CHAPTER 3
THE GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY
UNDER INTERNATIONAL CRIMINAL LAW

3.1 THE EMERGENCE OF THE DOCTRINE

Although it was adumbrated after the First World War, it was in the aftermath of the Second World War that there evolved in international law the notion of criminal responsibility of superiors for failure to prevent or punish crimes perpetrated by their subordinates. The gradual evolution of ICL on the matter can be roughly divided up into various phases.

At the outset law-makers and courts considered that military commanders were to be held criminally liable for failure to prevent or punish, for in so acting they in some way aided and abetted the crimes of their underlings. Some national laws set out the notion tersely and conceived of such responsibility as a form of complicity. For instance, the French Order on War Crimes of 28 August 1944 provided in Article 4 that where a subordinate is prosecuted as the principal perpetrator of a war crime and his hierarchical superiors may not be investigated as co-perpetrators, they shall be held to be accomplices to the extent that they have organized or tolerated the criminal offences of their subordinates (emphasis added).

Here the notion was clearly set out that a military commander is criminally liable as an aider and abetter, if he tolerated—that is, failed to stop or repress—the commission of war crimes by his subordinates. A slightly broader notion was embodied in the Chinese law of 24 October 1946 on the trial of war criminals, which, however, like the French law, regarded culpable commanders as

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155 See the proposals of the 1919 International Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, in 14 AJIL (1920), at 121.

accomplices of the subordinates committing crimes.\textsuperscript{157} In 1949-50 two Belgian Courts Martial took the same approach in Schniitt, although they stressed the notion that a commander is under a set of obligations, the breach of which may entail his criminal liability.\textsuperscript{158}

A further step in the evolution of the doctrine can be seen in a leading, if controversial, US case, Yamashita (1946). In this case the first fully fledged enunciation of the doctrine was propounded, again with regard to military commanders. The court did not base itself on the notion of complicity but only stressed that command responsibility is consequent upon the breach of the duties incumbent upon commanders. Given the importance of the case a few words of explanation prove necessary.

The Japanese general Yamashita had been Commanding General of the Japanese Army in the Philippines between 1943 and 1945. His soldiers had massacred a large part of the civilian population of Batangas Province and inflicted acts of violence, cruelty, and murder upon the civilian population and prisoners of war, as well as wholesale pillage and wanton destruction of religious monuments in the occupied territory. The US authorities accused the General, before a US Military Commission, of breaching his duty as an army commander

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157 Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals.'

158 The Antwerp Court Martial dealt with the case of a German head of a prisoners of war camp at Breedonck where many inmates died either of fatigue for the forced labour to which they had been subjected or of starvation, whereas some 32 inmates were killed by some of the prison guards. The Court applied Art. 66 of the Belgian Penal Code (which made liable for a crime both the perpetrators and aiders and abettors). It stressed that the defendant; as head of the camp *had the positive duty to protect prisoners in his custody* (at 751). The Court therefore found that he was accountable, as co-perpetrator, for the killing for the 32 inmates, whereas for the death of the inmates resulting from excessive fatigue or starvation he was liable as an accomplice, on account of his breach of his duty *'since he had rendered such assistance that without it the crimes could not be committed';* he had seriously breached his duty as head of the camp and hence voluntarily and consciously cooperated to the criminal activity of the Sicherheitsdienst [the SS branch whose members were in charge of the camp at his orders] (ibid.). On appeal, a Military Court of Appeal upheld the decision and noted that the defendant's action was twofold: *'positive', where he imposed exhausting labour and ordered the destruction of food parcels, and *'negative*, where he refrained to step in to prevent cruel acts. The appellant, the Court went on to hold, must be punished for both classes of conduct. As for the latter, he was punishable for the breach of his duty to see to it that *'the inmates in his camp be adequately nourished and treated' so as not to 'become physically exhausted and unable to work';* this duty, the Court noted, was similar to *'that incumbent upon a person charged with nourishing another person unable to attend to himself, and who gets him to starve'. In this case *'the failure to act constitutes the material act sufficient to evidence criminal intent' (at 752).
to control the operations of his troops 'by permitting them to commit' extensive and widespread atrocities. The Commission upheld these submissions by setting out a new doctrine as follows:

Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them (1597).

The US Supreme Court, to which the case had been brought by the defendant by way of a petition for habeas corpus agreed. It held that commanders had a duty to take such appropriate measures as are within their power to control the troops under their command for the prevention of violations of the laws of warfare. It derived this duty from a number of provisions of such laws: Articles I and 43 of the Regulations annexed to the Fourth Hague Convention of 1907 (under the former, combatants, to be recognized as legitimate belligerents, must 'be commanded by a person responsible for his subordinates'; pursuant to the latter, the commander of a force occupying enemy territory shall take all the measures in his power to re-tore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'); Article 19 of the Tenth Hague Convention of 1907, relating to bombardment by naval vessel and providing that commanders-in-chief of the belligerent vessels 'must see that the above Articles are properly carried out'; Article 26 of the 1929 Geneva Convention on the wounded and sick, which made it the duty 'of the commanders-in-chief of the belligerent armies to provide for the detail of execution of the foregoing Articles [of the Convention] as well as for unforeseen cases'?? The Court's majority held that these provisions made it clear that the accused had an affirmative duty to take such measures as were within his power
and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals (13).

However, two judges, Murphy and Rutledge, forcefully (and rightly) disagreed and set forth their views in important Dissenting Opinions. They noted among other things that the Court’s majority had not shown that Yamashita had 'knowledge' of the gross breaches perpetrated by his troops (at 31, 36, 48-9, 50) or had any 'direct connection with the atrocities' (at 36), or could be found guilty of 'a negligent failure [...] to discover' the atrocities (at 49) or in other words, had 'personal culpability' (at 36-79).

This is therefore a case where the principle was affirmed, based (as the two dissenting judges rightly noted), on a novel interpretation of existing rules of IHL, as well as a questionable application of the principles to the case at bar, in addition to total disregard for the required mental element for the crime.

Although case law thus started off on the wrong foot, soon other decisions handed down after the Second World War followed suit and fleshed out the doctrine. Unlike Yamashita, these decisions, which can be considered as a third step in the formation of the doctrine at issue, emphasized the need for the commander to have knowledge of the crimes committed by his underlings, in some instances also requiring criminal intent for the commander's liability to arise. They all neglected the notion of complicity. Furthermore, in some cases the doctrine was extended to civilian leaders.

In Karl Brand and others (Docto'is case), a US Military tribunal sitting at Nuremberg under Control Council Law no. 10 held the German top medical staff

159 Justices Murphy and Rutledge did not only dissent on the application of the law to the facts by the Commission—they also objected to the whole notion of command responsibility as a matter of law. Justice Murphy stated: 'The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed dependent on its biased view as to the petitioner's duties and his disregard thereof, a practice reminiscent otthat pursued in less respected nations in recent years' (32/ US, at 28).
liable for the killings perpetrated by their subordinate doctors, stressing that those leaders had knowledge of what was going on. In Pohl and others, a US Military Tribunal held that 'the law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war' (at 1011). The Tribunal required 'actual knowledge' of the misdeeds of subordinates (1011-2). The same doctrine was set out in a subsequent case, Wilhem List and others (Hostages case), where another US Military tribunal sitting at Nuremberg applied it to 12 high-ranking German officers charged, among other things, with the unlawful killing of hostages by way of reprisal. In this case the Tribunal stressed that, to pronounce a guilty verdict, it required 'proof of a causative, overt act or omission from which a guilty intent can be inferred' (1261). Turning to the liability of the defendants for their failure to prevent or punish, the Tribunal noted that, for this form of criminal liability to arise, knowledge by the army commander of the crimes committed by the subordinates was required. Furthermore, the Tribunal emphasized that a commander has the duty to require reports about occurrences

160 After citing the Yamashita case, the Tribunal stated: "This decision is squarely in point as to the criminal responsibility of those defendants in this dock who had the power and authority to control the agents through whom these crimes were committed. It is not incumbent upon the prosecution to show that this or that defendant was familiar with all of the details of all of these experiments. Indeed, in the Yamashita case, there was no charge or proof that he had knowledge of the crimes 1... But we need not discuss the requirement of knowledge on the facts of this case. It has been repeatedly proved that those responsible leaders of the German medical services in this dock not only knew of the systematic and criminal use of concentration camp inmates for murderous medical experiments, but also actively participated in such crimes. Can it be held that Karl Brandt had no knowledge of these crimes when he personally initiated the jaundice experiments by Dohmen in the Sachsenhausen concentration camp and the phosgene experiments ofBickenbach? Can it be found that he knew nothing of the criminal Euthanasia Program when he was charged by Hitler with its execution? Can it be said that Handloser had no knowledge when he participated in the conference of 29 December 1941 where it was decided to perform the Buchenwald typhus crimes, when reports were given on criminal experiments at meetings called and presided over by him? Was Rostock an island of ignorance when he arranged the program for and presided over the meetings at which Gebhardt and Fischer lectured on their sulfanilamide experiments, when he classified as "urgent" the criminal research ofHirt, Haagen, and Bickenbach? Did Schroeder lack knowledge when he personally requested Himmel to supply him with inmates for the sea-water experiments? Can it be found that Genzken had no knowledge of these crimes when the miserable Dr. Ding was subordinated to and received orders from him in connection with the typhus experiments in Buchenwald, when his office supplied Rascher with equipment for the freezing experiments? Was Blome insufficiently informed in the face of proof that be collaborated with Rascher in the blood coagulation experiments, issued a research assignment to him on freezing experiments and to Hirt on the gas experiments, as well as performed bacteriological warfare and poison experiments himself? No, it was not lack of information as to the criminal program which explains the culpable failure ofthese men to destroy this Frankenstein's monster. Nor was it lack of power' (934-5).
taking place in the area under his control, failing which he may be accused of 'dereliction of duty' (at 1271-2). These notions were taken up and elaborated on by another US Tribunal sitting at Nuremberg in Wilhelm van Leeb and others (High Command case). The Tribunal noted that a commander's 'criminal responsibility is personal. The act or neglect to act must be voluntary and criminal' (at 543). It went on to note that there must be a personal dereliction. That can occur where the act is directly traceable to him [the commander] or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. [...] the occupying commander must have knowledge of these offences [by his troops] and acquiesce or participate or criminally neglect to interfere in their commission and [...] the offences committed must be patently criminal (543-5).

The doctrine was not only embraced by US tribunals. The International Tokyo Tribunal also upheld it in Araky and others (at 29-31). In dealing with responsibility for war primes against prisoners of war, the Tribunal insisted on the liability of commanders on account of their 'negligence or supineness' (at 30) if a commander that had the duty to know 'knew or should have known' the commission of crimes but failed to stop them or to take 'adequate steps' 'to prevent the occurrence of [...] crimes in the future' (at 31).

Similarly, the

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161 If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence' (1271).

162 The Tribunal also noted the following: 'Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means co-extensive. Modern war such as the last war, entails a large measure of de-centralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander-in-Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part' (at 543)
doctrine was enunciated by an Australian-US Military Tribunal, in Soemu Toyoda (at 5005-6) and by a Chinese War Crimes Tribunal in Takashi Sakai (at 1-7). It is notable that in Soemu Toyoda the Tribunal, besides insisting on the need for knowledge as a requirement of 'command responsibility, also held that such knowledge may be either 'actual', 'as in the case of, an accused who sees' the commission of the subordinates' crimes or 'is informed thereof shortly after', but also 'constructive knowledge', which can be asserted to exist when there is the commission of such a great number of offences within his command that a reasonable man could come to no other conclusion than that the accused must have known the offences or of the existence of an understood and acknowledged routine of their commission (5005-6).

It can thus be held that in a matter of few years after the Second World War the doctrine of command responsibility crystallized into an international customary rule (i) imposing on military commanders as well as civilian or civilian leaders the obligation to prevent or repress crimes by their subordinates if they knew or should have known that the troops were about or were committing or had committed crimes; and (ii) criminalizing the culpable failure to fulfill this obligation, albeit without clearly outlining the mental element of such criminal liability. That such a rule (the existence of which was authoritatively asserted in Delalic and others, TJ, §343) evolved so quickly should not surprise. In modern times international criminality increasingly tends to be planned, organized, ordered, or condoned or tolerated by superior authorities. In other words, a clear trend is emerging in the world community towards commission of crimes either by high-

163 The Tribunal found the highest-ranking defendant, prime minister Hideki Tojo, guilty of acts of omission in that 'He took no adequate step to punish offenders [who had ill-treated prisoners and internees] arid to prevent the commission of similar offences in the future. His attitude towards the Bataan death March gives the key to his conduct towards these captives. He knew in 1942 something of the conditions of that march and that many prisoners had died as a result of these conditions. He did not call for a report on the incident. When in the Philippines in 1943 he made perfunctory inquiries about the march but took no action. No one was punished.[... ] Thus the head of the Government of Japan knowingly and wilfully refused to perform the duty which lay upon the Government of enforcing performance of the Laws ofWar' (at 462).

164 For this latter category of cases see in particular. Alaky and others (the Tokyo trial), heard by the Tokyo International Tribunal (vol. 20, at 791,816,831), Flick and others, brought before a US Military Tribunal sitting at Nuremberg (at 1202-12), Rochlingand others, heard by a French court in the French Occupation Zone in Germany (at 8, or 403-4), and Delalic and others (41370.377-8).
level military or political leaders or by low-level officials or military personnel, who, however, perpetrate crimes because superior authorities (be they military or civilian) do not prevent, or tolerate or at any rate fail to repress them. Hence, the issue of superior responsibility has gradually acquired enormous importance in international criminal law.

Subsequently the customary criminal rule was enshrined in the Statutes of the ICTY, ICTR, and the ICC and has been relied upon in many cases brought before the ICTY and the ICTR. It covers superior responsibility for any international crime committed by subordinates; that is, not only war crimes but also crimes against humanity, genocide, etc.

It is notable that after the establishment of the ICTY and the ICTR the doctrine was gradually refined by case law, also under the influence of the 2002 German Code of Crimes Against International Law\textsuperscript{165} and some leading commentators.\textsuperscript{166} As a consequence, the criminal liability of the superior was increasingly seen as a consequence of his own culpability, not necessarily linked by means of a causal nexus to the responsibility of the subordinates (see below).

It should be added that in 2003 the ICTY AC rightly set out the notion that command responsibility also applies in time of internal armed conflict, basically because also with regard to such conflicts a general principle of international law assumes that there must be an organized military force: 'military organization implies responsible command and [...] responsible command in turn implies command responsibility'.\textsuperscript{167}

\textsuperscript{165} The Code is important for it draws a clear distinction between three different hypotheses: Responsibility of superiors (Section 4), Violations of the duty of supervision (Section 13), and Omission to report a crime (Section 14), thus identifying the distinct mens rea required for each of these classes.


\textsuperscript{167} Hadlihasanovti, Alagic and Kubura, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, §17 and see §§11-36; see also in the same case the re Decision on Joint Challenge to Jurisdiction, §§67-179.
It is striking that in this area there has been an inversion of the normal process whereby states first develop an international rule binding upon them, namely an interstate rule imposing a certain behaviour, and then this rule gradually evolves as a penal rule criminalizing any conduct contrary to the standards imposed by the interstate rule (see above, 1.2 at point 4). In this case there first emerged a criminal law rule (admittedly based on a general principle of IHL concerning 'responsible command') that addressed itself to individuals (military commanders or civilian or political leaders); then a written rule was agreed upon by states imposing on them to see to it that their commanders prevent or repress crimes by their subordinates. This is Article 87 of the First Additional Protocol, which is addressed to the Contracting parties and to the Parties to a conflict, and spells out as well as codifies the principle on responsible command mentioned above. This rule is accompanied by Article 86 of the same Protocol, which in S2 restates the customary criminal law rule.

As noted above, this class of responsibility is different from the others considered so far, in that it is responsibility by omission: the person is criminally liable not for an act he has performed, but for failure to perform an act required by international law. In other words, he is responsible for the breach of an international obligation incumbent upon any commander or superior authority, to prevent or suppress crimes by subordinates.

168 "The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches of the Conventions or of this Protocol which result from a failure to act under a duty to do so.

169 According to the ICTY AC in DetaUlU and others (Af) (§240) there is no duty, incumbent upon military or civilian authorities, to ascertain that their subordinates are not committing crimes. This proposition is questionable, in light of the abundant case law on the matter, as well as some clear treaty provisions and provisions of important Military Manuals. With regard to international rules, it may suffice to mention Article 87 of the First Additional Protocol of 1977, on 'Duty of commanders'. The obligation in question is clearly set out in many national Military Manuals, for instance, those of Switzerland, Reglement (1987), Article 19b ('Les commandants doivent informer la troupe de ses obligations aux termes des Conventions, 11s sont responsables du fail que leurs troupes respectent les Conventions et de punir d'eventueHes infractions'); Russia's Military Manual (1990), Part VII, §§a and b (commanders of all grades must 'call to account persons who committed violations of the rules of international humanitarian law defined by Articles 85-7 of the First Additional Protocol'); Germany, Military Manual (1992), ch. I, no. 138; New Zealand, Military Manual (1992), ch. 16, s. 2, §1603-2 (It is incumbent upon a commanding officer to ensure that the forces under his command behave in a manner consistent with the laws and customs of war [...] and it is part of his responsibility to ensure that the troops under his command are aware of their obligations'); Australia, Defence Force Manual (1994), §1304 ('Military commanders of all Services and at all levels bear responsibility for ensuring that forces under their control comply with the Law of Armed
3.2 CRIMINAL CATEGORIES INTO WHICH THE GENERAL NOTION MAY BE SUBDIVIDED

International rules tend to lump together various classes of superior responsibility, without drawing any distinction. This, for instance, holds true both for Articles 7(3) and 6(3) of the Statutes of the ICTY and ICTR, respectively and for Article 28 of the ICC Statute. These provisions are essentially of a descriptive nature, in that they indicate the prohibited conduct by enumerating the various forms this conduct may take. They do not, however, differentiate between the various categories of liability that can be logically identified, nor do they attach any legal relevance to conduct falling under one particular category rather than another.

