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JOINT CRIMINAL ENTERPRISE AND THE CONTROL THEORY: HIGH-LEVEL LEADERS AS PRINCIPALS OF CRIME

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Abstract

This paper explores the nature of principal liability in international criminal law. In prosecuting high-level leaders most responsible for crimes, both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) have used modes of principal liability to convict high-level leaders. In examining the elements of joint criminal enterprise (JCE) and the control over the crime theory (control theory), this paper seeks to identify steps for the ICC to take in its future prosecutions. Whilst the ICC's control theory is an appropriate mode of liability for the conviction of high-level leaders, the ICC must justify its recourse to the control theory. This paper questions whether the ICC can use the control theory as a source of law, identifies aspects of the ICC's jurisprudence that should be clarified, and looks at indirect co-perpetration as a future tool of principal liability. If these steps are taken, the ICC can on more justified grounds continue its mission of ending impunity for high-level leaders.

Word count

The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises approximately 15,000 words.

List of Abbreviations Used

ECCC = Extraordinary Chambers in the Courts of Cambodia

UCP = Union of Congolese Patriots

FNI = *Front des Nationalistes et Intégrationnistes*

FRPI = *Force de Résistance Patriotique de l'Ituri*

ICC = International Criminal Court

ICTR = International Criminal Tribunal for the Former Rwanda

ICTY = International Criminal Tribunal for the former Yugoslavia

JCE = Joint Criminal Enterprise

SCSL = Special Court of Sierra Leone

SPSC = East Timorese Special Panel for Serious Crimes

STL = Special Tribunal for Lebanon

I Introduction

Classifying orchestrators of mass atrocity as accessories is entirely wrong – "almost backward, in fact".[1] The idea of individuals most responsible for crimes being convicted accomplices is untenable:[2]

> One especially evocative image drives the process. For many, the dilemma is that the application of everyday rules of criminal attribution leads to Hitler's conviction as an accomplice to the Holocaust.

International criminal law should seek to label high-level leaders as principals. The two dominant modes of principal liability used to convict high-level leaders are the doctrine of joint criminal enterprise (JCE) and the control over the crime theory (control theory). The International Criminal Court (ICC) has adopted the control theory in its approach to prosecuting high-level leaders, but this reliance on the control theory has been questioned by judges and scholars alike.[3] What are the most appropriate steps for the ICC to take in its future prosecutions?

The following paper seeks to answer this by examining the elements of JCE and the control theory. Part II begins by identifying the task of international criminal law and the qualities that any theory inculpating high-level leaders should have. Parts III and IV identify the utility of and problems with JCE and the control theory respectively. Part V is future-focussed and aims to identify feasible steps that the ICC could take in its jurisprudence. International criminal law still requires a coherent basis for attributing responsibility.[4]

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1 Mark Osiel *Making Sense of Mass Atrocity* (Cambridge University Press, Cambridge, 2009) at 85.

2 James Stewart "The End of 'Modes of Liability' for International Crimes" (2012) 25 Leiden Journal of International Law 165 at 167.

3 See *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*) ICC Trial Chamber II, ICC-01/04-02/12, 18 December 2012 at [5]; *Prosecutor v Thomas Lubanga Dyilo (Separate Opinion of Judge Fulford)* ICC Trial Chamber I ICC-01/04-01/06, 14 March 2012 at [6]; Marina Aksenova "The Modes of Liability at the ICC: The Labels that Don't Always Stick" (2015) 15 International Criminal Law Review 629 at 630; and Gerhard Werle "Individual Criminal Responsibility in Article 25 of the ICC Statute" (2007) 5 Journal of International Criminal Justice 953 at 959.

4 Neha Jain *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Hart Publishing, Oregon, 2014) at 9.

II Combatting Impunity

Impunity undermines the purpose of international criminal law. Impunity is a failure to investigate, prosecute, and charge individuals guilty of serious violations of law. This undermines the rights of victims, weakens state institutions, and even degrades human values.[5] For these reasons, international criminal law seeks to hold individuals responsible for mass atrocity. Domestic courts are primarily charged with prosecuting such individuals.[6] International judicial bodies may, however, prosecute individuals where domestic courts cannot.[7] The development of international judicial bodies has increased international law's relative ability to respond to and prosecute serious violations of law.[8] This paper narrows its focus to two of these bodies: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICC.

A Prosecuting Individuals Who Are "Most Responsible"

The ICTY focuses on prosecuting "the most senior leaders suspected of being most responsible for crimes committed within the jurisdiction of [the ICTY]".[9] Similarly, the ICC concentrates its indictments on "those who bear the greatest responsibility for crimes". Both the ICTY and the ICC seek to combat the impunity of a particular type of defendant: those most responsible for mass atrocity. This begs the question: which individuals in any instance of mass atrocity are those most responsible? What type of defendant should the prosecutorial policy of an international judicial body concern itself with?

1 High-level leaders

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5 Brussels Group for International Justice "Brussels Principles Against Impunity and For International Justice" (paper presented to the Fight Against Impunity: Stakes and Perspectives, March 2002).

6 Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), preamble [Rome Statute].

7 Markus Benzing "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity" (2003) 7 Max Planck Yearbook of United Nations 591 at 599.

8 See Payam Akhavan "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" (2001) 95 American Journal of International Law 7 at 31; and Antonio Cassese "The Role of Internationalised Courts and Tribunals in the Fight Against International Criminality" in Cesare Romano, Andre Nollkaemper and Jann Kleffner *Internationalised Criminal Courts and Tribunals* (Oxford University Press, Oxford, 2004) at 3.

9 *International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)* SC Res 1534, S/Res/1534 (2004) at 5.

The answer of the ICTY and the ICC is that leaders who occupy the upper echelons of power are those most responsible. The ICC focuses on prosecuting "those who bear the greatest responsibility, such as leaders of the State or organisation allegedly responsible for those crimes".[10] One reason for this is that whilst one physical perpetrator can cause considerable harm, an influential leader can cause thousands of physical perpetrators to do far greater harm.[11] The position of responsibility that an individual occupies indicates their level of responsibility. A former ICTY Prosecutor identified that individuals most responsible are generally the highest political, military, paramilitary or civilian leaders in the State atrocities were committed in.[12] High-level leaders may command military units, rebel groups operating outside the control of a government, or other groups acting under a policy.[13] To this extent, high-level leaders are those "most responsible" through the power they exert over others.

