint criminal enterprise constitutes the inchoate crime of conspiracy.

Conspiracy, however, is distinct from a joint criminal enterprise. A joint criminal enterprise, in itself, is not a crime. On the other hand, a conspiracy, in itself, is an inchoate crime that would require the imposition of criminal responsibility. Under the rubric of inchoate crimes, it is similar in character with attempt and incitement. In addition, with regards to conspiracy, the conclusion of the agreement suffices as the *actus reus* of the inchoate crime. On the other hand, a joint criminal enterprise would require the commission of some act, or the preparation for the commission of crimes which may entail liability for the inchoate crime of attempt.

There are three categories of joint criminal enterprise with each applying to a distinctive situation. These situations are discussed below. All forms of joint criminal enterprise share the same *actus reus* element. To be precise, the prosecution has to prove that there was a plurality of persons,<sup>25</sup> an agreement or understanding to commit a crime, also known as a common plan, between two or more persons that led to, or involved the commission of crimes must exist;<sup>26</sup> the defendants must have participated in the common plan,<sup>27</sup> and such a participation must be voluntary.<sup>28</sup> The distinction between these three forms would be the *mens rea* element. Each form has its own specific *mens rea* requirement and they will be discussed below. Nonetheless, all three forms share a general requirement of the mental element and that is the parties to the enterprise also referred to as co-perpetrators,

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<sup>25</sup> Gerhard Werle and Florian Jesseberger, *Principles of International Criminal Law* (3<sup>rd</sup> edn, Oxford University Press 2014) 201.

<sup>26</sup> Gideon Boas, James L. Bischoff and Natalie L. Reid, *International Criminal Law Practitioner Library: Volume 1, Forms of Responsibility in International Criminal Law* (Cambridge University Press 2008) 37.

<sup>27</sup> Catherine H. Gibson, 'Testing the Legitimacy of the Joint Criminal Enterprise Doctrine in the ICTY: A Comparison of Individual Liability for Group Conduct in International and Domestic Law' (2008) 18 *Duke Journal of Comparative & International Law* 521; Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan and Christopher Gosnell, *Cassese's International Criminal Law* (3<sup>rd</sup> edn, Oxford University Press 2013) 163.

<sup>28</sup> Mahmoud Cherif Bassiouni (ed), *Introduction to International Criminal Law* (Martinus Nijhoff Publishers 2012) 378.

must have had the intention to take part in the common plan.<sup>29</sup> When material and mental elements are proved, the defendant shall be found guilty of the intended crime(s) in the common plan together with those which he did not intend but where foreseeable as a result of executing the common purpose.<sup>30</sup>

Liability is not limited to crimes committed by members of the joint criminal enterprise. In other words, it is possible for a non-member of the joint criminal enterprise, upon being used by a member of the joint criminal enterprise, to commit a crime that formed part of the common purpose. In order to convict a joint criminal enterprise member for the crimes committed by a non-member of the joint criminal enterprise, it must be proved beyond a reasonable doubt that the crimes committed by the non-member formed part of at least one of the crimes intended by the enterprise,<sup>31</sup> or the acts must be attributed to members of the joint criminal enterprise.<sup>32</sup>

Given the fact that membership in a joint criminal enterprise is voluntary, the question that may be asked is this: can a member of a joint criminal enterprise withdraw from it? The answer would be yes. For a member to escape criminal liability, his withdrawal from the enterprise must be done expressly or it can be implied from the member's conduct. It must be a timeous withdrawal. It must be effective. The member must communicate his or her withdrawal to other members of the joint criminal enterprise. Lastly, the member must 'take steps to avert the danger which he has helped to create'.<sup>33</sup>

The three forms of a joint criminal enterprise are first, the basic, secondly, the systematic, and thirdly, the extended form. Taking into consideration the general

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<sup>29</sup> Giulia Bigi, 'Political and Military Leaders' Criminal Responsibility before International Criminal Courts and Tribunals' in Nerina Boschiero, Tullio Scovazzi, Cesare Pitea, Chiara Ragni (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Springer Science & Business Media 2013) 630; Gunel Guliyeva 'The Concept of Joint Criminal Enterprise and the ICC Jurisdiction' (2008) 5 *Eyes on the ICC* 49.

<sup>30</sup> Jasmina Pjanic, 'Joint Criminal Enterprise: New former of individual criminal responsibility' <[http://www.okobih.ba/files/docs/Jasmina\\_Pjanic\\_ENG\\_i\\_BHS.pdf](http://www.okobih.ba/files/docs/Jasmina_Pjanic_ENG_i_BHS.pdf)> accessed 03 October 2015.

<sup>31</sup> Bassiouni (n 28) 381.

<sup>32</sup> Werle and Jesseberger (n 25) 202.

<sup>33</sup> *White v Reidley* (1978) 140 CLR 342.

requirements discussed above, the basic form of a joint criminal enterprise exists where the participants or the co-perpetrators of the joint criminal enterprise possess the same criminal intent in line with the common purpose.<sup>34</sup> For example, A, B, C and D, with the necessary intention to commit murder, develop a plan to kill E in area X. They agree that A will provide the murder weapon, B will lure E to area X, and C will tie E's hands and legs whilst D inflicts the fatal wound. In this scenario, A, B, C and D constitute a plurality of persons as they may be seen as a group (this group does not have to be of an organised military, political or administrative nature<sup>35</sup>). Secondly, a common plan or purpose existed between the parties. It is important to note that it is not mandatory that the purpose be previously arranged or formulated and it is not necessary to prove that there was a formal agreement between the parties.<sup>36</sup> Lastly, all the parties participated in the killing of E. As to the participation of the parties, it is important that their participation must have been a significant contribution to the group.<sup>37</sup> It is not necessary to prove that the defendants' participation in the enterprise was *a sine qua non*.<sup>38</sup> In contrast, with reference to the contribution of the parties, Gibson argues that the parties in the basic form of the joint criminal enterprise must have made a minimal contribution in ensuring that the crime be committed.<sup>39</sup>

The second form of a joint criminal enterprise is the systematic form and it exists where there is an organised system of ill-treatment or perpetration of mass atrocities. For example, the operation of Concentration Camps during the Second World War where and when thousands of people including Jews and foreign nationals (French, Ukrainian and

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<sup>34</sup> Charles Taku, *Contextual Foundation of International Criminal Jurisprudence: Selected Cases: an insider's Perspective* (AuthorHouse 2012) 169; Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law: Cases and Commentary* (Oxford University Press 2011) 337; Werle and Jesberger (n 25) 202-203.

<sup>35</sup> Gibson (n 27) 521.

<sup>36</sup> Ibid.

<sup>37</sup> Cassese *et al* (n 34) 163.

<sup>38</sup> Gibson (n 27) 521.

<sup>39</sup> Ibid.

Russian) were exterminated.<sup>40</sup> Under this kind of joint criminal enterprise, the parties must have held authoritative positions either in the civilian or military administration.<sup>41</sup> In order for liability to be imposed, it must be established that an organised system of repression existed, the defendant actively participated in ensuring that the system of repression was enforced, the defendant must have had the knowledge of the nature of the system and must have intended to further the system of repression.<sup>42</sup>

The last form of the joint criminal enterprise is the extended form.<sup>43</sup> This form exists where a member of the joint criminal enterprise commits an act which is outside the common plan or purpose, yet it is seen as a natural and foreseeable consequence in the execution of common purpose.<sup>44</sup> For example, while A, B and C implement their common plan to rob a bank, A threatens D, a bank teller, at gunpoint to give him the money. In the course of holding D at gunpoint, the gun goes off. Although murder was not expressly part of the common purpose, it was a foreseeable consequence taking into consideration the nature of the crime intended and as a result, A, B and C may be guilty of murder.

#### 2.2.2.7 Omission

The imposition of criminal responsibility in most legal systems is not limited to individuals who commit a positive act.<sup>45</sup> A crime may be committed by way of an omission.<sup>46</sup> As a general rule, the law does not impose a general duty to act.<sup>47</sup> For example, if A sees B, a homeless man about to consume a poisonous substance and A is in a position to inform B that the substance is poisonous but abstains from doing so and as a result, B consumes the

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<sup>40</sup> Cassese *et al* (n 34) 339.

<sup>41</sup> Gibson (n 27) 521; Werle and Jesseberger (n 25) 203.

<sup>42</sup> Bassiouni (n 28) 378.

<sup>43</sup> Gibson (n 27) 521.

<sup>44</sup> Taku (n 34) 169; Cassese *et al* (n 34) 339; Werle and Jesseberger (n 25) 203.

<sup>45</sup> Jacqueline Martin and Tony Storey, *Unlocking Criminal Law* (Routledge 2015) 35.

<sup>46</sup> Werle and Jesseberger (n 25) 267; Cassese *et al* (n 43) 180.

<sup>47</sup> Martin and Storey (n 45) 35.

poisonous substance and dies, A did not commit an offence because there was no positive act on A's part that led to the death of B.

Most domestic legal systems, especially the common law, recognise omission as a mode of participation. The complicated issue with regards to omission as a mode of participation is establishing a causal link between the omission and the result. This has proved to be true especially in medical cases involving the death of the victim.

The general rule on omission is that liability may be imposed where a duty to act was implied upon the accused.<sup>48</sup> In addition, it must be physically capable of being performed without undue risk or sacrifice and must be accompanied by the *mens rea* of the crime.<sup>49</sup> Concerning the necessary *mens rea* of a crime, many scholars are of the view that the mental element in cases of omission are harder to prove as compared to that of cases of positive acts.<sup>50</sup> According to Stephen, for an act to be criminal through omission, it must be intentional, and where the crime through omission was committed unintentionally, he argues that 'the crime itself must, from the nature of the case, be committed unintentionally'.<sup>51</sup> Legal duty refers to acts which the law requires to be done,<sup>52</sup> acts prescribed by law to be performed, prohibited from acting or a duty that is created by operation of the law.<sup>53</sup>

Criminal liability may be imposed under four circumstances. Firstly, where the law expressly states that anyone who fails to act shall be liable.<sup>54</sup> For example, if the law requires a motorist involved in an accident to stop his vehicle and provide his identity details, failure to do so when an accident occurs would constitute an omission – failure to fulfil a statutory

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<sup>48</sup> *S v Russell* 1967 (3) 739 (N); Martin and Storey (n 45) 35; Astolfo Di Amato, *Criminal Law in Italy* (Kluwer Law International 2011) 75; Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan and Christopher Gosnell, *Cassese's International Criminal Law* (3<sup>rd</sup> edn, Oxford University Press 2013) 181.

<sup>49</sup> Stephen Shute and Andrew P. Simester, *Criminal Law Theory: Doctrines of the General Part* (Oxford University Press 2002) 122.

<sup>50</sup> Jonathan Hering, *Great Debates in Criminal Law* (Palgrave Macmillan 2015) 31.

<sup>51</sup> James Fitzjames Stephen, *A history of the Criminal Law of England* (Cambridge University Press 2014) 113.

<sup>52</sup> < <http://www.thefreedictionary.com/legal+duty> > accessed 3 October 2015.

<sup>53</sup> < <http://www.yourdictionary.com/legal-duty> > accessed 3 October 2015.

<sup>54</sup> Jos Monballyu, *Six Centuries of Criminal Law: History of Criminal Law in the Southern Netherlands and Belgium (1400-2000)* (Martinus Nijhoff Publishers 2014) 67; Cassese *et al* (n 48) 180.

duty – and may incur criminal liability. Secondly, where a legal relationship exists between the victim of a crime committed by omission and the individual who failed to act.<sup>55</sup> A relationship here could be statutory, contractual or common-law. Examples include a parent and a child, a doctor and a patient.<sup>56</sup> In the English case of *Gibbins v Proctor*,<sup>57</sup> a father and his wife were found guilty of murder in that they neglected to feed a child who subsequently died of starvation. Another example would be where a medical doctor failed to discharge his duty to provide medical care to a patient. Thirdly, liability may also be imposed on a person where assumption of care for another existed. In the English case of *R v Instan*,<sup>58</sup> the defendant lived with her elderly aunt who got sick and died. During her last days, the aunt had gangrene and was unable to take care of herself. The defendant knew of this condition and did nothing. The court held that the defendant had a common-law duty to care for her aunt.<sup>59</sup> Lastly, liability in criminal law may also be imposed where there was a contractual duty to perform a task and such a person fails to perform the duty prescribed in the contract.<sup>60</sup> In the English case of *R v Pittwood*,<sup>61</sup> a railway company employed the defendant to man the gate at a level crossing. In order to allow a cart to pass, the defendant lifted the gate and then went to lunch and failed to put the gate back down. As a result, a train collided with a horse cart and killed the train driver. The defendant was found guilty for the reason that he had a contractual duty to close the gate, and his failure to execute this duty resulted in the death of the victim.

There are a number of considerations which may be taken into account before liability can be imposed. One of these considerations is the *bono mores* of the community. In the case

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<sup>55</sup> Shute and Simester (n 49) 122.

<sup>56</sup> ‘Can a failure to Act make an Individual Guilty in the eyes of the Law? Distinction between Acts and Omissions’ (*In Brief*) <<http://www.inbrief.co.uk/offences/failure-to-act-law.htm#>> accessed 22 September 2015.

<sup>57</sup> (1918) 13 Cr APP R 134.

<sup>58</sup> (1893) 1 QB 450.

<sup>59</sup> *Ibid.*

<sup>60</sup> ‘Can a failure to Act make an Individual Guilty in the eyes of the Law? Distinction between Acts and Omissions’ (*In Brief*) <<http://www.inbrief.co.uk/offences/failure-to-act-law.htm#>> accessed 22 September 2015.

<sup>61</sup> (1902) TLR 37



of *Minister of Police v Ewels*,<sup>62</sup> a citizen was assaulted in a police station by a police officer who was off duty in the presence of other members of the police who were able at that time to prevent the assault. The court held that the police officers who witnessed the assault had a legal duty to assist the person being assaulted and their failure to do so implies that liability must be imposed.

In order for a person to be liable for failure to act where a legal duty exists, there are three requirements that must be proved.<sup>63</sup> First, the realisation of a result. In other words, it must be possible to commit the crime by omission.<sup>64</sup> Secondly, the legal duty to act must have existed. For example, A is a teacher and witnesses B threatening another student with a sharp object. A fails to interfere and as a result, B inflicts a fatal wound on C and C dies instantly. A had a legal duty to intervene in the situation. Thirdly, there must be a causal link between the omission and the result.<sup>65</sup>

There are two categories of offences by omission. Amato makes a distinction between offences of mere omission and commission by omission. Mere omission offences are committed as a result of a person failing to act where a legal duty to act existed, for example failure to file a tax return. Commission by omission can only occur where there was a legal duty to act and where a person failed to act accordingly in order to prevent the specific event from occurring.<sup>66</sup> For example, a medical doctor who fails give a patient proper medical treatment leading to the death of the patient. The doctor may be found guilty of manslaughter. It is possible for omission to constitute the physical elements of other modes of liability such as aiding and abetting and instigation. And it can also contribute to the joint criminal enterprise.<sup>67</sup>

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<sup>62</sup> 1975 (3) SA 590 (A).

<sup>63</sup> Bassiouni (n 28) 331.

<sup>64</sup> Martin and Storey (n 45) 35.

<sup>65</sup> See generally Omerod and Laird (n 7) 69-96.

<sup>66</sup> Astolfo Di Amato, *Criminal Law in Italy* (Kluwer Law International 2011) 76.

<sup>67</sup> Cassese *et al* (n 48) 181-182.

### 2.3 Chapter Summary

The imposition of criminal liability is not limited to the person who satisfies the definitional elements of a crime. It is possible for a crime to be committed by more than one person, each individual performing his or her individual role, which later contributes to the commission of a crime. When this occurs, the law assigns criminal liability based whether such a person was a principal or co-offender, whether he or she ordered, instigated or incited, procured, aided or abetted the commission of a crime, or whether he or she was an accessory after the fact or a party to a joint criminal enterprise.

Having looked at these modes of participation in legal systems, the next chapter looks at the recognition of these modes of participation in international criminal justice.

## CHAPTER 3

### A SYNOPTIC DESCRIPTION OF THE EVOLUTION OF MODES OF PARTICIPATION IN INTERNATIONAL CRIMINAL LAW

#### 3.1 Introduction

The previous chapter identified and discussed the general principles relating to participation in criminal law. It made a distinction between the different kinds of participants in criminal law: principal offender, co- or joint offender, aider and abettor, accessories after the fact.

Participation in the commission of a crime may occur prior to, during, or after, the commission of that crime. Depending on the time of participation, what form of assistance, and the intention that the participant had in his or her mind, the legal principles on the characterization of such participants may well vary from legal system to another. However, suffice it to say to despite the differences that may be related to the jurisprudential nomenclature, the basic principles do not vary so much in detail.

These traditional modes of participation have been recognized in international criminal law. In fact, a perusal of the relevant international instruments since the birth of international criminal justice would evidence the imposition of criminal responsibility on individuals who participated in some way or the other in the commission of serious crimes in international law.

The recognition of these modes of participation serve as eloquent evidence that international criminal law did not introduce unprecedented legal doctrines with regards to the modes of participation in serious crimes in international law. It could therefore be postulated that international criminal law simply gave further recognition of these traditional modes of participation.

It should, however, be borne in mind that with regards to the rules relating to participation in the commission of serious crimes in international law, the jurisprudence from the different tribunals suggests that these modes of participation as they exist under domestic legal systems are very narrow and shallow. For example, with regard to what may constitute instigation or aiding and abetting in the commission of serious crimes in international law, the scanty literature on the principles is surpassed by the extensive deliberations by the tribunals on these same modes of participation. Another example is the failure to act (omission) as a mode of committing a crime. In international criminal law, this mode of participation, so far, has been applied to a specific category of individuals: responsibility for the acts of subordinates.

This chapter looks at the concept of participation in the commission of serious crimes in international law. In order to do this, I examine every international instrument related to serious crimes in international law. In this regard, the Charters of the International Military Tribunal, Nuremberg, and the International Military Tribunal for the Far East, Tokyo, the Allied Control Council Law No. 10, the works of the International Law Commission, the Statutes of the UN *ad hoc* Tribunals, the Rome Statute of the International Criminal Court, and the respective Statutes of hybrid tribunals such as the Special Court for Sierra Leone and the Extraordinary Chambers of the Courts of Cambodia.

This chapter will focus on a discussion of the different modes of participation, and a mention of a few cases coming from the tribunals. However, given the fact that the core of this dissertation is the contributions from the *ad hoc* tribunals, I will endeavor not to delve into their jurisprudence here since that is the focus of the next chapter.

In order to present the evolution of the modes of participation, it will be proper to do so in a chronological manner, grouping the different instruments under specific rubrics relating to the institutions that created them. As such, this chapter starts with the Allied

Powers' formulations, then, proceed to the works of the International Law Commission and finally, it examines the the post-1994 developments.

### 3.2 The Allied Powers' Formulations

The Allied Powers of the Second World War established the London Agreement to which was attached the Charter of the International Military Tribunal (IMT).

#### 3.2.1 The Charter of the IMT, Nuremberg

At the conclusion of the Second World War, the Allied Powers resolved to bring to justice persons who bore responsibility for the atrocities committed in Europe. To achieve this, the Charter of the International Military Tribunal (IMT), Nuremberg, was annexed to the London Agreement of August 8, 1945. The specific purpose of the establishment of the IMT, Nuremberg, was to try and punish the major war criminals of the European Axis.<sup>1</sup>

In addition to specifying and defining the crimes over which the IMT, Nuremberg, would have jurisdiction over, the Charter also stipulated the modes of participation in the commission of these crimes. It provided as follows:

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

Stipulating that 'leaders, organizers, instigators and accomplices' who participated in 'the formulation or execution of a common plan or conspiracy' to commit any of the crimes over which the Tribunal had jurisdiction would make them criminally responsible meant that the scope of participation was not limited to only those who physically committed the crime. It meant that even those who participated prior to the commission of any of these crimes would be held responsible. Examples include those who gave orders or instigated the commission of any of these crimes. Every individual who was indicted and tried at Nuremberg would have, in some way or the other, participated in the crimes either as a leader (civilian and military),

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<sup>1</sup> The Charter of the International Military Tribunal (hereinafter referred to as the IMT), Nuremberg, Article 1.

and instigator or an accomplice who helped in the formulation or execution of a common plan or conspiracy.

Numerous individuals were prosecuted at the IMT, Nuremberg. However, the selection of those individuals was limited to those who played a major role in terms of the formulation of a conspiracy and plan to commit the crimes over which the IMT, Nuremberg, had jurisdiction. They included key civilian and military personnel, some of whom were Hermann Wilhelm Goering, Rudolf Hess, Joachim Von Ribbentrop, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Karl Doenitz, Hjalmar Schacht, Erich Raeder, Baldur von Schirach, Fritz Saukel, Alfred Jodl, Martin Bormann, Franz Von Papen, Arthur Seyss-Inquart, Albert Speer, Constantin Von Neurath, and Hans Fritzsche.

To conclude, the establishment of the IMT, Nuremberg, and the conduct of the trials were very significant and considered to be landmarks in the development of international criminal justice. They were unprecedented efforts that would, in later decades, evolve to what has become contemporary international criminal justice for serious violations of international law. In addition, the IMT, Nuremberg, the trials that took place therein and the kinds of individuals docked for trial would signal that mass atrocities that shock the conscience of mankind would not go unpunished.

In addition to the IMT, Nuremberg, there were other participants who contributed in the commission of crimes during the Nazi Regime. Such participants were indicted and tried under the Allied Control Council Law No. 10.

### 3.2.2 Allied Control Council Law No. 10

The Allied Control Council was a military governing body of the Allied Occupation Zones in Germany established in 1945. The Allied Control Council Law No. 10 of 1945 was issued in order to establish a uniform legal basis to authorise German courts to prosecute war criminals

and other offenders who were not prosecuted by the IMT, Nuremberg, and to reconstruct the German court system. In fulfilment of the first objective, the Allied Control Council Law No.10 laid down the crimes over which it had jurisdiction, namely, crimes against peace,<sup>2</sup> war crimes<sup>3</sup> and crimes against humanity.<sup>4</sup> Participation in the commission of any of these crimes was also provided for in the Allied Control Council Law No. 10, which provided as follows:

- (a) ... to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy ...
- 2. Any person ..., is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was
  - (a) a principal or
  - (b) was an accessory to the commission of ... crime or ordered or abetted ...
  - (c) took a consenting part therein or
  - (d) was connected with plans or enterprises involving its commission or
  - (e) was a member of any organization or group connected with the commission of any such crime or
  - (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.<sup>5</sup>

Given these provisions relating to the crimes over which it had jurisdiction and the kinds of individuals tried therein, cases were conducted and concluded under different appellations like the *Medical Trial*, *Milch Trial*, *Judge Trial*, *Pohl Trial*, *Flick Trial*, *IG Farben Trial*, *Hostage Trial*, *RuSHA Trial*, *Einsatzgruppen Trial*, *Krupp Trial*, *Ministries Trial*, and the *High Command Trial*. Evidently, the provisions relating to the modes of participation as spelt out in the Allied Control Council Law No. 10 were much broader than the Charter of the IMT, Nuremberg. Definitely, and in addition to the broader scope of participants that were contemplated, the Allied Control Council Law No. 10 led to more arrests and convictions than the IMT, Nuremberg.

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<sup>2</sup> The Allied Control Council Law No. 10, Article II(1)(a).

<sup>3</sup> The Allied Control Council Law No. 10, Article II(1)(b).

<sup>4</sup> The Allied Control Council Law No. 10, Article II(1)(c).

<sup>5</sup> The Allied Control Council Law No. 10, Article II(1)(a).

### 3.2.3 The Charter of the IMTFE, Tokyo

Prior to, and during the Second World War, Japan committed numerous atrocities in the Far East. Even though most of these atrocities did not involve other Allied Powers like the UK, France and the USSR, the bombing of the American Naval base at Pearl Harbour in December 1941 was seen as an act of aggression and war against the United States. With the defeat of the Japanese, the Americans, like the Allied Powers had done, sought to bring the major war criminals to justice.

The Americans, under the Supreme Commander of the Allied Powers, established the International Military Tribunal for the Far East (IMTFE), Tokyo. The Charter of the IMTFE, Tokyo, gave the IMTFE jurisdiction over crimes that were defined in ways very similar to those of the IMT, Tokyo. In addition to the definition of these crimes, the Charter stipulated the modes of participation in the following words:

(c) ... Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan....<sup>6</sup>

Neither the official position... of an accused, nor ... that an accused acted pursuant to order of his government or of a superior shall... be sufficient to free such accused from responsibility for any crime ....<sup>7</sup>

From the above, it is clear that specific modes of participation existing in domestic legal systems were recognized by international law. By holding leaders, instigators and organizers accountable, the Charters of the two Military Tribunals sought to impose responsibility on the top civilian and military personnel of these two countries for the atrocities that were committed by them and others as part of a common plan or conspiracy. In the aftermath of these Tribunals, the next major developments with regard to addressing

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<sup>6</sup> The Charter of the International Military Tribunal for the Far East (hereinafter referred to as the IMTFE), Tokyo, Article 5.