Nonetheless, it is both logically appropriate and also relevant for the practical purposes of sentencing to draw a distinction between different classes. It is not sound, for instance, to hold that a commander who fails to punish subordinates who previously, unbeknown to him, have perpetrated acts of genocide, is responsible for genocide, if only as an accomplice. Plainly, in this case the requisite conduct and the mens rea of the superior are neatly different from those required for the perpetrators of genocide, or for persons aiding and abetting genocide. Only when the superior in some way knows of the crime being or about to be perpetrated and willingly fails to check or prevent its commission, may he be deemed to participate in some way in the crime (according to some

As for case law, one may recall, in addition to Yamashita (see supra, 11.4.1), the instructions a Judge Advocate issued to a US Court Martial in Medina-, he stated: In relation to the question pertaining to the supervisory responsibility of a Company Commander, I advise you that as a general principle of military law and custom an military superior in command is responsible and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties as assigned by him. In other words, after taking action and issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation' (1732).
commentators, as a co-perpetrator or accomplice), for in this case there is a clear nexus of causality between the superior's omission and the crime.

This approach, which seems logically and theoretically correct and also consonant with general principles of justice (because of its consequences at the level of sentencing), leads to distinguishing three categories:

1. A commander or superior breaches his duty to prevent his subordinates from engaging in criminal conduct. He knows that an offence is about to be, or is being, committed by his subordinates and willingly fails to stop the crime. In this case, the superior has knowledge of the crime and its omission is deliberate (intent).

According to one view the offender should be legally treated as a co-perpetrator, although the crimes are physically committed by the subordinates, or at least as an accomplice. In a way the superior participates in the crime, for if he had acted to stop it, the delinquency would not have been perpetrated. There is therefore a causal link between the superior's attitude and the commission of crimes. Arguably this view was reflected to some extent not only in the French and Chinese laws mentioned above, and in Araki and others (Tokyo trial), at 30-1, but also in the German Law on Crimes against International Law (Section 4).

Under a different view (that would seem to be reflected in e.g. Halilovic, TJ, §54; Hadzhihasanovic and Kubura, T), §75), the superior is responsible for violating his own duty to prevent or stop misconduct by his subordinates; both the objective and the subjective elements of his crime are different from those of the subordinates. For instance, if the underlings have committed large-scale rape within a context of systematic attack on civilians, the conduct (sexual assault) and the mens rea (intent to sexually abuse a civilian in a grave manner, plus awareness of the systematic nature of the attack on civilians) are different from

Section 4(1) of the Code provides that the commander 'shall be punished in the same way as the perpetrator of the offence committed by [the]subordinate'. And the Explanatory Memorandum of the German Government states that 'from a theoretical viewpoint' 'the negligence' of the superior 'could be classified as mere complicity' (at 39).
those of the commander, who may be accused of failure to act (conduct) with knowledge that crimes were being or were about to be perpetrated, and intent not to stop or forestall them. True, the subjective and objective elements of the criminal offence attributable to the superior are not far from those of aiding and abetting: in both cases the person other than the perpetrator does not share the criminal intent of the perpetrator, but knows the crime that the perpetrator is committing or will commit, and in both cases the person at issue provides assistance to the perpetrator (in the case under discussion by not preventing the commission of his crimes). Nevertheless, the fact remains that the aider and abettor, by his action or omission, intends to further the act of the perpetrator, and this element must be proved by the prosecution; instead, in the case of command responsibility that intent is not a legal requirement, and consequently need not be proved in court, although it may happen that the commander by his inaction aimed in fact at furthering the crime of the subordinate. Therefore, although for sentencing purposes the conduct of the superior may be as blameworthy as that of the subordinates, the legal ingredients of the crimes are different.\(^{171}\)

2. A commander or a superior breaches his duty properly to supervise the conduct of his troops or underlings. He intentionally or negligently omits to monitor the actions of his subordinates, where he could have become cognizant of the imminent commission of the offence or of the fact that the offence was being committed, and therefore prevented it. Here the superior does not know that the subordinate is about to commit or is committing a crime: he lacks knowledge. However, his failure to know derives from his negligent or deliberate breach of his duty of supervision, with the consequence that he does not impede the perpetration of crimes that he could foresee and avoid. In these cases the offence imputable to the superior is arguably different from and less serious than

\(^{171}\) In Hadziahasanovic and Kubura, the TC held that there must be a link or nexus between the superior's omission and the crimes in the sense that the superior's 'omission created or heightened a real and reasonably foreseeable risk that those crimes would be committed, a risk he accepted willingly', a risk that 'materialised in the commission of those crimes. In that sense, the superior has substantially played a part in the commission of those crimes. (...) it is presumed that there is such a nexus between the superiors' omission and those crimes' (TJ, §§193).
that perpetrated by the subordinate, in that it rarely consists of the deliberate or negligent dereliction of supervisory duties.\textsuperscript{172}

However, a different view is also admissible, although it is arguably less persuasive. One can contend that failure by the superior to exercise his duty of supervision has a causal link with the crime, in that by breaching his supervisory duty he has in some way contributed to bringing about the offence. In other words, the superior's conduct may be considered as serious as that of the subordinate; the former could therefore be punished by a sentence similar to that of the subordinate.

3. A superior breaches his duty to report to the appropriate authorities crimes committed by his subordinates unbeknownst to him. Here the superior knows that a crime has been perpetrated and fails immediately to draw the attention of the body responsible for the investigation or prosecution of the crime. In this case, the superior is liable to be punished for the specific crime of failure to report. His offence is plainly different from that of his subordinates: he is responsible if, upon becoming cognizant of the crimes of his subordinates, he deliberately or with culpable negligence fails to report them to the appropriate authorities for punishment. Here the superior's conduct may not be held to have caused, or contributed to cause, the criminal offence.\textsuperscript{173}

\textsuperscript{172} With respect to the supervisory duties of a commander, the holding of the US Military Tribunal in Wilhelm List and others (Hostage case) is instructive. Since the defence of List (commander in chief of the German armed forces in 1941-2), had alleged that he had no knowledge of the killings of civilians in occupied territory, the Tribunal noted the following: 'A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area of his command. His responsibility is coextensive with his area of command. He is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence' (1271; emphasis added).

\textsuperscript{173} The various categories are instead merged in Toyoda. The Tribunal stated the following: "The Tribunal considers the essential elements of command responsibility for atrocities of any commander to be; 1. That offenses, commonly recognized as atrocities, were committed by troops of his command; 2. The ordering of such atrocities. In the absence of proof beyond a reasonable doubt of the issuance of orders, then the essential elements of command responsibility are: 1. As before, that atrocities were actually committed; 2. Notice of the commission thereof. This notice may be either: a. Actual, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter; b. Constructive; that is the commission of such a great number of offenses within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of the existence of an understood and
In a case brought before the ICTY (Hadzihasanovic, Alagic and Kubura) the AC dismissed the proposition (upheld instead by the TC: Decision on joint Challenge to Jurisdiction, §§197-202) that a commander may also be responsible for failure to report crimes committed before he took command of the relevant unit. The main reason for this holding is that there is no practice or opinio juris to support the proposition (Decision on IA Challenging Jurisdiction in Relation to Command Responsibility, §§37-56). It would seem instead that the proposition is correct (as was rightly opined by Judges Hunt and Shahabuddeen in their dissenting opinions appended to the decision of the AC). It is not necessary to search for a specific customary rule on the matter. The duty to report follows, as in the case of crimes committed by the underlings while the commander was in control, from the general principles on superior responsibility set out by the AC in the same case (see §§12-18). If international law imposes on a military commander the obligation to report to the appropriate authorities any crime committed by his subordinates, clearly this obligation applies whether or not the crimes have been committed when he was the commander. The purpose of the obligation incumbent upon any person in a position of command to make his subordinates criminally accountable is twofold: (i) to ensure military discipline and respect for IHL: and (ii) to avoid the troops interpreting any inaction by the superior as an implicit approval of their misconduct. It does not matter at all whether the crimes were perpetrated when he was in control of the troops or prior to that date: this circumstance is immaterial to the fulfillment of the obligation. The contrary view is based on a misapprehension of the various categories of command responsibility

acknowledged routine for their commission. 3. Power of command; that is, the accused must be proved to have had actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders. 4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violations of the laws of war. 5. Failure to punish offenders. In the simplest language it may be said that this Tribunal believes the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished' (5005-6).

In BagHishema the ICTR AC rightly insisted on the fact that the information about the crimes must be specific, namely specifically related to the crimes by subordinates. It stated that it was necessary 'to make a distinction between the fact that the Accused had information about the general situation that prevailed in Rwanda at the time, and the fact that he had in his possession general information which put him on notice that his subordinates might commit crimes' (§42). See also Krnojelac, T), §§312-13, Al, §§165-71.
and the fact that ‘failure to report’ is a 'distinct category from the others, where the breach lies in a dereliction of the duty to inform other authorities of the crimes so that they take action to punish the perpetrators. In addition, as Judge Shahabuddeen rightly emphasized in his dissenting opinion (§14), one of the consequences of the AC ruling is that the subordinates' crimes may go unpunished: if the crimes were committed 'shortly before the assumption of duty of the new commander—possibly, the day before, when all those in previous command authority disappeared', and were not reported by the then commander, and the new commander were not obliged to report them even if he knows that the crimes were committed, the crimes would not be punished by anyone. This would clearly be contrary to the notion that superiors are legally bound to make their subordinates criminally accountable.

3.3 GENERAL CONDITIONS OF SUPERIOR RESPONSIBILITY

Before trying to identify the mental element required for each of these three categories, it may be helpful to set out the general conditions required for all these categories. Superior authorities, whether military or civilian, bear responsibility for crimes committed by their subordinates if the following cumulative conditions are met:

1. Commission of international crimes by troops or other subordinates. It is not necessary for the troops or the other subordinates to have physically perpetrated the crimes. They may have engaged in criminal conduct under any head of liability, namely perpetration, co-perpetration, aiding and abetting, joint criminal enterprise to commit crimes, etc.\textsuperscript{174}

2. Effective command and control over the subordinates. It is not necessary for there to be a formal hierarchical structure. Individuals in positions of authority, whether within civilian or military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their de facto or

\textsuperscript{174} See ICTY, Boskffvskiand Tarlulovski, TC, Decision on the Proserutioni Motion to Amend the Indictment §§18-20; One, TL 297-8.
dejure position as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility.\textsuperscript{175}

Control must be effective. Thus in von Weizsacker and others (Ministries case) a US Military Tribunal sitting at Nuremberg held that the mere appearance of an official’s name on a distribution list attached to an official document could only provide evidence that it was intended that he should provide with the relevant information, and not that ‘those whose names appear on such distribution lists have responsibility for, or power and right of decision with respect to the subject-matter of such document’ (at 693).\textsuperscript{176} In Blaskic an ICTY TC held that ‘what counts is his material ability [of a superior to control the subordinate], which instead of issuing orders or taking disciplinary actions may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken’ (§302). In Kordic and Cerkez an ICTY TC provided some important examples.\textsuperscript{177} And in Cappelli and others the Milan Court of Cassation held that a superior who in fact had been deprived of his authority, although he still was formally vested with his position, could not be held responsible for crimes perpetrated by his subordinates unbeknownst to him or even in breach of his orders, for lack of the required intent (at 86-7).

\textsuperscript{175} Delatic and others (T), 55377-8). Al (§§197-8); KordU arid Cerkel (T), 11405-7).

\textsuperscript{176} See, e.g., Delalic and nihers, §354-78; Delalic and others (Appeal), 19192-5; BlaikU, §§295-303; Kordii andCerkez, §§405-171.

\textsuperscript{177} It thLs stated that: ‘For instance, a government official who knows that civilians are used to perform forced labour or as human shields will be held liable only if it is demonstrated that he has effective control over the persons who are subjecting the civilians to such treatment. A showing that the official merely was generally an influential person will not be sufficient. In contrast, a government official specifically in charge of the treatment of prisoners used for forced labour or as human shields, as well as a military commander in command of formations which are holding the prisoners, may be held liable on the basis of superior responsibility because of the existence of a chain of command’ (§415).

In addition, with reference to civilian authorities, the same TC stated in the same case: ‘Evidence that an accused is perceived as having a high public profile, manifested through public appearances and statements, and thus as exercising some authority, may be relevant to the overall assessment of his actual authority although not sufficient in itself to establish it, without evidence of the accused’s overall behaviour towards subordinates and his duties. Similarly, the participation of an accused in high-profile international negotiations would not be necessary in itself to demonstrate superior authority. While in the case of military commanders, the evidence of external observers such as international monitoring or humanitarian personnel may be relied upon, in the case of civilian leaders evidence of perceived authority may not be sufficient, as it may be indicative of mere powers of influence in the absence of a subordinate structure’ (§424).
It bears noting that in Kordic and Cerkez, the TC found that one of the accused, Kordic, a civilian leader and politician having 'tremendous influence' and playing an important role in military matters, nevertheless did not possess the authority to prevent the crimes that were being committed, or to punish the perpetrators. It therefore acquitted the accused of charges involving command responsibility, while nonetheless convicting him of various offences on the basis of perpetration under Article 7(1) of the Statute (§§838-41).

A question that can also arise is how effective the control over subordinates must be when crimes are perpetrated by irregular armies or rebel groups. The question was convincingly discussed by an SCSL TC in Brima and others.178

Another question has arisen before international courts: whether commanders of a unit engaged in joint combat with other units may be held liable for acts of these other units formally not under their de jure command. In Hadzihasanovic and Kubura an ICTY TC held that 'mere participation in joint combat operations is not sufficient to find that commanders of different units exercise effective control over all participants in battle. Although such cooperation might be an indicator of effective control, it is appropriate to determine on a case-by-case basis what authority an accused commander actually had over the troops in question' (Tl, §84).

3. Knowledge (or constructive knowledge, namely knowledge that can be inferred from or implied by the conduct of the persons involved, the surrounding

178 According to the TC, in a conflict involving irregular armies or rebel groups, 'the traditional indicia of effective control provided in the jurisprudence may not be appropriate or useful' (§787). Such indicia include 'that the superior had first entitlement to the profits of war, such as looted property and natural resources; exercised control over the fate of vulnerable persons such as women and children; the superior had independent access to and/or control of the means to wage war, including arms and ammunition and communications equipment; the superior rewarded himself or herself with positions of power and influence; the superior had the capacity to intimidate subordinates into compliance and was willing to do so; the superior was protected by personal security guards, loyal to him or her, akin to a modern praetorian guard; the superior fuels or represents the ideology of the movement to which the subordinates adhere; and the superior interacts with external bodies or individuals on behalf of the group' (§788). The TC, however, conceded that the traditional indicia of control remain crucial, including the superior's power to issue orders and take disciplinary action (§789).
circumstances, etc.) or breach of the obligation to acquire knowledge. The superior knew, or had information which should have enabled him to conclude in the circumstances at the time, that crimes were about to be, or were being committed or had been committed. The superior is also criminally liable if, owing to the circumstances prevailing at the time, he should have known and consciously disregarded information indicating that his subordinates were going to commit (or were about to commit, or were committing, or had committed), international crimes. The case law has clarified that the superior need not know the exact identity of the subordinates, it being sufficient that he should know the 'category' of the subordinates engaging in criminal conduct (this can be inferred from the fact that this is what courts have required prosecutors to prove). 179

4. Failure to act. The superior failed to take the action necessary to prevent or repress the crimes, thereby breaching his duty to prevent or suppress crimes by his subordinates.

3.4 SPECIFICATION OF THE SUBJECTIVE ELEMENT IN THE VARIOUS CLASSES OF OMISSION

The objective element of the crime is apparent from what has just been set out. It is clear from the above that command responsibility, or responsibility by omission of superior authorities, is not a form of strict or objective liability; that is, liability for offences for which one may be convicted without any need to prove any form or modality of mens rea. 180 Even for this category of crimes a mental element is required.

First of all, one ought to distinguish between the mens rea required for the crimes perpetrated by the subordinates (normally intent, as in the case of killing of civilians, rape, use of unlawful weapons, torture, etc.) and that required for the

179 KrnojelaCi decision on the defence motion on the formbf indictment, §46; HadzihasanovU and Kubura, 17, §90.

180 Recently ICTY Trial Chambers rightly took this view in Delalic and others. §239, and in Kordii and Cerkez, §369.
superior. This follows from the fact that in the case of superior responsibility the superior is criminally liable for his own culpability, which follows from his own breach of obligation; he is not responsible for the crimes committed by his subordinates, which may require a different actus reus and mens rea, although there may be a causal link between those crimes and the responsibility of the superior.

That law should admit for the superior a less culpable mental element as sufficient for his liability to arise (for instance, gross negligence instead of the intent required for the subordinates), is justified by his hierarchical position, the obligation attendant upon this position to control the subordinates and ensure that they comply with the law of international armed conflict, and the consequent need to make him accountable for the conduct of his subordinates.

It would seem that intent is not always required for the superior to be held criminally liable. Rather, one should distinguish various situations:

1. The superior knows that crimes are about to be committed or are being committed by his subordinates and nonetheless takes no action. Here international rules require for culpability (i) knowledge, that is awareness that the crimes are being or are about to be committed; and (ii) intent, that is the will not to act or, in other words, the conscious decision to refrain from preventing or stopping the crimes of the subordinates (this intent is clearly different from that

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181 Halitavic, Tf, S54; Hadithasanoncand Kubura, TJ, §75.

182 In Baba Masao, the judge Advocate summed up the law for the Australian Military Court trying the case: 'In order to succeed [in proving charges of command responsibility] the prosecution must prove [...] that war crimes were committed as a result of the accused's (Commanding General of the [Japanese Army in Borneo] failure to discharge his duties as a commander, either by deliberately failing in his duties or by culpably or wilfully disregarding them, not caring whether this resulted in the commission of a war crime or not' (at 207).