Prosecuting leaders as opposed to physical perpetrators is also more practical. Mass atrocity cannot be committed without the participation of a large number of ordinary people.[14] In cases of large-scale violence, ordinary citizens may comply with or submit to brutality.[15] Not all perpetrators of serious violations of law can be tried at international tribunals. The ICC Prosecutor has stated that it is not feasible to bring charges against all apparent perpetrators.[16] By way of example, it is estimated that 200,000 people participated in the perpetration of the Rwandan genocide.[17] This does not mean that less important or low-level perpetrators should enjoy impunity. Instead, low-level perpetrators should be

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10 *Paper on some policy issues before the Office of the Prosecutor* International Criminal Court ICC-OTP-2003, September 2003 at 7.

11 Jo Stigen *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers, Boston, 2008) at 370.

12 Carla Del Ponte "Prosecuting the Individuals Bearing the Highest Level of Responsibility" (2004) 2 Journal of International Criminal Justice 516 at 517.

13 Attila Bogdan "Individual Criminal Responsibility in the Execution of a 'Joint Criminal Enterprise' in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia" (2006) 6 International Criminal Law Review 63 at 64.

14 Jain, above n 4, at 8.

15 Laurel Fletcher "From Indifference to Engagement: Bystanders and International Criminal Justice" (2005) 26 Michigan Journal of International Law 1013 at 1026.

16 *Informal Meeting of Legal Advisors of Ministries of Foreign Affairs (Statement by Luis Moreno-Ocampo)* ICC Office of the Prosecutor, 24 October 2005 at 5.

17 Scott Straus "How Many Perpetrators Were There in the Rwandan Genocide? An Estimate" (2006) 6 Journal of Genocidal Research 85 at 95.

transferred to and charged by domestic courts.[18] For the ICTY and the ICC, the foremost concern is the basis on which the actions of low-level perpetrators can be attributed to a high-level leader.[19]

2 Three examples of mass atrocity

Large-scale and serious violations of international humanitarian law can occur in a number of ways. The "most serious crimes of concern to the international community as a whole"[20] inevitably involve collective criminality.[21] Three examples of mass atrocity are outlined below. These three examples show that high-level leaders may be remote from a crime scene, high-level leaders may smokescreen their actions, and high-level leaders may need to collaborate in order to organise the perpetration of serious crimes.[22]

The genocide committed in Srebrenica in July 1995 (Srebrenica genocide) is an example of mass atrocity committed with the assistance of a high-level leader remote from the crime. In the Srebrenica genocide, over 25,000 Bosnian Muslims were forcibly transferred out of Srebrenica in pursuit of a common plan.[23] Subsequently, between 7,000 and 8,000 Bosnian Muslims were executed.[24] These executions were not a part of the commonly agreed plan to forcibly transfer civilians, but were a natural and foreseeable consequence of the common plan.[25] Radislav Krstic, was the Chief of Staff and Deputy Commander of the Drina Corps.[26] There was insufficient evidence to show that Radislav Krstic was present at the execution sites: instead, Radislav Krstic was engaged in other military activities.[27] Nevertheless, a phone conversation between Radislav Krstic and a subordinate demonstrated that Radislav Krstic knew that executions were taking place and that Radislav

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18 *Letter dated 16 November 2015 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council* SC Res 874, S/Res/874 (2015) at 43.

19 Osiel, above n 1, at 16.

20 Rome Statute, preamble.

21 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)*, above n 3, at [501].

22 Jens Ohlin, Elies van Sliedregt and Thomas Weigend "Assessing the Control Theory" (2013) 26 Leiden Journal of International Law 725 at 735.

23 *Prosecutor v Radislav Krstic (Judgment)* ICTY Trial Chamber IT-98-33-T, 2 August 2001 at [615].

24 At [720].

25 At [616].

26 At [298].

27 At [377] and [378].

Krstic undertook to assist the subordinate in obtaining additional men to carry out the executions.[28] Radislav Krstic contributed to the crime by identifying a particular group of additional men that could be used, and by undertaking to send these men to the site of the executions.[29] High-level leaders who contribute to a crime may be remote from the physical commission of that crime.[30] To this extent, high-level leaders may provide assistance from afar without physically perpetrating crimes.[31]

Argentina's dirty war is an example of mass atrocity committed in an arbitrary and spontaneous manner.[32] During Argentina's dirty war, at least 15,000 people were murdered. Mark Osiel notes that a recurring theme of this war was that high-level leaders suppressed the political and social activities of citizens.[33] In addition, some high-level leaders deliberately planned arbitrary actions in order to smokescreen their plans.[34] Argentina's dirty war shows that high-level leaders may employ a deliberate policy of spontaneity. Another characteristic of this war was that senior officers and junior officers alike were involved in mass murder. These junior officers had a considerable degree of autonomy in their actions.[35] Argentina's dirty war is an apt example of mass atrocity where some senior officers had control over their subordinates whereas others did not.

Crimes committed by high-level leaders may require collaboration. As a result, a high-level leader may not exercise direct influence over a physical perpetrator nor share intent with them. The crimes committed by Germain Katanga and Mathieu Ngudjolo Chui are an excellent example of such combined leadership.[36] Germain Katanga was the military leader of a Ngiti group known as the *Force de Résistance Patriotique de l'Ituri* (FRPI).[37] Germain Katanga's leadership was improvised and his army has an ill-defined hierarchical

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28 At [385].

29 At [387].

30 Stefano Manacorda and Chantal Meloni "Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?" (2011) 9 Journal of International Criminal Justice 159 at 160.

31 Elies van Sliedregt *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (TMC Asser Press, The Hague, 2003) at 113.

32 Osiel, above n 1, at 88.

33 Mark Osiel "Constructing Subversion in Argentina's Dirty War" (2001) 75 Representations 119 at 125.

34 At 126.

35 Osiel, above n 1, at 102.

36 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)* ICC Pre-Trial Chamber I ICC-01/04-01/07, 30 September 2008 at [519].

37 At [6].

structure.[38] Mathieu Ngudjolo Chui was a colonel of a Lendu group known as the *Front des Nationalistes et Intégrationnistes* (FNI).[39] Germain Katanga and Chui's combined troops murdered the civilian population of Bogoro village, destroyed properties, and committed rapes and killings.[40] The distinction between Ngitis and Lendus made it unlikely that combatants would comply with the orders of a leader who was not of the same ethnicity.[41] Because of this, the atrocities committed could only have been perpetrated by the combined forces of the FRPI and the FNI.

The ICC sought to hold Germain Katanga responsible for the combined conduct of FRPI and FNI forces. This was the case even though Germain Katanga himself did not exercise direct influence over a member of Mathieu Ngudjolo Chui's forces nor share any intent with them.[42] The charges against Mathieu Ngudjolo Chui were subsequently dropped, and Germain Katanga was later convicted of a lesser form of accessorial liability for all crimes excluding rape and sexual slavery.[43] Nevertheless, this example of combined leadership shows that high-level leaders must sometimes collaborate in order to commit atrocity. As a result, high-level leaders may only indirectly influence the physical commission of crims. Together, these three examples give a practical basis to the following analysis of an appropriate mode of high-level leader liability.