<sup>7</sup> The Charter of the IMTFE, Tokyo, Article 6.



participation in international criminal law would be the works of the International Law Commission.

The Tokyo Tribunal tried Japanese personnel's accused of war crimes including an intellect and writer Shumei Okawa, General Seishiro Itagati who was said to be among those who took steps in the execution of aggression in Manchuria, General Iwane Matsui who is said to have waged aggressive war, civilian leader such as the former Prime Minister Koki Hirota, military leaders such as General Hideki Tojo, civilian financial officers such as Naoki Hoshino, Ambassador Hiroshi Oshima who played a role in the negotiations of the Axis alliance with Germany.<sup>8</sup>

The IMTFE, Tokyo is mostly known for its acknowledgment and application of the doctrine superior responsibility and it has an impact on military jurisprudence.<sup>9</sup> Judge Bernard Victor Aloysius Roling, in his dissenting judgement, he speaks of how superior responsibility may be imposed upon an individual. In the judgment, the Judge mentions that, in order for a superior to be held responsible for acts of the subordinates, it is important that three elements are proved: knowledge, power, and duty. That is, the superior must have had knowledge of the commission of the criminal acts, should have had the power and authority to prevent or repress such criminal conducts, and, must have had a legal duty or obligation to act.<sup>10</sup> Out of the 28 defendants who were indicted 25 were convicted.

### 3.3 The Works of the International Law Commission

In the aftermath of the World War Two and the establishment of the United Nations, the International Law Commission was established by a United Nations General Assembly Resolution with the mandate to study the progressive evolution of international law. Between

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<sup>8</sup> Neil Boister, 'The Tokyo Trial' in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011).

<sup>9</sup> Jeanie M. Welch, *The Tokyo Trial: A Bibliographic Guide to English-Language Sources* (ABC-CLIO 2002) 134.

<sup>10</sup> Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell, and Alex Whiting, *International Criminal Law: Cases and Commentary* (Oxford university Press 2011) 432.

1948 when it was established and 1994 when the second UN *ad hoc* Tribunal was established, the ILC played a vital role in the development of two international instruments relating to the peace and security of mankind. Even though they never crystalized into any adopted instrument, these two Draft Codes helped shape the evolution of participation in serious crimes in international law as would be seen in the Statutes of the ICTY and ICTR respectively.

The ILC played a prominent role in the formulation and development of the Nuremberg Principles in 1949, the drafting of the Statute of the International Criminal Court in 1994, and two Draft Codes of Crimes against the Peace and Security of Mankind in 1954 and 1956.

### 3.3.1 The Nuremberg Principles, 1949

The United Nations General Assembly Resolution 177(II), paragraph (a) directed the ILC to formulate principles of international law recognised in the Charter of Nuremberg. The principles are a set of guidelines which international tribunals and courts may use in order to determine what constitutes war crimes.<sup>11</sup> The Nuremberg Principles are:

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

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

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

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

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<sup>11</sup> Laura La Bella, *The Nuremberg Trials* (The Rosen Publishing Group 2014) 61.

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

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

a. Crimes against peace:

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

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

b. War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

c. Crimes against humanity:

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

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

### 3.3.2 The ILC Draft Code of Offences against the Peace and Security of Mankind, 1954

The efforts of the ILC in developing the Nuremberg Principles of 1949 would help it come conclude a Draft Code of Offences against the Peace and Security of Mankind in 1954. This Draft Code of Offences against the Peace and Security of Mankind defined participation in the following words:

(3) The preparation...

(4) The organization, or the encouragement of the organization, ...for incursions into the territory of another State, ..., as well as direct participation in or support of such incursions.

(5) The undertaking or encouragement by the authorities of a State ...

- (6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or ... to carry out terrorist acts in another State....
- (11) Inhuman acts...committed...by the authorities of a State or by... individuals acting at the instigation or with the toleration of such authorities.<sup>12</sup>

### 3.3.3 The ILC Draft Statute for an International Criminal Court, 1994

The ILC Draft Statute for an International Criminal Court, unfortunately, did not address the issue of participation in any of the crimes over which the ICC would have jurisdiction. Rather, it addressed, amongst other things, the crimes within the jurisdiction of the International Criminal Court.<sup>13</sup>

### 3.3.4 The ILC Draft Code of Crimes against the Peace and Security of Mankind, 1996

A key feature of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind is the broad categories of participation that it contemplated. In addition to specifying what crimes constitute ‘crimes against the peace and security of mankind’,<sup>14</sup> this Draft Code was far more extensive in its discussion of the modes of participation, extending to even responsibility imposed upon superiors for the acts of their subordinates.

Participation in the crimes against the peace and security of mankind is states as follows:

#### Article 2:

1. A crime against the peace and security of mankind entails individual responsibility.

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<sup>12</sup> Draft Code of Offences against the Peace and Security of Mankind, 1954, Article 2.

<sup>13</sup> *Article 20.*

*Crimes within the jurisdiction of the Court*

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) The crime of aggression;
- (c) Serious violations of the laws and customs applicable in armed conflict;
- (d) Crimes against humanity;
- (e) Crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

<sup>14</sup> Crimes of aggression, crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes.

2. An individual shall be responsible for the crime of aggression in accordance with article 16.

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

(a) Intentionally commits such a crime;

(b) Orders the commission of such a crime which in fact occurs or is attempted;

(c) Fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;

(d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;

(e) Directly participates in planning or conspiring to commit such a crime which in fact occurs;

(f) Directly and publicly incites another individual to commit such a crime which in fact occurs;

(g) Attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

#### Article 6 Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

### 3.4 The UN *ad hoc* Tribunals

The atrocities that took place in the former Yugoslavia and Rwanda constituting serious violations of international law would attract the UN Security Council to establish two *ad hoc* international criminal tribunals with the specific mandate of bringing to account persons responsible for them. The first *ad hoc* tribunal was the ICTY, followed by the second and last, the ICTR.

#### 3.4.1 The International Criminal Tribunal for the former Yugoslavia

United Nations' Security Council Resolution 823 of 1993 established the first *ad hoc* international criminal tribunal, the ICTY with the specific mandate of prosecuting persons who bear the greatest responsibility for the atrocities committed in that region (the former Yugoslavia). With jurisdiction over crimes such as grave breaches of the 1949 Geneva

Convention,<sup>15</sup> violations of the laws of war,<sup>16</sup> genocide,<sup>17</sup> and crimes against humanity,<sup>18</sup> the Statute of the ICTY imposed criminal responsibility on individuals who would have participated in any of the following ways:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so require

### 3.4.2 The International Criminal Tribunal for Rwanda

A few months after the United Nations Security Council established the International Military Tribunal for the former Yugoslavia, another ad hoc tribunal was established. The Statute of the International Criminal Tribunal for Rwanda was established to bring to justice those responsible for serious violation of international humanitarian law committed in Rwanda and neighboring states between 1 January 1994 and 31 December 1994. The tribunal had the power to prosecute persons who committed genocide<sup>19</sup>, crimes against humanity<sup>20</sup>, and lastly

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<sup>15</sup> Statute of the International Criminal Tribunal for the former Yugoslavia (hereinafter referred to as the ICTY), annexed to United Nations Security Council Resolution 827, U. N. SCOR, 3217th meeting, U.N. Doc. S/RES/827 (1993). Article 2.

<sup>16</sup> Statute of the ICTY, Article 3.

<sup>17</sup> Statute of the ICTY, Article 4.

<sup>18</sup> Statute of the ICTY, Article 5.

<sup>19</sup> Statute of the International Criminal Tribunal for Rwanda (hereinafter referred to as the ICTR), annexed to United Nations Security Council Resolution 955, U. N. SCOR, 3453rd meeting, U.N. Doc. S/RES/955 (1994), Article 2.

<sup>20</sup> Statute of the ICTR, Article 3.

for the violations of article 3 common to the Geneva Conventions and of Additional Protocol

II.<sup>21</sup>

Article 6 of the Statute of the ICTR provides for individual criminal responsibility:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

### 3.5 The Rome Statute of the International Criminal Court (ICC)

In 1998, the Rome Statute of the International Criminal Court was adopted which would give birth to a permanent International Criminal Court with the mandate to try persons who bear responsibility for serious crimes in international law.<sup>22</sup> The Rome Statute of the ICC stipulates in Article 25(3) the ways in which an individual may participate in the crimes over which it has jurisdiction as follows:

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;

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<sup>21</sup> Statute of the ICTR, Article 4.

<sup>22</sup> Rome Statute of the International Criminal Court, U. N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 (1998) (hereinafter referred to as the Rome Statute of the ICC).

- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission....

### 3.6 Post-ICC Developments

The adoption of the Rome Statute of the ICC and the establishment of the permanent ICC in 2002 represent the most significant development in international law regarding the commitment of the global community to hold accountable individuals who commit serious crimes in international law. Despite this colossal development, numerous developments have occurred thereafter in which the international community has stipulated the modes of participation in the serious crimes over which these institutions do have jurisdiction.

#### 3.6.1 The Statute of the Special Court for Sierra Leone

The Special Court for Sierra Leone to prosecute individuals who bore the greatest responsibility for serious violation of international humanitarian laws of Sierra Leone committed within its borders during 30 November 1996 and the Sierra Leone Civil War<sup>23</sup>; and also for the violation of the Geneva Convention of 1949. The Special Court for Sierra Leone has jurisdiction to prosecute individuals for crimes against humanity,<sup>24</sup> violations of article 3 common to the Geneva Conventions and of Additional Protocol II,<sup>25</sup> other serious violations of international humanitarian law,<sup>26</sup> and crimes under Sierra Leonean law.<sup>27</sup>

Article 6 of the statutes stipulates that:

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<sup>23</sup> Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone pursuant to United Nations Security Council Resolution 1315, U.N. SCOR, 4186<sup>th</sup> meeting, U.N. Doc. S/RES/1315 (2000), Article 1 (1).

<sup>24</sup> Statute of the SCSL, Article 2.

<sup>25</sup> Statute of the SCSL, Article 3.

<sup>26</sup> Statute of the SCSL, Article 4.

<sup>27</sup> Statute of the SCSL, Article 5.



1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.
2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

From the time of its establishment the SCSL only eight individuals are currently serving their sentence and they are: Alex Brima, Morris Kallon, Issa Sessay, Charles Taylor, Augustine Gbao, Brima Kamara, Allieu Kondewa and Santigie Kanu.

### 3.6.2 The Statute of the Extraordinary Chambers in the Courts of Cambodia (ECCC)

The Statute of the Extraordinary Chambers of Cambodia was established<sup>28</sup> to try individuals responsible for crimes and serious violations of Cambodian penal law, international humanitarian law and custom and international conventions recognized by Cambodia.

Article 29 that individual criminal responsibility may be imposed on:

Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes ... shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The fact that any of the acts ... were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to

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<sup>28</sup> The Statute of the Extraordinary Chambers in the Courts of Cambodia (hereinafter referred to as the ECCC), United Nations General Assembly Resolution 228 B, U.N.G.A. 57<sup>th</sup> Session, U.N.Doc. A/RES/57/228B (2003) OF 22 May 2003.

commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

### 3.6.3 The Statute of the Iraqi Special Tribunal

The promulgation of the Statute of the Iraqi Special Tribunal was a measure to prosecute individuals for their participation in crimes related to Saddam Hussein including those who took part in the Ba'ath crimes.<sup>29</sup> The Statute authorised the Tribunal to try individuals for the crimes of genocide,<sup>30</sup> crimes against humanity,<sup>31</sup> war crimes,<sup>32</sup> and violations of stipulated Iraqi laws.<sup>33</sup>

Article 15 provides for the imposition of individual responsibility:

b) In accordance with this Statute, and the provisions of Iraqi criminal law, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Tribunal if that person:

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

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<sup>29</sup> Robert Cryer, *Prosecuting International Crimes: Selectively and the International Criminal Law Regime* (Cambridge University Press 2005) 71.

<sup>30</sup> Statute of the Iraqi Special Tribunal, Annexed to CPA Order No. 48, CPA/ORD/9 Dec 2003, Article 11.

<sup>31</sup> Statute of the Iraqi Special Tribunal, Article 12.

<sup>32</sup> Statute of the Iraqi Special Tribunal, Article 13.

<sup>33</sup> Statute of the Iraqi Special Tribunal, Article 14.

of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

c) The official position of any accused person, whether as president, prime minister, member of the cabinet, chairman or a member of the Revolutionary Command Council, a member of the Arab Socialist Ba'ath Party Regional Command or Government (or an instrumentality of either) or as a responsible Iraqi Government official or member of the Ba'ath Party or in any other capacity, shall not relieve such person of criminal responsibility nor mitigate punishment. No person is entitled to any immunity with respect to any of the crimes stipulated in Articles 11 to 14.

d) The fact that any of the acts referred to in Articles 11 to 14 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to submit the matter to the competent authorities for investigation and prosecution.

e) The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

#### 3.6.4 The Statute of the Special Court for Lebanon

In 2006, the UNSC Resolution 1664 of 2006 established the Special Tribunal for Lebanon<sup>34</sup> to try persons responsible for the terrorist crime between October 1<sup>st</sup> and 12<sup>th</sup> December 2005 which killed the former Lebanese Prime Minister Radik Hariri and many others. Article 2 provides that the tribunal has the power to prosecute individuals for 'acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy...'

Article 3 of the statute provides for the imposition of individual criminal responsibility in the following words:

(a) Committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute; or

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<sup>34</sup> The Statute of Special Court for Lebanon, annexed to the Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon pursuant to United Nations Security Council Resolution 1757, U.N.SCOR, 5685<sup>th</sup> meeting, U.N.Doc. S/RES/1757 (2007).

(b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting *Saddam Hussein Al Majeed* with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.

2. With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Since the establishment of the tribunal, the prosecution has indicted nine individuals in total who are all at large. Mustafa Amine Badreddine, Salim Jamil Ayyash, Hussein Hassan Oneissi, Assad Hassan Sabra and on 20<sup>th</sup> December 2013, the tribunal decided that Hassan Habib Merhi should be the fifth accused.

### 3.7 Chapter Summary

The evolution of modes of participation in international criminal law is methodological. The IMT, Nuremberg did not establish new modes of participation, what it did was to establish the essential elements of the modes of participation already existing in national legal systems to fit the nature of international crimes. It is for this reason that the Nuremberg Trials has been accepted to be a landmark in the international community in ensuring that participants of international crimes are held responsible for the roles they took in the commission of these crimes. Since then, numerous statutes post Nuremberg provide for similar modes of participation enlisted in the Charter of the IMT, Nuremberg. This serves as proof that the Nuremberg Trials have been accepted as a breakthrough in the development of principles of international criminal law on the imposition of individual criminal responsibility.

## CHAPTER FOUR

### THE JURISPRUDENCE OF THE UNITED NATIONS *AD HOC* TRIBUNALS ON THE MODES OF PARTICIPATION

#### 4.1 Introduction

The previous chapters have explored participation under domestic legal systems and international instruments. Amongst these international instruments are the Statutes of the UN *ad hoc* Tribunals: the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. This chapter looks at how the Trial and Appeal Chambers of these *ad hoc* Tribunals have construed the different modes of participation stipulated in the respective Statutes. To do this, extensive reliance is made on the jurisprudence of the Trial and Appeal Chambers on how they have construed these modes of participation.

Under the Statutes of the *ad hoc* Tribunals, different modes of participation are stipulated: they range from the traditional modes which require the commission of some positive act, or involvement at some stage in the preparation of the commission of the crime, to instances where an individual commits a crime by failing to act (liability for omission). Even though the concept of joint criminal enterprise has not featured in the modes of participation, some Trial and Appeal Chambers of the *ad hoc* Tribunals have infused this concept in their analyses of modes of participation. This chapter addresses some of those instances. However, before delving into a jurisprudential construction of the modes of participation under these Statutes, it is necessary to re-state the relevant provisions of the Statutes of the ICTY and ICTR dealing with participation.

#### 4.2 Participation under the Statutes of the *ad hoc* Tribunals

The Statutes of the *ad hoc* Tribunals defined the crimes over which the respective tribunals would have jurisdiction. Except for the crimes of genocide and crimes against humanity, the

characterisation of these crimes, specifically, war crimes, was different under the two Statutes. In addition, even though both Tribunals have jurisdiction over, amongst other things, the crime of crimes against humanity, the definitions contained in these two Statutes are very different.

Despite these remarkable differences, it is quite clear that on the imposition of individual criminal responsibility, the two Statutes bear plenty of similarities. Under the Statute of the ICTY, the imposition of individual criminal responsibility is stipulated under Article 7. Without doubt and any change, these same words were regurgitated in the Statute of the ICTR under Article 6.

The substantive content of the crimes as well as their definitions are not the focus of this dissertation. Rather, as it addresses the issue of participation under the Statutes of the ICTY and ICTR, the focal point here would be to discuss participation as it features under both Statutes.

When read together, Article 7 and Article 6 of the Statutes of the ICTY and ICTR respectively stipulate as follows:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime ... shall be individually responsible for the crime.<sup>1</sup>

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<sup>1</sup> Statute of the International Criminal Tribunal for the former Yugoslavia (herein referred to as the ICTY), annexed to United Nations Security Council Resolution 827, U. N. SCOR, 3217<sup>th</sup> meeting, U. N.Doc. S/RES/827 (1993), Article 7(1); Statute of the International Criminal Tribunal for Rwanda (hereinafter referred to as the ICTR), annexed to United Nations Security Council Resolution 955, U. N. SCOR, 3453<sup>rd</sup> meeting, U.N. Doc. S/RES/955 (1994), Article 6(1). For the jurisprudence, see the following cases: *Prosecutor v Zlatko Aleksovski*, Judgment, Case No. IT-95-14/1-T, 25 June 1999, Para 58; *Prosecutor v Duško Tadić*, Judgment, Case No. IT-94-1-A, Appeal Chamber, 15 July 1999, Para 186; *Prosecutor v Tihomir Blaškić*, Judgment, Case No. IT-95-14-T, 3 March 2000, Para 263; *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Judgment, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001, Para 387; *Prosecutor v Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić, and Dragoljub Prcać*, Judgment, Case No. IT-98-30/1-T, 2 November 2001, Para 240; *Prosecutor v Blagoje Simić, Miroslav Tadić and Simo Zarić*, Judgment, Case No. IT-95-9-T, 17 October 2003, Para 135; *Prosecutor v Naser Orić*, Judgment, Case Number IT-03-68-T, Ch. III, 30 June 2006, Para 266; *Prosecutor v Milan Martić*, Judgment, IT-95-11-T, T. Ch. I, 12 June 2007, Para 434; *Prosecutor v Mile Mrkšić, Miroslav Radić, and Veselin Šljivančanin*, Judgment, Case No. IT-95-13/1-T, T. Ch II, 27 September 2007, Para 541; *Prosecutor v Dragomir Milošević*, Judgment, Case No. IT-98-29/1-T, T. Ch. III, 12 December 2007; *Prosecutor v Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić*, Judgment, Case No. IT-05-87-T, Volume 1 of 4, 26 February 2009, Para 75 & 954; *Prosecutor v Milan Lukic and Sredoke Lukic*, Judgment, Case No. IT-98-32/1-T, T. Ch.

2. The official position of any accused person... shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts ... was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Under these Statutes, the modes of participation can be sub-divided into two: first, the traditional modes of participation (planned, instigated, ordered, committed, or aided and abetted), and secondly, participation through failure to prevent the commission of a crime (omission).

#### 4.3 Participation under the Statutes of the ICTY and ICTR: The Commonality of the Provisions

Common to these two Statutes is the requirement that for liability to be incurred, the accused must have at least participated in the commission of any of the crimes over which the Tribunal has jurisdiction. As has been construed by the Tribunals, should an accused participate by way of words, positive acts or by lending support, such acts shall be seen as acts of participation if they had a substantial effect in the commission of the crime.<sup>2</sup> In other words, the imposition of individual criminal responsibility under Articles 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively provides for the physical perpetration or the culpable omission of an act.<sup>3</sup> The jurisprudence of the ICTY suggests that there is no need to prove a causal link (the existence of a cause-effect relationship) between the mode of participation and the commission of the crime. The key issue is that the act of participation

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III, 20 July 2009, Para 896; *Prosecutor v Vlastimir Đorđević*, Judgment, Case No. IT-05-87/1-T, 23 February 2011, Para 1857.

<sup>2</sup> *Prosecutor v Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić and Esad Landžo also known as "Zenga"*, Judgment, Case No. IT-96-21-T, 16 November 1998, Para 326; *Aleksovski* (n 1); *Prosecutor v Ljube Boškoski and Johan Tarčulovski*, Judgement, Case No. IT-04-82-T, T. Ch. II, 10 July 2008, Para 393.

<sup>3</sup> *Boškoski et al* (n 2) Para 393.

must have facilitated or had substantial effect in the commission of the crime.<sup>4</sup> Such an act, however, must be accompanied by the requisite mental element: in other words, it must be proved that the accused was aware, knew what he was doing,<sup>5</sup> and that his assistance would contribute to the perpetration of the crime.<sup>6</sup>

Participation under the Statutes of the ICTY and ICTR may take place at any stage of the commission of the crime. Both Statutes make mention of these modes of participation (planning, instigating, ordering, committing or aiding and abetting) ‘in the planning, preparation or commission’ of any of the crimes over which the Tribunal has jurisdiction. A logical construction of these provisions would lead to the conclusion that any of the modes of participation would suffice if it leads to any of the stages of the crimes. The use of a disjunctive word ‘or’ rather than a conjunctive word ‘and’ supports this view. Therefore, in the case where orders were given and these led to the preparation for the crimes, such an individual who issued the orders would have participated in the commission of the crime. The wording of these provisions suggests that the imposition of individual criminal responsibility is bifurcated: it must be shown first, that the accused’s act or conduct can be classified as planning, instigating, ordering, committing or aiding and abetting, and secondly, such conduct of the accused led to the planning, preparation or commission of any of the crimes over which the Tribunal has jurisdiction.

Given this logical and broad interpretation of the wordings of Article 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively, it can be said that it is possible that ‘the act(s) contributing to the commission and the act of commission itself can be geographically and be temporarily distanced.’<sup>7</sup>

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<sup>4</sup> *Delalić et al* (n 2) Para 326.

<sup>5</sup> *Aleksovski* (n 1) Para 61.

<sup>6</sup> *Delalić et al* (n 2) Para 326

<sup>7</sup> *Aleksovski* (n 1) Para 62.



Based on the jurisprudence of the Trial and Appeal Chambers of the ad hoc Tribunals, criminal responsibility under Article 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively can be imposed only when the prosecution has proved, firstly, participation: in other words, that the conduct of the accused contributed, directly or indirectly to,<sup>8</sup> or had an effect on, the commission of a crime over which the Tribunal has jurisdiction. The accused's participation must be a substantial contribution to the commission of the crime.<sup>9</sup> The accused does not have to be present at the scene of the crime as 'the role of the individual in the commission of the offence need not always be a tangible one'.<sup>10</sup> Secondly, the knowledge or intent of the accused must be proved beyond a reasonable doubt, that is, the accused was aware that his conduct(s) amount to him participating in the crime.<sup>11</sup>

Responsibility is incurred by individuals who physically perpetrate the crime and those who participate in, and contribute to, the commission of them crime.<sup>12</sup> Participation ranges from the planning to execution phases.<sup>13</sup> In cases where an accused person played more than one role, the prosecution is required to identify the 'particular acts or the particular course of conduct on the part of the accused....'<sup>14</sup> Individual criminal responsibility is 'only' imposed on individuals where the crime is committed.<sup>15</sup> In cases of inchoate crimes, some complication arises: the Trial and Appeal Chambers have limited this to the crime of genocide, specifically, attempt to commit genocide, conspiracy to commit genocide and direct and public incitement to commit genocide.

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<sup>8</sup> *The Prosecutor v Clément Kayishema and Obed Ruzindana*, Judgment, Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999, Para 200.

<sup>9</sup> *Kayishema et al* (n 8) Paras 198-199.

<sup>10</sup> *Kayishema et al* (n 8) Para 200

<sup>11</sup> *Kayishema et al* (n 8) Para 198 & 203; *Prosecutor v Stanislav Galić*, Judgment, Case No. IT-98-29-T, T.Ch. I, 5 December 2003, Para 172.

<sup>12</sup> *The Prosecutor v Laurent Semanza*, Judgment, Case No. ICTR-97-20-T, T. Ch. III, 15 May 2003, Para 377; *The Prosecutor v Paul Bisengimana*, Judgment, Case No. ICTR-00-60-T, T. Ch II, 13 April 2006, Para 31; *The Prosecutor v Michel Bagaragaza*, Judgement, Case No. ICTR-05-86-S, T.Ch. III, 17 November 2009, Para 21.