183 In Maltauro and others the Court of Assize of Milan held in 1952 that the head of police, being cognizant of the massacre that was about to be carried out by partisans, failed to prevent it. He was therefore held responsible as a co-perpetrator of the massacre (at 176-7). The massacre took place in a prison where numerous fascists, previously arrested by partisans on 28 April 1945 (the day when Schio, the small town in northern Italy, had been liberated), were being held. See also Sumida Haruzo and others (at 260-1).
required for such crimes of the subordinates as murder, torture, rape, etc., as well as the further subjective ingredient of crimes against humanity, if any, namely awareness of the existence of a widespread or systematic practice).  

2. The superior has information which should enable him to conclude in the circumstances at the time that crimes are being or will be committed, and fails to act, in breach of his supervisory duties. Or he does not pay attention to reports concerning crimes about to be committed or being perpetrated by subordinates, and consequently fails to prevent or stop those crimes. Here either recklessness or gross or culpable negligence (culpa gravis) may be held sufficient. The former mental element consists of awareness that failure to prevent the action of subordinates risks bringing about certain harmful consequences (commission of the crimes), and nevertheless ignoring this risk. The latter state of mind, as pointed out above (3.8), may be found when: (i) the commander is required to abide by certain standards of conduct or to take certain specific precautions (for example, to request reports on the conduct of his underlings, or to exact that reports submitted to him be more accurate and specific); in addition (ii) he

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184 See, for instance, Cappellini and others (at 86-7), Leoni (Milan Court of Cassation, decision of 31 July 1945, at 128), Bonini (Court of Cassation, decision of 3 March 1948, at 1137-8), Tabellini (Rome Military Tribunal, decision of 6 August 1945, at 394-8). This last case is particularly interesting: the defendant was a colonel of the Carabinieri, accused of having allowed, in October 1943, at the request of the German occupying forces, the disarming and transfer of the Carabinieri stationed in Rome to Northern Italy; they had been subsequently deported to Germany and detained in concentration camps. The Court found that the defendant was not guilty of failure to prevent the commission of a crime. He was not aware of the real reasons for the transfer and believed that it was done in the exercise of the Occupant's power to transfer civil servants and police forces; according to the Court 'he lacked the requisite intent, because he carried out the execution of the order believing that such order was not inconsistent with his duties and those of the police forces to which he belonged, pursuant to international law' (at 398).

185 According to Delalic and others, this is the case when the commander or the superior authority *had in his possession information of a nature, which at least, would put him on notice of the risk of such offences [by his subordinates] by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates' (§383).

186 In Xotomi Sueo and others a Temporary Court Martial in the Netherlands East Indies, in dealing with the responsibility of the commander of a prisoner of war camp in Celebes, held in 1947 that: 'Even though a particular act had been neither ordered nor condoned by a superior, who might even [have] been unaware of it, he must nevertheless be held responsible for the outrages of those under his command, on the ground that as a Commander he was bound to prevent their occurrence, the more so as he could reasonably foresee that they would be committed' (at 209).
contemplates the risk of harm and nevertheless takes it, for he believes that the risk will not materialize.\textsuperscript{187} It should be clear that a conviction for command responsibility can only be predicated on gross negligence; that is, if the military or civilian commanders conduct glaringly falls short of the standard set by the reasonably prudent and competent commander test.

3. The superior should have known that crimes were being or had been committed. Here again gross or culpable negligence (culpa gravis) is sufficient.\textsuperscript{188}

\textsuperscript{187} In Sumida Haruzo and others the Prosecutor stated that, 'with respect to the torture inflicted by the members of his unit [on the prisoners], this may be attributed to his [of Sumida Haruzo] neglect in exercising sufficient supervision, and he may, as a result, be condemned on a charge arising out of responsibility for supervision, which is entirely different from being condemned on criminal responsibility' (at 235). In Delalic and others the ICTY AC upheld the interpretation given by the TC to the standard 'had reason to know': that is, 'a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates. This is consistent with the customary law standard of mens rea as existing at the time of the offences charged in the Indictment* (§241). The AC specified, however, that the information available to the commander 'may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system'. Furthermore, this information 'does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge' (§238). See also Bag Hisema, A; (ICTR), §28; Krnojdac, A), at §59; Blaikic, AJ, §62.

\textsuperscript{188} In Rochling and others a French court stated that the lack of knowledge alleged by the defendant was culpable because he had the authority to stop the odious practices to which forced labourers were subjected and instead showed utter indifference to the plight of those labourers (at 8). In Soemu Tffyoda a US Military Commission held that the accused 'should have known, by use of reasonable diligence, the perpetration of atrocities by his troops' (at 5006). The Commission went on to point out that In determining the guilt or innocence of an accused, charged with dereliction of his duty as a commander, consideration must be given to many factors. The theory is simple, its application is not. [...] His guilt cannot be determined by whether he had operational command, administrative command, or both. If he knew, or should have known, by use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and punish the offenders, he was derelict in his duties. Only the degree of his guilt would remain' (5008).

A Canadian Court Martial relied upon the notion of negligence in Sergeant Boland. The defendant had failed to prevent two subordinates from torturing and beating to death a Somali civilian taken prisoner fat 1075-8). See also Medina (cited above).

In Delalic and others an ICTY TC held that 'from a study of these decisions [of post World War II tribunals], the principle can be obtained that the absence of knowledge should not be considered a defence if, in the words of the Tokyo judgement, the superior was "at fault in having failed to acquire such knowledge"' (§388). In Blaikic an ICTY TC held that 'after World War II a standard was established according to which a commander may be liable for crimes by his subordinates if "he failed to exercise the means available to him to learn of the offence and, under the circumstances, he should have known and such failure to know constitutes criminal dereliction"' (§322).
4. The superior becomes cognizant that crimes have been committed and fails to repress them by punishing the culprits. Here, knowledge and intent or culpable negligence would seem to be required for criminal liability.

3.5 GENERAL: VARIOUS CLASSES OF IMMUNITIES

One of the possible obstacles to prosecution for international crimes may be constituted by rules intended to protect the person accused by granting him immunity from prosecution.

There exist two categories of immunities that may in principle come into play and be relied upon.

1. Those accruing under international law. They may relate either to conduct of state agents acting in their official capacity (so-called functional immunities), or protect the private life of the state official (personal immunities). The former immunities apply, on the strength of the so-called Act of State doctrine, to all state agents discharging their official duties. In principle, an individual performing acts on behalf of a sovereign state may not be called to account for any violations of international law he may have committed while acting in an official function. Only the state may be held responsible at the international level. The latter category of immunities (personal immunities) are granted by international customary or treaty rules to some categories of individuals on account of their functions and are intended to protect both their private and their public life, or in other words to render them inviolable while in office. Such individuals comprise Heads of State, prime ministers or foreign ministers, diplomatic agents, and high-ranking agents of international organizations. They enjoy these immunities so as to be able to discharge their official mission free from any impairment or interference. These immunities end with the cessation of the agent's official duties.

All these immunities may be invoked by a state official before foreign courts or other foreign organs (for example, enforcement agencies).
2. The immunities provided for in national legislation and normally granted to the Head of State, members of cabinet, and members of Parliament. They normally cover the acts of the individuals concerned and involve exemption from national jurisdiction. In addition, they also often include immunity from national prosecution for ordinary crimes having no link with the function and committed either before or during the exercise of the functions. However, such immunity terminates as soon as the functions come to an end, although normally the individual remains immune from jurisdiction for any official act performed during the discharge of his functions.

The rationale behind these national immunities is grounded in the principle of separation of powers and in particular the need to protect state officials (say, the Head of State) from interference by other state organs (say, courts) that could jeopardize their independence or political action.

All these categories of immunity normally apply to ordinary crimes. Do they also apply to international crimes? To answer this question one must of course establish whether there are international customary or treaty rules that cover this matter.

3.6 FUNCTIONAL AND PERSONAL IMMUNITIES PROVIDED FOR IN INTERNATIONAL CUSTOMARY LAW

Let us now return to and dwell upon an issue that is of great importance for our purposes: the distinction between two categories of immunities laid down in international law; that is, functional (or ratione materiae or organic) immunities and personal (or ratione personae) immunities. One ought always to distinguish between these two categories when discussing the question of, among other things, exemption from foreign jurisdiction.

The first category is grounded in the notion that states must respect other states' internal organization and may not therefore interfere with the structure of foreign states or the allegiance a state official may owe to his own state. Hence no state
agent is accountable to other states for acts undertaken in an official capacity and which therefore must be attributed to the state.

The second category is predicated on the need to avoid a foreign state either infringing sovereign prerogatives of states or interfering with the official functions of a state agent under the pretext of dealing with an exclusively private act (ne impediaturllegatio, i.e. the immunities are granted to avoid obstacles to the discharge of diplomatic functions).

This distinction, based on state practice as well as some recent judicial decisions is important. Organic or functional immunities: (i) relate to substantive law, that is, amount to a substantive defence (although the state agent is not exonerated from compliance with either international law or the substantive law of the foreign country—if he breaches national or international law, this violation is not legally imputable to him but to his state) (ii) cover official acts of any de jure or defacto state agent; (iii) do not cease at the end of the discharge of official functions by the state agent (the reason being that the act is legally attributed to the state, hence any legal liability for it may only be incurred by the state); (iv) are erga omnes, that is, may be invoked towards any other state.

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189 With regard to the first class of immunities, suffice it to refer to the famous McLwd incident and the Rainbow Warrior case. For the McLwd case, see British and Foreign Papers, vol. 29, at 1139, as well as Jennings, 'The Caroline and McLwd Cases', 32 AJIL (1938), 92-9; see also the decision of 1841 of the New York Supreme Court in People v. McLeod, at 270-99. For the Rainbow Warrior case, see UN Reports of International Arbitral Awards, XIX, at 213. See also the Governor Collot case, in B. Moore, A Digest of International Law, vol. II (Washington: Government Printing House, 1906), at 23.

190 One can mention the judgment rendered by the Supreme Court of Israel in Eichmann (at 308-9), that handed down by the German Supreme Court (Bundesgerichtschef) in Scotland Yard, at 1101-2 (the Director of Scotland Yard was not amenable to German civil jurisdiction for he had acted as a state agent). See also the judgment delivered by the ICTY AC in Blaskic (subpoena) (at §38 and 41). For other cases see in particular M. Bothe, 'Die strafrechtliche Immunitat fremder Staatsorgane', in 31 Zeit. Ausl. Off. Recht Volk (1971), at 248-53.

191 Nevertheless, it would seem that if the state official acting abroad has breached criminal rules of the foreign state, he may incur criminal liability and be liable under foreign criminal jurisdiction (at least, this is what happened both in McLeod and in the Rainbow Warrior case). Be that as it may, it seems certain, how-ever, that the state official in question will not in any case be asked to pay for any damage his act may have caused. The state for which he acted remains internationally responsible for that act and will have to bear all the legal consequences of such responsibility.
In contrast, personal immunities', (i) relate to procedural law, that is, they render the state official immune from civil or criminal jurisdiction (a procedural defence); (ii) cover official or private acts carried out by the state agent while in office, as well as private or official acts performed prior to taking office; in other words, they assure total inviolability; (iii) are intended to protect only some categories of state officials, namely diplomatic agents, Heads of State, heads of government, foreign ministers (under the doctrine set out by the International Court of Justice in its judgment in the Case Concerning the Arrest Warrant of 11 April 2000, at §§51-5); (iv) come to an end- after cessation of the official functions of the state agent; (v) may not be erga omnes (in the case of diplomatic agents they are only applicable with regard to acts performed as between the receiving and the sending state, plus third states through whose territory the diplomat may pass while proceeding to take up, or to return to, his post, or when returning to his own country: so-called jus transitus innoxii, i.e. the right to move from one place to another without hindrance).

The above distinction permits us to realize that the two classes of immunity coexist and somewhat overlap as long as a state official who may also invoke personal or diplomatic immunities is in office. While he is discharging his official functions, he always enjoys personal immunity. In addition, he enjoys functional immunity, subject to one exception that we shall see shortly, namely in the case of perpetration of international crimes. Nonetheless, the personal immunity prevails even in the case of the alleged commission of international crimes, with the consequence that the state official may be prosecuted for such crimes only after leaving office.

3.7 THE CUSTOMARY RULE LIFTING FUNCTIONAL IMMUNITIES WITH RESPECT TO INTERNATIONAL CRIMES

(A) THE QUESTION OF IMMUNITY FROM PROSECUTION

The traditional rule whereby senior state officials may not be held accountable for acts performed in the discharge of their official duties was significantly undermined after the Second World War, when international treaties and judicial decisions upheld the principle that this 'shield' no longer protects those senior state officials accused of war crimes, crimes against peace, or crimes against humanity. More recently, this principle has been extended to torture and other international crimes.

It seems indisputable that by now an international general rule has evolved on the matter. Initially this rule only applied to war crimes and covered any member of the military of belligerent states, whatever their rank and position. When the major provisions of the London Agreement of 8 August 1945 (setting forth the Statute of the IMT) gradually turned into customary law, Article 7 ('The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment') has also come to acquire the status of a customary international rule.

National case law proves the existence of such a rule. Many cases where state military officials were brought to trial demonstrate that state agents accused of war crimes, crimes against humanity, or genocide may not invoke before national courts their official capacity as a valid defence. Even if we leave aside cases where tribunals adjudicated on the strength of international treaties or Control Council Law no. 10, a string of significant judgments where courts applied national law should be mentioned.\textsuperscript{193} Admittedly, in most of these cases the

\textsuperscript{193} One may recall, for instance, Eichmann in Israel (at 277-342), Barbie in France (see the various judgments in 78 ILR, 125ff; and 100 ILR 331ff), Kappler (193-9), and Priebke in Italy (959ff). Router (526-48), Albrecht (747-51), and Bouterse in the Netherlands (Amsterdam Court of Appeal), Kesserling (9ff) before a British Military Court sitting in Venice, and von Lewinski (called von Manstein) before a British Military Court in Hamburg (523-4), Pinochet in the UK (see infra, n. 7), Yamashita in the USA (1599ff), Buhler before the Supreme National Tribunal of Poland (682), Pinochet and Scilingo in Spain (at 4-8 and 2-8, respectively), and Miguel Cavallo in Mexico (by Judge Jesus Guadalupe Luna authorizing the extradition of Ricardo Miguel Cavallo to Spain).
accused did not challenge the court's jurisdiction on the ground that he had acted as a state official. The fact remains, however, that the courts did pronounce on acts performed by those officials in the exercise of their functions. The defendants' failure to raise the 'defence' of acting on behalf of their state shows that they were aware that such defence would have been of no avail. In addition, in some cases the defendant did plead that he had acted in his official capacity and hence was immune from prosecution. This, for example, happened in Eichmann, where the accused raised the question of 'Act of State'. Although the Court used that terminology, which could be misleading, in essence it took the right approach to the question at issue and explicitly held that state agents acting in their official capacity may not be immune from criminal liability if they commit international crimes (at 309-12).

It can also be conceded that most of the cases under discussion deal with military officers. However, it would be untenable to infer from that fact that the customary rule only applies to such persons. It would indeed be odd that a customary rule should have evolved only with regard to members of the military and not for all state agents who commit international crimes.

Besides, it is notable that the Supreme Court of Israel in Eichmann (at 311) and more recently various Trial Chambers of the ICTY have held that the provisions of, respectively, Article 7 of the Charter of the IMT at Nuremberg and Article 7(2) of the Statute of the ICTY (both of which relate to any person accused of one of the crimes provided for in the respective Statutes) 'reflect a rule of customary international law'. In 2002 in Letkoflnf. Soedjarwo the Indonesian Ad Hoc Court on Human Rights held that the relevant provision of the ICC Statute has 'developed' into 'a legal principle' (at 23). Furthermore, Lords Millet and Phillips of Worth Matravers in the House of Lords' decision of 24 March 1999 in Pinochet took the view, with regard to any senior state agent, that functional immunity

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194 See Karadzic and others (§24). Furundzija (§140), and Slobodan Milosevic (decision on preliminary motions) (§28)
cannot excuse international crimes. The ICTY Appeals Chamber had already set out this legal proposition in Blaikic (subpoena) (§41) (see also SCSL, TC, Taylor (Decision on the immunity from prosecution), §§52-3).

In addition, important national Military Manuals, for instance those issued in 1956 in the USA and in 1958 (and then in 2004) in the UK, expressly provide that the fact that a person who has committed an international crime was acting as a government official (and not only as a serviceman) does not constitute an available defence.

It is also significant that, at least with regard to one of the crimes at issue, genocide, the ICJ implicitly admitted that under customary law official status does not relieve responsibility (see Reservations to the Convention on Genocide, at 24).

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195 See at 171-9 (Lord Millet) and 186-90 (Lord Phillips of Worth Matravers). Instead, according to Lord Hope (at 152), Pinochet lost his immunity ratione materiae only because of Chile's ratification of the Torture Convention. In other words, for him the unavailability of functional immunity did not derive from customary law; it stemmed from treaty law.


197 One should also recall that on 11 December 1946 the UN General Assembly unanimously adopted Resolution 95, whereby it 'affirmed' 'the principles recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'. These principles include Principle III as formulated in 1950 by the UN International Law Commission. This Principle provides as follows: '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.' See YILC (1950-11), 192. All the Nuremberg Principles, Israel's Supreme Court noted in Eichmann, 'have become part of the law of nations and must be regarded as having been rooted in it also in the past' (at 311).

It is notable that the UN SG took the same view of the customary status of the Genocide Convention (or, more accurately, of the substantive principles it lays down), a view that was endorsed implicitly by the UN Security Council (see Report of the Secretary-General Pursuant to Para. 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, W) and explicitly by a TC of the ICTR in Akayesu (§495) and of the ICTY in Krstic (§541).