B An Appropriate Mode Of High-Level Leader Liability

Both the ICTY and the ICC seek to prosecute high-level leaders. Part 1 will analyse whether leaders of the highest echelons should be labelled as principals of or accessories to a crime, concluding that such leaders must be labelled as principals. Part 2 will analyse whether command responsibility provides for an appropriate mode of liability, concluding that command responsibility does not adequately reflect the culpability of high-level

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38 *Prosecutor v Germain Katanga (Judgment)* ICC Trial Chamber II ICC-01/04-01/07, 7 March 2014 at [1420]; and Gerhard Werle and Boris Burghardt "Indirect Perpetration: A Perfect Fit for International Prosecution of Armchair Killers? Foreword" (2011) 9 Journal of International Criminal Justice 85 at 89.

39 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)*, above n 36, at [9].

40 At [568].

41 At [519].

42 Elinor Fry "International Criminal Court" (2013) 31 Netherlands Quarterly of Human Rights 217 at 220.

43 *Prosecutor v Mathieu Ngudjolo Chui (Judgment Pursuant to Article 74 of the Statute)* ICC Trial Chamber II ICC-01/04-02/12, 18 December 2012 at [197]; and *Prosecutor v Germain Katanga (Judgment)*, above n 36, at [1693].

leaders. Part 3 will identify the elements of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute) and the Rome Statute of the International Criminal Court (Rome Statute).[44] Part 4 will discuss the tension between individual criminal responsibility and convicting high-level leaders before Part 5 identifies the current status of principal liability for high-level leaders.

1 Principals, not accessories

There are a number of ways to attribute criminal responsibility to a high-level leader. An argument can be made that the exact label attached to an accused is irrelevant so long as defendants are held accountable and punished equally.[45] In this vein, Judge Van den Wyngaert rejects the proposition that there is an inherent difference in guilt or blameworthiness between principals and accessories. Her Excellency, in a Concurring Opinion in *Prosecutor v Mathieu Ngudjolo Chui (Judgment)*, held that there is no inherent difference in blameworthiness between abetting a crime and committing a crime.[46] Her Excellency reasoned that the blameworthiness of a defendant depends on the factual circumstances of a case as opposed to abstract legal categories. Her Excellency held:[47]

> I fail to see an inherent difference in blameworthiness between aiding and abetting and committing a crime. I do not believe that the foot soldier who participated in a mass killing (Article 25(3)(a)) is necessarily more blameworthy than the army general who aided and abetted the same killing (Article 25(3)(c)).

Judge Van den Wyngaert's argument ignores a number of important considerations. International judicial bodies concentrate their prosecutions on high-level leaders as opposed to the physical perpetrators of mass atrocity.[48] The situation where a foot soldier is convicted and held by virtue of principal status more blameworthy than an army general is in the practice of international tribunals unlikely. More importantly, an army general who assists in a same killing could, depending on the factual circumstances of the case,

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44 *Statute of the International Criminal Tribunal for the Former Yugoslavia* SC Res 827, S/Res/827 (1993), art 7(1); and Rome Statute, art 25(3)(a).

45 Jain, above n 4, at 6.

46 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [24].

47 At [24].

48 *Informal Meeting of Legal Advisors of Ministries of Foreign Affairs (Statement by Luis Moreno-Ocampo)*, above n 16, at 5.

either come under the ambit of principal liability[49] or be brought under the doctrine of command responsibility.[50]

Some scholars argue that labels are unnecessary because the gravity of a crime can be taken into account at the sentencing stage.[51] The Rome Statute, however, does not provide for sentences based on the sub-article of art 25(3) that a defendant is convicted under. To this extent, the only basis for differences in sentencing is a judge's comprehension of the factual circumstances of the case.[52] A court cannot on Monday convict a defendant of aiding and abetting and on Tuesday convict another defendant of perpetration on substantively the same, or largely similar, facts.[53] To tell the latter defendant that it makes no difference whether they are convicted as a perpetrator or an accessory undermines the very existence of labelling.

A more sophisticated proposition is suggested by Neha Jain.[54] Neha Jain argues that statements of criminal responsibility fulfil a critical expressive function. Criminal responsibility fulfils this essential communicative function only if the status of the defendant in relation to a crime is accurately expressed.[55] This communicative function is more important in international than domestic courts given the power of international tribunals to create a historical record of wrongdoing and to advance a sense of accountability for flagrant human rights violations.[56] In addition, clearly communicating a defendant's level of responsibility may help to reduce the likelihood of future violence in international law.[57] By clearly labelling a mastermind of a crime as a principal, the law communicates to victims and to the international community who the 'real culprit' is.[58]

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49 Rome Statute, art 25(3)(a).

50 Rome Statute, art 28.

51 Stewart, above n 2, at 70; and *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [26].

52 Olena Kucher and Alesky Petrenko "International Criminal Responsibility After Katanga: Old Challenges, New Solutions" (2015) 3 Russian Law Journal 143 at 152.

53 Ohlin, Van Sliedregt and Weigend, above n 22, at 729.

54 Jain, above n 4, at 6.

55 At 7.

56 Mirjan Damaska "What is the Point of International Criminal Justice?" (2008) 83 Chicago Kent Law Review 329 at 330.

57 Alison Danner and Jenny Martinez "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law" (2004) 93 California Law Review 75 at 93.

58 Elies van Sliedregt *Individual Criminal Responsibility in International Law* (Oxford University Press, Oxford, 2012) at 74.

In the jurisprudence of international criminal courts, accessories are considered less blameworthy or responsible than perpetrators. ICTY sentencing practice shows that aiding and abetting are considered less blameworthy than direct perpetration.[59] By way of example, in *Prosecutor v Mile Mrksic Veselin Sljivancanin (Judgment)* the ICTY Appeals Chamber held that aiding and abetting are considered a "lower form" of liability than perpetrating a criminal enterprise.[60] In a similar manner, the ICC's Trial Chamber has explicitly affirmed the importance of principal liability's capacity to express a defendant's responsibility. In *Prosecutor v Thomas Lubanga Dylio (Judgment)*, the ICC held that principal liability has the "capacity to express the blameworthiness of those persons who are most responsible for the most serious crimes of international concern".[61] Principal liability is consistent with international criminal law's fight against impunity because it can label who is 'most responsible' for mass atrocity.