<sup>13</sup> *The Prosecutor v Juvenal Kajelijeli*, Judgment, Case No. ICTR-98-44A-T, T. Ch. II, 1 December 2003, Para 757.

<sup>14</sup> *The Prosecutor v Jean-Baptiste Gatete*, Judgment, Case No. ICTR-2000-61-T, T.Ch. III, 31 March 2011, Para 557.

<sup>15</sup> *The Prosecutor v Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, T. Ch. I, 22 September 1998, Para 473.

The Trial and Appeal Chambers' jurisprudence indicate that for all the traditional modes of participation stipulated in Article 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively, the accused's conduct (whether an act or omission) must have substantially contributed to the commission of a crime. In addition, it must be established that he must have been 'aware that his conduct would so contribute to the crime'.<sup>16</sup> In cases of accomplice liability, the required *mens rea* is that the accused must have acted with the knowledge that his act assisted the perpetrator in committing the crime. In this case, the accused does not have to know about the offence to be committed, but rather must have been aware of the essential elements of the crime<sup>17</sup> and support the commission of a crime.<sup>18</sup>

#### 4.4 Traditional Modes of Participation

The traditional modes of participation under the Statutes of the ICTY and ICTR can be found under Articles 7(1) and 6(1) respectively, which provides as follows:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime ...shall be individually responsible for the crime.

The Trial and Appeal Chambers of the ICTY and ICTR have construed the meanings of these words, and further stipulated the distinguishing elements of each mode of participation.

##### 4.4.1 Planning

A crime is said to be planned when one or more persons design a criminal conduct at the preparation and execution phase.<sup>19</sup> If such planning leads to the execution of a crime, then,

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<sup>16</sup> *Kayishema et al* (n 8) Para 209; *Semanza* (n 12) Para 379.

<sup>17</sup> *The Prosecutor v Jean de Dieu Kamuhanda*, Judgment, Case No. ICTR-95-54A-T, T. Ch. II, 22 January 2004, Para 599.

<sup>18</sup> *Kajelijeli* (n 13) Para 768.

<sup>19</sup> *Akayesu* (n 15) Para 480; *The Prosecutor v Alfred Musema*, Judgment, Case No. ICTR-96-13-A, T. Ch. I, 27 January 2000, Para 119; *Blaškić* (n 1) Para 279; *Prosecutor v Dario Kordić*, Judgment, Case No. IT-95-14/2-T, 26 February 2001, Para 386; *Prosecutor v Radislav Krstić*, Judgment, Case No. IT-98-33-T, 02 August 2001, Para 601; *Prosecutor v Mladen Naletilić, aka "Tuta" and Vinko Martinović, aka "Stela"*, Judgment, Case No. IT-98-34-T, 31 March 2003, Para 59; *Kajelijeli* (n 13) Para 761; *Kamuhanda* (n 17) Para 592; *The Prosecutor v Sylvestre Gacumbitsi*, Judgment, Case No. ICTR-2001-64-T, T. Ch. III, 17 June 2004, Para 271; *The Prosecutor v Mikaeli Muhimana*, Judgment, Case No. ICTR-95-1B-T, T. Ch. III, 28 April 2005, Para 503; *Prosecutor v Fatmir Limaj, Haradin Bala and Isak Musliu*, Judgment, Case No. IT-03-66-T, T. Ch. II, 30 November 2005, Para 513; *The Prosecutor v Athanase Seromba*, Judgment, Case No. ICTR-2001-66-I, 13 December 2006, Para

liability should be imposed.<sup>20</sup> The planning must have substantially contributed to the commission of the crime.<sup>21</sup> The level of participation must be substantial such as the formulation of a plan or the endorsement of a plan proposed by another individual.<sup>22</sup> With regards to the mental element, it must be proved that the accused had the intention to ‘plan the commission of a crime or, at a minimum, it must be proved that the accused was aware of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned’.<sup>23</sup> Lastly, a person cannot be found guilty of planning and committing the crime at the same time.<sup>24</sup> It is not necessary to prove that but for the plan of the accused the crime would not have been committed.<sup>25</sup> It is unlikely for a conviction to be granted solely on

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303; *The Prosecutor v Callixte Kalimanzira*, Judgment, Case No. ICTR-05-88-T, T. Ch. III, 22 June 2009, Para 161; *The Prosecutor v Ephrem Setako*, Judgment, Case No. ICTR-04-81-T, T.Ch. I, 25 February 2010, Para 446; *The Prosecutor v Yussuf Muniyazi*, Judgment, Case No. ICTR-97-36A-T, T. Ch. I, 5 July 2010, Para 427; *The Prosecutor v Gaspard Kanyarukiga*, Judgment, Case No. ICTR-2002-78-T, T.Ch. II, 1 November 2010, Para 618; and, *The Prosecutor v Ildphonse Hategekimana*, Judgment, Case No. ICTR-00-55B-T, T.Ch. II, 6 December 2010, Para 643; *Đorđević* (n 1) 1869. See also Robert Cryer, Hakan Friman, Darryl Robinson, and Elizabeth Wilmschurst, *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup> edn Cambridge University Press 2014) 379; Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell, and Alex Whiting, *Cassese's International Criminal Law* (3<sup>rd</sup> edn, Oxford university Press 2013) 197-198; Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell, and Alex Whiting, *International Criminal Law: Cases and Commentary* (Oxford university Press 2011) 364; Mohamed Elwa Badar, ‘Participation in Crimes in the Jurisprudence of the ICTY and ICTR’ in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011).

<sup>20</sup> *Prosecutor v Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, T. Ch. II, 1 September 2004, Para 268; *Limaj et al* (n 19) Para 548; *Milošević* (n 1) Para 956; and, *Boškoski et al* (n 2) Para 398; *Gatete* (n 14) Para 573.

<sup>21</sup> *Seromba* (n 19) Para 303; *Mrkšić* (n 1) Para 548; *Boškoski et al* (n 2) Para 398; *Milutinović et al* (n 1) Para 81; *Setako* (n 19) Para 446; *Hategekimana* (n 19) Para 643; *Đorđević* (n 1) Para 1869; *Gatete* (n 14) Para 573; *Prosecutor v Ante Gotovina, Ivan Čermak and Mladen Markač*, Judgment, Case No. IT-06-90-T, T. Ch. I, 15 April 2011, Para 1957; and, *Prosecutor v Zdravko Tolimir*, Judgment, Case No. IT-05-88/2-T, T. Ch. II, 12 December 2012, Para 899.

<sup>22</sup> *Semanza* (n 12) Para 380; *Kajelijeli* (n 13) Para 761; *Kamuhanda* (n 17) Para 592; *Tolimir* (n 21) Para 899.

<sup>23</sup> *Limaj et al* (n 28) Para 513; *The Prosecutor v Jean Mpambara*, Judgment, Case No. ICTR-01-65-T, T. Ch. I, 11 September 2006, Para 20; *Mrkšić* (n 1) Para 548; *Boškoski et al* (n 2) 398; *The Prosecutor v Hormisdas Nsengimana*, Judgment, Case No. ICTR-01-69-T, T. Ch. I, 17 November 2009, Para 796; *Setako* (n 19) Para 446; *Prosecutor v Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević*, Judgment, Case No. IT-05-88-T, T.Ch. II, 10 June 2010, Para 1006; *Đorđević* (n 1) Para 1869; *Kanyarukiga* (n 19) Para 618; *Hategekimana* (n 14) Para 643; *Gatete* (n 14) Para 573; *The Prosecutor v Gregoire Ndahimana*, Judgment, Case No. ICTR-01-68-T, T. Ch. II, 30 December 2011, Para 717; *The Prosecutor v Edouard Karemera and Mattieu Ngirumpatse*, Judgment, Case No. ICTR-98-44-T, T. Ch. III, 2 February 2012, Para 1426; *The Prosecutor v Callixte Nzabonimana*, Judgment, Case No. ICTR-98-44D-T, T.Ch. III, 31 May 2012, Para 1693; *The Prosecutor v Augustin Ndirabatware*, Judgment, Case No. ICTR-99-54-T, T.Ch. II, 20 December 2012, Para 1290; Robert Cryer, Hakan Friman, Darryl Robinson, and Elizabeth Wilmschurst, *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup> edn Cambridge University Press 2014) 379; Cassese *et al* (n 19) 197- 198; Schabas and Bernaz (n 19) 248.

<sup>24</sup> *Kordić et al* (n 19) Para 386; *Naletilić et al* (n 19) Para 59; *Prosecutor v Milomir Stakić*, Judgment, Case No. IT-97-24-T, T. Ch. II, 31 July 2003, Para 443; and, *Popović et al* (n 23) Para 1006.

<sup>25</sup> *Milutinović et al* (n 1) Para 82 and *Popović et al* (n 23) Para 1006.

‘planning’ as a mode of participation. This is because this mode of participation overlaps with other modes of participation such as ordering and aiding and abetting.

Below are examples of cases where the Trial Chambers were convinced that accused persons participated in the planning of the crimes within their jurisdiction:

In the case of the *Prosecutor v Dario Kordić and Mario Čerkez* the Trial Chamber held that, the accused (*Kordić*) participated in the HVO attacks and had the intention to commit the crimes associated with them and as such he was responsible for not only instigating, but also planning the crimes.<sup>26</sup>

In the case of *Prosecutor v Mladen Naletilić, aka “Tuta” and Vinko Martinović, aka “Štela”*, the Trial Chamber held that the accused were involved in the Sovici/Doljani operation and that *Naletilić* took final decisions as to how the operation was to be carried out<sup>27</sup> and he had the knowledge of transfers of Muslim civilians since he was involved in the planning of the transfers.<sup>28</sup>

In the case of *Prosecutor v Milan Babić*, as from August 1991 the accused (*Babić*) intentionally participated in planning the campaign to forcibly remove the Croat and non-Serb populations and also planned SDS policies to advance the campaign of persecution against non-Serb populations.<sup>29</sup>

In the case of *The Prosecutor v Sylvestre Gacumbitsi*, the Trial Chamber found that the accused (*Gacumbitsi*) planned the murder of Tutsi’s in Rusumo *commune*: he received boxes of weapons which were later used at the commune. He addressed crowds at Nyakarambi market requesting the Hutu majority not to let Tutsis escape and to arm themselves with machetes and fight to eliminate the Tutsis. Although the Trial Chamber concluded that the attacks were as a result of the instigation stirred up by the accused, the

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<sup>26</sup> Judgment, Case No. IT-95-14/2-T, 26 February 2001, Para 834.

<sup>27</sup> *Naletilić* (n 19) Para 132.

<sup>28</sup> *Naletilić* (n 19) Paras 522 and 532.

<sup>29</sup> *The Prosecutor v Milan Babić*, IT-03-72, 29 June 2004, Paras 26 and 57.

Trial Chamber also held that the accused was responsible for planning the attacks which led to the killing of Tutsis at Rusumo *commune*.<sup>30</sup>

In *The Prosecutor v Gatete*, the Trial Chamber held that, the accused (Gatete) took part in the coordination and planning operation of the massacre in Kizigura and therefore responsible for the death of the Tutsi civilians.<sup>31</sup>

In *Gaspard Kanyarukiga v The Prosecutor* the Appeal Chamber affirmed the accused (Kanyarukiga) conviction for planning genocide and extermination as a crime against humanity in that he participated in the planning the destruction of the Nyange church which resulted in the death of approximately 2000 Tutsi civilians.<sup>32</sup>

#### 4.4.2 Instigation

Another traditional mode of participation that features under Article 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively is instigation, which, as interpreted by the Trial Chambers of the ICTR, is synonymous with incitement. Even though instigation by its nature is an inchoate crime, and ought to be so if construed correctly and logically under Articles 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively, it has been quite problematic to the Trial and Appeal Chambers of the ad hoc Tribunals. Prior to discussing this problematic interpretation and jurisprudence, it is important to consider the meaning of instigation under Articles 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively.

Instigation as a mode of participation means encouraging, influencing or provoking another to engage in a criminal act.<sup>33</sup> It may take the form of words, gestures, or even actions.

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<sup>30</sup> *Gacumbitsi* (n 19) Para 271-278.

<sup>31</sup> *Gatete* (n 14) Para 24 and 26.

<sup>32</sup> ICTR-02-78-A, 8 May 2012, Para 3

<sup>33</sup> *The Prosecutor v Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, T. Ch. I, 22 September 1998, Para 557; *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v The Prosecutor, Appeal Judgment*, Case Number ICTR-99-52-A. Ch., 28 November 2007, Para 692; *The Prosecutor v Casimir Bizimungu, Justin Mugenzi, Jerome-Clement Bicamumpaka, and Prosper Mugiraneza*, Judgment, Case No. ICTR-99-50-T, T.Ch. II, 30 September 2011, Para 1974.

Most often, it comprises a speech that could be delivered to someone in private, or even to a community at large.

Like the other traditional modes of participation, there is a need to prove a causal link between the act of instigation and the commission of the crime.<sup>34</sup> The instigator must have acted with the intent that the crime be committed, or, at least, must have had awareness of the substantial likelihood that the crime may be committed.<sup>35</sup> According to the ICTY and the ICTR respectively, for an accused to be criminally liable for instigation, two requirements must be satisfied: first, the act(s) of instigation must have directly and substantially contributed in the perpetration of a crime,<sup>36</sup> and, secondly, the crime must have been committed.<sup>37</sup> The requirements of substantial contribution and actual commission of the crime flow from an incorrect and illogical interpretation of the wording of Article 6(1) of the Statute of the ICTR.<sup>38</sup>

As a mode of participation under the Statutes of the ICTY and ICTR, it ought to have been construed as unnecessary that it led to the physical perpetration of the crime. This approach is reasoned on the wording of Article 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively. The enlisted modes of participation should lead to any of the stages

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<sup>34</sup> *Blaškić* (n 1) Para 278; *Kordić* (n 19) Para 387; *Semanza* (n 12) Para 381; *Kajelijeli* (n 13) Para 762; *Kamuhanda* (n 17) Para 593; *Gacumbitsi* (n 19) Para 279; *Brđanin* (n 20) Para 269; *Muhimana* (n 19) Para 504; *Limaj et al* (n 28) Para 514; *Orić* (n 1) Para 274; *Mrkšić* (n 1) Para 549; *Boškoski et al* (n 2) Para 399; *Dorđević* (n 1) Para 1870; ; *Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgment, Case No. IT-04-84bis-T, T.Ch. II, 29 November 2012, Para 623.

<sup>35</sup> *Kvočka et al* (n 1) Para 252; *Naletilić et al* (n 19) Para 60; *The Prosecutor v Emmanuel Ndindabahizi*, Judgment, Case No. ICTR-2001-71-I, T. Ch. I, 15 July 2004, Para 45; *Limaj et al* (n 28) Para 514; *Orić* (n 1) Para 279; *Mrkšić* (n 1) Para 549; *Boškoski et al* (n 2) Para 399; *Nsengimana* (n 23) Para 797; *Setako* (n 19) Para 447; *Popović et al* (n 23) Para 1007; *Kanyarukiga* (n 19) Para 619; *Hategekimana* (n 19) Para 644; ; *Dorđević* (n 1) Para 1870; *Gotovina et al* (n 21) Para 1958; *Bizimungu* (n 33) Para 1913; *Ndahimana* (n 23) Para 719; *Karempera et al* (n 23) Para 1427; *Nzabonimana* (n 23) Para 1694; *Ngirabatware* (n 23) Para 1291.

<sup>36</sup> *Ndindabahizi* (n 33) Para 456; *Brđanin* (n 20) Para 269; *Mpambara* (n 23) Para 18; *Seromba* (n 19) Para 304; *Boškoski et al* (n 2) Para 399; *Setako* (n 19) Para 447; *Popović et al* (n 23) Para 1009; *Munyakazi* (n 19) Para 428; *Kanyarukiga* (n 19) Para 619; *Hategekimana* (n 19) Para 644; *Gatete* (n 14) Para 547; *Ndahimana* (n 23) Para 718; *Karempera et al* (n 23) Para 1427; *Nzabonimana* (n 23) Para 1694; *Ngirabatware* (n 23) Para 1291; *Cassese et al* (n 19) 197; *Schabas and Bernaz* (n 19) 249.

<sup>37</sup> *Akayesu* (n 15) Para 482, *Gacumbitsi* (n 19) Para 456; *Ndindabahizi* (n 33) Para 456; *Mpambara* (n 23) Para 18.

<sup>38</sup> Avitus A. Agbor, 'The Substantial Contribution Requirement: The Unfortunate Outcome of an Ilogical Construction and Incorrect Understanding of Article 6(1) of the Statute of the ICTR' (2012) 12 *International Criminal Law Review* 155.

(planning, preparation or execution) of any of the crimes under the Tribunals' jurisdiction. Therefore, like in the cases of ordering and planning, it is sufficient to show that such conduct led to the planning or preparation of any of the crimes under the Tribunals' jurisdiction. This itself, lends support to the view that the mode of participation, in its own right, is inchoate: it should not require the commission of the crime for responsibility to be imposed.

Looking at the jurisprudence of the Trial and Appeal Chambers of the ICTR on instigation, instigation as a mode of participation must take the form of a call for criminal actions directed at a number of individuals gathered in a public place for example a market, or must be directed to members of public at large. A person may do this by making use of mass media such as radio or television, or making use of speeches, shouting, threats uttered in a public place or gatherings or making use of public display of placards or posters or audio-visual communications.<sup>39</sup> In determining whether the acts of incitement of an accused satisfied this requirement, the following must be taken into account: the place where the incitement took place, and whether or not the acts of assistance was selective or limited.<sup>40</sup>

An accused is said to have instigated the commission of a crime where he prompted, influenced,<sup>41</sup> or provoked<sup>42</sup> another person, through a positive act or omission,<sup>43</sup> by way of urging or encouraging verbally or by making use of other means of communication to

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<sup>39</sup> *Kalimanzira* (n 19) Para 515.

<sup>40</sup> *Akayesu* (n 31) Para 556; *Augustin Ndirabatware v The Prosecutor*, Appeal Judgment, Case No.MICT-12-29-A, A. Ch., 18 December 2014, Para 52.

<sup>41</sup> *Ndahimana* (n 23) Para 718.

<sup>42</sup> *Blaškić* (n 1) Para 280; *Kordić et al* (n 19) Para 387; *Krstić* (n 19) Paras 243 and 252; *Semanza* (n 12) Para 381; *Brđanin* (n 20) Para 269; *Limaj et al* (n 28) Para 514; *Orić* (n 1) Para 270; *Nsengimana* (n 23) Para 797; *Kalimanzira* (n 19) Para 161; *Popović et al* (n 23) Para 1007; *Đorđević* (n 1) Para 1870; *The Prosecutor v Augustin Ndiriliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye and Innocent Sagahutu*, Judgment, Case No. ICTR-00-56-T, T. Ch. II, 17 May 2011, Para 1913; *Karemera et al* (n 23) Para 1427; *Nzabonimana* (n 23) Para 1694 and *Ndirabatware* (n 23) Para 1291.

<sup>43</sup> *Naletilić et al* (n 19) Para 60; *Kajelijeli* (n 13) Para 762; *Kamuhanda* (n 17) Para 593; *Muhimana* (n 19) Para 504; *Seromba* (n 19) Para 304; ; *Mrkšić* (n 1) Para 549; *Boškoski et al* (n 2) Para 399; *Milutinović et al* (n 1) Para 83; *Setako* (n 19) Para 447; *Popović et al* (n 23) 1007; *Munyakazi* (n 19) Para 428; *Kanyarukiga* (n 19) Para 619; *Hategekimana* (n 19) 644; *Gatete* (n 14) Para 574; *Haradinaj* (n 34) Para 623.



commit a crime.<sup>44</sup> Instigation does not have to be direct or public.<sup>45</sup> The instigator does not have to be present at the crime scene. Instigation can be done face-to-face or by an intermediary exerted over a small or large audience ‘provided that the instigator had the corresponding intent’.<sup>46</sup>

Unfortunately, this line of reasoning has not been taken by the Trial and Appeal Chambers of the ICTY and ICTR. More specifically, the ICTR whose Trial and Appeal Chambers dealt with many cases involving direct and public incitement to commit the crime of genocide. The inclusion of the crime of genocide as well as the punishable crimes related to genocide posed a challenge to the Trial and Appeal Chambers of the ICTR. The cases from the Trial and Appeal Chambers of the ICTR indicate that instigation has been limited to the inchoate crime of direct and public incitement to commit genocide under Article 2(3)(c) of the Statute of the ICTR.

However, these two provisions do have some notable distinctions: first, instigation under Article 6(1) of the Statute of the ICTR is distinct from direct and public incitement to commit genocide under Article 2(3)(c) of the Statute of the ICTR. Under the former, instigation ought to lead to any of the stages of any of the crimes over which the ICTR has jurisdiction. On the other hand, instigation under Article 2(3)(c) of the Statute of the ICTR is limited to the crime of genocide. Secondly, the former does not have any qualifying adjectives. On the other hand, under Article 2(3)(c) of the Statute of the ICTR, such incitement must be ‘direct’ and ‘public’: these words have been construed by the Trial and Appeal Chambers of the ICTR. Thirdly, instigation as a mode of participation under Article 6(1) of the Statute of the ICTR is not limited to any crime. It is a mode of participation that

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<sup>44</sup> *Ndandibahizi* (n 14) Para 456; *Mpambara* (n 23) Para 18; *Milutinović et al* (n 1) Para 83 and *Tolimir* (n 21) Para 900. Cryer, Friman, Robinson, and Wilmschurst (n 31) 376; Cassese *et al* (n 19) 197; Schabas and Bernaz (n 19) 248-249.

<sup>45</sup> *Semanza* (n 12) Para 381; *Kajelijeli* (n 13) Para 762; *Kamuhanda* (n 17) Para 593; *Muhimana* (n 19) Para 504. *Orić* (n 1) Para 273 and *Tolimir* (n 21) Para 900.

<sup>46</sup> *Orić* (n 1) Para 273.



should result to any of the stages of any of the crimes over which the ICTR has jurisdiction. On the other hand, Article 2(3)(c) of the Statute of the ICTR is limited to the crime of genocide.

Common to these two provisions relating to instigation is the fact that they ought to be seen as inchoate. Beyond doubt is the fact that the Trial and Appeal Chambers of the ICTR have interpreted Article 2(3)(c) of the Statute of the ICTR as inchoate: responsibility would be incurred if it is established that there was a direct and public incitement to commit genocide. It is unnecessary to show that such a direct and public incitement to commit genocide actually led to the commission of the crime of genocide.

Given this construction of these provisions, it is clear that there may be instances of an overlap: that is to say, an act that qualifies as instigation under Article 6(1) of the Statute of the ICTR may well qualify as direct and public incitement to commit genocide under Article 2(3)(c) of the Statute of the ICTR. The only requirement under the latter is that such instigation must be direct, public, and for the commission of the crime of genocide.

Even though numerous cases that were concluded by the Trial and Appeal Chambers indicated instances of this overlap, it went quite unnoticed until the case of *The Prosecutor v Callixte Kalimanzira*. The Trial Chambers of the ICTR noticed this overlap and went further to develop a set of rules which have been characterised as the ‘Kalimanzira Guidelines’. The Trial Chamber stipulated as follows:

- Incitement resulting in the commission of a genocidal act is punishable under the combination of Articles 2(3)(a) and 6(1) of the Statute as Genocide by way of Instigation;
- Incitement resulting in the commission of a genocidal act and which may be described as ‘direct’ and ‘public’ is punishable under either Article 2(3)(c) of the Statute as Direct and Public Incitement to Commit Genocide, or under the combination of Articles 2(3)(a) and 6 (1) of the Statute as Genocide by way of Instigation;
- Incitement not resulting in the commission of a genocidal act but which may be described as ‘direct’ and ‘public’ is only punishable under Article 2(3)(c) of the Statute; and,

- Incitement not resulting in the commission of a genocidal act, and which may not be described as ‘direct’ and ‘public’, is not punishable under the Statute.

The development of the ‘Kalimanzira Guidelines’ was to shed light on instances of instigation overlapping under Articles 6(1) and 2(3)(c) of the Statute of the ICTR, and also postulate a set of rules in order to avoid inconsistencies in future situations. These Guidelines, however, have not been immune to scholarly criticism.<sup>47</sup>

It is settled that under Articles 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively, instigation is a mode of participation. These two Statutes, like the UN Convention on the Prevention and Punishment for the Crime of Genocide, do make punishable ‘direct and public incitement to commit genocide’. The inchoate crime of direct and public incitement to commit genocide is itself a crime, and not a mode of participation under the Statutes of the ICTY and ICTR. It therefore falls outside the scope of this dissertation which is limited to modes of participation, and instigation as a mode of participation is covered only under Article 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively.