A further element supporting the existence of a customary rule having a general purport can be found in the pleadings made by the two states (the Congo and Belgium) that were in dispute before the International Court of Justice in the aforementioned Case Concerning the Arrest Warrant of 11 April 2000. In its Memoire of 15 May 2001, the Congo explicitly admitted the existence of a principle of ICL, whereby the official status of a state agent cannot exonerate him from individual responsibility for crimes committed
Arguably, while each of these elements of practice, on its own, cannot be regarded as indicative of the crystallization of a customary rule, taken together they may be deemed to evidence the formation of such a rule (a rule, it should be added, on whose existence legal commentators seem to agree, although admittedly without producing compelling evidence concerning state or judicial practice, and which the Institut de droit international recently restated, at least with regard to Heads of State or government).

Let me emphasize that the logic behind this rule, which was forcefully set out as early as 1945 by justice Robert H. Jackson in his Report to the US President on the works for the prosecution of major German war criminals, is in line with present day trends in international law. Today, more so than in the past, it is state officials, and in particular senior officials, that commit international crimes. Most of the time they do not perpetrate crimes directly. They order, plan, instigate, organize, aid and abet, or culpably tolerate or acquiesce, or willingly or negligently fail to prevent or punish international crimes. This is why 'superior responsibility' has acquired such importance since Yamashita (1946) (see above, while in office; the Congo also added that on this point there was no disagreement with Belgium (Memoire, at 39, §60).


199 See the Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law' adopted at the Session of Vancouver (August 2001), Article 13(2).

200 In his Report to the US President of 6 June 1945, Justice R. H. Jackson (who had been appointed by President Roosevelt as 'Chief Counsel for the United States in prosecuting the principal Axis War Criminals') illustrated as follows the first draft of Article 7 of the London Agreement (whereby 'The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment'), contained in a US memorandum presented at San Francisco on 30 April 1945: 'Nor should such a defense be recognized as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Justice Coke, who proclaimed that even a King is still "under God and the law" ' (in International Conference on Military Trials, 47).
11.4). To allow these state agents to go scot-free only because they acted in an official capacity, except in the few cases where an international criminal tribunal has been established or an international treaty is applicable, would mean to bow to traditional concerns of the international community (chiefly, respect for state sovereignty). In the present international community respect for human rights and the demand that just ice be done whenever human rights have been seriously and massively put in jeopardy, override the traditional principle of respect for state sovereignty. The new thrust towards protection of human dignity has shattered the shield that traditionally protected state agents.

(B) THE QUESTION OF EXEMPTION FROM THE DUTY TO ASSIST COURTS

An important issue related to that we have just discussed is the extent to which the current removal of state officials' immunity from prosecution for international crimes also sets aside their right not to appear before an international court to testify, or at any rate to assist the court. To put it differently, may a state official that an international criminal court, through the issuance of a binding order or subpoena, has ordered to appear before the court either to give testimony or to deliver probative material, refuse to do so? Or is he instead legally bound to comply with the order? Clearly, the question does not turn on answering for international crimes, but on giving or handing over evidence about crimes committed by others. In Blaskic (subpoena) Croatia contended that under international law the ICTY was not allowed to issue binding orders to state organs acting in their official capacity; hence it asked the AC to quash the subpoena daces teucum (a judicial injunction to hand over evidence, accompanied by a threat of penalty in case of non-compliance) issued by an ICTY TC to the Croatian defence Minister, which ordered him to produce military

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201 A recent deviation from the rule should, however, be stressed. In 2007, in Ibrakim Matar and others v. Avraham Dichter, the US District Court for the Southern District of New York dismissed a civil action brought before US courts under the Alien Torts Statute against a former Israeli agent who, in his capacity as head of the Shin Beth, had allegedly authorized, planned, and directed the bombing on 22 July 2002 of an apartment building in Gaza City housing a Palestinian terrorist (the bombing caused many deaths and other casualties among civilians, and was termed in the petition a war crime). The US District Court, applying the US Foreign Sovereign Immunities Act, held that that action was covered by immunity (at 4-15).
documents or, alternatively, appear before the Chamber to show cause of non-compliance with the order. The TC relied upon Article 18(2) of the ICTY Statute, which grants the Prosecutor express authority to deal with state authorities and therefore implies, according to the TC, a general power of the Tribunal directly to 'approach' the relevant state officials. It consequently held that state officials could be directly addressed by the Tribunal by means of compelling orders (Blaskic, Decision on the Objection of Croatia to the Issuance of sub-poenas, §§67-9). The AC held instead that the general customary rule on functional immunities of state officials, though set aside by another customary rule where such officials are accused of international crimes, was still applicable when it came to the question of state cooperation with international criminal courts. These courts face states, so did the AC argue, and have therefore to address themselves to states, not to individual state officials, if they intend to order the production of documents, the seizure of evidence, etc. (§§42-3). The AC buttressed this legal argument by noting that in any case, were the state to refuse to deliver documents, the state official concerned would be bound by such refusal, and his appearing in court publicly to explain such refusal would serve little purpose (§44).

It would seem that the AC laid too much emphasis on state sovereignty and traditional international law. The contention is warranted that at present the expansion of the human rights doctrine and the thrust towards international criminal justice involve a significant erosion of traditional tenets. The duty of states to cooperate with international criminal courts that they have either voluntarily accepted or to which they are subjected on the strength of binding resolutions of the UN SC, entails that these courts are authorized to issue binding orders or subpoenas directly to state, officials (hence not through designated state channels), whenever they need the handing over of probative material necessary for the administration of justice. If the highest state authorities refuse to deliver the documents requested and consequently oblige the subpoenaed state official to behave accordingly, it is nevertheless important for such official to appear before the international court in order formally and publicly to set out the reasons for such refusal. Similarly, international criminal courts are
authorized to compel incumbent (and a fortiori former) state officials to testify in court, by issuing a subpoena ad testificandum. This is borne out by case law.  

3.8 INTERNATIONAL PERSONAL IMMUNITIES

(A) DO THEY INVOLVE IMMUNITY FROM PROSECUTION?

The problem of international personal immunities arises with regard to state officials accused of international crimes when they are abroad: may they be arrested and brought to trial for the alleged crimes? As we shall see, the problem can be differently framed and solved when the state official is in his own country; the question then arises whether under national (or international) law national courts are empowered to take proceedings against him.

The conflict between international rules granting personal immunities and the customary rules proscribing international crimes may be settled as indicated by the ICJ in its judgment in the Case Concerning the Arrest Warrant of 11 April 2000 (§§51-7). The Court logically inferred from the rationale behind the rules on personal immunities of such senior state officials as Heads of State or government (plus foreign ministers and diplomatic agents), that these immunities must perforce prevent any prejudice to the 'effective performance' of their functions. They therefore bar any possible interference with the official activity of such officials. It follows that an incumbent senior state agent (belonging to one of the categories mentioned above) is immune from jurisdiction, even when he is on a private visit or acts in a private capacity while holding office. Clearly, not only the arrest and prosecution of such a state agent while on a private visit abroad, but also the mere issuing of an arrest warrant, may seriously hamper or jeopardize the conduct of international affairs of the state for which that person acts.  

202 See KrstU (Decision on application for subpoenas) (ICTY, Al, §§23-8); Milosevic (Decision on application for interview and testimony of Tony Blair and Gerhard Schroder), ICTY, A), §§12-33; and Norman and others (Decision on interlocutory appeal against Trial Chamber decision refusing to subpoena the President of Sierra Leone) (SCSL, AC, §§8-29). It should be noted that in the last two cases the court declined to issue the subpoena only because it held that the testimony of the dignitaries at issue was not material to the defence case.
In summary, even when accused of international crimes, the state agent entitled to personal immunities is inviolable and immune from prosecution on the strength of the international rules on such personal immunities. This proposition is supported by some case law (for instance, Pinochet\textsuperscript{203} in the UK and Fidel Castro\textsuperscript{204} in Spain, which relate to a former and an incumbent Head of State, respectively).

If the allegations about international crimes committed by foreign state officials are known before they enter a foreign territory, the territorial state may ask the foreign state official to refrain from setting foot in the territory; if that official is already on the territory, the state may declare him persona non grata and request him to leave forthwith.

Of course, it may be that an international treaty on specific international crimes implicitly or expressly prescribes that personal immunities may not relieve officials of responsibility for the international crimes they envisage. Many treaty rules, although couched in general terms, may be interpreted to this effect. On this score one can mention the Genocide Convention of 1948 (Article IV), the 1984 Convention on Torture (Article 4), as well as a number of treaties on terrorism. To these treaties one should add the Statutes of the ICTY and ICTR. Both contain a provision (respectively, Articles 7(2) and 6(2)), whereby "The official position of any accused person, whether as Head of State or Government or as responsible Government official, shall not relieve such person of criminal


\textsuperscript{204} See Order (auto) of 4 March 1999 (no. 1999/2723). The Audiencia Nacional held that the Spanish Court could not exercise its criminal jurisdiction, as provided for in Article 23 of the Law on the Judicial Power, for the crimes attributed to Fidel Castro. He was an incumbent Head of State, and therefore the provisions of Article 23 could not be applied to him because they were not applicable to Heads of State, ambassadors, etc. in office, who thus enjoyed immunity from prosecution on the strength of international rules to which Article 21(2) of the same Law referred (this provision envisages an exception to the exercise of Spanish jurisdiction in the case of 'immunity from jurisdiction or execution provided for in rules of public international law'); see Legal Grounds nos 1-4. The Court also stated that its legal finding was not inconsistent with its ruling in Pinochet, because Pinochet was a former Head of State, and hence no longer enjoyed immunity from jurisdiction (see Legal Ground no. 5). For the (Spanish) text of the order, see the CD-Rom, EL DERECHO, 2002, Criminal case law.
responsibility nor mitigate punishment.' The strictness of this provision can be construed to the effect that it rules out the possibility of invoking personal immunities as a legal ground for not being prosecuted or tried. The same interpretation could be advanced with regard to the 1984 Convention on Torture, Articles 1-4 of which are so strict as to warrant such interpretation. However, the only treaty that explicitly excludes the right to rely upon personal immunities is the ICC Statute (Article 27(2)).

Certainly, there is still resistance to this trend favourable to lifting personal immunities in the case of international crimes. For example, in March 2000 the US State Department allowed a Peruvian alleged torturer to go free on the grounds that he enjoyed personal (that is, diplomatic) immunity.

The question must nevertheless be raised as to whether a customary rule has evolved in the international community removing personal immunities for alleged international crimes, at least when jurisdiction over such crimes is granted to international criminal courts or tribunals. This question is not only theoretical, but also has a practical dimension. For instance, the STL, unlike the Statutes of other international criminal courts and tribunals referred to above, does not provide in terms for the lifting of the immunity under discussion. Can we nevertheless hold

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205 Therefore, it would seem that one ought to reject as unfounded the claim made by the Serbian authorities of the FRY that some of the co-accused of Mr Slobodan Milosevic, in particular the former foreign minister of the FRY and incumbent president of Serbia, Mr M. MIlutinovic, could not be arrested and handed over to the ICTY because they enjoyed immunities under the national or federal Constitution. Assuming this were correct under national law, the rules of the ICTY Statute would prevail, because those rules were enacted by the Security Council under Chapter VII of the UN Charter, and therefore override contrary treaties, customary rules, and also national legislation pursuant to Article 103 of the UN Charter.

206 In the above example, Major Tomas Ricardo Anderson Kohatsu, a retired official of Peru's notorious Armv Intelligence Service, was alleged by the US State Department to have perpetrated *horrendous crimes* in 1997. In early March 2000 the Peruvian authorities sent him to the US to appear before a hearing of the Inter-American Commission on Human Rights in Washington. When he was about to leave the US to return to Peru, FBI agents detained him, pursuant to the 1984 UN Convention against Torture, duly ratified by the US. However, a few hours later he was released following a decision by the Under-Secretary of State, Thomas Pickering. According to Pickering, Anderson was entitled to diplomatic immunity because he held a G-2 visa, granted to accredited members of the staff of the Peruvian Mission to the Organization of American States. Consequently, he could not be arrested or prosecuted (on-line: at www.windos\temp\center for constitutional rights.htm). It was pointed out by M. Ratner, (US Center for Constitutional Rights), that Anderson had not in fact been accredited to the Peruvian Mission. More importantly, the 1984 Convention on Torture does not permit exemption for diplomatic immunity. In any case, it was for the US courts to determine the matter. As Ratner pointed out, 'despite serious doubts as to Andersons claimed immunity, the decision to allow him to return to Peru was made by the State Department and not the courts' (see ibid., at 2, §3).
the view that the Tribunal is not barred from prosecuting and trying state officials enjoying personal immunities (including inviolability and immunity from foreign criminal jurisdiction)? In other words, is a Head of State, a prime minister, a foreign minister or a diplomat, charged by the Tribunal's Prosecutor with the crime of terrorism, precluded from claiming personal immunity?

It is submitted that the above question must be answered in the affirmative, on three grounds. First, the judgment of the ICJ on Arrest warrant does not exclude either explicitly or implicitly that a customary rule on the matter has evolved with regard to international criminal courts and tribunals. It held that 'the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances' (§61). It then enumerated among such instances the case where 'an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction (ibid., emphasis added). The Court then mentioned the ICTY, the ICTR, and the ICC, noting that the ICC Statute expressly provides, in Article 27(2), that [i] immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person"' (ibid.). It is thus clear that the ICJ did not make the lifting of personal immunities before international criminal courts contingent upon the express or implicit contemplation of such lifting in the relevant courts statute. It instead held that the non-invocability of personal immunity before international courts was admissible to the extent that the relevant court or tribunal had jurisdiction over the international crime with which the state official at stake was charged.

Secondly, the rationale for foreign state officials being entitled to urge personal immunities before national courts does not apply to international courts and tribunals. That rationale resides in the need for foreign state officials not to be exposed to the prosecution by national authorities that might use this means as a way to interfering with the foreign state officials' activity, thereby unduly impeding or limiting their international action. In many states judicial authorities are not
independent of the political power; they could therefore decide to prosecute foreign state officials on grounds that have little to do with their legal or illegal conduct and indeed amount to a way of unduly interfering with the action of those state officials. This danger of abuse does not arise instead with regard to international criminal courts and tribunals, which are totally independent of states and subject to strict rules of impartiality. In addition, these courts and tribunals are much better equipped than national courts to deal with international crimes, because they are 'specialized' in this area and their judges are selected on account of their particular competence or experience in the matter.

Thirdly, the current thrust of international law is to broaden as much as possible the protection of human rights and, by the same token, to make those who engage in heinous breaches of such rights criminally accountable. The very logic of the present trends of international law therefore fully warrants the subjection of state officials to the judicial scrutiny of international independent bodies, whenever such officials (i) are accused of serious criminal offences against basic values of the world community; and (ii) there is no risk that such judicial scrutiny be surreptitiously used as a means of unduly restraining the official activity of the state agent concerned.

In summary, it seems justified to hold that under customary international law personal immunities of state officials may not bar international criminal courts and tribunals from prosecuting and trying persons suspected or accused of having committed international crimes, or at any rate the criminal offences over which the relevant international court or tribunal has jurisdiction.

All this applies to incumbent senior state officials. As soon as the state agent leaves office, he may no longer enjoy personal immunities and, in addition, becomes liable to prosecution for any international crime he may have perpetrated while in office (or before taking office), pursuant to the aforementioned customary rule lifting functional immunities in the case of international crimes.
(B) DO THEY EXEMPT SENIOR STATE OFFICIALS FROM THE DUTY TO TESTIFY OR HAND OVER EVIDENCE?

We must now briefly discuss the question of whether an incumbent senior state official belonging to one of the four abovementioned categories is entitled to invoke personal immunity in order to refuse either to testify before an international court or tribunal dealing with international crimes, or to hand over documents needed, by the court or tribunal.

Plausibly, a Head of State may not be compelled to testify before a foreign court, not even with regard to an international crime: an order to testify issued by a national court to a foreign Head of State (or prime minister or foreign minister or diplomat) would run counter to international rules protecting personal immunities (as for the rationale behind this legal regulation, see above). Arguably here traditional notions relating to state sovereignty still apply and have not yet been set aside by the demands of international justice.

Does the same hold true for orders issued by international courts exercising jurisdiction over international crimes? It would seem that the rationale applying to the lifting of personal immunity from prosecution for those crimes, mentioned above, should also apply to the right of one of those senior officials to refrain from testifying; it follows that such right may not be invoked. Here the paramount demands of inter-national justice, together with the absence of any possible risk that the international court may interfere with the state agent activity or abuse its powers, override the rights of senior state officials deriving from traditional notions of respect (by other states or state organs) for their sovereign prerogatives. It follows that an international criminal tribunal is empowered to compel a senior state official (belonging to one of the four categories) to testify (subpoena ad testificandum) or to hand over important documents (subpoena duce tecum).

Interestingly, the ICTY AC in Krstic (Decision on application for subpoenas decision) (§ 27) and an ICTRTC in Bagosora (Decision on request for a subpoena
for Major f.Biot, at §4) affirmed this authority of international criminal courts, stating that they may compel senior state agents to testify, whether or not such agents witnessed the relevant facts in their official capacity. Other courts have in fact eschewed pronouncing on the merits of this matter. In Fofana and others, in 2006 a SCSL TC did not grant a request to issue a subpoena ad testificandum against the incumbent President of Sierra Leone, for it found that the requirements set out in Rule 54 (on the power to issue such orders 'as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial') were not met in the case at issue. The AC upheld the decision (§§8-39). However, a member of the TC, Judge T, Thompson, issued a forceful opinion clearly showing that the law allowed the issuance of the order (Dissenting Opinion, §§14-30); similarly, in the AC Judge Robertson appended an opinion along the same lines, providing reference to previous case law (Dissenting Opinion, §§10-50). In Milosevic Slobodan (Decision of 9 December 2005) the AC declined to call to testify the incumbent British prime minister.