2 Command responsibility

Command responsibility (or superior liability) is a form of liability for omission. Command responsibility, despite being structurally appropriate to inculpate military[62] and civilian[63] leaders, does not adequately reflect the involvement of senior leaders in crime.[64] In *ad hoc* tribunals such as the ICTY, command responsibility is treated as an alternate, or fall-back, form of liability.[65] In a similar manner, the ICC Pre-Trial Chamber in *Prosecutor v Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b)* held that command responsibility and liability under art 25(3)(a) are different forms of criminal

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59 See *Prosecutor v Mitar Vasiljevic (Judgment)* ICTY Appeals Chamber IT-98-32-A, 25 February 2004 at [812]; *Prosecutor v Blagoje Simic (Judgment)* ICTY Appeals Chamber IT-95-9-A, 28 November 2006 at [265]; and Barbora Hola "International Sentencing Facts and Figures: Sentencing Practice at the ICTY and the ICTR" (2011) 9 Journal of International Criminal Justice 411 at 417.

60 *Prosecutor v Mile Mrksic Veselin Sljivancanin (Judgment)* ICTY Appeals Chamber IT-95-13/1-A, 5 March 2009 at [407].

61 *Prosecutor v Thomas Lubanga Dyilo (Judgment)* ICC Trial Chamber I ICC-01/04-01/06, 14 March 2012 at [999].

62 Rome Statute, art 28(a).

63 Article 28(b).

64 Manacorda and Meloni, above n 30, at 161.

65 See Kai Ambos *Treastie on International Criminal Law, Volume 1: Foundations and General Part* (Oxford University Press, Oxford, 2013) at 149.

responsibility.[66] The Pre-Trial Chamber held that an assessment of art 28 command responsibility is a secondary assessment to art 25(3)(a) principal liability.[67] A defendant who takes steps in committing a crime is likely to be charged under art 25(3)(a) instead of art 28.[68] In a similar manner, the Pre-Trial Chamber explicitly stated that commission of a crime under art 25(3)(a) is distinguished from "the responsibility of superiors under article 28 of the [Rome] Statute and any other forms of accessory, as opposed to principal, liability".[69]

Some scholars note that the sentences associated with command responsibility are disproportionately short or lenient.[70] Others argue that successful prosecutions under charges of command responsibility are challenging.[71] By way of example, the ICTY Appeals Chamber overturned the guilty conviction under command responsibility of two military leaders, despite the fact that the military leaders were aware that their troops would deport villages and commit murders in four areas.[72] Command responsibility is outside the scope of this paper as it is a form of liability for omission, therefore failing to sufficiently reflect the involvement of high-level leaders in crime.[73]

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66 *Prosecutor v Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* ICC Pre-Trial Chamber II ICC-01/05-01/08, 15 June 2009 at [405].

67 At [402] and [403]; and Kate Neilson "Ending Impunity: Bringing Superiors of Private Military and Security Company Personnel to Justice" (2011) 9 New Zealand Yearbook of International Law 121 at 125.

68 *Prosecutor v Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)*, above n 66, at [342]; and Chantal Meloni "Command Responsibility, Joint Commission and 'Control Over The Crime' Approach in the First ICC Jurisprudence" in Triestino Mariniello *The International Criminal Court in Search of Its Purpose and Identity* (Routledge, New York, 2015) at 50.

69 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)* ICC Pre-Trial Chamber I, ICC-01/04-01/06, 29 January 2007 at [320].

70 Christine Bishai "Superior Responsibility, Inferior Sentencing: Sentencing Practice at the International Criminal Tribunals" (2013) 11 Northwestern Journal of International Human Rights 83 at 84; and Osiel, above n 1, at 21.

71 Mark Harmon and Fergal Gaynor "The Sentencing Practice of the International Criminal Tribunals: Ordinary Sentences for Extraordinary Crimes" (2007) 5 Journal of International Criminal Justice 683 at 685.

72 *Prosecutor v Ante Gotovina, and Mladen Markac (Judgment)* ICTY Appeals Chamber IT-06-90-A, 16 November 2012 at [137].

73 Manacorda and Meloni, above n 30, at 161.

3 The ICTY Statute and the Rome Statute

As stated above, leaders in the highest echelons of power should be labelled as principals, and not as accessories or guilty by omission. This section will analyse whether the ICTY Statute and the Rome Statute are consistent with this proposition. Do these statutes allow high-level leaders to be convicted as principals? The ICTY Statute is less detailed than the Rome Statute. Article 7(1) of the ICTY Statute states that "a person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime" shall be individually responsible for the crime.[74] Article 7(1) of the ICTY Statute codifies the principle of personal culpability.[75] Article 7(1) of the ICTY Statute has nevertheless been interpreted to convict high-level leaders, under the doctrine of JCE, as principals. This interpretation of the sparse wording in art 7(1) is controversial.[76] The ICTY Statute has successfully, though not without an expansive reading of art 7(1), been used to convict high-level leaders as perpetrators.

Article 25(3) of the Rome Statute details various modes of criminal responsibility. The Rome Statute is relatively more precise in its codification of modes of liability than the ICTY Statute.[77] The Rome Statute is unique in international law as it recognises three types of perpetration: direct perpetration, joint perpetration, and indirect perpetration.[78] Article 25(3)(a) provides that a person shall be criminally responsible for a crime within the ICC's jurisdiction if that person:[79]

> "3(a). Commits a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible."

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74 *Statute of the International Criminal Tribunal for the Former Yugoslavia* SC Res 827, S/Res/827 (1993), art 7(1).

75 *Prosecutor v Dusko Tadic (Judgment)* ICTY Appeals Chamber IT-94-1-A, 15 July 1999 at [186].

76 See Jens Ohlin "Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise" (2007) 5 Journal of International Criminal Justice 69 at 76; Sofia Lord "Joint Criminal Enterprise and the International Criminal Court" (LLB dissertation, Stockholm University, 2013) at 12; Alexander Zahar and Goran Sluiter *International Criminal Law: A Critical Introduction* (Oxford University Press, Oxford, 2008) at 223; and *Prosecutor v Milan Martic (Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martic)* ICTY Appeals Chamber IT-95-11-A, 8 October 2008 at [4].

77 Robert Cryer and others *An Introduction to International Criminal Law* (3rd ed, Cambridge University Press, Cambridge, 2015) at 355.

78 Van Sliedregt, above n 58, at 74.

79 Rome Statute, art 25(3)(a).

Nevertheless, the Rome Statute does not explicitly provide the elements of principal liability for high-level leaders.[80] In this respect, art 25(3)(a) is "maddeningly vague".[81] The constituent elements of "jointly with another" (co-perpetration) or "through another person" (indirect perpetration) are unspecified: the Statute does not specify the substantive content of these modes of perpetration. Whilst an in-depth analysis of the origins of the ICC is outside the scope of the present paper, the drafting history of the Rome Statute may shed light on art 25(3).