In *The Prosecution v Jean-Paul Akayesu*, one of the legal questions that had to be answered was whether or not a crimes under Article 2(3)(c) of the Statute of the ICTR can be punishable even where incitement was unsuccessful and it held that direct and public incitement to commit genocide is punishable even where the incitement failed to produce the

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<sup>47</sup> For example, according to Agbor, under the Kalimanzira Guidelines, incitement is limited to the crime of genocide only, and as a result, the possibility of an accused being charged with incitement to commit crimes against humanity is overlooked. The core of his argument is that Article 6(1) provides that liability may be imposed where one assumes any of the five traditional modes of participation, at any of the stages stipulated, in the commission of any of the crimes which the ICTR has jurisdiction. In addition, he contends that, the Trial Chamber maintains the interpretation of Article 6(1) in relation to instigation as applying to a selective crime which is genocide. The second argument he raises is that the *Kalimanzira* Principles repeatedly make use of the phrase ‘resulting in the commission of’. To support his point of view, he argues that this phrase is based on the ‘substantial contribution’ requirement established in the jurisprudence of the ICTR. The requirement singles out instigation as a mode of participation performed at the commission (or execution of a crime as stipulated in article 6(1)) of a crime while Article 6(1) provides for the planning, preparation and execution of a crime: Avitus A. Agbor, *Instigation to Commit Crimes against Humanity: The Flawed Jurisprudence of the Trial and Appeal Chambers of the International Criminal Tribunal for Rwanda (ICTR)* (Martinus Nijhoff 2013) 135-138.

intended result by the perpetrator. The Trial Chamber defined direct and public incitement as act or acts that directly provoke(s) a perpetrator to commit genocide and an accused must have the intention to directly prompt or provoke another to commit genocide, that is, the person who is inciting must have the specific intention to commit genocide. The Trial Chamber held that the accused (Akayesu) successfully incited genocide directly and publicly leading to the destruction of Tutsi in the commune of Taba.<sup>48</sup>

In *The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze*, Nahimana and Barayagwiza were founders of the *Radio Television Libre des Mille Collines (RTLM)* and Ngeze founded the *Kangura* newspaper and was Editor-in-Chief.<sup>49</sup> The Trial Chambers found all three guilty for direct and public incitement to commit genocide. The accused lodged an appeal. One of the issues of appeal were the elements of direct and public incitement to commit genocide. The Appeal Chamber made a distinction between instigation under article 6(1) and direct incitement to commit genocide under article 2(3)(c) of the Statute of the ICTR. Firstly, the Appeal Chamber held that, instigation is a mode of participation and for an accused to incur liability, his acts must have substantially contributed in the commission of any of the crimes enlisted in Article 2 to 4 of the Statute of the ICTR. On the other hand, direct and public incitement to commit genocide under Article 2(3)(c) was a crime in itself even if genocide did not occur.<sup>50</sup> Secondly, article 2(3)(c) requires incitement to be direct and public, whilst article 6(1) does not.<sup>51</sup> The Appeal Chamber confirmed the conviction of Ngeze for directly and publicly inciting the commission of genocide through certain articles and editorials in *Kangura* in 1994<sup>52</sup> and that Nahimana failed to take

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<sup>48</sup> *Akeyesu* (n 15) Paras 559, 560, 562 and 675.

<sup>49</sup> Judgment, Case No. ICTR-99-52-T, 3 December 2003, Paras 5-7.

<sup>50</sup> *Nahimana et al* (n 33) Para 677-678.

<sup>51</sup> *Nahimana et al* Para 679.

<sup>52</sup> *Nahimana et al* Para 886.

necessary and reasonable measures to prevent or punish direct and public incitement to murder Tutsi in 1994 by RTLM staff.<sup>53</sup>

In *The Prosecutor v Tharcisse Muvunyi* the accused (Muvunyi) was a Lieutenant-Colonel and he was charged with direct and public incitement to commit genocide and was found guilty with respect to the meetings held at Gikonko in April and Gikore in May 1994. It was held that in Gikonko the accused referred Tutsis as “snakes” and addressed a crowd of Hutu male civilians that the Tutsis should be killed leading to the death of a Tutsi man named Vincent Nkurikiyinka who was killed by the mob. The Trial Chamber held that Muvunyi’s words were spoken in public, were directed to Hutu civilians and to provoke the civilians to kill Tutsis. In a public meeting at Gikore made a speech where he called for the killing of Tutsis, destruction of their property and associated the Tutsis with the enemy at a time of war and denigrated the Tutsis by associating them with snakes and poisonous agents. The Trial Chamber held that the audience understood the accused remarks as a call to kill to eliminate the Tutsi population and he knew of this fact, and therefore he had the intention to destroy in whole or in part the Tutsi ethnic group.<sup>54</sup>

In *The Prosecution v Simon Bikindi* one of the key questions that had to be answered was whether or not Bikindi’s songs constituted direct and public incitement to commit genocide. The Trial Chamber held that, a song may constitute direct and public incitement to commit genocide depending on the nature of the conveyed message and the circumstances. It further held that the songs sung by the accused (Bikindi) encouraged ethnic hatred and manipulated the history of Rwanda and had an amplifying effect on genocide. The accused was found guilty for calling out Hutus to exterminate Tutsis on the main road between

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<sup>53</sup> *Nahimana et al* Para 856.

<sup>54</sup> Judgment, Case No. ICTR-00-55A-T, T.Ch. III, 11 February 2010, Paras 30, 506, 507, 509 and 510.

Kivumu and Kayove in late June 1994 under Article 2(3)(c) and 6(1) as a principal perpetrator<sup>55</sup>

In *The Prosecution v Callixte Kalimanzira*, the Trial Chamber found the accused (Kalimanzira) for committing direct and public incitement to commit Genocide at the Jaguar roadblock. In mid to late April 1994 the accused stopped at the roadblock and handed Marcel Ntirusekanwa a rifle in the presence of other who civilians who were manning the roadblock and told everyone that the gun was to be used to kill Tutsis. It held that, the people present at the roadblock understood his words and actions as a call to kill the Tutsis and that the accused intended to directly and publicly incite such acts, that is to say, the incitement to kill the Tutsis was clear, direct, and was made in a public place to an indeterminate group of persons.<sup>56</sup>

In *The Prosecutor v Idelphonse Hategekimana*, the Trial Chamber considered instigation to be synonymous to incitement and defined it as prompting another to commit an offence. According to the Trial Chamber, it is not necessary to prove that but for the involvement of an accused the crime would not have been committed, however, it is sufficient to show that the accused act(s) of incitement substantially contributed to the conduct of another to commit a crime. The accused must have the intent to instigate another to commit a crime or at a minimum, must have been aware of the substantial likelihood that the crime will be committed.<sup>57</sup>

#### 4.4.3 Ordering

‘Ordering’ is not only a mode of participation but also a form of complicity:<sup>58</sup> it takes place where a person in a position of authority instructs another person (usually someone below

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<sup>55</sup> *The Prosecution v Simon Bikindi*, Judgment, Case No. ICTR-01-71-T, T. Ch. III, 2 December 2008, Paras 254, 264, 389 and 426.

<sup>56</sup> *Kalimanzira* (n 19) Para 560 561 and 562.

<sup>57</sup> Judgment, Case No. ICTR-00-55B-T, T.Ch. II, 6 December 2010, Para 644.

<sup>58</sup> *Akayesu* (n 15) Para 483.

him or her) to commit an offence.<sup>59</sup> The mental elements here is that such an instruction must be accompanied by an intent that the crime be committed.<sup>60</sup> Ordering is considered to be a more direct form of responsibility.<sup>61</sup> Liability is incurred where the order has a direct and substantial effect on the commission of the crime.<sup>62</sup> An order must be given by way of a positive act, and not by omission.<sup>63</sup> There must be a causal link between the order that is given and the commission of a crime.<sup>64</sup>

There are conflicting views on the requirement of the existence of a superior-subordinate relationship for ordering to take place.<sup>65</sup> One view provides that a superior-subordinate relationship must exist between a person who gave the order and the person who implemented or executed it.<sup>66</sup> Such a relationship could be either a formal or an informal hierarchical relationship involving an accused's effective control over the physical perpetrator, that is, the individual executing the order.<sup>67</sup> On the other hand, the other view focuses on the existence of a formal superior-subordinate relationship. Although there are two distinctive views on this aspect, the Tribunals have accepted that a formal superior-

<sup>59</sup> *Akayesu* (n 15) Para 483; *Blaškić* (n 1) Para 281; *Krstić* (n 19) Para 601; *Naletilić et al* (n 19) Para 61; *Semanza* (n 12) Para 382; *Stakić* (n 24) Para 445; *Kamuhanda* (n 17) Para 594; *Gacumbitsi* (n 19) Para 281; *Brđanin* (n 20) Para 270; *Prosecution v Pavle Strugar*, Judgment, Case No. IT-01-42-T, T.Ch. II, 31 January 2005, Para 331; *Muhimana* (n 19) Para 505; *Limaj et al* (n 28) Para 515; *Mpambara* (n 23) Para 19; *Seromba* (n 19) Para 305; *Martić* (n 1) Para 441; *Mrkšić* (n 1) Para 550; *Milošević* (n 1) Para 957; *Boškoski et al* (n 2) Para 400; *Milutinović et al* (n 1) Para 85; *Nsengimana* (n 23) Para 799; *The Prosecutor v Tharcisse Muvunyi*, Judgment, Case No. ICTR-00-55A-T, T.Ch. III, 11 February 2010, Para 467; *Setako* (n 19) Para 449; *The Prosecutor v Dominique Ntawukulilyayo*, Judgment, Case No. ICTR-05-82-T, T.Ch. III., 3 August 2010, Para 416; *Kanyarukiga* (n 19) Para 620; *Hategekimana* (n 19) Para 645; *Đorđević* (n 1) Para 1871; *Gatete* (n 14) Para 575; ; *Gotovina et al* (n 21) Para 1959; *Ndindiliyimana et al* (n 35) Para 191; *Ndahimana* (n 23) Para 719; *Karempera et al* (n 23) Para 1428; *Nzabonimana* (n 23) Para 1695; and, *The Prosecutor v Iidephonse Nizeyimana*, Judgment, Case No. ICTR-2000-55C-T, T. Ch. III, 19 June 2012, Para 1464; *Haradinaj et al* (n 34) Para 624. Cassese *et al* (n 19) 196; Schabas and Bernaz (n 19) 249; William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) 301.

<sup>60</sup> *Brđanin* (n 20) Para 270; *Limaj et al* (n 28) Para 515; *Seromba* (n 19) Para 306; *Boškoski et al* (n 2) Para 400; *Milutinović et al* (n 1) Para 85; *Đorđević* (n 1) Para 1872; *Haradinaj et al* (n 34) Para 624; *Tolimir* (n 21) Para 904 *Ngirabatware* (n 23) Para 1292.

<sup>61</sup> *The Prosecutor v Andre Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Judgment, Case No. ICTR-99-46-T, T. Ch. III, 25 February 2004, Para 746.

<sup>62</sup> *Milošević* (n 1) Para 958; *Boškoski et al* (n 2) Para 400; *Karempera et al* (n 23) Para 1428; *Nzabonimana* (n 23) Para 1695; *Tolimir* (n 21) Para 905; *Ngirabatware* (n 23) Para 1292.

<sup>63</sup> *Popović et al* (n 23) Para 1010; and, *Đorđević* (n 1) Para 1871.

<sup>64</sup> *Strugar* (n 59) Para 331. Schabas and Bernaz (n 19) 250.

<sup>65</sup> *Gacumbitsi* (n 19) Para 282; and, *Ndindiliyimana et al* (n 35) Para 1911.

<sup>66</sup> *Semanza* (n 12) Para 382. Cryer *et al* (n 19) 375.

<sup>67</sup> *Limaj et al* (n 28) Para 515; *Seromba* (n 19) Para 305.

subordinate relationship does not need to exist between the accused and the physical perpetrator of the offence.<sup>68</sup> In addition, the existence of such a relationship can be established on a case-to-case basis.<sup>69</sup> However, it must be proven that the accused was in a position of authority (*de jure* or *de facto* authority)<sup>70</sup> that compelled or convinced<sup>71</sup> another person to commit the offence by way of implementing the order given.<sup>72</sup>

The order must not be in writing, or in any particular form.<sup>73</sup> Its existence may be proven by circumstantial evidence.<sup>74</sup> The authority of an accused may be derived from social, economic, political or administrative factors, or by merely abiding to moral principles. At times, the authority of an accused may have been enhanced by a lawful or unlawful element of coercion. The presence of such element is that it can determine the way the words of the influential person are perceived. As a result, the ICTR Trial Chambers held that mere words of encouragement, if given, may be perceived as an order under Article 6(1), which does not necessarily mean that there existed a formal superior-subordinate relationship. However,

instructions given outside a purely informal context by a superior to his subordinate within a formal administrative hierarchy, be it *de jure* or *de facto*, would also be considered as an “order” within the meaning of Article 6 (1).<sup>75</sup>

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<sup>68</sup> *Kordić et al* (n 19) Para 388; *Naletilić et al* (n 19) Para 61; *Kamuhanda* (n 17) Para 595; *Brđanin* (n 20) Para 270; *Strugar* (n 59) Para 331; *Limaj et al* (n 28) Para 515; *Mpambara* (n 23) Para 19; *Milutinović et al* (n 1) Para 86; *Nsengimana* (n 23) Para 799; *Setako* (n 19) Para 449; *Popović et al* (n 23) Para 1012; *Muvunyi* (n 59) Para 467; *Gatete* (n 14) Para 575; *Ntawukulilyayo* (n 59) Para 416; *Ndahimana* (n 23) Para 719; *Karempera et al* (n 23) Para 1428; *Nizeyimana* (n 59) Para 1464; *Tolimir* (n 21) Para 905. *Ngirabatware* (n 23) Para 1292; *Cassese et al* (n 19) 196.

<sup>69</sup> *Gacumbitsi* (n 19) Para 282.

<sup>70</sup> *Martić* (n 1) Para 441; *Boškoski et al* (n 2) Para 400; *Dorđević* (n 1) Para 1871; *Tolimir* (n 21) Para 905. *Schabas and Bernaz* (n 19) 250.

<sup>71</sup> *Akayesu* (n 15) Para 483. *Cassese et al* (n 19) 373.

<sup>72</sup> *Musema* (n 19) Para 121; *Krstić* (n 19) Para 601; *Kajelijeli* (n 13) Para 763; *Strugar* (n 59) Para 333; *Mpambara* (n 23) Para 19; *Mrkšić* (n 1) Para 550; *Milutinović et al* (n 1) Para 85 & 86; *Renzaho* (n 89) Para 738; *Nsengimana* (n 23) Para 799; *Setako* (n 19) Para 449; *Munyakazi* (n 19) Para 432; *Ntawukulilyayo* (n 59) Para 416; *Kanyarukiga* (n 19) Para 620; *Hategekimana* (n 19) Para 645; *Gatete* (n 14) Para 575; *Ndahimana* (n 23) Para 719; *Karempera et al* (n 23) Para 1428; *Nzabonimana* (n 23) Para 1695; *Nizeyimana* (n 59) Para 1464; *Haradinaj et al* (n 34) Para 624; *Ngirabatware* (n 23) Para 1292. *Cryer et al* (n 19) 375; *Cassese et al* (n 19) 196.

<sup>73</sup> *Cassese et al* (n 19) 373; *Schabas and Bernaz* (n 19) 250.

<sup>74</sup> *Blaškić* (n 1) Para 281; *Kordić et al* (n 19) Para 388; *Naletilić et al* (n 19) Para 61; *Brđanin* (n 20) Para 270; *Strugar* (n 59) Para 331; *Limaj et al* (n 28) Para 515; *Mrkšić* (n 1) Para 550; *Boškoski et al* (n 2) Para 400; *Milutinović et al* (n 1) Para 87; *Popović et al* (n 23) Para 1012; *Dorđević* (n 1) Para 1871; *Haradinaj et al* (n 34) Para 624; *Cassese et al* (n 19) 196.

<sup>75</sup> *Gacumbitsi* (n 19) Para 282.

The authority which allows the accused to issue such order(s) could be either informal or temporary in nature,<sup>76</sup> and the power conferred upon the accused does not have to be through a formal appointment.<sup>77</sup> In addition, the accused's authoritative position is inferred from the fact that the order was obeyed.<sup>78</sup> When giving the order, the accused must have been aware of the substantial likelihood that the crime would be committed as a result of implementing the order.<sup>79</sup> The order given does not have to be direct: it can be implied. However, the order must 'have a direct and substantial effect on the crime.'<sup>80</sup> It must also be taken into account that an intermediary at a lower chain of command may incur liability should he pass the order on to the principal perpetrator if the state of mind of such an accused can be proven beyond a reasonable doubt.<sup>81</sup> Lastly, an accused cannot be convicted for ordering the commission of a crime if he has already been convicted of committing a crime and the prosecution does not have to prove that but for the accused's order the crime would not have been committed.<sup>82</sup>

In *Prosecutor v Tihomir Blaškić*, the accused (*Blaškić*) was found guilty by the Trial Chamber for ordering civilians from a village to be used as human shields and also for ordering detained to dig trenches in dangerous conditions and he knew that his soldiers might commit violent acts against the vulnerable detainees. As a result, the detainees were said to have suffered both mental and physical violence inflicted by the soldiers and Military Police.<sup>83</sup>

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<sup>76</sup> *Milutinović et al* (n 1) Para 86; *Renzaho* (n 89) Para 738; *Nsengimana* (n 23) Para 799; *Setako* (n 19) Para 49; *Ntawukiliyayo* (n 12) Para 416; *Gatete* (n 14) Para 757; *Ndindilyimana et al* (n 35) Para 1911; *Ndahimana* (n 23) Para 719; *Nzabonimana* (n 23) Para 1695; *Nizeyimana* (n 59) Para 1464; *Tolimir* (n 21) Para 905; *Ngirabatware* (n 23) Para 1292.

<sup>77</sup> *Hategekimana* (n 19) Para 645.

<sup>78</sup> *Kamuhanda* (n 17) Para 594.

<sup>79</sup> *Hategekimana* (n 19) Para 645; and, *Karempera et al* (n 23) Para 1428. *Stakić* (n 24) Para 445; *Limaj et al* (n 29) Para 515; *Martić* (n 1) Para 441; *Mrkšić* (n 1) Para 550; *Gotovina et al* (n 21) Para 1959; *Tolimir* (n 21) Para 904; *Cryer et al* (n 19) 376; *Cassese et al* (n 19) 197; *Schabas and Bernaz* (n 19) 251.

<sup>80</sup> *Popović et al* (n 23) Para 103; *Munyakazi* (n 19) Para 432.

<sup>81</sup> *Kordić et al* (n 19) Para 388; *Milutinović et al* (n 1) Para 88; *Tolimir* (n 21) Para 906.

<sup>82</sup> *Strugar* (n 59) Para 332; *Milutinović et al* (n 1) Para 88; *Tolimir* (n 21) Para 906.

<sup>83</sup> Para 735, 738 and 743.



In *Prosecutor v Milomir Stakić*, the Trial Chamber found the accused (*Stakić*) guilty of the crime of deportation wherein it was convinced that he intentionally ordered the deportation of the non-Serb population from Prijedor municipality and as a result committed the crime as a co-perpetrator.<sup>84</sup>

In *Prosecutor v Enver Hadžihasanović and Amir Kubura*, the Trial Chamber noted that the accused (*Kubura*) issued an order which granted leave to soldiers who took part in the operations in Vares and ordered that the seized property be distributed. As such the accused was found guilty for failure to take punitive measures to avert the plunder and to punish the perpetrators of these crimes as he had knowledge of the plunder.<sup>85</sup>

In *The Prosecutor v Tharcisse Renzaho* the accused (*Renzaho*) was found guilty of genocide for ordering the killing of Tutsis at roadblocks throughout Kigali from April to July 1994, and also ordering killings at CELA on 22 April 1994. The killings of the Tutsis at Saint Famille church on the 17 June 1994 were said to have been as result of an order given by the accused.<sup>86</sup>

In *The Prosecutor v Ephrem Setako*, the accused (*Setako*) was a Lieutenant Colonel and head of the legal division of legal affairs in the Ministry of Defence. The Trial Chamber found the accused guilty for ordering the killings of 30 to 40 Tutsis at Mukamira camp on 25 April 1994 after the accused addressed a recruits and other soldiers at the camp that Tutsis needed to be hunted down and killed and the death of nine or ten others on 11 May 1994.<sup>87</sup>

In *The Prosecutor v Ildéphonse Nizeyimana*, the Trial Chamber found the accused (*Nizeyimana*) guilty of genocide for ordering the killings of Remy Rwekaza and Beata Uwambaye at the Gikongoro/ Cyangugu and Kigali roads junction roadblock.<sup>88</sup>

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<sup>84</sup> *Stakić* (n 24) Para 712.

<sup>85</sup> Para 1993.

<sup>86</sup> Judgment, Case No. ICTR-97-31-T, T. Ch. I, 14 July 2009, Paras 773 and 779

<sup>87</sup> Paras 1, 469, 470, 474, 482 and 491.

<sup>88</sup> Paras 1524 and 1539.

#### 4.4.4 Committing

An accused may be criminally liable for a crime where he ‘actually’ and intentionally commits the crime(s), directly and physically, within the jurisdiction of the Tribunals.<sup>89</sup> The commission of the crime could be done individually or jointly.<sup>90</sup> Committing as a mode of participation requires that the accused must have perpetrated any or all of the material elements of the crime in question. Furthermore, the accused must have been aware or had the necessary intent: that is, that there is a substantial likelihood that the crime will be committed due to his or her act(s) or omission(s).<sup>91</sup> Liability may also be imposed where an accused, through a positive act or omission, participates in the commission of a crime.<sup>92</sup> This applies to scenarios where a duty was imposed on the accused.<sup>93</sup> It is important to note that committing is not limited to direct and physical perpetration. The perpetration of other acts could constitute direct participation in the *actus reus* of the crime.<sup>94</sup>

It is possible that one or more perpetrators, in relation to the same crime,<sup>95</sup> can be held responsible for committing a crime ‘where the conduct of each perpetrator satisfies the requisite elements of the substantive offence’.<sup>96</sup> Where an accused physically perpetrated the crime, for example killed another person, the question is whether an accused’s conduct was

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<sup>89</sup> *Kordić et al* (n 19) Para 376; *Krstić* (n 19) Para 601; *Kvočka et al* (n 1) Para 243; *Prosecutor v Mitar Vasiljević*, Judgment, Case No. IT-98-32-T, T. Ch. II, 29 November 2002, Para 62; *Naletilić et al* (n 19) Para 62; *stakić* (n 24) Para 439; *Simić et al* (n 1) Para 137; *Kajelijeli* (n 13) Para 764; *Gacumbitsi* (n 19) Para 285; *The Prosecutor v Vidoje Blagojević and Dragan Jokić*, Judgment, Case No. IT-02-60-T, T. Ch. I, 17 January 2005, Para 694; *Muhimana* (n 19) Para 506; *Limaj et al* (n 28) Para 509; *Orić* (n 1) Para 269; *Seromba* (n 19) Para 302; *Lukic et al* (n 1) Para 897; *Kalimanzira* (n 19) Para 161; *The Prosecutor v Tharcisse Renzaho*, Judgment, Case No. ICTR-97-31-T, T. Ch. I, 14 July 2009, Para 739; *Nsengimana* (n 23) Para 798; *Setako* (n 19) Para 448; *Kanyarukiga* (n 19) Para 622; *Gatete* (n 14) Para 576; *Ndindilyimana et al* (n 35) Para 1912; *Ndahimana* (n 23) Para 720; *Karempera et al* (n 23) Para 1432; *Nzabonimana* (n 23) Para 1696; *Haradinaj et al* (n 34) Para 615; *Ngirabatware* (n 23) Para 1293; *Cryer et al* (n 19) 354; *Schabas and Bernaz* (n 19) 252.

<sup>90</sup> *Kunarac et al* (n 1) Para 390; *Kvočka et al* (n 1) Para 251; *Simić et al* (n 1) Para 137; and, *Haradinaj et al* (n 34) Para 615; *Cassese et al* (n 19) 330.

<sup>91</sup> *Kvočka et al* (n 1) Para 251; *Simić et al* (n 1) Para 137; *Limaj et al* (n 28) Para 509; *Lukic et al* (n 1) Para 897; *Tolimir* (n 21) Para 884.

<sup>92</sup> *Blagojević et al* (n 89) Para 694; *Gatete* (n 14) Para 576; *Haradinaj et al* (n 34) Para 615.

<sup>93</sup> *Musema* (n 19) Paras 122 and 123; *Kamuhanda* (n 17) Para 595; *Seromba* (n 19) Para 302; *Hategekimana* (n 19) Para 646.