3.9 NATIONAL PERSONAL IMMUNITIES

The question of whether a national court is authorized to start proceedings against a national accused of international crimes, who happens to be a senior state official enjoying immunities under national law (for instance, the Head of State, a member of cabinet, a member of parliament) must be looked at from the viewpoint of international and national law.

Customary international law, it would seem, does not contain any rule imposing upon a state the obligation to disregard national legislation on immunities. However, treaty rules may impose the obligation to punish the authors of international crimes. If this is the case, any national legislation granting immunity would be in conflict with the treaty obligation.

National law may contain general rules granting immunity from prosecution for any crime, including international crimes. It very much depends on each particular national system. However, after the entry into force of the ICC Statute,
those states that are gradually ratifying such Statute are no longer allowed to rely upon any possible national legislation on immunities. The national implementation of the ICC Statute requires that states change their legislation (including their constitutional provisions, if any) on immunities, removing any such immunities for the international crimes that fall under the jurisdiction of the Court.

3.10 The general principles of criminal responsibility under International Criminal Law

3.11 GENERAL

As in any national legal system, also in ICL responsibility arises not only when a person materially commits a crime but also when he or she engages in other forms or modalities of criminal conduct. In the following paragraphs I shall set out these different modalities of participation.

Before I do so, it may however prove fitting to discuss briefly the position in national legal systems. They converge in holding that, where a crime involves more than one person, all performing the same act, all are equally liable as co-perpetrators, or principals. In contrast, national legal orders differ when it comes to the punishment of two or more persons participating in a crime, where these persons do not perform the same act but in one way or another contribute to the realization of a criminal design.

For instance, A draws up plans for a bank robbery, B provides the weapons, C performs the actual robbery, D acts as a lockout, E drives the getaway car, and F hides the loot and in addition gives shelter to the robbers. Many systems (for instance those of the US, France, Austria, Uruguay, and Australia) do not make any legal distinction between the different categories of participant and mete out the same penalty to each participant, whatever his role in the commission of the crime. As the California Penal Code provides at §31, all those 'concerned in the commission of a crime' including those who aid and abet the crime, are to be held liable as principals.
In spite of this legal regulation, for classificatory purposes and to aid analysis, legal commentators and courts use descriptive terms to distinguish between the various categories of participant: in the example given above, A is an 'accessory before the fact' (he is not a 'principal' for he was not present when the robbery was perpetrated), B is an aider and abettor (or an 'accessory before the fact'), C is a 'first degree principal', D and E are 'second degree principals', and F is an 'accessory after the fact'. However, as noted above, under the general sentencing tariff no distinction is made between these different categories of person. It is only provided that for accomplices or accessories extenuating circumstances may be taken into account if their participation in the offence is less serious than that of the principal or principals. In fact, for the purposes of sentencing, judges often draw a distinction between principals, instigators, and aiders and abettors.

In other national legal systems (for instance, Germany, Spain, and Russia) the law draws instead a normative distinction between two categories—principals, and accomplices or accessories—and provides in terms that the persons falling under the latter category must be punished less severely. Thus, for instance, in German law, the scale of penalties for accomplices (at least in the case of aiders and abettors, Gehilfe) is less harsh than for the perpetrator (Tater).207

We will see that in international law neither treaties nor case law (as indicative of customary rules) make any legal distinction between the various categories, at least as far as the consequent penalties are concerned. This lack of distinction follows both from: (i) the absence of any agreed scale of penalties in ICL; and from (ii) the general character of this body of law; that is, its still rudimentary nature and the ensuing lack of formalism (see supra, 1.2).

207 In two cases, the Extraordinary Courts Martial established in the Ottoman Empire to try persons accused of participating in massacring Armenians in 1915 and plundering their possessions, applied the Imperial Military Penal Code, which drew a normative distinction between principals and accessories. The Court therefore made a point of distinguishing between the 'principal perpetrators' and the 'accessories', and assigning a different sentence to each category of defendant. In Kemal and TévftkU sentenced the principal perpetrator to death and the accessory to 15 years of hard labour (at 5-6, or 157-8); in Baháeddír Sdkir and others the majority of judges held that two defendants were accessories, while three dissenting judges held that they 'were equally guilty of having been principal co-perpetrators' (at 4 and 8 or 171 and 173).
Consequently, the differentiation between the various classes of participation in crimes, which I shall set out below, is merely based on the intrinsic features of each modality of participation. It serves a descriptive and classificatory purpose only. It is devoid of any relevance as far as sentencing is concerned. It is for judges to decide in each case on the degree of culpability of a participant in an international crime and assign the penalty accordingly, whatever the modality of participation of the offender in the crime.

3.12 PERPETRATION

Whoever physically commits a crime, either alone or jointly with other persons, is criminally liable. For instance, the soldier who kills a war prisoner or an innocent civilian is liable to punishment for a war crime. Similarly, the serviceman who rapes an enemy civilian as part of a widespread or systematic attack on civilians is accountable for a crime against humanity.

Perpetration is thus the physical carrying out of the prohibited conduct, accompanied by the requisite psychological element.\(^{208}\)

3.13 CO-PERPETRATION

\(^{208}\) In some cases courts have minimized the role of perpetrators executing illegal orders. This for instance holds true for Alfons Gotzfrid, which concerns mistreatment at the Majdanek camp. The Stuttgart Court (Landgericht) held that 'According to established case-law [...], the offender or accomplice is defined as one whose thoughts and actions coincide with those of the author of the crime, who willingly gives in to incitement to political murder, silences his conscience and makes another person’s criminal aims the basis of his own conviction and his own action or who sees to it that orders of that kind are ruthlessly carried out or who in so doing otherwise displays consenting enthusiasm or who exploits State terror for his own purposes. Accordingly, the accused could only be shown to have an attitude denoting guilt if, over and above the activity he was instructed to carry out, he had performed some contributory act on his own initiative beyon the call of duty, shown particular enthusiasm, had acted with particular ruthlessness in the exterminatio operation or had shown a personal interest in the killings. These conditions cannot be shown to exist in the case of the accused. He was at the end of the chain of command, had no power to decision himself and n authority to act [...] Similarly, there is no evidence that the accused had any personal interest in the killing He merely wanted to carry out the order which had been issued to him '(67, b).
Crimes are often committed by a plurality of persons. If all of them materially take part in the actual perpetration of the same crime and perform the same act (for instance, they are all members of an execution squad shooting innocent civilians), we can speak of co-perpetration. All participants in the crime partake of the same criminal conduct and the attendant mens rea.

3.14 PARTICIPATION IN A JOINT CRIMINAL ENTERPRISE TO COMMIT INTERNATIONAL CRIMES

3.14.1 INTRODUCTION

International crimes such as war crimes, crimes against humanity, genocide, torture, and terrorism share a common feature: they tend to be expression of collective criminality, in that they are perpetrated by a multitude or persons: military details, paramilitary units or government officials acting in unison or, in most cases, in pursuance of a policy. When such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the criminal enterprise or collective crime, on two grounds.

First, not all participants may have acted in the same manner, but rather each of them may have played a different role in planning, organizing, instigating, coordinating, executing or otherwise contributing to the criminal conduct. For instance, in the case of torture one person may order the crime, another may physically execute it, yet another may watch to check whether the victim discloses any significant information, a medical doctor may be in attendance to verify whether the measures for inflicting pain or suffering are likely to cause death, so as to stop the torture just before the measures become lethal, another person may carry food for the executioners, and so on. The question arises as to whether all these participants are equally responsible for the same crime, torture. Similarly, in the case of deportation of civilians or prisoners of war to an extermination camp, a commander may issue the order, several officers may organize the transport, others may take care of food and drinking water, others may carry out surveillance over the inmates so as to prevent their escape, others
may search the detainees for valuables or other things before deportation, and so on. Secondly, the evidence relating to each individual's conduct may prove difficult, if not impossible, to find. It would, however, be not only immoral, but also contrary to the general purpose of criminal law (to protect the community from the deviant behaviour of its members that causes serious damage to the general interests) to let those actions go unpunished. These considerations a fortiori apply to crimes such as murder or aggravated assault committed by a whole crowd; in such cases, it may prove even more difficult to collect evidence about the exact participation of members of the crowd in the crimes. The same considerations also hold true for cases where crimes are institutionally committed within organized and hierarchical units such as internment, detention, or concentration camps, where it is difficult to pinpoint the gradations of culpability of the various persons working within and for the organization.

As in most national legal systems, also in ICL all participants in a common criminal action are equally responsible if they (i) participate in the action, whatever their position and the extent of their contribution, and in addition (ii) intend to engage in the common criminal action. Therefore they are all to be treated as principals\textsuperscript{209} although of course the varying degree of culpability may be taken into account at the sentencing staged.\textsuperscript{210}

\textsuperscript{209} However, some courts of common law countries have taken the view that participants in a common criminal design may play the role of, and be regarded as, accessories. Thus, for instance, in Einsatzgruppen, with regard to common design, the Prosecutor T. Taylor, in his closing statement noted that ‘the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corpse. In line with recognized principles common to all civilized legal systems, \$2\textsuperscript{2} of Article II of Control Council Law No. 10 specifies a number of types of connection with crime which are sufficient to establish guilt. Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility’ (372).

\textsuperscript{210} In this connection one may mention, by way of example, a decision of the Supreme Court of Bosnia and Herzegovina in Tepez, delivered on 1 October 1999: ‘The appeal by the defence counsel argues that the contested judgment has not individualised the criminal responsibility of the accused and his personal involvement in actions characteristic of a war crime against the civilian population. For this crime to exist it is necessary to “commit murder, torture, inhumane acts, inflict severe suffering, physical and mental injuries on civilians, destroying their health and physical integrity”. The disposition does not include these essential elements of this criminal act and therefore represents a major violation of the provisions of criminal procedure. This Court finds these allegations groundless. The appeal fails to note that the contested judgment states that the accused carried out these actions with three other named individuals (as
The notion of joint criminal enterprise (JCE) denotes a mode of criminal liability that appears particularly fit to cover the criminal liability of all participants in a common criminal plan. At the same time, this notion does not run contrary to the general principles of criminal law. As in national legal systems, the rationale behind this legal regulation is clear: if all those who take part in a common criminal action are aware of the purpose and character of the criminal action and share the requisite criminal intent, they must perforce share criminal liability, whatever the role and position they may have played in the commission of the crime. This is the case because: (i) each of them is indispensable for the achievement of the final result; and on the other hand (ii) it would be difficult to distinguish between the degree of criminal liability, except for sentencing purposes.

Thus, it is by now widely accepted by international criminal courts that in the case of collective' criminality where several persons engage in the pursuit of a common criminal plan or design, all participants in this common plan or design may be held criminally liable for the perpetration of the criminal act, even if they have not materially participated in the commission of said act; in addition, they may also be held responsible, under a number of well-defined conditions, for criminal conduct that, although not originally envisaged in the common criminal design, has been undertaken by one of the participants and may to some extent be regarded as a natural and foreseeable consequence of such a common plan.

well as others), which means that he perpetrated the crime for which he has been pronounced guilty in complicity with others. It further means that in cases of this kind where it is not possible to isolate individual actions and their consequences or to distinguish the degree to which each person was involved in their execution, it suffices that these actions complement each other and together form a single entity, which the accused [Tepe] wishes to achieve by being involved. Therefore it was neither possible nor necessary for the court of first instance to separate only the actions of the accused. It suffices that the accused participated in executing these actions, even if it had only been one or two actions of personal involvement in the beating of civilians. However, the court of first instance has established that the accused personally beat up many individuals on many occasions' (2).

Also the decision of a Canadian court in Moreno deserves mentioning: In reaching this conclusion, I am influenced by one commentator's view that the closer a person is involved in the decision-making process and the less he or she does to thwart the commission of inhumane acts, the more likely criminal responsibility will attach (...) of course, the further one is distanced from the decision makers, assuming that one is not a "principal", then it is less likely that the required degree of complicity necessary to attract criminal sanctions, or the application of the exclusion clause, will be met' (18). See also Ramirez (6-9)
It is also widely accepted that at the international level this mode of criminal liability can take three different forms. It was the ICTY AC that first articulated in Tadic (A] 1999) the doctrine of ICE as a fully fledged legal construct of modes of criminal liability. However, the doctrine had already been upheld at the national or international level by various courts, if only in passing. In Tadic (A] 1999) the ICTY AC spelled out the three categories I will refer to below.

3.14.2 LIABILITY FOR A COMMON INTENTIONAL PURPOSE

(A) The notion

The first and more widespread category of liability is responsibility for acts agreed upon when making the common plan or design. Here all the participants share the same intent to commit a crime, and all are responsible, whatever their role and position in carrying out the common criminal plan (even if they simply vote, in an assembly or in a group, in favour of implementing such a plan). In addition to shared intent, dolus eventualis (i.e. recklessness or advertent recklessness) (see supra, 3.7) may also suffice to hold all participants in the common plan criminally liable. For instance, if a group of servicemen decides to deprive civilians of food and water in order to compel them to build a bridge necessary for military operations or to disclose the names of other civilians who have engaged in unlawful attacks on the military, and then some civilians die, the servicemen should all be accountable not only for a ICE to commit the war crimes of intentionally starving civilians and 'compelling the nationals of the hostile party to take part in operations of war directed against their own country; they should also be held guilty of murder. Indeed, even if the servicemen did not intend to bring about the death of the civilians, the death was the natural and foreseeable consequence of their common criminal plan and the follow-up action.

Society—in our case the world community—must defend itself from this collective criminality by reacting in a repressive manner against all those who, in some form, took part in the criminal enterprise. Society may not indulge in distinctions between the different roles played by each of the participants when trying to
uproot or, better, punish this form of collective criminality. All actors are guilty, even though in some instances the mens rea (for example, intent to murder) is not attended by the corresponding conduct (for example, stabbing or firing a gun); this applies to all those who, while sharing the criminal intent, do not carry out the primary crime (for example, the driver or the look-out in an armed robbery involving murder). However, the differing degrees of culpability can be taken into account at the stage of sentencing.

(B) Case law

In Ponzano, a case concerning the unlawful killing of four British prisoners of war by German troops, the Judge Advocate adopted the approach suggested by the Prosecutor, and stressed the requirement that an accused, before he can be found guilty, must have been concerned in the offence (...T) to be concerned in the commission of a criminal offence [...] does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation [...] In other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means (at 7). The Judge Advocate also underlined that the accused should have knowledge of the intended purpose of the criminal enterpriser.211

211 Georg Otto Sandrock et al. (also known as the Almelo Trial) can also be cited. Three Germans had killed a British prisoner of war; it was clear that they had all had the intention of killing the British soldier, although each of them played a different role. The British Court found all of them guilty of murder under the doctrine of common enterprise' (at 35,40-1). In Holzer and others, brought before a Canadian military court, in his summing up the judge Advocate emphasized that the three accused (Germans who had killed a Canadian prisoner of war) knew that the purpose of taking the Canadian to a particular area was to kill him. The judge Advocate spoke of a 'common enterprise' with regard to that murder (at 341, 347, 349). In Jepsen and others a British court had to pronounce upon the responsibility of Jepsen and others for the death of inmates of a concentration camp in transit to another concentration camp. The Prosecutor argued that '[i]f Jepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act'. The Judge Advocate did not rebut the argument (at 241). In Schonfeld the judge Advocate stated that: 'if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose, kills a man, it is murder in all who are present f... provided that the death was caused by a member of the party in the course of this endeavours to effect the common object of the assembly' (68).
In 2001, in Krstic, an ICTY TC held that the defendant had participated in a JCE to commit genocide. The Court explained at length that initially Krstic had only taken part in a common plan to forcibly expel Muslims from the area of Srebrenica; however, later on, when it became apparent that the various military leaders in fact were planning the killing of thousands of military-aged men, the defendant showed, through his various acts and behaviour, that he shared the ‘genocidal intent to kill the men’ (§§621-45). The Chamber therefore found Krstic guilty of genocide and sentenced him to 46 years in prison. The AC held instead that Krstic was only guilty of complicity in genocide, for he had not shared the genocidal intent but simply aided and abetted genocide. It reduced his sentence to 35 years' imprisonment.

In 2003, in Blagojevic, Simic and others an ICTY TC held that the three accused, Bosnian Serbs operating in the municipalities of Bosanski Sarna; and Odzak in Bosnia Herzegovina, committed various crimes there. The main defendant, Simic (who, at the time of the conflict, was the President of the Municipal Assembly and of the Crisis Staff, later renamed ‘the War Presidency’), participated in a basic form of JCE. He shared with others the intent to execute a common plan of persecution to non-Serb civilians in the Bosanski Samac municipality. According to the TC, Simic, as the highest-ranking civilian in the municipality, acted in unison with others to execute a plan that included: the forcible takeover of the town of Bosanski Samac, and the persecutions of non-Serb civilians in the area, which took the form of unlawful arrests and detention, cruel and inhumane treatment including beatings, torture, forced labour assignments, and confinement under inhumane conditions, deportations and forcible transfers. The Chamber held that he was a participant in the JCE, while no evidence permitted the conclusion that the other two defendants were also participants (TC, 2003, §§144-60,983-1055).  