(a) The drafting history of art 25(3)(a) of the Rome Statute

The drafting history of the Rome Statute suggests no singular doctrine underlying art 25(3)'s modes of perpetration.[82] Instead, the drafting history of art 25(3)(a) of the Rome Statute is based upon a diverse range of sources from the legal traditions of several nations.[83] The drafting of art 25(3) was a difficult process, yet eventually near-consensus was reached.[84] Article 25(3) essentially provides judges with a variety of modes of participation to choose from.[85] In addition to the influence of national legal systems, art 25(3)(d) of the Statute draws upon art 2(3) of the International Convention on the Suppression of Terrorist Bombings.[86] Article 25's multiple origins reflect the wishes of State parties to find a compromise between different national traditions.[87] To this extent, art 25(3) is based on a variety of legal traditions.

Despite being based on a variety of legal traditions, one version of the draft text provides some insight into art 25(3)(a). For some time, a version of art 25(3)(a) stated: "commits such a crime, whether as an individual, jointly with another, or through a person who is not

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80 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [14].

81 Kevin Heller "Lubanga Decision Roundtable: More on Co-Perpetration" Opinio Juris (16 March 2012) at 1.

82 Van Sliedregt, above n 58, at 86.

83 Per Saland "International Criminal Law Principles" in Roy Lee (ed) *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations and Results"* (Kluwer Law International, The Hague, 1999) at 198.

84 Ohlin, Van Sliedregt and Weigend, above n 22, at 744.

85 Saland, above n 83, at 198.

86 International Convention on the Suppression of Terrorist Bombings A/52/653 (opened for signature 12 January 1998, entered into force 23 May 2001), art 2(3).

87 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [13].

criminally responsible".[88] The phrase "through another person who is not criminally responsible" was later replaced with "through another person, regardless of whether that other person is criminally responsible".[89] Elies van Sliedregt notes that this is reminiscent of Claus Roxin's control theory.[90] Beyond this, the drafting history suggests no single legal tradition behind art 25(3)(a).

(b) The phrasing of art 25(3)(a) of the Rome Statute

Article 25(3)(a)'s strict wording is inconsistent with a naturalistic (or derivative) approach to liability but consistent with a normative approach to liability. A naturalistic approach to liability is defined as an approach of cause and effect.[91] A naturalistic approach holds that a principal immediately causes a crime to happen, and an accessory contributes to the commission of that crime. A naturalistic approach generally means that a principal must have physically perpetrated a crime.[92] Conversely, a normative approach to liability is defined as approach of responsibility.[93] A normative approach holds that a principal is the person who is most responsible for a crime.[94] Elies van Sliedregt states that in this sense, a principal can have a decisive influence on a crime without necessarily physically perpetrating it.[95] As stated earlier, art 25(3)(a) of the Rome Statute codifies intellectual perpetration as a mode of principal liability. Article 25(3)(a) is inconsistent with a naturalistic approach to liability.

Article 25(3)(a) is consistent with a normative approach to liability. The ICC's preference for a normative approach to art 25(3) can be seen in the cases of *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)* (*Lubanga Decision on the Confirmation of Charges*)[96] and *Prosecutor v Katanga (Judgment)*.[97] International criminal

88 Van Sliedregt, above n 58, at 95.

89 Rome Statute, art 25(3)(a).

90 Van Sliedregt, above n 58, at 95.

91 Van Sliedregt, above n 58, at 71.

92 See Jain, above n 4, at 106.

93 Van Sliedregt, above n 58, at 71.

94 Elies van Sliedregt "International Criminal Law" in Markus Dubber *The Oxford Handbook of Criminal Law* (Oxford University Press, Oxford, 2014) at 1157.

95 Van Sliedregt, above n 58, at 72.

96 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 69, at [330].

97 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)*, above n 36, at [506].

courts have adhered to a normative approach to labelling participants[98] due to the value in making clear who the 'real' culprit of crime is.[99] Article 25(3)(a) not only permits, but is consistent with, a normative approach that labels intellectual perpetrators as principals.

A normative approach to liability also honours the principle of fair labelling. The principle of fair labelling states that a defendant's role in a crime should be properly reflected in the mode of criminal responsibility they are liable under.[100] If high-level leaders are labelled as accessories, this does not adequately reflect the role that the high-level leader played. A normative approach to liability is capable of labelling intellectual perpetrators as the person most responsible. This performs the crucial expressive function of international criminal law.[101] In contrast, a naturalistic approach to liability labels intellectual perpetrators of crimes as accessories. A naturalistic theory of participation fails to honour the principle of fair labelling.[102] Given that the ICC recognises a normative approach to liability under art 25(3), high-level leaders most responsible for crimes should be labelled as perpetrators.[103]

4 Safeguarding the rights of defendants

The search for an appropriate theory of high-level leadership should not obscure the rights of defendants. A legacy of the Nuremberg trials is the importance of individual criminal responsibility.[104] The principle of individual criminal responsibility, otherwise known as personal culpability (*nulla poena sine culpa*), holds that a defendant cannot be held criminally responsible for crimes in which he has not personally engaged or in some way participated in.[105] To this extent, as James Stewart notes, the Hitler-as-accomplice dilemma must be balanced with Adolf Eichmann's appeal to unfairness.[106] Adolf Eichmann, a Nazi military leader, stated: "I have the most profound conviction that I am being made to pay

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98 See Gregory Townsend "Current Developments in the Jurisprudence of the International Criminal Tribunal for Rwanda" (2005) International Criminal Law Review 147 at 156; and Van Sliedregt, above n 58, at 80.

99 Thomas Weigend "Perpetration Through an Organisation: The Unexpected Career of a German Legal Concept" (2011) 9 Journal of International Criminal Justice 91 at 102.

100 Jain, above n 4, at 95.

101 Mark Drumbl *Atrocity, Punishment, and International Law* (Cambridge University Press, Cambridge, 2007) at 174.

102 Jens Ohlin "Lubanga Decision Roundtable: Lubanga and the Control Theory" Opinio Juris (15 March 2012) <www.opiniojuris.org>.

103 Ohlin, Van Sliedregt and Weigend, above n 22, at 729.

104 Miles Jackson *Complicity in International Law* (Oxford University Press, Oxford, 2015) at 62.

105 *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [186].

106 Stewart, above n 2, at 165.

here for the glass that others have broken".[107] In this sense, as undesirable as the Hitler-as-accomplice dilemma is, a theory of participation should not make a defendant "pay" for acts they have not in some way brought about. A theory of participation must not substantiate Adolf Eichmann's appeal to unfairness by attributing a high-level leader with crimes they did not contribute to.