<sup>94</sup> *Munyakazi* (n 19) Para 430; *Hategekimana* (n 19) Para 646; *Karempera et al* (n 23) Para 14; *Ngirabatware* (n 23) Para 1293. *Schabas and Bernaz* (n 19) 253.

<sup>95</sup> *Nzabonimana* (n 23) Para 1696.

<sup>96</sup> *Kajelijeli* (n 13) Para 764.

as much an integral part of the crimes as were the killings which it enabled.<sup>97</sup> The leadership role played by an accused may constitute an integral part of the crimes.<sup>98</sup>

In the case of *The Prosecutor v Mikaeli Muhimana*, the Trial Chamber held the accused to be criminally liable for personally killing members of the Tutsi group. Through his personal conduct such as throwing a grenade at Mubuga Church which led to the death of many refugees and, raping and killing Tutsi refugees at Mugonero Complex, he participated through the commission of the material elements of the offences for which he was charged.<sup>99</sup>

#### 4.4.5 Aiding and Abetting

The last mode of participation stipulated in Articles 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively is aiding and abetting. Aiding and abetting is a form of accessorial liability,<sup>100</sup> and it constitutes complicity.<sup>101</sup> Under the Trial and Appeal Chambers of the ad hoc Tribunals, a person is said to have aided or abetted when he carries out acts that directly assist, encourage, or at least lend moral support and have substantial (or foreseeable) effect<sup>102</sup> to the commission of a crime.<sup>103</sup> The conduct of an aider and abettor does not necessarily

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<sup>97</sup> *Callixte Kalimanzira v The Prosecutor*, Appeal Judgement, Case No. ICTR-05-88-A, 20 October 2010, para. 219; *The Prosecutor v Yussuf Munyakazi*, Appeal Judgement, Case No. ICTR-97-36A-A, 28 September 2011.

<sup>98</sup> *Nzabonimana* (n 23) Para 1696; and, *Ngirabatware* (n 23) Para 1293.

<sup>99</sup> *Muhimana* (n 19) Para 512-513.

<sup>100</sup> *Tadić* (n 1) Para 229; *Kordić et al* (n 19) Para 399; *Kvočka et al* (n 1) Para 253; *Bisengimana* (n 12) Para 33; *Muvunyi* (n 59) Para 469.

<sup>101</sup> *Akayesu* (n 15) Para 484; *The Prosecutor v Vincent Rutaganira*, Judgment, Case No. ICTR-95-1C-T, T.Ch. III, 14 March 2005, Para 63.

<sup>102</sup> *Seromba* (n 19) Para 309.

<sup>103</sup> *Delalić et al* (n 2) Para 327; *Prosecutor v Anto Furundžija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998, Para 249; *Tadić* (n 1) Para 229; *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić, also known as "Vlado"*, Judgment, Case No. IT-95-16-T, 14 January 2000, Para 772; *Musema* (n 19) Para 126; *Blaškić* (n 1) Para 283; *Kunarac et al* (n 1) Para 391; *Krstić* (n 19) Para 601; *Kvočka et al* (n 1) Para 243 & 253; *Prosecutor v Milorad Krnojelac*, Judgment, Case No. IT-97-25-T, T.Ch. II, 15 March 2002, Para 88; *Vasiljević* (n 89) Para 70; *Naletilić et al* (n 19) Para 63; *Simić et al* (n 1) Para 161 & 162; *Galić* (n 11) Para 168; *Ndindabahizi* (n 33) Para 457; *Brđanin* (n 20) Para 271; *Blagojević et al* (n 89) Para 726; *Strugar* (n 59) Para 349; *Rutaganira* (n 101) Para 63; *Limaj et al* (n 28) Para 516; *Orić* (n 1) Para 280; *Seromba* (n 19) Para 307 & 309; *Mrkšić* (n 1) Para 551; *Boškoski et al* (n 2) Para 401; *The Prosecutor v Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva*, Judgment, Case No. ICTR-98-41-T, T.Ch. I, 18 December 2008, Para 2009; *Milutinović et al* (n 1) Para 89; *Renzaho* (n 86) Para 742; *Lukic et al* (n 1) Para 901; *Nsengimana* (n 23) Para 800; *Kalimanzira* (n 19) para 161; *Popović et al* (n 23) Para 1014 & 1018; *Setako* (n 19) Para 450; *Muvunyi* (n 59) Para 469; *Ntawukulilyayo* (n 59) Para 417; *Hategekimana* (n 19) Para 652; *Đorđević* (n 1) Para 1873 & 1874; *Gotovina et al* (n 21) Para 1960; *Ndindiliyimana et al* (n 35) Para 1914; *Perišić* (n 129) Para 126; *Ndahimana* (n 23) Para 723; *Karemera*

constitute an indispensable element, that is, a *conditio sine qua non* of the crime.<sup>104</sup> Aiding and abetting may be understood as two distinct legal concepts, with aiding being acts of assisting (tangible assistance) or helping another person to commit a crime. On the other hand, abetting means advising, facilitating or instigating in the commission of a crime.<sup>105</sup> The acts of assistance may be geographically and temporarily unconnected to the actual commission of the crime.<sup>106</sup> Assistance may take the form of an act or omission.<sup>107</sup> When exercising the role of an aider and abettor, the accused does not have to be in an authoritative position.<sup>108</sup>

The accused's criminal act must be established for liability to be imposed since liability cannot be incurred if the crime has not been committed.<sup>109</sup>

The contribution made by an aider and abettor may take place before, during or after the commission of the crime. It may take different forms, including, but not limited to, practical assistance, moral support or encouragement. Irrespective of the form, it must be shown to have had substantial effect on the consummation of the crime.<sup>110</sup> The accused must possess the requisite *mens rea* at the time of the planning, preparation or execution of the crime.<sup>111</sup> Aiding and abetting 'may be remote both in time and place' from where the crime is

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*et al* (n 23) Para 1429; *Nzabonimana* (n 23) Para 1466; *Haradinaj et al* (n 34) Para 625-626; *Tolimir* (n 21) Para 907; *Ngirabatware* (n 23) Para 1294; *Cryer et al* (n 19) 371; *Cassese et al* (n 19) 193.

<sup>104</sup> *Kvočka et al* (n 1) Para 255; *Naletilić et al* (n 19) Para 63; *Limaj et al* (n 28) 517; *Orić* (n 1) Para 284; *Seromba* (n 19) Para 307; *Lukic et al* (n 1) Para 901; *Perišić* (n 129) Para 126.

<sup>105</sup> *Akayesu* (n 15) Para 484; *Furundžija* (n 103) Para 230; *The Prosecutor v Georges Anderson Nderubumwe Rutaganda*, Judgment, Case No. ICTR-96-3-T, T. Ch. I, 6 December 1999, Para 43; *Kvočka et al* (n 1) Para 254; *The Prosecutor v Elizaphan and Gerard Ntakirutimana*, Judgment, Case No. ICTR-96-10 & ICTR-96-17-T, T. Ch. I, 21 February 2003, Para 787; *Semanza* (n 12) Para 384; *Kajelijeli* (n 2112) Para 765; *Galić* (n 11) Para 168; *Kamuhanda* (n 17) Para 596; *Muhimana* (n 19) Para 507; *Limaj et al* (n 28) Para 516; *Bisengimana* (n 12) Para 32; *Orić* (n 1) Para 282; *Muvunyi* (n 59) Para 470. Schabas and Bernaz (n 19) 251.

<sup>106</sup> *Aleksovski* (n 1) Para 62; *Rutaganda* (n 12) Para 43; *Musema* (n 19) Para 125; *Blaškić* (n 1) Para 285; *Kvočka et al* (n 1) Para 256; *Strugar* (n 59) Para 349; and, *Perišić* (n 129) Para 126 *Nzabonimana* (n 23) Para 1697; *Ngirabatware* (n 23) Para 1294.

<sup>107</sup> *Krnojelac* (n 103) Para 88; *Kamuhanda* (n 17) Para 597; *Ndindabahizi* (n 33) Para 457; *Blagojević et al* (n 89) Para 726.

<sup>108</sup> *Karemera et al* (n 23) Para 1429.

<sup>109</sup> *Popović et al* (n 23) Para 1015.

<sup>110</sup> *Delalić et al* (n 2) Para 327; *Furundžija* (n 103) Para 249; *Kunarac et al* (n 1) Para 391; *Kordić et al* (n 19) Para 399; *Krnojelac* (n 103) Para 88; *Ntakirutimana* (n 105) Para 787; *Naletilić et al* (n 19) Para 63; *Mrkšić* (n 1) Para 552; *Boškoski et al* (n 2) Para 402; *Lukic et al* (n 1) Para 901; *Gatete* (n 14) Para 579; *Perišić* (n 129) Para 126.

<sup>111</sup> *Kvočka et al* (n 1) Para 256; *Brđanin* (n 20) Para 271; *Blagojević et al* (n 89) Para 728; *Limaj et al* (n 8) Para 517; *Lukic et al* (n 1) Para 901.

committed.<sup>112</sup> The principal perpetrator does not have to be aware of the aider and abettor's contribution.<sup>113</sup> Also, there need not be proof of an existing common concerted plan or a pre-existing plan between the physical perpetrator of the crime and the aider and abettor.<sup>114</sup>

The *actus reus* is performed by another person not the accused,<sup>115</sup> and need not serve as a condition precedent for the crime. It may occur before, during or after the crime has been committed.<sup>116</sup> Also, an omission may be seen as an act of aiding and abetting when proven that such failure had a decisive effect on the commission of a crime.<sup>117</sup> The *actus reus* may also be satisfied when a commander authorises the use of resources under his control. In this case, the commander may authorise another person to make use of his personnel to facilitate the perpetration of a crime.<sup>118</sup> The aider and abettor must have had the knowledge that his acts would assist in the commission of the specific crime.<sup>119</sup> The awareness does not have to be explicitly expressed,<sup>120</sup> and the accused need not be present during the commission of a crime<sup>121</sup> unless the presence was significant to the principal offender.<sup>122</sup>

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<sup>112</sup> Orić (n 1) Para 285.

<sup>113</sup> Milutinović *et al* (n 1) Para 92; Popović *et al* (n 23) Para 1016; Perišić (n 129) Para 127.

<sup>114</sup> Tadić (n 1) Para 229.

<sup>115</sup> Bisengimana (n 12) Para 33; *The Prosecutor v Joseph Nzabirinda*, Sentencing Judgment, Case No. ICTR-2001-77-T, T. Ch.II, 23 February 2007, Para 15.

<sup>116</sup> Simić *et al* (n 1) Para 162; Kajelijeli (n 13) Para 766; Kamuhanda (n 17) Para 597; Strugar (n 59) Para 349; Limaj *et al* (n 28) Para 517; Bisengimana (n 12) Para 33; Seromba (n 19) para 307; Mrkšić (n 1) Para 552; Boškoski *et al* (n 2) Para 402; Bagosora *et al* (n 103) Para 2009; Renzaho (n 86) Para 742; Nsengimana (n 23) Para 800; Setako (n 19) Para 450; Ntawulilyayo (n 59) Para 417; Đorđević (n 1) Para 1874; Gatete (n 14) Para 579; Gotovina *et al* (n 21) Para 1960; Ndindiliyimana *et al* (n 35) Para 1914; Ndahimana (n 23) Para 723; Karemera *et al* (n 23) Para 1429; Nzabonimana (n 23) Para 1697; Tolimir (n 21) Para 908; Ngirabatware (n 23) Para 1294.

<sup>117</sup> Bisengimana (n 12) Para 34.

<sup>118</sup> Bagosora *et al* (n 103) Para 2009; Renzaho (n 86) Para 742; Perišić (n 129) Para 128; Ndindiliyimana *et al* (n 35) Para 1914.

<sup>119</sup> Furundžija (n 103) Para 236, 245 & 249; Tadić (n 1) Para 229; Kupreškić *et al* (n 103) Para 772; Blaškić (n 1) Para 286; Kunarac *et al* (n 1) Para 392; Kvočka *et al* (n 1) Para 253 & 255; Krnojelac (n 103) Para 90; Vasiljević (n 89) Para 71; Simić *et al* (n 1) Para 163; Brđanin (n 20) Para 271; Blagojević *et al* (n 89) Para 727; Limaj *et al* (n 28) Para 518; Bisengimana (n 12) Para 36; Boškoski *et al* (n 2) Para 402; Bagosora *et al* (n 103) Para 2009; Milutinović *et al* (n 1) Para 94; Lukic *et al* (n 1) Para 902; Popović *et al* (n 23) Para 1016; Ntawukulilyayo (n 59) Para 418; Đorđević (n 1) Para 1876; Perišić (n 129) Para 129; Ndahimana (n 23) Para 723; Nzabonimana (n 23) Para 1699; Haradinaj *et al* (n 34) Para 626; and, Tolimir (n 21) Para 911; Ngirabatware (n 23) Para 1296. Cryer *et al* (n 19) 371.

<sup>120</sup> Strugar (n 59) Para 350; Limaj *et al* (n 28) Para 518; Milutinović *et al* (n 1) Para 94.

<sup>121</sup> Musema (n 19) Para 125; Semanza (n 12) Para 385; Bisengimana (n 12) Para 35; Seromba (n 19) Para 307; Cassese *et al* (n 19) 193.

<sup>122</sup> Vasiljević (n 89) Para 70.

The accused as an aider and abettor is not expected to know the precise offence being committed. What is important is that the aider and abettor must have known the perpetrator's intent and must have been aware of the essential elements of the crime.<sup>123</sup> If the accused was aware that a number of crimes would be committed, and it so happens that one of them is in fact committed, then the accused would be guilty as an aider and abettor.<sup>124</sup> However, the fact that an aider and abettor does not share the same intent with the principal offender does not necessarily lessen his criminal culpability vis-à-vis that of an accused acting pursuant to the JCE who does.<sup>125</sup> An aider and abettor may become a co-perpetrator to a joint criminal enterprise (discussed below) if the original acts of assistance are so involved in the operation of the enterprise.<sup>126</sup> Such an aider and abettor need not share the intent of the co-perpetrators: he only need to be aware that their contribution may assist or facilitate in the commission of a crime.<sup>127</sup> In short, the aider and abettor must have acted intentionally, must have the intention to contribute to, and have the crime completed. The intention must contain a cognitive element of knowledge and a volitional element of acceptance. Lastly, the aider and abettor must have been aware of the essential elements of the crime.<sup>128</sup>

#### 4.5 Participation through the doctrine of Superior (Command) Responsibility: Liability for Omissions

In addition to the traditional modes of participation stipulated in the Statutes of the ICTY and ICTR is another mode of participation through omission: the failure to perform a duty that

<sup>123</sup> *Furundžija* (n 103) Para 245 & 246; *Blaškić* (n 1) para 287; *Kunarac et al* (n 1) Para 392; *Kvočka et al* (n 1) Para 255; *Krnjelac* (n 103) Para 90; *Vasiljević* (n 89) Para 71; *Naletilić et al* (n 19) Para 63; *Simić et al* (n 1) Para 163; *Kamuhanda* (n 17) Para 599; *Brđanin* (n 20) Paras 271 and 273; *Blagojević et al* (n 89) Para 727; *Strugar* (n 59) Para 350; *Limaj et al* (n 28) Para 518; *Bisengimana* (n 12) Para 36; *Seromba* (n 19) Para 309; *Nzabirinda* (n 115) Para 19; *Mrkšić* (n 1) Para 556; *Boškoski et al* (n 2) Para 403; *Milutinović et al* (n 1) Para 93; *Lukić et al* (n 1) para 901; *Mrkšić* (n 1) Para 556; *Boškoski et al* (n 2) Para 403; *Milutinović et al* (n 1) Para 93; *Lukić et al* (n 1) para 901; *Nsengimana* (n 23) Para 800; *Popović et al* (n 23) Para 1016; *Muvunyi* (n 59) Para 470; *Đorđević* (n 1) Para 1876; *Gatete* (n 14) Para 579; *Gotovina et al* (n 21) Para 1960; *Perišić* (n 129) Para 129; *Nizeyimana* (n 59) Para 1467; *Haradinaj et al* (n 34) Para 626; *Tolimir* (n 21) Para 911; *Cryer et al* (n 19) 371; *Cassese et al* (n 19) 194.

<sup>124</sup> *Kvočka et al* (n 1) Para 255; *Limaj et al* (n 28) Para 518; *Mrkšić* (n 1) Para 556; *Popović et al* (n 23) Para 101; *Gotovina et al* (n 21) Para 1960.

<sup>125</sup> *Vasiljević* (n 89) Para 71.

<sup>126</sup> *Kvočka et al* (n 1) Paras 249 and 273; *Limaj et al* (n 28) 510.

<sup>127</sup> *Kvočka et al* (n 1) Paras 284, 285 and 289.

<sup>128</sup> *Naletilić et al* (n 19) Para 63; *Orić* (n 1) Para 288.



results in the commission of a crime. In criminal law, this is known as liability for the actions of subordinates, couched in international criminal jurisprudence as the doctrine of superior or command responsibility. In order to understand this concept, it is necessary to state the relevant provisions that on this mode of participation:

[t]he fact that any of the acts referred to in ... of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>129</sup>

Common to Articles 7(3) and 6(3) of the Statutes of the ICTY and ICTR is the imposition of criminal responsibility on superiors for the actions of their subordinates. The Trial Chamber of the ICTR in the case of *The Prosecutor v. Clement Kayishema et al* held that the ‘doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates’.<sup>130</sup> The Trial Chamber of the ICTY in *The Prosecutor v. Blagojević* held that this mode of participation must not be seen as a form of strict liability.<sup>131</sup> The responsibility of a superior for failure to act is at times referred to as ‘indirect superior responsibility’.<sup>132</sup> The responsibility of an accused for failure to act may be imposed based on the gravity of the crime committed by the subordinate(s).<sup>133</sup>

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<sup>129</sup> Statute of the ICTR, Article 6 (3); *Akayesu* (n 15) Para 487; *Musema* (n 19) Para 127; *Kunarac et al* (n 1) Para 394; *Kvočka et al* (n 1) Para 240; *Krnojelac* (n 103) Para 72 & 92; *Semanza* (n 12) Para 399; *The Prosecutor v. Eliezer Niyitegeka*, Judgment, Case No. ICTR-96-14-T, T.Ch. I, 16 May 2003, Para 471; *Stakić* (n 24) Para 420; *Kajelijeli* (n 13) Para 770; *Kamuhanda* (n 17) Para 601; *Blagojević et al* (n 89) Para 790; *The Prosecutor v. Pavle Strugar*, Judgment, Case No. IT-01-42-T, T.Ch.II, 31 January 2005, Para 357; *The Prosecutor v. Sefer Halilović*, Judgment, Case No. IT-01-48-T, T.Ch. I, 16 November 2005, Para 38; *Limaj et al* (n 28) Para 519; *Mrkšić* (n 1) Para 557; *Boškoski et al* (n 2) Para 406; *Dorđević* (n 1) Para 1878; *Prosecutor v. Momčilo Perišić*, Judgment, Case No. IT-04-81-T, T. Ch.I, 6 September 2011, Para 138; *Cassese et al* (n 19) 187.

<sup>130</sup> *Kayishema* (n 8) Para 217; *Kordić et al* (n 19) Para 405.

<sup>131</sup> *Blagojević et al* (n 89) Para 792; *Halilović* (n 129) Para 65; *Cassese et al* (n 19) 188.

<sup>132</sup> *Aleksovski* (n 1) Para 68.

<sup>133</sup> *Prosecutor v. Rasim Delić*, Judgment, Case No. IT-04-83-T, T.Ch. I, 15 September 2008, Para 55.

Under this mode of participation, the superior is held criminally liable as a result of his failure to prevent or punish his subordinates for the crime perpetrated,<sup>134</sup> from instigating or aiding and abetting crimes committed by others. The specific purpose of this doctrine is to give superiors an obligation to ensure that their subordinates do not engage in conduct that results in the violation of international criminal or humanitarian law as a result of his failure to perform a duty to protect others from harm.<sup>135</sup>

The provisions of Article 7(3) and 6(3) of the Statutes of the ICTY and ICTR respectively do apply to both individuals with military<sup>136</sup> and civilian authority.<sup>137</sup> Also within the purview of these provisions are political leaders in positions of authority.<sup>138</sup> With respect to the superior's actual or formal power of control over his subordinates, it still remains a determining factor in charging civilians with superior responsibility.<sup>139</sup> The principle of superior responsibility may apply to a civilian superior where it has been proved that such a person has effective control,<sup>140</sup> either *de jure* or *de facto* (which implies indirect subordination authority<sup>141</sup>).<sup>142</sup> There must be a causal link between the acts of the superior's conduct and the crime committed by the subordinate. Furthermore, it needs to be proved that without the superior's failure to prevent the crimes, no crime would not have been committed.<sup>143</sup>

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<sup>134</sup> *Blaškić* (n 1) Para 300; *Halilović* (n 129) Para 38 & 54; *Limaj et al* (n 28) Para 519; *The Prosecutor v Enver Hadžihasanović and Amir Kubura*, Judgment, Case No. IT-01-47-T, 15 March 2006, Para 72 & 74; *Milutinović et al* (n 1) Para 113; *Cassese et al* (n 19) 444.

<sup>135</sup> *Orić* (n 1) Paras 296 and 300.

<sup>136</sup> *Aleksovski* (n 1) Para 76; *Kunarac et al* (n 1) Para 396; *Naletilić et al* (n 19) Para 69; *Semanza* (n 12) Para 400; *Kajelijeli* (n 13) Para 771; *Kamuhanda* (n 17) Para 602.

<sup>137</sup> *Akayesu* (n 15) Para 491; *Kayishema et al* (n 8) Para 216; *Aleksovski* (n 1) Para 75 & 78; *Kordić et al* (n 19) Para 414; *Kvočka et al* (n 1) Para 315; *Kajelijeli* (n 13) Para 773; *Kamuhanda* (n 17) Para 604; *Brđanin* (n 20) Para 281; *Boškoski et al* (n 2) Para 409; *Popović et al* (n 23) Para 1037; *Dorđević* (n 1) Para 1882.

<sup>138</sup> *Musema* (n 19) Paras 132 and 136; *Orić* (n 1) Para 308.

<sup>139</sup> *Musema* (n 19) Para 135.

<sup>140</sup> *Kordić et al* (n 19) Para 414; *Ntakirutimana et al* (n 110) Para 819; *Niyitegeka* (n 129) Para 472; *Milutinović et al* (n 1) Para 117; *Dorđević* (n 1) Para 1882; *Cryer et al* (n 19) 386.

<sup>141</sup> *Musema* (n 19) 143.

<sup>142</sup> *Aleksovski* (n 1) Para 76; *Kunarac et al* (n 1) Para 396; *Kvočka et al* (n 1) Para 315; *Galić* (n 11) Para 173; *Halilović* (n 129) Para 39; *Boškoski et al* (n 2) Para 410. *Cassese et al* (n 19) 188.

<sup>143</sup> *Orić* (n 1) Para 338.



The Trial and Appeal Chambers of both the ICTY and ICTR have construed the wording of Articles 7(3) and 6(3) of the ICTY and ICTR respectively as a mode of participation that would lead to the imposition of individual criminal responsibility only when three elements would have been proved. These elements are first, that there existed a superior-subordinate relationship, secondly, that the superior knew or had reason to know that the crimes were to be committed by the subordinates, and thirdly, the superior failed to take reasonable steps to prevent the commission of such crimes or punish the perpetrators after the commission of the crimes. These three elements are discussed below.

#### 4.5.1 The existence of a superior-subordinate relationship

The existence of a superior-subordinate relationship is the core of the doctrine of command responsibility.<sup>144</sup> It is the superior's position over, and his power to prevent the acts of, the subordinates which form the basis of both the superior's duty to act and 'for his corollary liability for a failure to do so.'<sup>145</sup>

The existence of such a superior-subordinate relationship can be proved by showing that there was a formal or informal hierarchical relationship.<sup>146</sup> The chain of command between the superior and the subordinate can be direct (direct command responsibility) or indirect (indirect command responsibility).<sup>147</sup> However, this relationship does not have to be permanent in nature.<sup>148</sup> Neither does it have to be formalized: this means that a tacit or implicit understanding between them as to their respective positions is sufficient enough.<sup>149</sup>

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<sup>144</sup> *Perišić* (n 129) Para 141

<sup>145</sup> *Strugar* (n 59) Para 359; *Limaj et al* (n 28) Para 521; *Orić* (n 1) Para 307.