It should be noted that the ICTR upheld the doctrine at issue as well. In Rwamakuba (Decision on Interlocutory appeal) the AC held that the Tribunal had jurisdiction to try the appellant on a charge of genocide through the mode of liability of JCE (§§9-39). In Elizaphan Ntakirutimana and Gerard ‘akirutimana the AC relied upon the first category of JCE, but found that the TC had been correct in not applying the doctrine to the case at issue (§§462,466,468-84). In Simba, in 2005, an ICTR TC held [hat the accused was guilty of JCE to commit genocide and extermination (§§386-96, 411-19, 420-6). In another case where the Prosecution had similarly charged a person with JCE to commit genocide and extermination (Mpambara), an ICTR TC held instead that no proof beyond a reasonable doubt had been tendered that the
The ICTY took an important stand in Brdanin in 2004. In the indictment, the Prosecution had alternatively pleaded the defendants criminal responsibility pursuant to the first and third categories of JCE (on this third category see infra, 9.4,4). With respect to the first category, the Prosecution alleged in the various counts that 'the purpose of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state by the commission of the crimes alleged'. The alternative pleading of the third category specified that '(the defendant] [was] individually responsible for the crimes enumerated in [various counts] on the basis that these crimes were natural and foreseeable consequences of the acts' of deportation and forcible transfer of civilians. The Chamber noted that for both categories of JCE to materialize, it was required to prove not only the existence of a common criminal plan, but also that the crimes had been perpetrated by one or more participants in such common plan. However, in the case at issue the crimes had been committed by members of the army, police, and para-military groups that had not participated in the criminal plan or enterprise (§345)\(^{215}\) The Chamber therefore dismissed the applicability of the notion of JCE to those crimes (§§351 and 355). However, the AC reversed the TC decision on this issue, taking the contrary view. After reviewing post-Second World War case law it concluded that such case law recognizes the imposition of liability upon an accused for his participation in a common criminal purpose, where the conduct that comprises the criminal actus reus is perpetrated by persons who do not share the common purpose and that in addition it does not require proof that there was an understanding or agreement to commit that particular crime between the accused and the principal perpetrator of the crime. The AC thus held that '[W]hat matters in a first category ICE is not whether the person who carried out the actus reus of a particular crime is a member of JCE, but whether the crime in question forms part of the common purpose, in cases where the principal perpetrator of a particular crime is not a member of the JCE, this

\(^{215}\) The TC had set out the same view in a previous decision in the same case (Brdanin, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, §44).
essential requirement may be inferred from various circumstances, including the fact that the accused or any other member of the ICE closely cooperated with the principal perpetrator in order to further the common criminal purpose. In this respect, when a member of the JCE uses a person outside the JCE to carry out the actus reus of a crime, the fact that the person in question knows of the existence of the ICE—without it being established that he or she shares the mens rea necessary to become a member of the) CE—may be a factor to be taken into account when determining whether the crime forms part of the common criminal purpose. However, this is not a sine qua non for imputing liability for the crime to that member of the JCE (§410). [...] Considering the discussion of post-World War II cases and of the Tribunals jurisprudence above, the Appeals Chamber finds that, to hold a member of the JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member—when using a principal perpetrator—acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis (§413).

The AC clinched the point by adding, always in light of post-Second World War jurisprudence, that when the principal perpetrator is not part of the JCE, for the accused to be held liable for the crime perpetrated, an understanding or an agreement between the accused and the principal perpetrator of the crime is not necessary. It may suffice that the crime at issue be part of the common criminal purpose (§§415-19) and the accused 'uses' the principal perpetrator to further that purpose (§§430-1).

For the reasons set out below (§§9.4.5), it is respectfully submitted that this broadening of the notion under discussion is excessive and raises doubts about its consistency with the nullum crimen principle and the principle of personal responsibility. The AC'S ruling in Brctdlin seems all the more objectionable because in the same case the Chamber also held that the doctrine of the JCE extends to large-scale cases' or in other words covers instances where crimes
are perpetrated on a large scale by individuals who are remote from the accused (§§420-5).

3.14.3 LIABILITY FOR PARTICIPATION IN A COMMON CRIMINAL PLAN WITHIN AN INSTITUTIONAL FRAMEWORK

(A) The notion

The second modality of liability is that of responsibility for carrying out a task within a criminal design that is implemented in an institution such as an internment, detention, or concentration camp. In one such camp where inmates are severely ill-treated and even tortured, not only the head of the camp, but also his senior aids and those who physically inflict torture and other inhuman treatment bear responsibility for those acts. In addition to those who physically carry out the misdeeds, also those who discharge administrative duties indispensable for the achievement of the camp's main goals (for example, to register the incoming inmates, record their death, give them medical treatment, or provide them with food) may incur criminal liability.

They bear this responsibility so long as they (i) are aware of the serious abuses being perpetrated (knowledge); (ii) willingly take part in the functioning of the institution (intent); and (iii) make an important contribution to the pursuit of the institution's goals. That they should be held responsible is only logical and natural: by fulfilling their administrative or other operational tasks, they contribute to the commission of crimes. Without their willing support, crimes could not be perpetrated. Thus, however peripheral their role, they may constitute an indispensable cog in the murdering machinery. The man who, upon arrival of new trains at Auschwitz, separated the men and the women from the children and the elderly, knowing that this served to establish who should be a forced labourer and who should instead be sent immediately to gas chambers, was instrumental in the perpetration of extermination. Had he intended to shirk criminal responsibility, he should have asked to be relieved of his duties and to discharge other duties elsewhere. This decision was possible and was
sometimes made (although it often involved being sent to combat zones on the Eastern Front). Similarly, the locomotive driver of a train that carried hundreds of detainees to Auschwitz could have been held criminally liable for his participation in extermination, so long as he knew what would happen to the persons he was transporting and showed to share the intent to exterminate those persons by willingly continuing to fulfill his role (instead of asking to be exempted from this horrible task).

It can thus be noted that for this mode of liability no previous plan or agreement is required. Nevertheless, one can legitimately hold that each participant in the criminal institutional framework not only is cognizant of the crimes in which the institution or its members engage, but also implicitly or expressly shares the criminal intent to commit such crimes. It cannot be otherwise, because any person discharging a task of some consequence in the institution could refrain from participating in its criminal activity by leaving it. As pointed out above, for criminal liability to arise it is also necessary that the person at issue make a substantial contribution to the joint criminal enterprise. It follows that those who, for example, merely sweep the streets or clean the laundry should not incur criminal liability for their action, although they may both be aware of the criminal purpose pursued by the whole institution and share it.

Clearly, this mode of responsibility is very close to that of criminal organizations laid down in the IMT Charter annexed to the London Agreement of 8 August 1945 (Articles 9-11), and upheld in some respects by the IMT at Nuremberg (see infra, 2.2). Indeed, in both cases belonging to and operating for an organization (or an institutional framework) that primarily or at least in part pursues criminal purposes involves, subject to certain conditions, the personal guilt of a member. However, the conditions for personal liability of a member to arise are only partially similar. True in both cases membership as such is not punishable. In both cases it is necessary for the member to have knowledge of the criminal acts being committed or be personally implicated in the commission of such acts. 214

214 In Goring and others the IMT held that the definition of criminal organization 'should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by
However, in the case of criminal organization this would be sufficient, for the assumption is that the organization as such institutionally pursues a criminal purpose (e.g. extermination of a racial or religious group). Instead, in the JCE under consideration, since the institutional aims are not per se criminal (the camp has been established to detain prisoners of war, or intern enemy civilians, etc.), but the institution is incidentally used for criminal purposes (torture, murder, extermination, rape, etc.), it is also necessary for a member to make a substantial contribution to the furtherance of criminal purposes, for his liability to arise.

(B) Case law

One can find a particularly clear and significant illustration of this category of criminality in Alfons Klein and others (the Hadamar trial), heard by a US Military Commission sitting at Wiesbaden. It is fitting to dwell on this case at some length, because it best shows how the category of criminality at hand works.

The accused were seven Germans. Between July 1944 and April 1945, they killed over 400 Polish and Russian nationals, who had been obliged to work in Germany for the German war effort and were suffering from tuberculosis or pneumonia. Brought to Hadamar, in Germany, where there was a hospital or institution originally designed to care for the mentally unsound, but with no medical facilities to treat persons ill with tuberculosis or pneumonia, they were told that they would be given medication. In fact they were killed by injections of poisonous drugs; afterwards the relevant medical records and death certificates were falsified. It would seem that the primary purpose of these killings was to make space in hospitals for German war victims. The accused comprised Klen, the administrative head of the hospital, a local Nazi Party leader who made all the arrangements leading to the perpetration of the atrocities; Wahlmann, a physician specializing in mental diseases, the Institution's only doctor (he participated in the conferences designed to plan the murders, knew what was
going on at the hospital, and acquiesced in it); three nurses, Ruoff, Willig, and Huber, who administered the poisonous drugs; Merkle, the institution's book-keeper (who registered incoming patients for the purpose of recording dates and causes of death, actually falsifying these documents); and Blum, a doorman and telephone switchboard operator, who also served as caretaker of the cemetery, charged with burying the victims in mass graves (but he sometimes walked through the wards to inspect the victims before they were taken, dead, to his cellars a few hours later).

The charge for all of them was 'violation of international law', namely, as the Prosecutor specified in his opening argument, breach of the laws of warfare (at 202). The specification stated that the seven accused 'acting jointly and in pursuance of a common intent' did [...] willfully, deliberately and wrongfully aid, abet and participate in the killing of human beings of Polish and Russian nationality'. Thus, in addition to the notion of 'participation in killing based on common intent' also the notion of 'aiding and abetting' was used. However, in his Opening Argument the Prosecutor, when setting out the applicable law (there was no Judge Advocate), emphasized that all those who participate in a common criminal enterprise are equally guilty as 'co-principals whatever the role played by each single participant. Referring to the case of murder committed by sever persons, he pointed out that

Every single one of those who participated in any degree towards the accomplishment of that result [murder] is as much guilty of murder as the man who actually pulled the trigger [...] That is why under our (that is US) Federal Law all distinctions between accomplices, between accessories before the fact and accessories after the fact, have been completely eliminated. Anyone who participates in the commission of any crime, whether formerly called as an accessory or no, are now co-principals and have been so for several years (203).

Moving then to the case at bar, the Prosecutor in fact offered an eloquent illustration of the rationale behind the legal notion he was invoking:
At this Hadamar mill there was operated production line of death. Not a single one of these accused could do all the things that were necessary in order to have the entire scheme of things in operation. For instance, the accused Klein, the administrative head, make arrangements for their death chamber, and at the same time go up these and use the needle that did the dirty work, and then also turn around and haul the bodies out and bury them, and falsify the records and the death certificates. No, when you do business on a wholesale production basis as they did at the Hadamar Institution, that murder factory, it means that you have to have several people doing different things of that illegal operation in order to produce the results, and you cannot draw a distinction between the man who may have initially conceived the idea of killing them and those who participated in the commission of those offences. Now, there is no question but that any person, who participated in that matter, no matter to what extent, technically is guilty of the charge that has been brought [...] every single one of the accused has overtly and affirmatively participated in this entire network that brought about the illegal result (205-7).

The defence counsel did not dispute these concepts, but in their arguments preferred to rely upon the notions of necessity and superior orders, or argued that German law rather than US or international law should apply. The Court upheld the charge. The administrative head of the hospital and two nurses were sentenced to death; the physician (a 70-year-old man) to life imprisonment and hard labour; the book-keeper to 35 years and hard labour; the third nurse to 25 years and hard labour; the doorman and caretaker to 30 years and hard labour (at 247).

Courts also applied this notion of JCE in cases where the crimes had allegedly been committed by members of military or administrative units running concentration camps; that is, by groups of persons acting pursuant to a concerted plan. In such cases the accused held some position of authority

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215 See, for instance, such cases as Dachau Concentration Camp, brought before a US Tribunal under Control Council Law no. 10 (at 5. 14), Nadlerand others, decided by a British Court of Appeal under Control Council Law no. 10 (at 132-4), Auschwitz Concentration Camp, decided by a German Court (at 882), as well as Belsen, decided by a British military court sitting in Germany (121).
within the hierarchy of the concentration camps. Normally, the defendants were charged with having acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes.\textsuperscript{216} When found guilty, they were regarded as co-principals in the various crimes of ill-treatment, because of their objective 'position of authority' within the concentration camp system and because they had 'the power to look after the inmates and make their life satisfactory' but failed to do so. In these cases, as the ICTY AC pointed out in Tadic (AJ, 1999) the required actus reus was the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The mens rea element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual's high rank or authority would have, and of itself, indicated an awareness of the common design and an intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment, although of course the penalty varied according to the degree of participation of each accused in the commission of the war crime (§203).

Later on an ICTY TC invoked this mode of responsibility in 2001 in Kvocka and others. The Chamber found that the five defendants had occupied positions or roles in the operation of a detention camp at Omarska, where various crimes were committed (persecution, murder, and torture). Kvocka had been the camp commander's right hand; Kos was a guard shift commander; Radic was a shift commander. Zigic, who was a taxi driver in the Prijedor area during the period of 26 May to 30 August 1992, used to enter Omarska as well as other two camps for the purpose of abusing, beating, torturing, and killing prisoners. Finally, Prcac

\textsuperscript{216} In his summing up in the Betsen case, the Judge Advocate took up the three requirements set out by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organized system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e. encouraged, aided, and abetted or in any case participated in the realization of the common criminal design (637-41).
was de facto a deputy camp commander. According to the Chamber, the Omarska camp was a JCE, a facility used to interrogate, discriminate against, and otherwise abuse non-Serbs from Prijedor and which functioned as a means to rid the territory of or subjugate non-Serbs' (§323). The Chamber held that the continuous perpetration of crimes in the camp was common knowledge to anybody living there (§324). It held that all the accused formed part of a JCE to commit the crimes ascribed to them, and sentenced all of them to varying sentences. The AC confirmed the convictions and sentences.

It is worth stressing that the TC rightly emphasized the need for the participation of a person in an institutionalized JCE to be 'significant'; that is, through 'an act or omission that makes an enterprise efficient or effective; e.g. a participation that enables the system to run more smoothly or without disruption' (§309). It then wisely went on to note that the significance of the contribution is to be determined on a case-by-case basis, taking into account a variety of factors (§311). On this point the AC took a slightly different stand.217

In other cases the Chamber has stressed the need for the contribution of each participant in a JCE to be 'substantial'.218 For instance, in Lima] and others an ICTYTC found that the Prosecution had not proved that the three accused persons (members of the Kosovo Liberation Army) were liable for a joint criminal enterprise to commit in 1998 such crimes as torture, ill-treatment, and murder in a prison camp in Kosovo (§§665-70).

It bears noting that the requirement that the contribution of a participant in a JCE should be 'substantial' had not been envisaged by the ICTY AC in Tadic (A], 1999, §227). This requirement seems to the present writer to be indispensable.

217 It held that 'in general, there is no specific legal requirement that the accused make a substantial contribution to the JCE. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the JCE. In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose (§97). However, the Chamber subsequently held that in some exceptional cases the 'substantial' character of a participants contribution is needed (§599).

218 Ibid., §667
INCIDENTAL CRIMINAL LIABILITY BASED ON FORESIGHT AND VOLUNTARY ASSUMPTION OF RISK:

(A) The notion

The third mode of responsibility concerns those participants who agreed to the main goal of the common criminal design (for instance, the forcible expulsion of civilians from an occupied territory) but did not share the intent that one or more members of the group entertained to also commit other crimes incidental to the main concerted crime (for instance, killing or wounding some of the civilians in the process of their expulsion). This mode of liability only arises if the participant who did not have the intent to commit the 'incidental' offence, was nevertheless in a position to foresee its commission and willingly took the risk.

A clear example in domestic criminal law of this mode of liability is that of a gang of thugs who agree to rob a bank without killing anyone, and to this end agree to use fake weapons. In this group, however, one of the members secretly takes real weapons with him to the bank with the intent to kill, if need be. Suppose another participant in the common criminal plan sees this gang member stealthily carrying those weapons. If the armed man then kills a teller or bank officer during the robbery, the one who saw him take the real weapons may be held liable for robbery and murder, like the killer and unlike the other robbers, who will only be liable for armed robbery. Indeed, he was in a position to expect with reasonable certainty that the robber who was armed with real weapons would use them to kill, if something went wrong during the robbery. Although he did not share the mens rea of the murderer, he foresaw the event and willingly took the risk that it might come about (plainly, he could have told the other robbers that there was a serious danger of a murder being committed; consequently, he could either have taken the weapons away from the armed robber or withdrawn from the specific robbing expedition or even dropped out of the gang).

To clarify the matter, one should perhaps distinguish between an abstract and a concrete foreseeability of the unconcerted crime. Arguably, for criminal liability
under the third category of ICE to arise it is necessary for the unconcerted crime to be abstractly in line with the agreed-upon criminal offence; in addition, it is also essential that the 'secondary offender' had a chance of predicting the commission of the unconcerted crime by the 'primary offender'. For instance, if a paramilitary unit occupies a village with the purpose of detaining all the women and enslaving them, a rape perpetrated by one of them would be in line with enslavement, since treating other human beings as objects may easily lead to raping them. It would, however, also be necessary for the 'secondary offender' to have specifically envisaged the possibility of rape (a circumstance that should be proved or at least inferred from the facts of the case), or at least to have been in a position to predict the rape.