It is worth noting that a theory of high-level leadership stretches the bounds of individual criminal responsibility. Individual criminal responsibility holds that defendants cannot be held criminally responsible for crimes in which they have not personally engaged or in some way participated in. It is self-evident that a high-level leader does not physically perpetrate criminal acts. Yet a high-level leader may be temporally and geographically remote from the scene of a crime. A high-level leader may never meet the physical perpetrators of atrocity, instead merely orchestrating the climate in which atrocities take place. A high-level leader may go so far as to consciously plan arbitrary actions in order to smokescreen their culpability.[108] None of these situations result in a less harm than a high-level leader who is close to the scene of a crime and personally engaged with subordinates. The principle of individual criminal responsibility is stretched where a defendant is less connected to the commission of the crime. To this extent, individual criminal responsibility in international law is necessarily *sui generis* as it does not fit well with a traditional mode of liability.[109]

International judicial bodies who prosecute high-level leaders must honour procedural justice. The ICTY has a wide power to create or amend its own Rules.[110] The ICC has a more restricted framework. Article 21 of the Rome Statute limits the sources of law that the ICC can draw on.[111] An example of an ICC procedural safeguard is the principle of *in*

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107 At 166.

108 Osiel, above n 33, at 125.

109 Kai Ambos "Command Responsibility and Organisationscherrschaft: Ways of Attributing International Crimes to the 'Most Responsible'" in Andre Noelkaemper and Harmen Van der Wilt (eds) *Systematic Criminality in International Law* (Cambridge University Press, Cambridge, 2009) at 127; and Elies van Sliedregt "The Curious Case of International Criminal Liability" (2012) 10 Journal of International Criminal Justice 1171 at 1173 and 1188.

110 Sergey Vasiliev "Procedural Fairness in the International Criminal Court" in Arman Sarvarian and others (eds) *Procedural Fairness in International Courts and Tribunals* (British Institute of International and Comparative Law, London, 2015) at 23.

111 Rome Statute, art 21(1); David Hunt "The International Criminal Court: High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges" (2004) 2 Journal of International Criminal Justice 56 at 63.

dubio pro reo. Article 22 of the Rome Statute states that in the event of ambiguity, the Rome Statute shall be construed in favour of the defendant (the principle of *in dubio pro reo*).[112] Part III will identify how JCE has been accused of unduly impacting upon a defendant's right to a defence.

At this stage, it is worth noting that the ICC seeks to uphold the due process rights of defendants. By way of example, despite the fact that Judge Fulford disagreed with the Pre-Trial Chamber's interpretation of art 25(3), His Excellency held that the case should proceed to the Trial Chamber on the basis of the law set out by the Pre-Trial Chamber thereby retaining a defendant's right to be informed of the charges against them.[113] Some authors note that the ICC may come close to breaching the legality principle in its interpretation of art 25(3)(d) accessorial liability.[114] This paper, however, narrows its scope to art 25(3)(a) in order to evaluate the most appropriate elements of a theory of principal liability. This section concludes that individual criminal responsibility is *sui generis* in relation to a theory of participation and international tribunals should seek to safeguard the rights of defendants.

5 The current status of a mode of principal liability for high-level leaders

Two major modes of principal liability for high-level leaders exist in international law: the ICTY's doctrine of JCE, and the ICC's control theory. What is interesting is that neither the ICTY Statute nor the Rome Statute express the elements of a mode of perpetration for high-level leaders. Instead, judges have read meaning into art 7(1) of the ICTY Statute in order to convict high-level leaders under the doctrine of JCE. Similarly, art 25(3)(a) of Rome Statute has been interpreted to convict high-level leaders under the control theory. But what is the most appropriate mode of liability for future international prosecutions? Parts III and IV will analyse JCE and the control theory respectively as the two major modes of perpetrator liability used to convict high-level leaders in international law.

III The Doctrine Of Joint Criminal Enterprise

JCE is a doctrine created by the ICTY's Appeals Chamber in *Prosecutor v Dusko Tadic (Judgment)* (*Tadic*).[115] The ICTY was created for the sole purpose of prosecuting crimes

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112 Rome Statute, art 22(2).

113 *Prosecutor v Thomas Lubanga Dyilo (Separate Opinion of Judge Fulford)*, above n 3, at [20].

114 Kucher and Petrenko, above n 52, at 163.

115 *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [227].

committed after 1 January 1991 in the former Yugoslavia. The UN Security Council passed Resolution 827 to establish the ICTY.[116] The creation of JCE upholds the driving force behind Nuremberg prosecutions, being the need to devise an acceptable solution to prosecute individuals for mass atrocities.[117] JCE liability is based on art 7(1) of the ICTY Statute. Article 7(1) states that a defendant will be "individually responsible" for a crime if that defendant planned, instigated, ordered, committed, or otherwise aided and abetted in the planning or execution of a crime.[118] There is no explicit reference to liability for participation in a joint criminal enterprise in the ICTY Statute. JCE, the "darling of prosecutors", is a wide-ranging doctrine that is appropriately capable of labelling high-level leaders as perpetrators. JCE has nevertheless faced significant criticism over its inconsistent jurisprudence[119] and allegations that the doctrine goes too far.[120]

A Tadic

In June of 1992, a group of armed men entered Jaskici, a village in Bosnia. This group of armed men attacked and killed five Bosnian Muslims. Witnesses identified Dusko Tadic as a member of this group of armed men. The witnesses could not, however, specifically link Dusko Tadic to the killings. Though Dusko Tadic was a member of the group and played a crucial role in the attack, the Trial Chamber was not satisfied that he physically perpetrated the killings. Factually, the killings were a foreseeable consequence of the group's common plan or policy to ethnically cleanse the region of non-Serbians.[121] On this basis, the Appeals Chamber overturned the Trial Chamber and held that Dusko Tadic was guilty under art 7(1) of these killings by way of a joint criminal enterprise.

The Appeals Chamber firstly noted that the principle of personal culpability (*nulla poena sine culpa*) means that a defendant cannot be held criminally responsible for crimes in which he has not personally engaged or in some way participated in.[122] The Trial Chamber,

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116 *Statute of the International Criminal Tribunal for the Former Yugoslavia* SC Res 827, S/Res/827 (1993).

117 Jain, above n 4, at 41.

118 *Statute of the International Criminal Tribunal for the Former Yugoslavia* SC Res 827, S/Res/827 (1993), art 7(1).

119 Guilia Bigi "Joint Criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of Senior Political and Military Leaders: The *Krajisnik* Case" (2010) 14 Max Planck Yearbook of United Nations 52 at 59.

120 Cryer and others, above n 77, at 358.

121 *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [231] and [232].