<sup>146</sup> *Delalić et al* (n 2) Para 353; *Kordić et al* (n 19) Para 408; *Krstić* (n 19) Para 604; *Krnojelac* (n 103) Para 93; *Semanza* (n 12) Para 401; *Stakić* (n 24) Para 459; *Kamuhanda* (n 17) Para 604; *Ntagerura et al* (n 61) Para 628; *Brđanin* (n 20) para 276; *Hadžihasanović et al* (n 134) Para 76; *Orić* (n 1) Para 309; *The Prosecutor v François Karera, Judgment*, Case No. ICTR-01-74-T, T.Ch.I, 7 December 2007, Para 564; *Bagosora* (n 103) Para 2012; *Renzaho* (n 86) Para 745; *Nsengimana* (n 23) Para 807; *Ntawukulilyayo* (n 59) Para 420; *Hategekimana* (n 19) Para 654; *Ndahimana* (n 23) Para 726; Schabas and Bernaz (n 19) 258.

<sup>147</sup> *Delalić et al* (n 2) Para 408; *Kajelijeli* (n 13) Para 771; *Milutinović et al* (n 1) Para 118; *Đorđević* (n 1) Para 1881.

<sup>148</sup> *Kunarac et al* (n 1) Para 399; *Limaj et al* (n 28) Para 522; *Mrkšić* (n 1) Para 560; *Đorđević* (n 1) Para 1881.

<sup>149</sup> *Kunarac et al* (n 1) Para 396.

The substance of what constitutes command may take different hierarchical forms and levels: Command comprises of different hierarchical levels. In the case of *Kunarac et al*, the Trial Chamber laid out the conceptual framework of what a command structure may look as described below:

...at the top of the chain, political leaders may define the policy objectives. These objectives will then be translated into specific military plans by the strategic command in conjunction with senior government officials. At the next level the plan would be passed on to senior military officers in charge of operational zones. The last level in the chain of command would be that of the tactical commanders which exercise direct command over the troops.<sup>150</sup>

In essence, what the Trial Chamber meant is that, under the relevant provisions of the Statutes relating to superior responsibility, a commander may be a colonel commanding a brigade, a corporal commanding a platoon or even a rankless individual commanding a small group of men.<sup>151</sup> It is necessary to show the group in which the perpetrators (i.e. subordinates) belong to and to show that the superior indeed exercised control over that group.<sup>152</sup> The failure to establish that the superior had effective control over the subordinates is *prima facie* proof that such a superior would not be held liable under Article 7(3) or Article 6(3) of the Statutes of the ICTY or ICTR respectively.<sup>153</sup>

The superior must have had power or authority (*de jure or de facto*) over his subordinates.<sup>154</sup> This control must have allowed the superior at the time, to either prevent or punish his subordinates for the crime committed.<sup>155</sup> Effective control is the material ability the superior had, whether military commander or civilian leader, which could have prevented

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<sup>150</sup> *Kunarac et al* (n 1) Para 398; *Kordić et al* (n 19) Para 419.

<sup>151</sup> *Kunarac et al* (n 1) Para 398.

<sup>152</sup> *Hadžihasanović et al* (n 134) Paras 90 and 169.

<sup>153</sup> *Galić* (n 11) Para 173; *Halilović* (n 129) Para 59.

<sup>154</sup> *Delalić et al* (n 2 ) Para 377; *Kunarac et al* (n 1) Para 396; *Kordić et al* (n 19) Para 405; *Krnojelac* (n 103) Para 93; *Naletilić et al* (n 19) Para 67; *Stakić* (n 24) Para 459; *Kajelijeli* (n 13) Para 773; *Kamuhanda* (n 17) Para 604; *Limaj et al* (n 28) Para 522; *Hadžihasanović et al* (n 134) Para 77, 78 & 80; *Orić* (n 1) Para 309; *Boškoski et al* (n 2) Para 404; *Milutinović et al* (n 1) Para 117; *Popović et al* (n 23) Paras 1037 and 1038; *Hategekimana* (n 19) Para 654; *Dorđević* (n 1) Para 1881; *Gotovina et al* (n 21) Para 1963; *Perišić* (n 129) Para 143; *The Prosecutor v Iidophonse Nizeyimana*, Judgment, Case No. ICTR-2000-55C-T, T. Ch. III, 19 June 2012, Para 1476. Cassese *et al* (n 19) 444; Schabas and Bernaz (n 19) 258-259.

<sup>155</sup> *Delalić et al* (n 2) Para 354; *Hadžihasanović et al* (n 134) Para 80; *Delić* (n 133) Para 60; *Ntawukulilyayo* (n 59) Para 420.

the crime committed or punish the subordinates.<sup>156</sup> This implies that the superior must have had effective control over his subordinates at the time the crime was committed.<sup>157</sup> It is not a requirement that the superior knows the identities of his subordinates.<sup>158</sup>

Effective control entails that more than one person may be held responsible for the crime(s) of the subordinate(s).<sup>159</sup> In determining whether or not effective control existed at the time of the commission of the crimes by the superior's subordinates, the following factors need to be taken into consideration: the position of the accused, the manner in which he was appointed, the actual tasks he performed, the capacity he had to issue orders, the nature of such orders and whether the orders were followed.<sup>160</sup> A superior cannot escape liability by claiming that he lacked effective control 'if his conduct before the crimes were committed demonstrates that he accepted the possibility that subsequently he might not be able to control his troops'.<sup>161</sup>

Noteworthy is the distinction between a commander in an occupied and an unoccupied territory: the authority of a commander or superior in an occupied territory is territorial in nature and liability is based on his substantial influence, whilst that of an

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<sup>156</sup> *Delalić et al* (n 2) Para 378; *Kayishema et al* (n 8) Para 217; *Blaškić* (n 1) Para 302; *Kunarac et al* (n 1) Para 396; *Kvočka et al* (n 1) Para 315; *Krnojelac* (n 103) Para 93; *Semanza* (n 12) Para 402; *Stakić* (n 24) Para 459; *Kajelijeli* (n 21) Para 774; *Kamuhanda* (n 17) Para 605; *Ntagerura et al* (n 61) Para 628; *Brđanin* (n 20) Para 276; *Blagojević et al* (n 89) Para 791; *Strugar* (n 59) Para 360; *Halilović* (n 129) Para 58 & 63; *Limaj et al* (n 28) Para 522; *Mrkšić* (n 1) Para 560; *Karera* (n 146) Para 564; *Delić* (n 133) Para 378; *Bagosora et al* (n 103) Para 2012; *Milutinović et al* (n 1) Para 117; *Renzaho* (n 86) Para 745; *Nsengimana* (n 23) Para 807; *Setako* (n 19) Para 459; *Ntawukulilyayo* (n 59) Para 420; *Đorđević* (n 1) Para 1881; *Perišić* (n 129) Para 144; *Bizimungu et al* (n 33) Para 1872; *Nizeyimana* (n 59) Para 1476. *Cryer et al* (n 19) 386; *Cassese et al* (n 19) 437, 444; *Schabas and Bernaz* (n 19) 258-259.

<sup>157</sup> *Kajelijeli* (n 13) Para 773; *Kamuhanda* (n 17) Para 604; *Ntagerura et al* (n 61) Para 628; *Strugar* (n 59) Para 363; *Orić* (n 1) Para 311; *Setako* (n 19) Para 459; *Hategekimana* (n 19) Para 654; *Ndindiliyimana* (n 35) Para 1917; *Perišić* (n 129) Para 138; *Ndahimana* (n 23) Para 726; *Karempera et al* (n 23) Para 1495. *Cassese, Gaeta, Baig, Fan, Gosnell, and Whiting* (n 27) 188.

<sup>158</sup> *Popović et al* (n 23) Para 1039; *Perišić* (n 129) Para 136; *Gotovina et al* (n 21) Para 1964. *Cassese, Gaeta, Baig, Fan, Gosnell, and Whiting* (n 27) 190.

<sup>159</sup> *Blaškić* (n 1) Para 303; *Krnojelac* (n 103) Para 93; *Strugar* (n 59) Para 365; *Mrkšić* (n 1) Para 560; *Boškoski et al* (n 2) Para 408; *Đorđević* (n 1) Para 1881.

<sup>160</sup> *Halilović* (n 129) Para 58; *Hadžihasanović et al* (n 134) Para 83; *Orić* (n 1) Para 312; *Mrkšić* (n 1) Para 561; *Boškoski et al* (n 2) Para 411; *Đorđević* (n 1) Para 1883; *Perišić* (n 129) Para 148; *Bizimungu et al* (n 33) Para 1875; *Karempera et al* (n 23) Para 1496; *Nizeyimana* (n 59) Para 1478. *Cassese, Gaeta, Baig, Fan, Gosnell, and Whiting* (n 27) 188.

<sup>161</sup> *Hadžihasanović et al* (n 134) Para 89.

unoccupied territory is limited to soldiers under his command and shall be liable for the crimes committed in his area.<sup>162</sup>

A direct and individualised superior-subordinate relationship is not required for responsibility pursuant to Article 7(3) and 6(3) of the Statutes of the ICTY and ICTR respectively. Effective control may descend from the superior to the subordinate culpable of the crime through intermediary subordinates.<sup>163</sup> The doctrine of command responsibility encompasses even a civilian superior, but his or her effective control – whether *de jure* or *de facto* – should be similar to that of a military superior.<sup>164</sup>

A superior who has *de jure* authority but in reality does not have effective control over his subordinates would not incur criminal responsibility. A *de facto* superior who lacks any formal letters of appointment, superior rank or commission and does not have effective control over his subordinates who perpetrated offences could incur criminal responsibility.<sup>165</sup> In summation, the existence of a superior-subordinate relationship depends on two factors: first, whether the principal perpetrators at the time of committing the crime were subordinates to the superior, and, secondly, whether the superior exercised effective control over the subordinates.<sup>166</sup>

#### 4.5.2 The superior's knowledge or reason to know that the criminal acts were about to be or had been committed by his subordinates

The superior must have known (actual knowledge) or had reason to know of the conduct of his subordinates in order for him to incur liability.<sup>167</sup> The requisite *mens rea* requires that the

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<sup>162</sup> *Hadžihasanović et al* (n 134) Para 81.

<sup>163</sup> *Orić* (n 1) Para 311; *Popović et al* (n 23) Para 1039.

<sup>164</sup> *Aleksovski* (n 1) Para 76 & 78; *Perišić* (n 129) Para 145; *Bizimungu et al* (n 33) Para 1874; *Karemera et al* (n 23) Para 1497; *Nizeyimana* (n 59) Para 1477.

<sup>165</sup> *Stakić* (n 24) Para 459; *Brđanin* (n 20) Para 276; *Blagojević et al* (n 89) Para 791.

<sup>166</sup> *Perišić* (n 129) Para 142.

<sup>167</sup> *Delalilic et al* (n 2) Para 383; *Kayishema et al* (n 8) Para 225; *Krstić* (n 19) Para 604; *Krnjelac* (n 103) Para 94; *Naletilić et al* (n 19) Para 70; *Stakić* (n 24) Para 460; *Kajelijeli* (n 13) Para 775; *Brđanin* (n 20) Para 278; *Strugar* (n 59) Para 367; *Halilović* (n 129) Para 64; *Limaj et al* (n 28) Para 523; *Hadžihasanović et al* (n 134) Para 89; *Orić* (n 1) Para 316; *Mrkšić* (n 1) Para 562; *Boškoski et al* (n 2) Para 412; *Milutinović et al* (n 1) Para 119; *Dorđević* (n 1) Para 1884; Cassese *et al* (n 19) 188, 447.

superior must have either known (actual knowledge) or had reason to know (reasonable belief).

A superior in a chain of hierarchical command with authority over a given geographical area would not be held strictly liable for crimes committed by his subordinates.<sup>168</sup> While the hierarchical position of an individual may be a significant *indicium* that he or she knew or had reason to know about subordinates' criminal acts, knowledge will not be presumed from status alone.<sup>169</sup> Furthermore, 'in the absence of direct evidence of the superior's knowledge of offences committed by subordinates', such will be presumed.<sup>170</sup> The fact that a superior is in an authoritative position implies that the superior would most likely know that the crimes were being committed by his subordinates. In addition, 'the more distant the commission of the acts was, the more difficult will be...to establish that the superior had knowledge...' of the crimes by his subordinates. On the other hand, where a crime is committed in the immediate proximity where the superior exercised his duties, it would be considered to establish a significant *indicium* that the superior had knowledge of the crime.<sup>171</sup>

A superior has a duty to act the moment he has knowledge or has reason to know that his subordinates committed a crime or were about to commit a crime.<sup>172</sup> The superior is said to have the required *mens rea* where, first, he had actual knowledge that his subordinates were committing or were about to commit, or had committed a crime or, secondly, information (oral or written and does not have to be explicit or specific<sup>173</sup>) was made available to the superior which would have put him on a notice of offences committed, being

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<sup>168</sup> *Semanza* (n 12) Para 404; *Kajelijeli* (n 13) Para 776.

<sup>169</sup> *Kajelijeli* (n 13) Para 776; *Kamuhanda* (n 17) Para 607.

<sup>170</sup> *Aleksovski* (n 1) Para 80.

<sup>171</sup> *Aleksovski* (n 1) Para 80, *Blaškić* (n 1) Para 308; *Naletilić et al* (n 19) Para 72; *Halilović* (n 129) Para 66; *Hadžihasanović et al* (n 134) Para 94; *Delić* (n 133) Para 64.

<sup>172</sup> *Mpambara* (n 23) Para 26; *Ndindiliyimana et al* (n 35) Para 1918; *Karemera et al* (n 23) Para 1491.

<sup>173</sup> *Galić* (n 11) Para 173.

committed or about to be committed<sup>174</sup> by the subordinates. The information does not necessarily have to compel the conclusion of such crimes.<sup>175</sup> The superior cannot incur responsibility for neglecting to acquire knowledge of the acts committed by the accused unless it can be proved that sufficient information was available to him.<sup>176</sup>

The actual knowledge of the superior cannot be presumed. In determining whether the superior had actual knowledge, the Trial Chamber in the case of *The Prosecutor v Basogora et al* laid down the following criteria:

the number, type and scope of illegal acts committed by the subordinates, the time during which the illegal acts occurred, the number and type of troops and logistics involved, the geographical location, whether the occurrence of the acts were widespread, the tactical tempo of operations, the *modus operandi* of similar illegal acts, the officers and staff involved and the location of the superior at the time.<sup>177</sup>

Knowledge on the part of a superior is presumed when the superior is said to have obtained the relevant information concerning the crime(s) and deliberately failed to act on his legal duties.<sup>178</sup> In addition, a superior who simply ignored the information before shall be liable under Articles 7(3) or 6(3) of the Statute of the ICTY or ICTR respectively.<sup>179</sup> The accused may incur liability for deliberately failing to find out, and not for negligently failing to find out.<sup>180</sup> The superior's prior knowledge has to be interpreted narrowly since 'it derives from a

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<sup>174</sup> *Krnjelac* (n 103) Para 94; *Semanza* (n 12) Para 405; *Ntagerura et al* (n 61) Para 629; *Brđanin* (n 20) Para 278; *Blagojević et al* (n 89) Para 792; *Boškoski et al* (n 2) Para 414; *Renzaho* (n 86) Para 746; *Ntawukulilyayo* (n 59) Para 421; *Dorđević* (n 1) Para 1886; *Ndahimana* (n 23) Para 727; *Karemura et al* (n 23) Para 1498.

<sup>175</sup> *Delalić et al* (n 2) Para 393; *Blaškić* (n 1) Para 310; *Naletilić et al* (n 19) Para 74; *Strugar* (n 59) Para 369; *Halilović* (n 129) Para 68; *Limaj et al* (n 28) Para 525; *Hadžihasanović et al* (n 134) Paras 97 and 131.

<sup>176</sup> *Perišić* (n 129) Para 152.

<sup>177</sup> *Delalić et al* (n 2) Para 386; *Blaškić* (n 1) Para 307; *Naletilić et al* (n 19)) Para 71; *Stakić* (n 24) Para 460; *Galić* (n 11) Para 169; *Strugar* (n 59) Para 368; *Halilović* (n 129) Para 66; *Limaj et al* (n 28) Para 524; *Hadžihasanović et al* (n 134) Para 94; *Mrkšić* (n 1) Para 563; *Boškoski et al* (n 2) Para 413; *Delić* (n 133) Para 386; *Bagosora et al* (n 103) Para 2014; *Renzaho* (n 86) Para 747; *Ntawukulilyayo* (n 59) Para 422; *Hategekimana* (n 19) Para 656; *Dorđević* (n 1) Para 1885; *Ndindiliyimana et al* (n 35) Para 1919; *Ndahimana* (n 23) Para 728; *Karemura et al* (n 23) Para 1499; *Cryer et al* (n 19) 389; *Cassese et al* (n 19) 389; Schabas and Bernaz (n 19) 260.

<sup>178</sup> *Delalić et al* (n 2) Para 387; *Blagojević et al* (n 89) Para 792; *Strugar* (n 59) Para 369; *Mrkšić* (n 1) Para 564.

<sup>179</sup> *Delalić et al* (n 2) Para 387.

<sup>180</sup> *Stakić* (n 24) Para 460; *Halilović* (n 129) Para 69; *Hadžihasanović et al* (n 134) Para 96; *Gotovina et al* (n 21) Para 1964; *Cassese et al* (n 19) 447; Schabas and Bernaz (n 19) 260.

situation of recurrent criminal acts and from circumstances where those acts could not be committed in isolation by a single identifiable group of subordinates’.<sup>181</sup>

#### 4.5.3 Failure by the superior to take necessary and reasonable measures to prevent such criminal acts or to punish the perpetrators

Where an accused is said to be a superior, and had the necessary knowledge of the criminal conduct(s) of his subordinates, and subsequently failed to take the necessary and reasonable measures to prevent or to punish crimes committed by his subordinates, such an accused may incur liability pursuant to either Article 7(3) or Article 6(3) of the Statute of the ICTY or ICTR.<sup>182</sup> The measures of the superior must be materially possible.<sup>183</sup> The superior’s degree of effective control<sup>184</sup> over his subordinates may be used as a guide to assess whether the superior took reasonable measures to prevent, stop, or punish his subordinates for committing the crime(s).<sup>185</sup> Liability for failing to discharge a duty to prevent or punish requires proof that first, the accused was bound by a specific legal duty to prevent a crime; secondly, if the accused was aware of, and willfully refused to discharge, his legal duty; and thirdly, if the crime took place.<sup>186</sup> A superior who has knowledge together with the material ability to prevent a crime from being committed cannot be said to have performed his duty by merely waiting and punishing his subordinates after the crime has been committed.<sup>187</sup>

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<sup>181</sup> *Hadžihasanović et al* (n 134) Para 118.

<sup>182</sup> *Delalić et al* (n 2) Para 394; *Aleksovski* (n 1) Para 67 & 81; *Kordić et al* (n 19) Para 441; *Krstić* (n 19) Para 604; *Krnjelac* (n 103) Para 95; *Semanza* (n 12) Para 406; *Stakić* (n 24) Para 461; *Kajelijeli* (n 13) Para 779; *Ntagerura et al* (n 61) Para 630; *Brđanin* (n 20) Para 279; *Blagojević et al* (n 89) Para 121; *Mpambara* (n 23) Para 25; *Boškoski et al* (n 2) Para 415; *Popović et al* (n 23) Para 1043; *Karemera et al* (n 23) Para 1491 & 1500; *Cryer et al* (n 19) 390; *Cassese et al* (n 19) 190; *Schabas and Bernaz* (n 19) 261.

<sup>183</sup> *Delalić et al* (n 2) Para 395; *Blaškić* (n 1) Para 335; *Kordić et al* (n 19) Para 442; *Krnjelac* (n 103) Para 95; *Semanza* (n 12) Para 406; *Stakić* (n 24) Para 461; *Galić* (n 11) Para 176; *Kamuhanda* (n 17) Para 610; *Brđanin* (n 20) Para 279; *Blagojević et al* (n 89) Para 793; *Strugar* (n 59) Para 372; *Halilović* (n 129) Para 73; *Limaj et al* (n 28) Para 527; *Hadžihasanović et al* (n 134) Para 12; *Mrkšić* (n 1) Para 565; *Boškoski et al* (n 2) Para 415; *Milutinović et al* (n 1) Para 122; *Popović et al* (n 23) Para 1043; *Đorđević* (n 1) Para 1887; *Gotovina et al* (n 21) Para 1965; *Perišić* (n 129) Para 156 & 160. *Cryer et al* (n 19) 391.

<sup>184</sup> *Kayishema et al* (n 8) Para 229; *Semanza* (n 12) Para 406.

<sup>185</sup> *Kajelijeli* (n 13) Para 779; *Ntagerura et al* (n 61) Para 630; *Halilović* (n 129) Para 73; *Limaj et al* (n 28) Para 526.

<sup>186</sup> *Mpambara* (n 23) Para 27.

<sup>187</sup> *Blaškić* (n 1) Para 336; *Kordić et al* (n 19) Para 444; *Semanza* (n 12) Para 407; *Stakić* (n 24) Para 461; *Brđanin* (n 20) Para 276; *Blagojević et al* (n 89) Para 793; *Strugar* (n 59) Para 373; *Limaj et al* (n 28) Para 527; *Hadžihasanović et al* (n 134) Para 126; *Orić* (n 1) Para 326; *Mrkšić* (n 1) Para 566; *Milutinović et al* (n 1)



Therefore, in terms of this element, the superior has two legal duties:<sup>188</sup> first, the duty to prevent. This concerns future crimes of subordinates.<sup>189</sup> This duty exists at the very moment he had knowledge or had reason to know of the crime committed or about to be committed.<sup>190</sup> There are factors that may be used in establishing the individual responsibility of the superior: this may include the superior's failure to secure reports that military actions have been carried out in accordance with international law, the failure to issue orders aimed at bringing the relevant practices into accord with the rules of war, the failure to take disciplinary measures to prevent the commission of atrocities by the troops under their command, the failure to protest against, or to criticise criminal action, and the failure to insist before a superior authority that immediate action be taken.<sup>191</sup> Also, 'a causal connection between the failure of a commander to punish past crimes committed by subordinates and the commission of any such future crimes is not only possible but likely'.<sup>192</sup> Secondly, the duty to punish. This duty arises after the crime has been committed. The superior has a legal duty to punish the moment he has knowledge that the crime has been committed.<sup>193</sup> The superior is expected to take active steps to ensure that the perpetrators will be punished for their criminal conduct.<sup>194</sup> The fact that the measures taken by the superior were disciplinary in nature, criminal, or a combination of both is irrelevant as what is important is that the superior took some necessary measures to punish where necessary and reasonably so. Lastly, 'a superior need not dispense punishment personally and may also punish the subordinates by reporting

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Para 116; *Dorđević* (n 1) Para 1886; *Gotovina et al* (n 21) Para 1965; *Perišić* (n 129) Para 154. *Cryer et al* (n 31) 390; *Cassese et al* (n 19) 262.

<sup>188</sup> *Strugar* (n 59) Para 373; *Halilović* (n 129) Para 94; *Orić* (n 1) Para 325; *Mrkšić* (n 1) Para 566; *Gotovina et al* (n 21) Para 1965; *Perišić* (n 129) Para 154.

<sup>189</sup> *Hadžihasanović et al* (n 134) Para 125-127; *Orić* (n 1) Para 373; *Mrkšić* (n 1) Para 566; *Perišić* (n 129) Para 154. *Cassese et al* (n 19) 190.

<sup>190</sup> *Kordić et al* (n 19) Para 445; *Strugar* (n 59) Para 373; *Hadžihasanović et al* (n 134) Para 156; *Orić* (n 10) Para 335; *Delić* (n 133) Para 72.

<sup>191</sup> *Strugar* (n 59) Para 374; *Limaj et al* (n 28) Para 528; *Mrkšić* (n 1) Para 567; *Delić* (n 133) Para 73; *Popović et al* (n 23) Para 1045; *Perišić* (n 129) Para 157; *Cryer et al* (n 19) 391; *Cassese et al* (n 19) 191.

<sup>192</sup> *Hadžihasanović et al* (n 134) Para 187.

<sup>193</sup> *Kordić et al* (n 19) Para 446; *Strugar* (n 59) Para 370; *Orić* (n 1) Para 326; *Mrkšić* (n 1) Para 566; *Boškoski et al* (n 2) Para 416; *Delić* (n 133) Para 69; *Dorđević* (n 1) Para 1888; *Perišić* (n 129) Para 154.