Furthermore, we should ask ourselves whether the mens rea requirement for this JCE is the 'secondary offenders' subjective foresight of the likelihood of the crime being committed by the 'primary offender' (i.e. the 'secondary offender' actually foresaw that the offence would be committed), or instead objective foreseeability of that likelihood (i.e. he ought to have foreseen that the crime was likely to be perpetrated). As the Supreme Court of Canada rightly pointed out in two celebrated decisions concerning constructive murder' (i.e. murder imputed to a person by law from his course of actions, though his deeds taken severally do not amount to voluntary murder), R. v. Vaillancourt (1987) and R. v. Martineau (1990), objective foreseeability constitutes a lower threshold.219 This threshold the Court in Vaillancourt considered admissible in cases of 'constructive murder', whereas in Martineau the same Court held the subjective test to be more consonant with principles of fundamental justice. Probably the later ruling was

219 See R. v. Vaillancourt, judgment of 3 December 1987, [1987] 2 S.C.R 636 (online: www.scc.lexum.umontreal.ca/1987/1987rcs2-636, at 24-29) and R. v. Martineau, judgment of 13 September 1990, [1990] 2 S.C.R 633 (online at: www.scc.lexum.umontreal.ca/1990/199rcs2-633, at 16-20). The facts in Vaillancourt are interesting. During an armed robbery, appellants accomplice shot and killed a client. He then escaped but the appellant was arrested and convicted of second degree murder (i.e. unlawful taking of human life with malice but without deliberation or premeditation) as a party to the offence. However, the two had previously agreed to commit the robbery armed only with knives; when on the night of the robbery the accomplice arrived with a gun, the appellant insisted that it be unloaded; the accomplice removed three bullets from the gun and gave them to the appellant, whose glove containing the three bullets was later recovered by the police at the scene of the crime. The Court upheld the appeal against conviction and ordered a new trial. As Judge L'Heureux-Dube later noted in his dissenting opinion in Martineau, "The facts themselves in Vaillancourt negated mens rea [...] Given these facts, it seems unlikely that Vaillancourt, or any reasonable person in his position, had reason to foresee that anyone would be killed in the course of the robbery' (at 29).
also dictated by the fact that under Canadian legislation a finding of murder entails a mandatory sentence of life imprisonment; it was therefore felt necessary to raise the threshold of culpability for any such finding. Be that as it may, it would seem that at the inter-national level the lower requirement of objective foreseeability is upheld by case law, as proved by the cases that I will consider below. In other words, at the international level what is required is not that the 'secondary offender' actually predicted that the 'primary offender' would engage in unconcerted criminal conduct; the test is rather whether a man of reasonable prudence would have forecast that conduct, under the circumstances prevailing at the time. Three reasons seem to warrant the acceptance of a lower threshold at the international level. First, the crimes at issue are massive and of extreme gravity; moreover, they are normally perpetrated under exceptional circumstances of armed violence. Under these circumstances one can legitimately expect that combatants and other persons participating in armed hostilities or involved in large-scale atrocities be particularly alert to the possible consequences of their actions. Secondly, the gravity of the crimes at issue makes it necessary for the world community to prevent and punish serious misconduct to the maximum extent allowed by the principle of legality. Thirdly, in ICL there is no fixed scale of penalties; courts are therefore free duly to appraise the level of culpability of the accused and impose a congruous sentence accordingly.

Some commentators have noted that the foreseeability standard on which this form of liability is based is unreliable, so much so that through such a standard—it has been claimed—the doctrine introduces a 'form of strict liability'. It has also been contended that this category of criminal enterprise disregards the necessity that a person be held guilty only if his culpability has been proven; or in other words, that the causal link between his conduct and mens rea on the one side, and the crime, on the other, be proved. Based on that doctrine, one would find a person guilty of, say, murder, even if that person lacked the requisite subjective element (intent or dolus) proper to the crime and only entertained a lesser form of mens rea (foreseeability plus willingly taking the risk that the crime be perpetrated; that is dolus eventualis). It would follow that the causal link between
mens rea and conduct on the one side and the event or crime, on the other, would be lacking. Thus—the objection continues—under certain conditions, one would place on a par the person who deliberately brought about the death of the victim with an individual who instead did not intend to cause such effect.

This objection is indisputably important, and can be met by propounding three arguments.

First, the foundation of this mode of responsibility is to be found in considerations of public policy; that is the need to protect society against persons who (i) band together to take part in criminal enterprises; and (ii) while not sharing the criminal intent of those participants who intend to commit more serious crimes outside the common enterprise, nevertheless are aware that such crimes may be committed; and (iii) do not oppose or prevent them. These policy considerations were aptly spelled out by the House of Lords in 1997, in two cases decided jointly, Regina v.

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220 For critical remarks about ICE, see in particular 1. D. Ohiin, 'Three Conceptual Problems with the Doctrine of joint Criminal Enterprise, 5/fC/(2007),69-90, in particular 75-88 (this paper is, however, marred by the insistence on the concept of conspiracy and a misapprehension of the relevant international case law); E. van Sliedregt, *joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, ibid., 184-207, particularly 187-91; K. Ambos, *joint Criminal Enterprise and Command Responsibility*, ibid., 159-83.

Less significant is the objection frequently heard whereby the category of ICE under discussion in fact amounts to, or is equally objectionable as, the common law concept of 'felony-murder'. Such concept, still widespread (albeit on the wane) in such countries as the UK, some states of the USA, New Zealand and certain Australian states, is substantially different from JCE. As first enunciated by Coke in 1797 (E. Coke, The Third Part of the Institutes of the Laws of England, London: Clarke and Sons, 1817, at 56), the concept entails that if an unlawful act involves the perpetration of murder, then the individual is guilty of murder (in the celebrated example by Coke, if a person (A), intending to steal a deer in the park of another person (B), throws an arrow at the deer but in so doing kills a boy hidden in a bush, he is guilty of murder 'for that act was unlawful, although A. had no intent to hurt the boy, nor knew not of him'). The concept has been widely criticized for it equates manslaughter (involuntary killing) to murder i.e. intentional killing of another person. In the case of the ICE we are discussing the secondary offender not only is involved in a common criminal plan or purpose to commit some crimes and has the intention to commit those crimes, but also actually foresee sees (or is in a position to foresee) the likely perpetration of a further crime by a member of the criminal group, and nevertheless deliberately accepts the risk of such likelihood. There is therefore here a mental element present with regard to the perpetration of the 'extra crime' (dolus eventualis) that is instead absent in the felony-murder or, if present, then only in the attenuated form ofculpa (negligence). In the case of 'felony-murder' the agent does not figure out at all the possibility of killing a person as a result of his engaging in an unlawful action such as theft; instead in the category of ICE we are discussing the agent is aware (or at least is fully in a position to be aware) that a crime may be perpetrated by another person and deliberately omits to take action (i.e. to stop or prevent that person from perpetrating the crime, or to disassociate himself from that criminal conduct). In addition, the concept of ICE can only be relied upon on condition that the lesser culpability of the secondary offender shall be taken into account at the sentencing stage.
Powell and another and Regina v. English, although the cases concerned crimes committed at the domestic level. The speeches of Lords Steyn and Sutton are enlightening. In their view by punishing the 'secondary-offender' the

221 In the first case, P., D., and a third man went to the home of a dealer in cannabis. As soon as he opened the door, one member of the group shot him and he died shortly afterwards. The defendants were charged with murder on the basis of joint enterprise. At the trial P. gave evidence and claimed that he was present at the scene only to buy cannabis. D. did not give evidence, but it was submitted on his behalf that he was unaware of the presence of the gun until it was used and that P. was responsible for the shooting. Both defendants were convicted of murder. The Court of Appeal (Criminal Division) dismissed both defendants' appeals.

In the second case, the defendant, E., aged 15 at the time of the offence, and W. were convicted of the murder of a police sergeant on the basis of joint enterprise. Both the defendant and W. had attacked the deceased with wooden posts. At the trial it was the Crown's case that the defendant was present when W. produced the knife with which the fatal injuries were inflicted. It was maintained on the defendant's behalf that there was evidence that he had fled the scene before W. produced the knife. The Court of Appeal (Criminal Division) dismissed, however, E.'s appeal.

222 His Lordship stated the following: 'At first glance there is substance in the third argument (of counsel for the Appellants) that it is anomalous that a lesser form of culpability is required in the case of a secondary party, viz. foresight of the possible commission of the greater offence, whereas in the case of the primary offender the law insists on proof of the specific intention which is an ingredient of the offence. This general argument leads, in the present case, to the particular argument that it is anomalous that the secondary party can be guilty of murder if he foresees the possibility of such a crime being committed while the prima can only be guilty if he has an intent to kill or cause really serious injury. Recklessness may suffice in the case of the secondary party but it does not in the case of the primary offender. The answer to this supposed anomaly, and other similar cases across the spectrum of criminal law, is to be found in practical and poll considerations. If the law required proof of the specific intention on the part of a secondary party, the utility of the accessory principle would be gravely undermined. It is just that a secondary party who foresees the primary offender might kill with the intent sufficient for murder, and assists and encourages the primary offender in the criminal enterprise on this basis, should be guilty of murder. He ought to be criminal liable for harm which he foresaw and which in fact resulted from the crime he assisted and encouraged. But it would in practice almost invariably be impossible for a jury to say that the secondary party wanted death to be caused or that he regarded it as virtually certain. In the real world proof of an intention sufficient murder would be well nigh impossible in the vast majority of joint enterprise cases. Moreover, the propos change in the law must be put in context. The criminal justice system exists to control crime. A prime function of that system must be to deal justly but effectively with those who join with others in criminal enterprises. Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed a) cannot be abolished or relaxed. For these reasons I would reject the arguments advanced in favour of a revision of the accessory principle' (8).

223 My Lords, I recognise that as a matter of logic there is force in the argument advanced on behalf of appellants, and that on one view it is anomalous that if foreseeability of death or really serious harm is not sufficient to constitute mens rea for murder in the party who actually carries out the killing, it is insufficient to constitute mens rea in a secondary party. But the rules of the common law are not based solely on lo; but relate to practical concerns and, in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public against criminals operating in gangs. As Lord Salmon stated in Reg. v. Majewski (1977) A.C. 443,482e, in rejecting criticism based on strict logic of a rule of the common law, "this is the view that has been adopted by the common law of England, which is founded on common sense and experience rather than strict logic". In my opinion there are practical considerations of weight a; importance related to considerations of public policy which justify the principle stated in Chan Wing-Sili The Queen 11985) A.C. 168 and which prevail over considerations of strict logic' (15).
law intends to convey the message that he should have opposed or impeded the crime of the 'primary offender'.

The second argument is more germane to strictly legal considerations. Generally speaking, one should not neglect an important factor: incidental criminal liability based on foresight and risk is a mode of liability that is consequential on (and incidental to) a common criminal plan; that is, an agreement by a multitude of persons to engage in illegal conduct. The 'extra crime' we are discussing is the outgrowth of previously agreed or planned criminal conduct for which each participant in the common plan is already responsible. This 'extra crime' is rendered possible by the prior joint planning to commit the agreed crime(s) other than the one 'incidentally' or 'additionally' perpetrated. Thus, what is at stake here is not the responsibility arising when members of a group (for instance, a military unit) engage in lawful action for example, overpowering by military force an enemy fortification) and in the course of combat one of the combatants kills a civilian or rapes a woman—a crime for which of course he alone must bear criminal responsibility. Our discussion here turns, rather, on cases where a plurality of persons agrees to perpetrate one or more crimes for which they all bear responsibility and in addition one of them commits a further crime. Here, it is plain, the additional crime is premised on the existence of a concerted criminal purpose. In other words, there exists a causal link between the concerted crime and the 'incidental' crime: the former constitutes the preliminary sine qua non condition and the basis of the latter (although, with regard to the latter, only the participant that evinced knowledge and risk-taking shares the liability of the other participant who perpetrated the 'additional' offence). To clarify further the nexus between the two categories of crimes at issue, it could perhaps prove useful to insist on the distinction between abstract and concrete (or specific) foreseeability, suggested above (9.4.4).\footnote{224}

\footnote{224 The fact that the incidental crime may be based on a nexus with the concerted crime was clearly emphasized by various courts. Suffice it to mention here the decision of the Italian Court of Cassation in D'Ottavio and others (decision of 12 March 1947). Two former Yugoslav war prisoners, who had escaped from a concentration camp, were suddenly surrounded by four local individuals near an Italian village. While one of them managed to flee, the other man was hit by two gunshots fired by D'Ottavio with his hunting rifle. The four aggressors then immediately left the scene. The injured man later died. The Teramo Court of Assize held that the accused had not intended to kill. With regard to the defendants other than D'Ottavio, it applied Article 116 of the Italian Criminal Code, providing that 'Where the crime committed is...
The third response to the objections under discussion is directed to emphasize that the basic proposition suggested here on the basis of existing case law (that any participant in a JCE is also guilty for acts by another participant, under the conditions set out in the case law) is premised on the proposition that at the sentencing stage one must, however, take into account the different degrees of culpability of the participants. The lesser form of mens rea of the 'secondary offender' shall be taken into account by meting out a lighter sentence than that inflicted on the participant who materially perpetrated the offence not envisaged in the criminal plan. Both participants are guilty, but the one who did not
materially perpetrate the further crime must receive a less stiff sentence on account of his lesser culpability.

(B) Limitations of the category at issue

There exist two important qualifications to the application of the third class of JCE under discussion.

First, resorting to such class would be intrinsically ill-founded when the crime committed by the 'primary offender' requires special or specific intent (dolus specialis), that is, the crime charged is one of genocide, persecution, or aggression (it is common knowledge that for genocide the intent to destroy a 'protected group' in whole or in part is required; persecution presupposes the intent to discriminate on one of the requisite grounds; aggression, at least in the opinion of some commentators, \(^ {225} \) is grounded in the intent to appropriate a foreign territory or to obtain economic advantages, or to interfere with the internal affairs of the victim state; see above, 7.3.3(B)). In these cases the 'secondary offender' may not share—by definition—that special intent (otherwise one would fall under the first and second class of JCE), even though entertaining such intent is a sine qua non condition for being charged with the crime. He may therefore not be accused of such crime under the doctrine at issue. This proposition is based on two grounds. First, on a logical impossibility: one may not be held responsible for committing a crime that requires special intent (in addition to the intent needed for the underlying crime) unless that special intent can be proved, whatever mode of responsibility for the commission of crimes is relied upon (this leaves out aiding and abetting, where it suffices to prove that the offender has made a substantial contribution to the commission of the crime by others, had knowledge of the crime, and intentionally provided assistance to its perpetration). Secondly, admittedly whoever is liable under the third category of JCE has a distinct mens rea from that of the 'primary offender'; nevertheless, as the 'secondary offender' bears responsibility for the same crime as the 'primary

offender,' the 'distance' between the subjective element of the two offenders must not be as drastic as in the case of crimes requiring special intent. Otherwise the crucial notions of 'personal culpability' and 'causation' would be torn to shreds.\footnote{In 2004 the ICTY AC took a contrary view in Brdanin, with regard to genocide, [in its Decision on Interlocutory Appeal of 19 March 2004 it held that 'provided that the standard applicable to that head of liability [the third category of JCE], i.e. "reasonably foreseeable and natural consequences" is established, criminal liability can attach to an accused for any crime that falls outside of an agreed upon joint criminal enterprise' (§9). It went on to say that "The Trial Chamber erred by conflating the mens rea requirement of the crime of genocide with the mental requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused' (§10). The AC thus reversed a prior decision of the TC (Brdanin, Decision for Acquittal Pursuant to Rule 98 bis, 28 November 2003), which had held (correctly, in my opinion) that the specific intent required for genocide 'cannot be reconciled with the mens rea required for a conviction pursuant to the third category of ICE. The latter consists of the Accused's awareness of the risk that genocide would be committed by other members of the JCE. This is a different mens rea and falls short of the threshold needed to satisfy the specific intent required for a conviction for genocide under Article 4(3)(a) (of the ICTY Statute)' (§57). In 2005, in Kvocka and others, the same AC limited the need for sharing the special intent to the first category of ICE. It 'affirmed' the Trial Chamber's conclusion that participants in a basic or systemic form of joint criminal enterprise must be shown to share the required intent of the principal perpetrators. Thus, for crimes of persecution, the Prosecution must demonstrate that the accused shared the common discriminatory intent of the joint criminal enterprise. If the accused does not share the discriminatory intent, then he may still be liable as an aider and abettor if he knowingly makes a substantial contribution to the crime' (§110). This proposition was taken up by an ICTR TC in Simba (at §388).} For such crimes the 'secondary offender' could only be charged—with aiding and abetting the main crime (needless to say, subject to the condition that the requirements of aiding or abetting the commission of one of the three classes of aforementioned crimes are met).

Let us now consider the second qualification to the application of the third class of JCE under discussion. Mature legal systems make it possible to take account of the lesser degree of culpability of the 'secondary offender' by qualifying his culpability through a charge less than that against the 'primary offender'. If the latter has engaged in murder while conducting a concerted unlawful deportation of civilians, the 'secondary offender' could be accused of manslaughter. This different charge would take into account the lesser degree of culpability of that offender. Unfortunately ICL is a rudimentary body); of law, which allows for such sophisticated distinctions or gradations only to a very limited extent. In short, one cannot charge a lesser offender with an offence belonging to a different category of international crimes; for instance, one cannot charge the 'primary offender' with murder as a crime against humanity and the 'secondary offender' with murder as a war crime. This would indeed be erroneous, for the two categories
show different features; the offences at issue belong either to one category (for instance, crimes against humanity) if the requisite conditions are met (chiefly, the existence of a context of widespread or systematic practice), or to the other. Furthermore, laying different charges within the same category of international crime is logically possible only with regard to some classes of underlying offences. As classes of offences where a gradation is possible, one can mention: murder and manslaughter (as a war crime, or a crime against humanity); willful killing (as a grave breach); and unlawful killing (as a war crime in an international armed conflict); rape and sexual violence (as a war crime or a crime against humanity); and torture and inhuman or degrading treatment (as a war crime or a crime against humanity). For other underlying offences it would seem difficult to apply such gradations of culpability and hence of charging.

(C) Case law

The first case where this category of ICE was raised is Tadic (Af, 1999). According to the Prosecution the TC had erred in finding that the accused could not be charged with the killing of five men in the village of Jalisic, when he participated in the attack on that village and the village of Sivci on 14 June 1992, because there was no evidence showing that he had killed or taken part in the killing of those five men. For the Prosecution 'the only conclusion reasonably open from all the evidence is that the killing of five victims was entirely predictable as part of the natural and probable consequences of the attack on the villages of Sivci and Jaskici on 14 June 1992' (§175). The Defence argued instead that the TC correctly found that 'it was a possibility that the five victims in Jaskici were killed by another, distinct group of armed men, especially as nothing [was] known as to who shot the victims or in what circumstances' (§176). As for the Prosecutions common purpose submission, the Defence contended that 'it would have to be shown that the common purpose in which the Appellant allegedly took part included killing as opposed to ethnic cleansing by other means' (§177).