122 At [186].

after analysing the jurisprudence of military tribunals,[123] held that collective criminality was firmly established in customary international law.[124] This customary basis has been subject to rigorous academic critique.[125] The ICTY subsequently enunciated three types of JCE: basic (JCE I),[126] systematic (JCE II),[127] and extended (JCE III).[128]

1 Actus Reus

The *actus reus* is materially the same for all three forms of JCE.[129] These requirements are a "plurality of persons";[130] the existence of a "common plan" or purpose which involves the commission of a crime provided for in the ICTY Statute;[131] and "participation of the accused in the common design".[132] The common plan need not be express, and its existence can be inferred from all the circumstances.[133] Two elements that have proved controversial are whether the common plan can be fluid,[134] and whether the accused's participation in the common design must be "substantial".[135] JCE allows each member of the common purpose to be equally responsible, even if some members are not involved in the physical perpetration of the crime.

1 Mens Rea

The *mens rea* differs for all three forms of JCE.[136]

(a) JCE I

123 At [195].
124 At [220].
125 See Ohlin, above n 76, at 76; and Sofia Lord, above n 76, at 12.
126 *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [196].
127 At [202].
128 At [204].
129 At [227].
130 At [227(i)].
131 At [227(ii)].
132 At [227(iii)].
133 At [229(ii)].
134 *Prosecutor v Momcilo Krajisnik (Judgment)* ICTY Appeals Chamber IT-00-39-A, 17 March 2009 at [172]; and Jain, above n 4, at 54.
135 *Prosecutor v. Radoslav Brdjanin (Judgment)* ICTY Appeals Chamber IT-99-36-A, 3 April 2007 at [430]; Bigi, above n 119, at 59; and Jain, above n 4, at 56.
136 *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [228].

For culpability under JCE I, the accused must share the intent to commit the relevant crime.[137] The accused must voluntarily participate in the common design, and must intend the object of the common design.[138] In addition, all participants must possess the same criminal intention but JCE members can use physical perpetrators who are not a part of the JCE.[139]

Neha Jain illustrates JCE I with an example.[140] A high ranking civilian leader and a military commander develop a common plan to ethnically cleanse a certain territory. These leaders order killings and torture, and implement these plans though unit leaders under their authority. The unit leaders then use civilians to commit crimes of murder and torture. The civilians are unaware of the full extent of the crimes planned nor the policy behind their commission. JCE I can hold the civilian leader, the military commander and the unit leaders liable for the crimes committed in execution of the common plan of ethnic cleansing. This is the case even though the physical crimes were committed by civilians who could not have known, intended, or foreseen that crimes were part of a plan of ethnic cleansing.

(b) JCE II

JCE II is specific to systematic, institutionalised systems of ill-treatment (such as concentration camps). For culpability under JCE II, the accused must have personal knowledge of the system of ill-treatment and an intent to further the system of ill-treatment.[141] In *Prosecutor v Miroslav Kvocka (Judgment)* (*Kvocka*), the Appeals Chamber held that an accused must have personal knowledge of the criminal nature of the system.[142] Personal knowledge of the system of ill-treatment can be inferred from circumstances.[143] Except in the instance of specific intent crimes, there is no requirement that the defendant intends to commit the crime they are charged with.[144] This inference-based knowledge is

137 At [228].

138 At [196].

139 Jain, above n 4, at 57.

140 At 58.

141 *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [228].

142 *Prosecutor v. Miroslav Kvocka, Milojica Kos, Mladjo Radic, Zoran Zigic, Dragoljub Prcac (Judgment)* ICTY Appeals Chamber IT-98-30/1-A, 28 February 2005 at [198].

143 At [203].

144 Jain, above n 4, at 59.

criticised on the basis that it reverses the burden of proof for intent and knowledge.[145] In an institutionalised system of ill-treatment with "functional divisions of labour", inferring knowledge of the full scale of crimes risks obscuring the different functions of individuals in such a system.[146] In practice, JCE II is more narrowly applied than JCE I or JCE III due to its focus on institutionalised systems of ill-treatment.

(c) JCE III

JCE III essentially enables liability for crimes committed outside a common plan if these crimes were nonetheless a foreseeable consequence of such a plan. For culpability under JCE III, the accused must possess the intent to participate in the JCE and must intend to further the criminal purpose of the enterprise.[147] In addition, if one or more members of the JCE (or a non-member of the JCE)[148] commits crimes that go beyond the common purpose, the accused is responsible for these crimes if two requirements are satisfied: the additional crimes were a foreseeable consequence of the realization of the common plan, and the accused willingly took this risk.[149]

This standard is also known as advertent recklessness (*dolus eventualis*).[150] More than negligence is required. Although a defendant may not intend to bring about a certain result, that defendant must have been aware (and must nevertheless have willingly taken the risk) that the actions of the group were most likely to lead to that result.[151] A defendant can be responsible for crimes outside the common purpose, even if they were unaware of their occurrence, if that defendant was aware that those crimes were a natural and foreseeable consequence of the common purpose.[152]

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145 See Verena Haan "The Development of the Concept of Criminal Enterprise at the International Tribunal for the former Yugoslavia" (2005) 5 International Criminal Law Review 167 at 201; and Jain, above n 4, at 59.

146 Elies van Sliedregt "Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide" (2007) Journal of International Criminal Justice 5 at 188.

147 *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [228].

148 *Prosecutor v Ljube Boskoski (Judgment)* ICTY Trial Chamber II IT-04-82-T, 10 July 2008 at [397].

149 *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [228].

150 At [219].

151 At [220].

152 *Prosecutor v Radislav Krstic (Judgment)* ICTY Appeals Chamber IT-98-33-A, 19 April 2004 at [150].

Neha Jain illustrates JCE III by way of a similar example.[153] A high ranking civilian leader and a military commander develop a common plan to ethnically cleanse a certain territory. They order killings – but not torture – and implement this plan though unit leaders under their authority. A unit leader recruits a new group of civilians to help with the common plan. In the course of these deportations, these civilians commit not only killings but torture and rapes (additional crimes outside of the common purpose). JCE III can hold the civilian leader, the military commander, and the unit leaders liable for these additional crimes committed by civilians in execution of the common plan of ethnic cleansing. This is the case even if the crimes committed were outside the common purpose, so long as crimes were a foreseeable consequence of the common plan and the accused willingly took this risk.

B From Small-Scale To Large-Scale Enterprises: The Wake of Tadic

Ad hoc tribunals have subsequently applied the doctrine of JCE, including the International Criminal Tribunal for the Former Rwanda (ICTR), the Special Court of Sierra Leone (SCSL), the East Timorese Special Panel for Serious Crimes (SPSC) and the Special Tribunal for Lebanon (STL). It is worth noting, however, that the Extraordinary Chambers in the Courts of Cambodia (ECCC) has refused to apply JCE III due to its controversial nature.[154] Whilst the ICTY initially applied JCE to small scale enterprises, JCE has subsequently been applied to large-scale enterprises in attempts to prosecute high-level leaders.[155] JCE was first applied to a large-scale enterprise[156] in the judgment of *Prosecutor v Radoslav Brdjanin (Judgment).*[157] Essentially, the Appeals Chamber accepted an interlinked concept of JCE in order to convict Radoslav Brdjanin (the Vice-President of a political party) of crimes against humanity committed during the Bosnian war.