<sup>194</sup> *Limaj et al* (n 28) Para 529.



the matter to the competent authorities.’<sup>195</sup> Or, where possible, he may exercise his own powers of sanction.<sup>196</sup> Concerning civilian superiors, should they lack disciplinary powers, they too need to report the matter to relevant (superior) authorities.<sup>197</sup>

In order to exercise his duty to punish, the superior needs to investigate the matter at hand with a view to establishing the facts.<sup>198</sup> In determining whether necessary measures were taken, the Trial and Appeal Chambers of the ICTY and ICTR respectively may consider ‘whether specific orders prohibiting or stopping the criminal activities were issued, what measures were taken to secure the implementation of these orders, what other measures were taken to ensure that the unlawful acts were stopped and whether these measures were reasonably sufficient in the specific circumstances, and, after the commission of the crime, what steps were taken to secure an adequate investigation and to bring the perpetrators to justice’.<sup>199</sup>

Civilian authorities may also punish if they possess effective control over the subordinates.<sup>200</sup> The criteria to follow when superior responsibility is to be imposed on a civilian superior may be found in Article 86(2) of the Additional Protocols to the Geneva Conventions which provides what must be taken into account:

The fact that a breach of the Convention or of this Protocol was committed by a subordinate does not absolve his subordinate from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and of they did not take all necessary measures within their power to prevent or repress the breach’.<sup>201</sup>

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<sup>195</sup> *Blaškić* (n 1) Para 335; *Stakić* (n 24) Para 461; *Limaj et al* (n 28) Para 529; *Strugar* (n 59) Para 376; *Mrkšić* (n 1) Para 568; *Boškoski et al* (n 2) Para 417; *Delić* (n 133) Para 74 & 75; *Milutinović et al* (n 1) Para 123; *Đorđević* (n 1) Para 1889; *Gotovina et al* (n 21) Para 1965; *Perišić* (n 129) Para 159; *Cryer et al* (n 19) 393; *Cassese et al* (n 19) 190.

<sup>196</sup> *Boškoski et al* (n 2) Para 418; *Delić* (n 133) Para 74; *Đorđević* (n 1) Para 1890.

<sup>197</sup> *Kvočka et al* (n 1) Para 316; *Brdanin* (n 20) Para 281; *Halilović* (n 129) Para 100; *Orić* (n 1) Para 336; *Boškoski* (n 2) Para 418.

<sup>198</sup> *Brdanin* (n 20) Para 279; *Strugar* (n 59) Para 376; *Limaj et al* (n 28) Para 529; *Orić* (n 1) Para 335; *Mrkšić* (n 1) Para 568; *Đorđević* (n 1) Para 1890; *Perišić* (n 129) Para 158.

<sup>199</sup> *Delalić et al* (n 2) Para 393; *Kordić et al* (n 19) Para 446; *Halilović* (n 129) Paras 75, 97, 98 and 100; *Đorđević* (n 1) Para 76.

<sup>200</sup> *Kordić et al* (n 19) Para 446.

<sup>201</sup> *Musema* (n 19) Para 145.

It must be taken into account that there are two distinct views as to the mental element of the superior. The first view provides for strict liability: the superior is responsible for criminal conducts by his subordinates based on his position. According to this view, it is unnecessary to prove the criminal intent of the superior. The second view provides for negligence on the part of the superior. In *Musema*, the Trial Chamber reaffirmed the views enunciated on this issue in the *Akayesu* Judgment that

the requisite mens rea of any crime is the accused's criminal intent. This requirement, which amounts to at least a negligence that is so serious as to be tantamount to acquiescence, also applies in determining the individual criminal responsibility of a person accused of crimes defined in the Statute [Statute of the ICTR], for which it is certainly proper to ensure that there existed malicious intent, or at least, to ensure that the accused's negligence was so serious as to be tantamount to acquiescence or even malicious intent.<sup>202</sup>

In summation, criminal responsibility may be imposed on a superior for the acts of his or her subordinates when the following elements have been proved: first, the status of the accused as a commander or a civilian exercising the equivalent of military command authority over a person who committed a violation of the law of war. Secondly, that a violation of the law of war actually occurred or was about to occur. Thirdly, that the commander had either actual knowledge of the commission of the violation of the law of war or that the commander had knowledge enabling him to conclude that the laws of war had been violated. Fourthly, that the commander failed to act reasonably in suppressing violations by investigating allegations and punishing perpetrators or by taking action to prevent future violations. Lastly, that the commander's failure to act was the cause of the war crime which actually was committed.<sup>203</sup>

If the crimes committed by the superior's subordinates are not attributable to the superior's failure to prevent the commission of such crimes, then, criminal responsibility cannot be imposed on such a superior.<sup>204</sup> In *The Prosecutor v Ntagerura et al*, the Trial Chamber held that, Samuel Imanishimwe was a commander and as such, had *de jure* and

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<sup>202</sup> Ibid Para 131.

<sup>203</sup> *Delalić et al* (n 2) Para 345.

<sup>204</sup> *Delalić et al* (n 2) Para 396.

effective control over soldiers of the Karambo military in Cyangungu. Therefore, he was in a position exercise his material ability to prevent or punish offences but instead failed to exercise his powers. While the Trial Chamber was not satisfied that the accused gave the soldiers an order to attack Tutsis at the Gashirabwoba football field, it held that the accused knew or should have known of the conduct of the soldiers in that he was present at the Gashirabwoba football field. The Trial Chamber further held that the conduct of the soldiers at the Gashirabwoba football field constituted widespread attack on Tutsi civilians and therefore, since the accused had effective control over the soldiers, he should be liable under Article 6(3) of the Statute of the ICTR.<sup>205</sup>

#### 4.6 Other Modes of Accessorial Liability

In addition to the modes of participation expressly stipulated in the Statutes of the ICTY and ICTR, the jurisprudence of the Trial and Appeal Chambers reveal additional modes of participation for which responsibility has been imposed on the individuals. These modes of participation can rightly be classified under the broader sub-category of accessorial liability.

Common to the Statutes of the ICTY and ICTR is the way criminal responsibility is imposed which is defined in the following words:

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

If one were to construe the wording of Article 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively, it is persuasive to argue that these provisions are inexhaustive. In other words, there is the possibility of identifying other modes of participation not contemplated or stipulated therein. Such modes of participation could qualify under the wording ‘...otherwise aided and abetted’. Based on the jurisprudence of the Trial and Appeal Chambers, there are at least three different kinds of scenarios that would qualify as accessorial liability if brought

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<sup>205</sup> *Ntagerura et al* (n 61) Para 749.

under the ambit of ‘otherwise aided and abetted’. These scenarios include, first, joint criminal enterprises, an approving spectator and omissions.

#### 4.6.1 Joint Criminal Enterprise (JCE)

There are three forms of joint criminal enterprise identified in the jurisprudence of the Trial and Appeal Chambers: basic, extended and systematic. All three may take the form of committing.<sup>206</sup> A joint criminal enterprise is simply a means to commit a crime, not a crime in itself.<sup>207</sup> The accused is perceived as a perpetrator rather than an accomplice.<sup>208</sup> A joint criminal enterprise exists whenever two or more individuals participate in a criminal endeavour. They have a common purpose: the commission of specific crimes that have been agreed upon. It involves a multiplicity of persons. Even within a joint criminal enterprise, it is possible that there exists another joint criminal enterprise.<sup>209</sup>

The *actus reus* of these forms comprises three elements: first, there must be a plurality of persons.<sup>210</sup> Plurality of persons does not necessarily mean that there must be an organised group, a military, political or administrative structure.<sup>211</sup> The identity of each is not necessarily relevant. However, if the plurality of persons are in categories or groups, such have to be identified to avoid vagueness or ambiguity.<sup>212</sup> The second element is the existence of a common purpose amounting to, or involving, the commission of a crime.<sup>213</sup> The common purpose does not have to be formulated or arranged: it can be extemporaneously

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<sup>206</sup> *Tadić* (n 1) Para 190; *Simić et al* (n 1) Para 138 & 142; *Krnjelac* (n 103) Para 78; *Brđanin* (n 20) Para 258; *Blagojević et al* (n 89) Para 695 & 697; *Limaj et al* (n 28) Para 511; *The Prosecutor v Momcilo Krajišnik*, Judgment, Case No. IT-00-39-T, T. Ch.I, 27 September 2006, Para 883; *Martić* (n 1) Para 435; *Milutinović et al* (n 1) Para 95; *Renzaho* (n 86) Para 739; *Nsengimana* (n 23) Para 798; *Setako* (n 19) Para 448; *Popović et al* (n 23) Para 1021; *Munyakazi* (n 19) Para 431; *Kanyarukiga* (n 19) Para 619 & 622; *Hategekimana* (n 19) Para 646; *Đorđević* (n 1) Para 1860; *Gatete* (n 14) Para 576; *Ndahimana* (n 23) Para 720; *Karempera et al* (n 23) Para 1433; *Nizeyimana* (n 59) Para 798; *Haradinaj et al* (n 34) Para 616; *Tolimir* (n 21) Paras 885 and 888; *Ngirabatware* (n 23) Para 1293 & 1299.

<sup>207</sup> *Mpambara* (n 23) Para 14.

<sup>208</sup> *Blagojević et al* (n 89) Para 696.

<sup>209</sup> *Tadić* (n 1) Para 191; *Kvočka et al* (n 1) Para 307; *Limaj et al* (n 28) Para 510.

<sup>210</sup> *Tadić* (n 1) Para 227; *Krstić* (n 19) Para 611; *Blagojević et al* (n 89) Para 708.

<sup>211</sup> *Tadić* (n 1) Para 227; *Martić* (n 1) Para 436; *Popović et al* (n 23) Para 1023.

<sup>212</sup> *Milutinović et al* (n 1) Para 98; *Đorđević* (n 1) Para 1861; *Gotovina et al* (n 21) Para 1953; *Tolimir* (n 21) Para 889. Schabas and Bernaz (n 19) 253.

<sup>213</sup> *Krstić* (n 19) Para 611; *Milutinović et al* (n 1) Para 100.

materialised.<sup>214</sup> Where the crimes are allegedly committed on a wider scale, the accused may be held liable for his participation on a smaller geographical area.<sup>215</sup> The third element is that the accused must have participated in the common purpose leading to the perpetration of the crimes.<sup>216</sup> The participation on the part of the accused does not imply that a specific crime included in the common purpose must have been committed. Rather, his participation must have assisted in, or contributed significantly and not substantially,<sup>217</sup> to the execution of the common purpose. There is no minimum threshold of significance or importance of the accused's conduct, and the act does not need to be an independent crime. What is essential is that 'the significance and scope of the material participation of an individual in a joint criminal enterprise may be relevant in determining whether that individual had the requisite *mens rea*'.<sup>218</sup> The participation requirement is determined when it is proved that the accused assisted and contributed in the joint criminal enterprise. Also, the accused need not to perform the *actus reus* of the crime.<sup>219</sup>

The mental element for each form of the joint criminal enterprise varies. For the basic form, the accused must have had the intent to perpetrate the crime and this intention must be shared by all members of the group or co-perpetrators.<sup>220</sup> This element may be proved by the

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<sup>214</sup> *Tadić* (n 1) Para 227; *Brđanin* (n 20) Para 261 & 262; *Blagojević et al* (n 89) Para 699; *Martić* (n 1) Para 437; *Milutinović et al* (n 1) Para 102; *Popović et al* (n 23) Para 1024; *Đorđević* (n 1) Para 1862; *Tolimir* (n 21) Para 891.

<sup>215</sup> *Popović et al* (n 23) Para 1024.

<sup>216</sup> *Furundžija* (n 103) Para 249; *Tadić* (n 1) Para 227, *Krstić* (n 19) Para 611; *Kvočka et al* (n 1) Para 244 & 266; *The Prosecutor v Milorad Krnojelac*, Appeal Judgement, Case No. IT-97-25-A, A. Ch., 17 September 2003, Para 116; *Simić et al* (n 1) Para 156 & 158; *Brđanin* (n 20) Para 260; *Blagojević et al* (n 89) Para 698 & 699; *Limaj et al* (n 28) Para 511; *Milutinović et al* (n 1) Para 103; *Popović et al* (n 23) Para 1026; *Đorđević* (n 1) Para 1863; *Tolimir* (n 21) Para 893; *Cryer et al* (n 19) 357-358.

<sup>217</sup> *Delalić et al* (n 2) Para 328; *Kordić et al* (n 19) Para 397; *Krstić* (n 19) Para 601; *Kvočka et al* (n 1) Para 246; *Brđanin* (n 20) Para 263; *Martić* (n 1) Para 435 & 440; *Mrkšić* (n 1) Para 545; *Boškoski et al* (n 2) Para 395; *The Prosecutor v Simeon Nchamihigo*, Judgment, Case No. ICTR-01-63-T, T. Ch. III, 12 November 2008, Para 327; *Renzaho* (n 86) Para 740; *Nsengimana* (n 23) Para 802; *Setako* (n 19) Para 452; *Munyakazi* (n 19) Para 438; *Kanyarukiga* (n 19) Para 624; *Hategekimana* (n 19) Para 649; *Đorđević* (n 1) Para 1863; *Gatete* (n 14) Para 577; *Bizimungu et al* (n 33) Para 1907; *Ndahimana* (n 23) Para 721; *Karemera et al* (n 23) Para 1436; *Nizeyimana* (n 59) Para 1454; *Haradinaj et al* (n 34) Paras 617-619; *Ngirabatware* (n 23) Para 1299.

<sup>218</sup> *Mpambara* (n 23) Paras 13 and 14.

<sup>219</sup> *Martić* (n 1) 440.

<sup>220</sup> *Tadić* (n 1) Para 196 & 228; *Kvočka* (n 1) Para 269; *Krnojelac* (n 103) Para 78; *Vasiljević* (n 89) Para 64; *Simić et al* (n 1) Para 157; *Brđanin* (n 20) Para 264; *Blagojević et al* (n 89) Para 703; *Limaj et al* (n 28) Para 511; *The Prosecutor v Aloys Simba*, Judgment, Case No. ICTR-01-76-T, T.Ch. I, 13 December 2005, Para 388;

accused's knowledge and his continuous participation in the JCE.<sup>221</sup> It must also be proved that the accused voluntarily participated in the common purpose and had the intention that crime or crimes will be committed.<sup>222</sup> For the systematic form, the accused must have had the knowledge of the 'system of repression, in the enforcement of which he participates' and he must have had the intention to further the 'common concerted design to ill-treat the inmates of a concentration camp'.<sup>223</sup> The second form of a joint criminal enterprise does not presume preparatory planning or explicit agreement between the members of the joint criminal enterprise.<sup>224</sup> Generally, there are three requirements that the prosecution must satisfy in order to hold an accused guilty under this category: first, the existence of an organised system to ill-treat the detainees and commit the various crimes alleged; secondly, the accused's awareness of the nature of the system; and thirdly, the fact that the accused, in some way, actively participated in enforcing the system. In other words, the accused encouraged, aided and abetted or in any case participated in the realisation of the common criminal design.<sup>225</sup>

With respect to the extended form, criminal liability on the part of an accused may be imposed where, first, it was foreseeable that one or more persons may commit the crime, and, secondly, the accused willingly took the risk (*dolus eventualis*).<sup>226</sup> The accused's presence in

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*Mpambara* (n 23) Para 14; *Martić* (n 1) Para 439; *Mrkšić* (n 1) Para 546; *Milutinović et al* (n 1) Para 96 & 108; *Boškoski et al* (n 2) Para 396; *Renzaho* (n 86) Para 739; *Nsengimana* (n 23) Para 803; *Kanyarukiga* (n 19) Para 625; *Hategekimana* (n 19) Para 650; *Dorđević* (n 1) Para 1864; *Gatete* (n 14) Para 578; *Gotovina et al* (n 21) Para 1950; *Bizimungu et al* (n 33) Para 1908; *Ndahimana* (n 23) Para 722; *Nizeyimana* (n 59) Para 1455; *Haradinaj et al* (n 34) Para 620; *Tolimir* (n 21) Para 895; *Ngirabatware* (n 23) Para 1301; *Cassese et al* (n 19) 164; *Schabas and Bernaz* (n 19) 254; *Cassese et al* (n 19) 337.

<sup>221</sup> *Dorđević* (n 1) Para 1864.

<sup>222</sup> *Brdanin* (n 8) Para 264; *Krajišnik* (n 206) Para 883; *Gotovina et al* (n 21) Para 1950.

<sup>223</sup> *Tadić* (n 1) 200, 2003, & 208; *Krnojelac* (n 103) Para 78; *Vasiljević* (n 89) Para 64; *Simić et al* (n 1) Para 157; *Limaj et al* (n 28) Para 511; *Krajišnik* (n 206) Para 880; *Mrkšić* (n 1) Para 456; *Boškoski et al* (n 2) Para 396; *Milutinović et al* (n 1) Para 96; *Dorđević* (n 1) Para 1864; *Gotovina et al* (n 21) Para 1951. *Cassese et al* (n 19) 165-166. *Schabas and Bernaz* (n 19) 255.

<sup>224</sup> *Krajišnik* (n 206) Para 883.

<sup>225</sup> *Tadić* (n 1) Paras 202 and 228.

<sup>226</sup> *Tadić* (n 1) Para 204 & 228; *Kordić et al* (n 19) Para 398; *Stakić* (n 24) Para 436; *Brdanin* (n 20) Para 265; *Blagojević et al* (n 89) Para 703; *Limaj et al* (n 28) Para 511; *Krajišnik* (n 206) Para 883; *Martić* (n 1) Para 439; *Mrkšić* (n 1) para 546; *Milutinović et al* (n 1) Para 96; *Boškoski et al* (n 2) Para 396; *Nsengimana* (n 23) Para 803; *Gotovina et al* (n 21) Para 1953; *Nizeyimana* (n 59) Para 1456; *Tolimir* (n 21) Para 896; *Ngirabatware* (n 23) Para 1302.

the joint criminal enterprise at the time the crime is committed is not required.<sup>227</sup> Nevertheless, the crime must have been foreseeable to the accused.<sup>228</sup>

Willingness on the part of the accused is established the moment the accused continues to participate in the joint criminal enterprise despite being aware that the extended crime might be committed.<sup>229</sup> The extended crime must be perpetrated at the time the common purpose was executed.<sup>230</sup> In situations where a non-member of the joint criminal enterprise commits an extended crime, it must be proved that the accused had the intention to participate in, and significantly contributed to, the joint criminal enterprise. In addition, depending on the circumstances of the case, that, first, it was foreseeable that the non-member would commit the extended crime in the execution of a crime forming part of the common purpose of the joint criminal enterprise; and secondly, the accused was aware that the extended crime was a possible consequence of the implementation of the common purpose of the joint criminal enterprise, and willingly took the risk that it would be committed.<sup>231</sup>

Where special intent is required, the accused must share this special intent with the rest of the members of the group.<sup>232</sup> It is important to prove the mental element depending on the form of the joint criminal enterprise concerned. The rationale behind this is that mere knowledge of the criminal purpose is not enough: the accused must intend that his or her acts will lead to the criminal result.<sup>233</sup>

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<sup>227</sup> *Limaj et al* (n 28) Para 511; *Mrkšić* (n 1) Para 545; *Milutinović et al* (n 1) Para 103; *Popović et al* (n 23) Para 1026.

<sup>228</sup> *The Prosecutor v Milomir Stakić*, Appeal Judgment, Case No. IT-97-24-A, A. Ch., 22 March 2006, Para 87; *Martić* (n 1) Para 439. Cryer, Friman, Robinson, and Wilmshurst (n 31) 359; Cassese *et al* (n 19) 168.

<sup>229</sup> *Stakić* (n 24) Para 436; *Popović et al* (n 23) Para 1030; *Tolimir* (n 21) Para 895.

<sup>230</sup> *Karemera et al* (n 23) Para 1463.

<sup>231</sup> *Krajišnik* (n 206) Para 883; *Boškoski et al* (n 2) Para 396 & 397; *Popović et al* (n 23) Para 1030; *Đorđević* (n 1) Para 1865; *Bizimungu et al* (n 33) Para 1909; *Karemera et al* (n 23) Para 1465.

<sup>232</sup> *Simba* (n 220) Para 388; *Nsengimana* (n 23) Para 803; *Setako* (n 19) Para 453; *Munyakazi* (n 19) Para 439; *Kanyarukiga* (n 19) Para 625; *Gatete* (n 14) Para 578; *Ndahimana* (n 23) Para 722; *Karemera et al* (n 23) Para 1439; *Nizeyimana* (n 59) Para 1455; *Ngirabatware* (n 23) Para 1301.

<sup>233</sup> *Ndahimana* (n 23) Para 722.



A person is said to have participated in the joint criminal enterprise where he, first, becomes a principal offender, secondly, becomes a co-perpetrator, and thirdly, ‘by acting in furtherance of a particular system in which the crime is committed by reason of the accused’s position of authority or function and with knowledge of the nature of that system and intent to further that system’.<sup>234</sup>

The parties to the joint criminal enterprise are equally guilty irrespective of the role they played in committing the crime.<sup>235</sup> However, it does not mean that the imposition of individual criminal responsibility arises as a result of mere membership to the joint criminal enterprise. Liability is incurred when the parties contribute to the common purpose.<sup>236</sup> For a member of a joint criminal enterprise to incur responsibility for crimes within the common purpose of the joint criminal enterprise committed by non-members of that joint criminal enterprise, it must be shown that the crimes can be imputed to one member of the joint criminal enterprise and that this member, when using the non-member to perpetrate the crime, acted in accordance with the common purpose.<sup>237</sup> It must be shown that the member of the joint criminal enterprise explicitly or implicitly requested the non- joint criminal enterprise member to commit the crime. The fact that the non member was aware of the existence of the joint criminal enterprise when committing the *actus reus* may also be taken into account.<sup>238</sup> In respect with the mental element, ‘it is not determinative whether the non-JCE member shared the *mens rea* of the JCE member or that he knew of the existence of the JCE, what matters is whether the JCE member used the non-JCE member to commit the *actus reus* of the crime forming part of the common purpose.’<sup>239</sup> It is possible for a person who is not a joint criminal enterprise member, to share the ‘general objective of the group’ and not be

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<sup>234</sup> *Krnjelac* (n 103) Para 82; *Stakić* (n 24) Para 435; *Blagojević et al* (n 89) Para 702.

<sup>235</sup> *Krnjelac* (n 103) Para 82; *Vasiljević* (n 89) Para 67; *Stakić* (n 24) Para 435.

<sup>236</sup> *Kvočka et al* (n 1) Para 281; and, *Simić et al* (n 1) Para 158; *Karemera et al* (n 23) 1437.

<sup>237</sup> *Boškoski et al* (n 2) Para 397; *Milutinović et al* (n 1) Para 99; *Popović et al* (n 23) Para 1029; *Dorđević* (n 1) Para 1866; *Karemera et al* (n 23) Para 1440; *Tolimir* (n 21) Para 890.

<sup>238</sup> *Mrkšić* (n 1) Para 547.

<sup>239</sup> *Dorđević* (n 1) Para 1866.



linked with the operation of the group. In such a case, when the crimes are committed by such a person, they cannot be attributed to the group.<sup>240</sup>

Where the crimes committed happened to be outside the common purpose, it must be proven that the accused had the knowledge that the ‘additional crimes were a natural and foreseeable consequence’.<sup>241</sup> The participation or the contribution of an accused need not to be a *conditio sine qua non* for the perpetration of the crime: the accused’s involvement in its execution must form a causal link.<sup>242</sup>

Liability on an accused may be imposed where the accused either acted, or failed to act where a duty existed. Either way, his conduct must have furthered the common purpose. In addition, his presence in the participation of the joint criminal enterprise at the commission of the crime is not required.<sup>243</sup>

Participation in a joint criminal enterprise must be significant: that is, the specific act or omission must have the ability to make the enterprise effective or efficient.<sup>244</sup> In determining the significance of an accused’s participation, various factors such as the size of the joint criminal enterprise, the functions performed, position of an accused, the amount of time spent by the accused participating after acquiring the knowledge of the criminality of the system, efforts that were made in preventing criminal activity or to impede the efficient functioning of the system, the seriousness and the scope of the crimes committed and the efficiency, zealotry or gratuitous cruelty exhibited in performing the actor’s function.<sup>245</sup>

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<sup>240</sup> *Krajišnik* (n 206) Para 1082; *Martić* (n 1) Para 438.

<sup>241</sup> *Krnjelac* (n 103) Para 78; *Prosecutor v Radoslav Brdanin*, Appeal Judgment, Case No. IT-99-36-A, 2 April 2007, Para 411; *Mrkšić* (n 1) Para 546 & 547; *Milutinović et al* (n 1) Para 111; *Dorđević* (n 1) Para 1865 & 1867; *Gotovina et al* (n 21) Para 1952.

<sup>242</sup> *Kvočka et al* (n 1) Para 274; *Brđanin* (n 20) Para 263; *Blagojević et al* (n 89) Para 702; *Mrkšić* (n 1) Para 545; *Boškoski et al* (n 2) Para 395; *Popović et al* (n 23) Para 1026; *Dorđević* (n 1) Para 1863; *Tolimir* (n 21) Para 395.

<sup>243</sup> *Dorđević* (n 1) Para 1863.

<sup>244</sup> *Kvočka et al* (n 1) Para 309; *Milutinović et al* (n 1) Para 104; *Popović et al* (n 23) Para 1027; *Gotovina et al* (n 21) Para 1953; *Tolimir* (n 9) Para 893.

<sup>245</sup> *Kvočka et al* (n 1) Para 311; *Simić et al* (n 1) Para 159; *Milutinović et al* (n 1) Para 105; *Tolimir* (n 21) Para 893.