227 This proposition is based on the assumption that grave breaches may only be committed in international armed conflicts, a position taken in 1995 by the ICTY AC in Tadić (IA), but probably no longer valid under current international customary law.
The AC upheld the Prosecution's submissions after engaging in an elaborate outline of the notion of common purpose or JCE in ICL.\footnote{228} Based on this notion, the AC found that in the case at issue the defendant had taken part in a common plan to commit inhumane acts against the non-Serb civilian population in the PriJedor region in 1992. He was an armed member of the armed group that took part in the attack and committed several crimes. He must have been aware 'that the actions of the group of which he was a member were likely to lead to [...] killings, but he nevertheless willingly took that risk' (§232). The AC therefore found the defendant guilty. Subsequently the TC, to which the case had been remitted for sentencing purposes, held that for the murder of the five Muslims, Tadic was simultaneously guilty of a grave breach, a war crime, and a crime against humanity. It sentenced him to 24 years' imprisonment for the grave breach and the war crime and 25 years for the crime against humanity, with the sentences to be served concurrently\footnote{229} (in its previous judgment, where the murder of the five Muslims had not been imputed to Tadic, the TC had sentenced him to 20 years' imprisonment).\footnote{230} The AC subsequently reduced the sentence to 20 years' imprisonment, both because it held the previous sentence to be excessive with regard to the relatively minor position of the accused, and because in its view 'there is in law no distinction between the seriousness of a crime against humanity and that of a war crime'. It was consequently wrong to consider the same offence as more grave if regarded as a crime against humanity than as a war crime.\footnote{231}

\footnote{228} With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category [...], personal knowledge of the system of the treatment is required (whether proved by express testimony fora matter of reasonable in view inference from the accuseds position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under thecircumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or are the members of the group and (ii) the accused willingly took that risk' (§228).

\footnote{229} 23 ICTY, TC, Sentencing Judgment, §§15-18,27-9 and 32 E and G.

\footnote{230} 24 ICTY TC, Sentencing judgment.

\footnote{231} 25 ICTY, AC, §§55-8.69 and 76(3).
The question of this category of criminal liability arose again in Krstic, although only tangentially, before the TC. The essential features of the category, as set out in Tadic (A), 1999) were restated by the ICTY AC in Vasiljevic (§99), Kvocka and others (§83), as well as in Babic (§27). In Stakic the AC, after reversing the TCs ruling based on the notion of co-perpetratorship’, held that the accused, in holding important positions such as President of the Crisis Staff, had participated in a JCE to commit crimes of persecution, forced displacement, and ill-treatment in detention camps against Muslims in the Prijedor area in Bosnia-Herzegovina. It then held that the accused bore criminal liability under the third category of JCE for crimes not agreed upon, namely killings in detention camps, transportation to camps of the non-Serb civilian population, and killings by the Serb armed military and police forces. The AC concluded that the accused was responsible under the third head of JCE for the crimes of murder (as a war crime and a crime against humanity) and extermination as a crime against humanity. It is notable that the Chamber insisted on the requirement of dolus eventualis and held, based on the findings of the TC, that this form of mens rea did exist in the case at issue (§§93-7).

An interesting application of the third category of JCE was made by an ICTY TC in Flago Jevic and fokic. After noting that where the objective of a JCE changes in time, a new and distinct JCE may be established, the TC pointed out that, with

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232 As pointed out above, the Chamber held that the defendant had participated in a JCE to commit genocide. Nevertheless, the Chamber relied upon the third category of criminal enterprise with regard to some crimes committed against the persons who had escaped the massacre. It held that it was not proved that various crimes committed against Muslims fleeing Srebrenica had been agreed upon in the criminal plan. The were nevertheless to be imputed to the defendant—so held the Chamber—because they were the foreseeable consequence of the policy of forcible expulsions that was part of the criminal plan: 'The Trial Chamber not, however, convinced beyond reasonable doubt that the murders, rapes, beatings and abuses committee against the refugees at Potocari were also an agreed upon objective among the members of the joint criminal enterprise. However, there is no doubt that these crimes were natural and foreseeable consequences of the ethnic cleansing campaign. Furthermore, given the circumstances at the time the plan was formed. General Krstic must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection. In fact, on 12 July, the VRS organised and implemented the transportation of the women children and elderly outside the enclave; General Krstic was himself on the scene and exposed to firstharni knowledge that the refugees were being mistreated by VRS or other armed forces' (§616)
the establishment of such new JCE a participant in the enterprise shall not incur responsibility for criminal acts beyond the scope of the enterprise in which he had agreed to participate, but only for those acts that are 'natural and foreseeable consequences', thereby falling under the third category of JCE (§701).

Finally, it should be mentioned that the ICTY AC has placed a broad interpretation on the category of JCE at issue. In 2004 in Brdanin it held that this category of JCE can also apply when acts of genocide are committed by the 'primary offender'. In 2006, in Karemera and others the ICTR AC held that this category of criminal liability can also cover crimes committed by fellow participants 'in a vast joint criminal enterprise' where crimes committed by the fellow participants are 'structurally or geographically remote from the accused.' The same view was taken in 2007 by the ICTY AC in Brdanit with regard to the category of JCE we are discussing (AJ, §§420-5).

3.14.5 THE QUESTION OF WHETHER THE 'PHYSICAL PERPETRATOR' SHOULD ALSO BE PART OF THE JCE

As we saw above (9.4.2(B)), in Brdanin the issue was raised of the relations between members of a JCE and persons not part to the JCE who nevertheless carry out crimes in execution of the JCE (deportation and forcible transfer of Bosnian Muslim or Croat civilians). The question is as follows: do such perpetrators (henceforth physical perpetrators) need to share the joint criminal purpose for the members of the JCE to be answerable for the crimes perpetrated? The TC answered in the negative (TJ, §§344-56), while the AC in the affirmative (AJ, §§410-19, 426-32). It is therefore appropriate to dwell on the question of the relations between members of a JCE and organized groups that commit crimes in execution of a common criminal purpose.

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233 Brdanin, Decision an interlocutory Appeal, at §§9-10.

234 ICTR AC, Karefnera and others. Decision on jurisdictional Appeals: Joint Criminal Enterprise, at §§11-18.
Normally members of a JCE make up fairly small groups and are persons operating at the same level, even though in different capacities. Hence no serious problem arises: each of them is responsible for the concerted criminal actions, even if such actions are performed only by one member of the JCE. However, there may be cases where the members of the JCE constitute a larger group and form part of a hierarchically constituted organization or structure. This is typically the case for ICE II (participation in a common criminal plan within an institutional framework). Here, however, only those who knowingly make a substantial contribution to the pursuit of common criminal purposes are personally liable. Hence for all of them it is required that they be part to the JCE. The problem becomes complicated when the criminal plan is agreed upon by a number of members of a political or military group, and one of these members carries out the common criminal purpose by ordering or instigating subordinate military units outside the JCE to commit some or all of the crimes envisaged in the JCE.

One should distinguish between the legal position of (a) the member of the JCE that orders or instigates outsiders to commit the crimes; and (b) that of the other members of the JCE.

To my mind the member of the JCE ordering or instigating the commission of crimes may be responsible under two distinct heads of liability. He is responsible for (1) the JCE to commit other crimes that may have been perpetrated by himself as well as other members of the JCE; and for (2) ordering and instigating the crimes perpetrated by the subordinates. These subordinates need not, of course, share the common criminal purpose (this is what occurred in Brdanin, according to the TC, which rightly found the defendant guilty of ordering and instigating the crime 'of deportation and forced expulsion of Bosnian Muslims and Croats, perpetrated by the army: §§359-69). If brought to trial, such subordinates are liable for the perpetration of the crime at issue.

Let us now move on to situation (b). Here the following question must be asked: does a member of the JCE other than the member that orders or instigates
subordinate troops or paramilitary units or police officers (not part to the JCE) to perpetrate crimes in consonance with the criminal purposes agreed by members of the JCE, bear responsibility for the crimes perpetrated by the executioners? The answer may only be given in light of general principles of international criminal law, in particular the principle of personal criminal responsibility (indeed the judicial precedents relied upon by the AC in Brdanin (A) 99393-404) are not germane to the question under discussion). \(^{235}\) In accordance with these principles the member of the JCE may only be held responsible for those crimes if(i) when concerting the crime to be perpetrated in execution of the JCE he had agreed to the physical perpetration of crimes by persons who, albeit outside the JCE, could, however, act upon the orders of one of the members of the JCE (in this case JCE I would be applicable); or (ii) he anticipated the risk that another member of the JCE might order or instigate persons outside the JCE to perpetrate crimes and willingly ran that risk (ICE III). It would not be sound to

\(^{235}\) They are two cases brought before US Military Tribunals sitting at Nuremberg: Alstotter and others (so-called Justice case) and Greifelt and others (so-called RL'SHA case). As the AC admitted in Brdanin (AI, 6393), in neither case did the Tribunals use the expression ICE'. What matters, however, is that neither Judgment relied upon the notion of JCE. In the former, faced with crimes planned, ordered or committed by member? ur the Ministry of Justice, the Tribunal adopted traditional notions of criminal responsibility, as is apparent from the following passage: 'The defendants are not now charged with conspiracy as a separate and substantive offense, but it is alleged that they participated in carrying out a governmental plan and program for the persecution and extermination of Jews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency. Some of the defendants took part in the enactment of laws and decrees the purpose of which was the extermination of Poles and Jews in Germany and throughout Europe. Others, in executive positions, actively participated in the enforcement of those laws and in atrocities, illegal even under German law, in furtherance of the declared national purpose. Others, as judges, distorted and then applied the laws and decrees against Poles and Jews as such in disregard of every principle of judicial behavior. The overt acts of the several defendants must be seen and understood as deliberate contributions toward the effectuation of the policy of the Party and State. The discriminatory laws themselves formed the subject matter of war crimes and crimes against humanity with which the defendants are charged. The material facts which must be proved in any case are: (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime' (1063; emphasis added). The reason why the Tribunal did not discuss the mental state of those who executed death sentences and other criminal acts agreed upon and planned by the defendants is simply that those executioners so acted following orders by the defendants: who were hence responsible not for ICE to commit persecution but for ordering persecution. Similarly in Greifelt and others the Tribunal convicted the defendants of ordering and instigating the kidnapping of children of foreign nationals, taking away foreign infants, executing in concentration camps foreigners and so on. As the Tribunal put it: 'it is no defense for a defendant to insist, for instance, that he never evacuated populations when orders exist, signed by him, in which he directed that the evacuation should take place. While in such a case the defendant might not have actually carried out the physical evacuation in the sense that he did not personally evacuate the population, he nevertheless is responsible for the action, and his participation by instigating the action is more pronounced than that of those who actually performed the deed' (153).
hold the member at issue liable even when the agreement (or consent) or the anticipation and deliberate taking of risk are lacking. In such case the basic pre-condition of liability for JCE would be lacking, and to hold the member responsible for the crimes committed by the physical perpetrator would be contrary to the principle of personal criminal responsibility. Of course, also in the case I have just discussed the member of the JCE that ordered or instigated subordinates is responsible for ordering and instigating the crimes, although he did so in consonance with or in execution of a JCE (which in this respect would not be relevant to the establishment of guilt of the accused, whereas it might perhaps have some relevance to the setting of penalty).

3.14.6 THE DIFFERENCE BETWEEN ICE AND AIDING AND ABETTING

It has been objected that the doctrine of JCE does not clearly distinguish between the responsibility of a participant in JCE and that of an aider and abettor. Moreover, that doctrine would even go so far as to foist a greater weight upon a person responsible for aiding and abetting than on a participant in a JCE. In fact a major difference between the two categories of persons does exist. It lies in their respective mens rea (as for actus reus, in both cases a 'substantial' contribution is required, as I shall point out below with regard to JCE). The participant in a JCE (i) takes part in a common criminal plan or purpose and shares a common intent to perpetrate a crime (murder, forced expulsion, persecution, and so on); or (ii) by willingly and knowingly participating in an institutional criminal framework, expressly or implicitly evinces his sharing the criminal conduct in which that institutional framework engages; or else (iii) in addition to adhering to a criminal plan and sharing the intent to commit a crime, willingly runs the risk that another participant may intentionally perpetrate a further crime that the former had foreseen.

In contrast, as we shall see when discussing aiding and abetting (see infra, 10.1), he who aids and abets does not share, either at the outset or later, the criminal

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236 For a similar view, see the Partly Dissenting opinion of fudge Shahabuddeen in Brdanin (AJ) (§§4 The contrary view is advanced by judge Meron in his Separate Opinion in the same case (513-8)
intent of the perpetrator, although he is cognizant that the perpetrator intends to commit a crime; the aider and abettor only intends to assist the perpetrator in the commission of a crime. This is why, in principle, the criminal liability of the aider and abettor is more tenuous (or less weighty) than that of a participant in a common criminal enterprise. As the ICTY AC put it in a number of cases, aiding and abetting 'generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise'.

It should be added that, according to ICTY case law, it would be wrong to speak of 'aiding and abetting a JCE', for whenever a person intends to assist in the commission of crimes by a group of persons involved in a JCE, that person should more correctly be held liable for participation in the JCE.

3.14.7 TO WHAT EXTENT CAN THE ICC RELY UPON THE DOCTRINE OF JCE?

The ICC Statute does not contain a provision that regulates JCE in detail as a mode of responsibility. That such form of criminal liability is implicitly permitted under the Statute can however be inferred from Article 25(1), which generically stipulates that:

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

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
(ii) Be made in the knowledge of the intention of the group to commit the crime' (emphasis added)

237 Krnojelac (Af, §75), Vasiljevic (A), §102), Krotka and others (A], §92).

238 ICTY AC, MilutinovU and others. Decision on Dragoliub OjdanU's Motion Challenging Jurisdiction of JCE, §20; Kvotha and others (A], §91).

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

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
(ii) Be made in the knowledge of the intention of the group to commit the crime' (emphasis added)
states that criminal responsibility for any of the crimes covered by the Statute is incurred by anybody 'committing a crime' 'jointly with another person'. This provision, in addition to co-perpetration (the same crime is committed by a plurality of persons, who perform the same criminal act; see above, 9.3), also covers JCE. However, the ICC Statute goes further, for, although in envisaging a different mode of liability (outsider's contribution to a JCE; see below), it explicitly refers to the 'commission or attempted commission of such a crime [within the jurisdiction of the Court] by a group of persons acting with a common purpose' (Article 25(3)(d)).

As for the mens rea required for ICE under the Statute, one can refer to the general provision of Article 30 (on the mental element of the crimes covered by the Statute), which requires 'intent or knowledge'. Should one hold the view that consequently the Statute of the ICC always requires intent as the necessary subjective element necessary for a finding of criminal liability, whatever the mode of responsibility, it would follow that the ICC, while generally empowered to rely upon the doctrine of JCE, would be barred from applying the third category referred to above. 240

However, Article 30, before setting out the two mental elements of intent or knowledge, contains a general clause ('unless otherwise provided') that leaves other subjective frames of mind unaffected, so long as they are provided for or required by other provisions of the Statute or by customary international law. 241 Hence the contention can be made that dolus eventualis or recklessness for the third form of the JCE is not excluded by the ICC Statute.

This interpretation would be justified by the need to punish criminal conduct that otherwise would not be regarded as culpable. In addition, it would not be contrary to the principle of personal culpability, for in any case the person at issue (i) would be guilty of intentionally participating in a criminal purpose or plan; (ii) his

240 It would seem that this is the view taken by the ICC Pre-Trial Chamber in Lubanga (§§322-67).

mens rea concerning the additional, not previously concerted crime, would have to be proved by the Prosecution; and (iii) his lesser culpability would have to be taken into account at the sentencing stage.

It should be added that, contrary to what various authors, including the present one, have either implicitly or expressly contended, the gist of Article 25(3)(d) is not the regulation of JCE but rather of a different mode of responsibility. This consists in the fact that a person outside the criminal group committing (or attempting to commit) a crime contributes to the perpetration of such crime without being a member of the criminal group. It would seem that such contribution is different from aiding and abetting. Indeed, the aider and abettor intends to assist in the commission of a crime by others but does not share the criminal intent of the perpetrator (see 10.1 and 9.4.6). Here, instead, the 'outside contributor' either (a) intends to further the criminal action (hence is aware of and shares the criminal intent of the group), or (b) simply knows, that is, is aware of, the criminal intent of the group. In the former instance, the 'outside contributor', by sharing the criminal intent of the group only distinguishes himself from members of the JCE in that he is not part of the criminal agreement (neither at the moment when such agreement is made nor later). In the latter instance, that is in the category (b), the 'outside contributor' distinguishes himself from the aider and abettor only in that he aides and abets a whole criminal group (that is, a multiplicity of persons) and not a single perpetrator. Otherwise, there is no distinction between the two classes of persons assisting in the commission of crimes by others.

Probably the inclusion of this new mode of liability is justified by its origin, namely the fact that the provision was taken up from Article 2(3) of the 1997 International Convention on the Suppression of Terrorist Bombing. The needs of the fight

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On Article 25(3)(d) see also K. Ambos in O. Triffterer (ed), Commentary, at 483-6 as well A. Eser, Cassese, Gaeta, fones (eds), The Rome Statute, 1,802-3.
against widespread and increasingly dangerous terrorist criminality warranted the expansion of responsibility to these forms of 'external assistance'. The ICC Statute rather uncritically restated that provision of the Terrorist Bombing Convention.243

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243 The category of 'outsider contributor' to ICE is in some respects not dissimilar from the category 'external participation in mafia crimes' (concorso esterno in associazione mafiosa), set forth by Italian cou (see P. L. Vigna, 'Fighting organized Crime, with particular reference to Mafia Crimes in Italy, in 4 /J (2006), 526-7; according to this author the criminal offence at issue covers cases where a person, although not a part and parcel of the structure of a criminal organization and free from any link of subject to the association, nevertheless provides the association with a contribution which is specific, conscious and voluntary. Such contribution must however be causally relevant to the strengthening of the criminal association and aimed at the implementation (albeit partial) of the criminal plan.' (ibidem).