If the objective of the joint criminal enterprise changes, such that it is profoundly different from the original, it implies that a new joint criminal enterprise has been established altogether.<sup>246</sup> It is important to note that a person may only incur liability for their participation in the joint criminal enterprise under the first category. For the second and third categories, only for the natural and foreseeable consequence of the enterprise.<sup>247</sup> The prosecution must prove the following elements: the nature of the joint criminal enterprise, the period in which the joint criminal enterprise existed, the identity of the members of the joint criminal enterprise, and the nature of the participation of the accused.<sup>248</sup>

#### 4.6.2 Approving Spectator

The mere presence of an accused may be considered as aiding and abetting.<sup>249</sup> When an accused is in an authoritative position and happens to be present at the crime scene, it does not imply that such an accused encouraged or supported the offence. The presence of an accused may be perceived as a significant *indicium* of his encouragement or support. In other words, the presence of an accused must have had a significantly encouraging effect.<sup>250</sup>

The accused must have had the knowledge that his presence would be perceived as that of showing support or encouragement in the eyes of the principal perpetrator.<sup>251</sup> When proving the mental element, the accused's prior and similar behaviours, failure to punish or verbal encouragement made by the accused, shall be taken into consideration.<sup>252</sup> Liability is

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<sup>246</sup> *Blagojević et al* (n 89) Para 700; *Popović et al* (n 23) Para 1028.

<sup>247</sup> *Blagojević et al* (n 89) Para 701.

<sup>248</sup> *Simić et al* (n 1) Para 145; *Cassese et al* (n 19) 163.

<sup>249</sup> *Ndindabahizi* (n 33) Para 457.

<sup>250</sup> *Furundžija* (n 103) Para 207; *Naletilić et al* (n 19) Para 63; *Simić et al* (n 1) Para 165; *Galić* (n 11) Para 169; *Ndindabahizi* (n 2112) Para 457; *Brđanin* (n 20) Para 271; *Limaj et al* (n 28) Para 517; *Bisengimana* (n 12) Para 34 & 36; *Orić* (n 1) Para 283; *Mpambara* (n 23) Para 22; *Seromba* (n 19) Para 309; *Nzabirinda* (n 115) Para 17; *Mrkšić* (n 1) Para 553; *Boškoski et al* (n 2) Para 402; *Hategekimana* (n 19) Para 652; *Dorđević* (n 1) Para 1875; *Perišić* (n 129) Para 136; *Karemera et al* (n 23) Para 1430; *Nzabonimana* (n 23) 1698; *Nizeyimana* (n 59) Para 1466; *Tolimir* (n 21) Para 909; *Ngirabatware* (n 23) Para 1295; *Schabas and Bernaz* (n 19) 251.

<sup>251</sup> *Kayishema et al* (n 8) Para 200; *Aleksovski* (n 1) Para 65; *Seromba* (n 19) Para 310; *Perišić* (n 129) Para 136.

<sup>252</sup> *Kajelijeli* (n 13) Para 769; *Kamuhanda* (n 17) Para 600; *Seromba* (n 19) Para 310.

imposed where the accused was present at the crime scene or in its immediate vicinity and his presence was interpreted as approving the conduct of the physical perpetrator.<sup>253</sup>

To sum up, in such cases, the accused's authority, combined with his presence at, or very near, the crime scene, especially if considered together with prior conduct, may amount to an official sanction of the crime, thereby substantially contributing to it.<sup>254</sup> In such circumstances, an approving spectator becomes a mode of participation for which criminal responsibility would be incurred.

#### 4.6.3 Omission

Omission is said to be a form of aiding and abetting.<sup>255</sup> Liability may be imposed on an accused for failure to act where a legal duty was imposed.<sup>256</sup> The *actus reus* would be failure to act where a duty to do so was imposed, which eventually assisted, encouraged, or lent support to the commission of a crime and having substantial effect in its execution.<sup>257</sup> The accused must have had the ability to act 'such that' the necessary means was available to the accused which would have enabled him to perform his duty.<sup>258</sup> The *men rea* element is that the aider and abettor must have known that his acts of omission would assist the principal perpetrator in the commission of a crime and, must have been aware of the elements of the crime ultimately committed.<sup>259</sup> Criminal responsibility for this form of participation is based on omission combined with the choice to be present.<sup>260</sup> For example, in participation by

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<sup>253</sup> *Semanza* (n 12) Para 386; *Mpambara* (n 23) Para 23; *Seromba* (n 19) Para 309; *Nzabirinda* (n 115) Para 18; *Muvunyi* (n 59) Para 472; *Ntawukulilyayo* (n 59) Para 417.

<sup>254</sup> *Nizeyimana* (n 59) Para 1466.

<sup>255</sup> *Rutaganira* (n 101) Para 64; *Limaj et al* (n 28) Para 517; *Mpambara* (n 23) Para 22; *Dorđević* (n 1) Para 1875.

<sup>256</sup> *Blaškić* (n 1) Para 284; *Kvočka et al* (n 1) Para 256; *Orić* (n 1) Para 283; *Mrkšić* (n 1) Para 553; *Milutinović et al* (n 1) Para 90; *Popović et al* (n 23) Para 1019; *Gotovina et al* (n 21) Para (1960); *Perišić* (n 129) Para 134; *Haradinaj et al* (n 34) Para 626; *Tolimir* (n 21) Para 909. *Cryer et al* (n 19) 372.

<sup>257</sup> *Kvočka et al* (n 1) Para 256; *Strugar* (n 59) Para 349; *Nzabirinda* (n 115) Para 17; *Popović et al* (n 23) Para 1019; *Dorđević* (n 1) Para 1875; *Haradinaj et al* (n 34) Para 626.

<sup>258</sup> *The Prosecutor v Milan Milutinović, Nikola Sainovic, Dragoljub Ojdanic, Nebojsa Pavkovic, Vladimir Lazarevic and Sreten Lukic*, Judgement, Case No. IT-05-87-T, Volume 3, 26 February 2009, Para 921; *Milutinović et al* (n 1) Para 90; *Perišić* (n 129) Para 135.

<sup>259</sup> *Bizimungu et al* (n 33) Para 1900.

<sup>260</sup> *Mpambara* (n 23) Para 22; *Nzabirinda* (n 115) Para 17; *Karemera et al* (n 23) Para 1431.

omission in extermination as a crime against humanity, the Prosecution must ask the following questions: first, did the accused have authority and did he choose to not exercise it? Secondly, did the accused have a moral authority over the principals such as to prevent them from committing the crime and did he choose not to exercise it? Thirdly, was the accused under a legal duty to act which he failed to fulfill?<sup>261</sup>

#### 4.7 Chapter Summary

The Statutes of the *ad hoc* Tribunals do define what crimes over which they do have jurisdiction.<sup>262</sup> Furthermore, they both stipulate the imposition of individual criminal responsibility by defining the different modes of participation. When read differently and jointly, a few observations are worthy to be mentioned here. First, as has been discussed earlier, there is the possibility of overlap between these provisions. For example, instigation as a mode of participation under either Article 7(1) or 6(1) of the Statute of the ICTY or ICTR should lead to any of the stages of any of the crimes under the Tribunal's jurisdiction. Genocide is one of the crimes over which the Tribunals do have jurisdiction.<sup>263</sup> In addition to defining the crime of genocide, both Statutes do make punishable direct and public incitement to commit genocide.<sup>264</sup> The jurisprudence of the Trial and Appeal Chambers of the ICTY and ICTR indicate that this is an inchoate crime in itself: in other words, such direct and public incitement may not necessarily lead to the commission of genocide for the act to be punishable.<sup>265</sup> Two features distinguish instigation as a mode of participation under Article 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively: the requirement that as a punishable act of genocide, the incitement must be direct and public. Secondly, instigation under Article 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively require

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<sup>261</sup> *Rutaganira* (n 101) Para 68.

<sup>262</sup> Statute of the ICTY, Articles 2-5; and Statute of the ICTR, Articles 2-4.

<sup>263</sup> Statute of the ICTY, Article 4; and Statute of the ICTR, Article 2.

<sup>264</sup> Statute of the ICTY, Article 4(3)(c); and Statute of the ICTR, Article 2(3)(c).

<sup>265</sup> William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) 179.

instigation to lead to any of the stages of any of the crimes. In the strictest construction of these provisions, the possibility of an overlap is not remote. In fact, even though such overlap occurred in numerous cases, only in *The Prosecutor v Callixte Kalima Kalimanzira* did the Trial Chamber notice this, and developed a set of guidelines aimed at dealing with such confluence. The Kalimanzira Guidelines, even though a significant step, seem to be flawed to some extent.<sup>266</sup>

Secondly, the definition of the crimes contained in the Statutes of the ICTY and ICTR bear some resemblance in terms of characterisation, but significant differences in terms of the substantive content. A good example is the crime of crimes against humanity. Under the Statute of the ICTY, crimes against humanity was defined as ‘...the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population.’<sup>267</sup> On the other hand, the Statute of the ICTR defined crimes against humanity as ‘the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds....’<sup>268</sup> The latter definition stipulated in the Statute of the ICTR was a radical departure from that postulated in the Statute of the ICTY, and has since then, been regurgitated, with minor changes, in subsequent international instruments.<sup>269</sup> The Trial and Appeal Chambers of the ICTY and ICTR have, through their jurisprudence, interpreted and developed the meaning of these phrases. However, some legal scholars contend that the very definition of crimes against humanity as stipulated in the Statute of the ICTR requires a multiplicity of persons for their commission. In short, they can be called group crimes as they

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<sup>266</sup> Agbor (n 47) 135-138.

<sup>267</sup> Statute of the ICTY, Article 5.

<sup>268</sup> Statute of the ICTR, Article 3.

<sup>269</sup> For example: Rome Statute of the International Criminal Court, U. N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 (1998), Article 7; Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone pursuant to United Nations Security Council Resolution 1315, U.N. SCOR, 4186<sup>th</sup> meeting, U.N. Doc. S/RES/1315 (2000), Article 2; and, Statute of the Iraqi Special Tribunal, Annexed to CPA Order No. 48, CPA/ORD/9 Dec 2003, Article 12.

require the element of either systematicity or widespreadness. If this argument is lucid, then, it is logical to argue that there is an implicit suggestion of the existence of a plurality of persons who agree to the commission of crimes against humanity if they have to meet the systematicity or widespread requirement. It was against this background, coupled with the history of the commission of the atrocities in Rwanda that some scholars have critiqued the Trial and Appeal Chambers of the ICTR. Like it happened in Nazi Germany and the prosecutors reasoned during the Nuremberg Trials, the Office of the Prosecutor at the ICTR ought to have construed the existence of a joint criminal enterprise within which the members agreed on what crimes should be committed, and ordered and planned the preparation and execution of these crimes. The perpetration of mass atrocities in Rwanda, involving top cabinet officials, political figures, civil society actors, clergy men, academics and militia groups was because of the existence of a joint criminal enterprise whose common purpose as shared by the members and non-members was to see and execute the systematic and widespread elimination of Tutsis based on their ethnicity and Hutu-moderates because of their tolerant political views.

The jurisprudence of the Trial and Appeal Chambers on the modes of participation is quite impressive and priceless, and over time, has been polished and perfected through rigorous legal thinking and understanding of the broader picture within which these atrocities were committed. An additional reason why credit ought to be given to these Chambers is the fact they were *ex post facto* creations that were developed and implemented by the UN Security Council. The Rome Statute of the International Criminal Court, a product of years of dedicated work and superb draftsmanship, exudes very little challenges as these modes of participation are carefully spelt out. It is therefore hoped that despite the conspicuous flaws of some aspects of the jurisprudence of the Trial and Appeal Chambers of the ad hoc Tribunals,

so much could be learned from them on the interpretation of these modes of participating in serious crimes in international law.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

In part, the pursuit of international criminal justice has been focused on holding accountable individuals who take part in the commission of serious crimes in international law. The establishment of the International Military Tribunal (IMT), Nuremberg,<sup>1</sup> followed by Allied Control Council No. 10,<sup>2</sup> and the International Military Tribunal for the Far East (IMTFE), Tokyo,<sup>3</sup> in the aftermath of the Second World War, exuded the will of the global community to see to it that perpetrators of mass atrocities are brought to justice. Over the past seven decades, monumental developments have taken place in the field of international criminal justice. These developments are dotted by the works of the International Law Commission,<sup>4</sup> the establishment of two United Nations' *ad hoc* Tribunals,<sup>5</sup> the conclusion and subsequent ratification of the Rome Statute of the International Criminal Court which has brought into existence the International Criminal Court,<sup>6</sup> the creation of hybrid/special courts/tribunals like in Sierra Leone,<sup>7</sup> Cambodia,<sup>8</sup> and Lebanon,<sup>9</sup> are landmarks in international criminal

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<sup>1</sup> Charter of the International Military Tribunal (IMT), Nuremberg, annexed to the London Agreement, August 1943.

<sup>2</sup> The Allied Control Council Law No. 10 was a domestic piece of legislation enacted by the Allied Powers after the defeat of Germany in the Second World War. It was granted supreme legislative status over Germany, and never intended to be an international instrument but rather a municipal piece of legislation that would provide the Allied Powers the legal basis for the prosecutions in Germany. See M Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (Kluwer Law International 1990) 3-6.

<sup>3</sup> Charter of the International Military Tribunal for the Far East (IMTFE), Tokyo.

<sup>4</sup> Examples of the works of the International Law Commission include the development of the Nuremberg Principles, 1949, the Draft Code of Crimes against the Peace and Security of Mankind, 1954, the Draft Statute of the International Criminal Court, 1994, the Draft Code of Crimes against the Peace and Security of Mankind, 1996.

<sup>5</sup> Statute of the International Criminal Tribunal for the former Yugoslavia (herein referred to as the ICTY), annexed to United Nations Security Council Resolution 827, U. N. SCOR, 3217<sup>th</sup> meeting, U. N.Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda (hereinafter referred to as the ICTR), annexed to United Nations Security Council Resolution 955, U. N. SCOR, 3453<sup>rd</sup> meeting, U.N. Doc. S/RES/955 (1994).

<sup>6</sup> Rome Statute of the International Criminal Court, U. N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 (1998) (hereinafter referred to as the Rome Statute of the ICC).

<sup>7</sup> Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone pursuant to United Nations Security Council Resolution 1315, U.N. SCOR, 4186<sup>th</sup> meeting, U.N. Doc. S/RES/1315 (2000).



justice as they were responses to different situations that shocked the conscience of mankind in terms of both the widespreadness or scale of victimisation and the organised or systematic nature of the atrocities.

Conceptualising participation in the commission of serious crimes in international law has never been an easy task. The challenge can be summarised in one question: in cases of mass atrocities, how can responsibility be attributed? This question begets another question: should focus be limited to the top civilian and military personnel who, through planning, ordering, preparing and instigating, masterminded the perpetration? This task, as was seen in the aftermath of the Second World War, would require a careful and meticulous understanding of the nature of every situation. The wisdom of the Allied Powers would direct them to focusing on the top level personnel in both military and civilian corps,<sup>10</sup> and then use a domestic legal system to catch other lower level officials who, in some way or the other, participated in the commission of the crimes over which the Tribunals had jurisdiction.<sup>11</sup>

The trend of events in the post-Nuremberg era has not been very different. In the former Yugoslavia, Rwanda, Sierra Leone and Cambodia, the perpetration of serious crimes in international law bore the fingerprint of masterminds who were officials in top-level cabinet positions. The wording of the relevant Statutes that defined the jurisdiction of the Tribunals and hybrid courts as well as the imposition of criminal responsibility was shaped in

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<sup>8</sup> The Statute of the Extraordinary Chambers in the Courts of Cambodia (hereinafter referred to as the ECCC), United Nations General Assembly Resolution 228 B, U.N.G.A. 57<sup>th</sup> Session, U.N.Doc. A/RES/57/228B (2003) of 22 May 2003.

<sup>9</sup> The Statute of Special Court for Lebanon, annexed to the Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon pursuant to United Nations Security Council Resolution 1757, U.N.SCOR, 5685<sup>th</sup> meeting, U.N.Doc. S/RES/1757 (2007).

<sup>10</sup> This wisdom is reflected in the way the imposition of criminal responsibility was articulated:

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

Charter of the IMT, Nuremberg and IMTFE, Tokyo, Articles 6(c) and 5(c) respectively.

<sup>11</sup> These crimes include crimes against peace, war crimes (or conventional war crimes as stipulated in the Charter of the IMTFE, Article 5(b)) and crimes against humanity (Charter of the IMT, Nuremberg, Article 6(a) – (c) and Charter of the IMTFE, Tokyo, Article 5(a) – (c) respectively.

ways that would cover those who bore the greatest responsibility for the crimes committed in those areas.<sup>12</sup>

In all these developments, the UN *ad hoc* Tribunals are the only institutions with the longest life span as they have spanned over two decades. In addition, the Statutes of these *ad hoc* Tribunals would remain very significant in the field of international criminal justice for many reasons: first, the *ad hoc* Tribunals took further the norms established at Nuremberg and Tokyo: accountability over impunity. By establishing the *ad hoc* Tribunals, the UN Security Council made a priceless contribution to the pursuit of international criminal justice: when mass atrocities are committed, those who bear the greatest responsibility, irrespective of their capacity when they committed such crimes, would be brought to justice. Secondly, the *ad hoc* Tribunals gave further content to, and elaboration of, what constitutes serious crimes in international law. By granting these Tribunals jurisdiction over war crimes,<sup>13</sup> genocide,<sup>14</sup> and crimes against humanity,<sup>15</sup> the substantive definition of what these crimes are was further developed as compared to the Charters of the IMT, Nuremberg and Tokyo.<sup>16</sup> The current definitional framework of what constitutes crimes against humanity was shaped extensively by the Statute of the ICTR which departed radically from what was stated in the Statute of the ICTY.<sup>17</sup> Today, in what can be considered to be the common-law of crimes against humanity, extensive reference is made to the jurisprudence of the Trial and Appeal Chambers of the ICTR. Thirdly, the Statutes of the *ad hoc* Tribunals detailed the modes of

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<sup>12</sup> See generally the Charters of the IMT, Nuremberg, and IMTFE, Tokyo, Articles 6(c) and 5(c) respectively.

<sup>13</sup> See Statute of the ICTY, Articles 2 ('Grave Breaches of the Geneva Conventions'), 3 ('violations of the laws or customs of war'); Statute of the ICTR, Article 4 (violations of article 3 common to the Geneva Conventions and of Additional Protocol II).

<sup>14</sup> Statute of the ICTY, Article 4; Statute of the ICTR, Article 2.

<sup>15</sup> Statute of the ICTY, Article 5, Statute of the ICTR, Article 3.

<sup>16</sup> For a comparative analysis of the substance of these definitions, see the Charters of the IMT, Nuremberg, Article 6(a) – (c) and IMTFE, Article 5(a) – (c) respectively.

<sup>17</sup> See Statute of the ICTY, Article 5, wherein the definition of crimes against humanity is stipulated, as compared to the Statute of the ICTR, Article 3, defining crimes against humanity. The former (Statute of the ICTY) defined crimes against humanity by linking it to the presence of an armed conflict, whether international or internal in character. On the other hand, the Statute of the ICTR defined it as requiring the presence of a widespread or systematic attack directed against any civilian population based on national, ethnic, racial, religious or political grounds.

participation that would lead to the imposition of individual criminal responsibility.<sup>18</sup> With regard to this, the specific provisions under the relevant portions of the Statutes of the ICTY and ICTR do not only recognise these modes of participation, but further eliminated the defence of obedience to superior orders,<sup>19</sup> the irrelevance of the official capacity of the perpetrator,<sup>20</sup> and would impose criminal responsibility on superiors for failure to act.<sup>21</sup>

The stipulated modes of participation are the triggers for the imposition of individual criminal responsibility. As has been seen in the previous chapter, the Trial and Appeal Chambers of both the ICTY and ICTR have construed these words and developed the distinguishing features that make them different.

In construing these provisions, the Trial and Appeal Chambers have had some challenges: first, as in the case of instigation as a mode of participation, they erred as they misunderstood the inchoate crime of direct and public incitement to commit genocide and instigation as a mode of participation.<sup>22</sup> This confusion, attributable to a poor construction and understanding of the wordings of the different provisions of the Statute, led to the development of the Kalimanzira Guidelines.<sup>23</sup> Legal scholars have debunked the line of reasoning of the Trial and Appeal Chambers on this.<sup>24</sup> Secondly, even though the notion of joint criminal enterprise did not feature in any of the Statutes, the Trial and Appeal Chambers incorporated this in their legal analysis of modes of participation. When introduced in some cases, it provided the Trial and Appeal Chambers a better picture of the conceptualisation and execution of the crimes over which the Tribunals had jurisdiction. Thirdly, with regards to

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<sup>18</sup> Statutes of the ICTY and ICTR, Articles 7(1) and 6(1) respectively.

<sup>19</sup> Statutes of the ICTY and ICTR, Articles 7(4) and 6(4) respectively.

<sup>20</sup> Statutes of the ICTY and ICTR, Articles 7(2) and 6(2) respectively.

<sup>21</sup> Statutes of the ICTY and ICTR, Articles 7(3) and 6(3) respectively.

<sup>22</sup> This is more specific to the jurisprudence of the Trial and Appeal Chambers of the ICTR in cases dealing with instigation and direct and public incitement to commit genocide.

<sup>23</sup> The Prosecutor v Callixte Kalimanzira, Judgment, Case No. ICTR-05-88-T, T. Ch. III, 22 June 2009, Para 516. See also Avitus A. Agbor, *Instigation to Commit Crimes against Humanity: The Flawed Jurisprudence of the Trial and Appeal Chambers of the International Criminal Tribunal for Rwanda (ICTR)* (Martinus Nijhoff 2013) 135-138.

<sup>24</sup> Agbor (n 23) 135-138.

superiors' responsibility for the acts of their subordinates, the *ad hoc* Tribunals have elaborated the principles that apply in such situations. Taking it from the early analysis at the IMTFE, Tokyo, the *ad hoc* Tribunals have been detailed in developing these principles, and today, much reference on this mode of participation comes from the jurisprudence of the *ad hoc* Tribunals, even though the concept was developed about seven decades ago. Lastly, given the different modes of participation, it is clear that some of them do overlap. The definitions of the crimes over which the Tribunals have jurisdiction contain the material elements of these crimes.<sup>25</sup> A particular act may qualify as genocide, a crime against humanity and a war crime, provided the definitional elements are met. For example, in Rwanda, where the Hutu majority embarked on ethnic cleansing, and an armed conflict took place, consider the following scenario: A, a Hutu mastermind and soldier with arms, knew of B and his entire family who were Tutsis (the target of their ethnic cleansing). In the presence of an armed conflict, and the intention to destroy the Tutsi population because of their ethnicity, and an ongoing systematic and widespread attack against a civilian population, A took his ammunition and went to B's residence and killed all of them, such a killing would qualify as a war crime, genocide and crimes against humanity. The doctrine of multiple convictions based on the same facts applies – a doctrine which is well recognised and entrenched in the jurisprudence of the Trial and Appeal Chambers of the ICTY and ICTR.<sup>26</sup>

Even though the *ad hoc* Tribunals were transformed to an International Residual Mechanism for Criminal Tribunals as they gradually wound down, the legacy of the Tribunals will remain very significant especially with regards to their jurisprudence. As academics begin to assess the different aspects of the jurisprudence, legal scholars and practitioners will only be able to evaluate the soundness of the legal reasoning over time. A

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<sup>25</sup> See the Statutes of the ICTY and ICTR, Articles 2-5 and Articles 2-4 respectively.

<sup>26</sup> Agbor (n 23) 141-147.

leading example of such scholarly scrutiny is Agbor who tackles the approach taken by the ICTR on instigation.<sup>27</sup>

With the Rome Statute of the ICC, participation is much broader than the Statutes of the *ad hoc* Tribunals. However, like the *ad hoc* Tribunals, it will be interesting to see how the Trial Chambers will construe these modes of participation and whether they will build extensively on, and progressively from, the jurisprudence of the *ad hoc* Tribunals.

However, it is recommended that the Trial Chambers of the ICC consider the jurisprudence of the *ad hoc* Tribunals with some degree of caution given the concerns raised above. Clarity and consistency should guide them as they interpret the different modes of participation in the various cases.

Lastly, probably, given the vast and complicated nature of participation, the international community may start considering the development of an international instrument that deals with participation in serious crimes in international law. Such a multilateral treaty should address issues such as the specific modes of participation, what constitutes aiding and abetting, instigation, and other recognised forms of accomplice liability like joint criminal enterprise and approving spectator. It should also address situations such as multiple convictions based on the same set of facts. Such an instrument, it is hoped, will provide guidelines to legal practitioners on how surmount challenges relating to specific modes of participation in serious crimes in international law.

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<sup>27</sup> Agbor (n 23) 135-138.

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