153 Jain, above n 4, at 63.

154 *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise* ECCC Pre-Trial Chamber D97/15/9, 20 May 2010 at [88].

155 Briony McKenzie "The Principal Liability of Political and Military Leaders for International Crimes: Joint Criminal Enterprise versus Indirect Co-Perpetration" (LLB (Hons) Dissertation, University of Otago, 2014) at 18.

156 Van Sliedregt, above n 58, at 158; Jain, above n 4, at 50.

157 *Prosecutor v Radoslav Brdjanin (Judgment),* above n 135, at [1082].

Applying JCE to a large-scale enterprise is controversial as JCE is based on cases involving small-scale enterprises[158] such as the case of *Prosecutor v D'Ottavio et al*.[159] In *Prosecutor v D'Ottavio et al.,* armed civilians pursued two prisoners of war who had escaped from a concentration camp. One civilian shot at the prisoners of war without intending to kill, but one prisoner of war died as a result. Scholars argue that JCE applies well to small-scale cases such as *Prosecutor v D'Ottavio et al,* or to the example of a group of platoon members who commit torture with the intent of obtaining information where there are only a few members of a criminal enterprise.[160] Mohamed Badar argues that on this basis, JCE cannot be applied to situations of large-scale or systematic criminality where thousands of members of a joint criminal enterprise may exist.[161] Similarly, Hector Osalo alleges that the application of JCE to large-scale enterprises unacceptably extends criminal liability to low-level and mid-level superiors.[162]

A number of arguments can be made against this conclusion. Firstly, the ICTY in *Tadic* explicitly acknowledged that JCE is compatible with large-scale enterprises. This was clear in the Appeals Chamber's statement that JCE III could apply where a group's common purpose was the forcible removal of individuals from a "town, village, or region".[163] The forcible removal of individuals from a region can require a huge number of physical perpetrators and a potentially large number of members of a common enterprise: as mentioned earlier, one example of forcible transfer of a population involved the movement of over 25,000 individuals from one region to another.[164] JCE, as first articulated by the ICTY, anticipated both small and large-scale common enterprises.

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158 *Prosecutor v Dusko Tadic (Judgment),* above n 75, at [215] and [223]; Van Sliedregt, above n 58, at 157.

159 *Prosecutor v D'Ottavio et al (Judgment)* Italian Court of Cassation Criminal Section I 270, 12 March 1947.

160 Hector Osalo "Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakic Appeal Judgment" (2007) 7 International Criminal Law Review 143 at 158; and Mohamed Badar "Just Convict Everyone! Joint Perpetration: From *Tadic* to *Stakic* and Back Again" (2006) 6 International Criminal Law Review 293 at 302.

161 Badar, above n 60, at 302.

162 Osalo, above n 160, at 158.

163 *Prosecutor v Dusko Tadic (Judgment),* above n 75, at [334].

164 See *Prosecutor v Radislav Krstic (Judgment),* above n 23, at [519]; and *Prosecutor v Radislav Krstic (Judgment)* ICTY Appeals Chamber IT-98-33-A, 19 April 2004 at 87.

Whilst *Tadic* cited cases of small-scale criminality as the basis of the doctrine of JCE, *Tadic* also cited the *Einsatzgruppen* case as a basis of JCE.[165] The Appeals Chamber in a later judgment held that the *Einstanzgruppen* case is a "clear-cut large scale case" that involved a murder program to kill Poland's elite.[166] JCE is not exclusively based on small scale common enterprises. Finally, Hector Osalo's argument that JCE unacceptably extends liability to low-level and mid-level perpetrators neglects two key considerations. The first is that international bodies and tribunals focus on prosecuting defendants who are most responsible.[167] The second is that in order to be held liable under JCE, a defendant must still participate in some way (by assistance or contribution) to the commission of the common plan.[168] High-level leaders in a large-scale criminal enterprise may be more remote from a crime, but in order to be liable these leaders must fulfil the *actus reus* requirements of JCE. Extending JCE to large-scale enterprises does not involve guilt by association because JCE liability is limited to defendants who contribute to a common plan.[169] The better question is whether this standard of contribution to a common plan is appropriate. The ICC's analogous standard of an essential contribution is analysed in Part IV.

C Plagued By Problems?

1 Procedural justice

Significant procedural justice issues have plagued the ICTY's jurisprudence. An accused can be convicted under JCE even if an indictment does not explicitly refer to JCE.[170] The net result is that JCE is frequently resorted to in the ICTY as a means of assigning liability to a defendant.[171] A subsidiary result is that defendants may not have sufficient opportunity to defend themselves under a charge of JCE.[172] Guilia Bigi notes that it is easier to hold a defendant liable for JCE than it is to hold a defendant liable for other forms of liability

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165 See *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [200]; and *United States of America v Otto Ohlendorf (Judgment)* Nuremberg Military Tribunal II 10(IV), 1951.

166 *Prosecutor v Radoslav Brdjanin (Judgment)*, above n 135, at [420].

167 See Del Ponte, above n 12, at 516.

168 *Prosecutor v Radoslav Brdjanin (Judgment)*, above n 135, at [424].

169 At fn 902.

170 *Prosecutor v Radislav Krstic (Judgment)*, above n 23, at [602]; and Bigi, above n 119, at fn 21.

171 Steven Powles "Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?" (2004) 2 Journal of International Criminal Justice 606 at 619; and Bigi, above n 119, at 59.

172 Lord, above n 76, at 6; and Guenael Mettraux *International Crimes and the Ad Hoc Tribunals* (Oxford University Press, Oxford, 2005) at 293.

provided for in the ICTY Statute.[173] Failure to identify the precise mode of participation is not fatal to a conviction under JCE.[174] Another critique of JCE is that the prosecution does not need to prove the *mens rea* of all members of the joint criminal enterprise. On this basis, JCE is criticised for expanding liability beyond an appropriate ground of culpability.[175] A coherent theory of participation in international law should seek to safeguard the rights of defendants. JCE, however, significantly breaches principles of fairness to defendants and due process.

Guila Bigi argues that JCE's inconsistent jurisprudence is a symptom of a poorly articulated doctrine.[176] By way of example, an issue specific to JCE III is the defendant's level of knowledge of additional crimes committed outside of the common purpose. In *Prosecutor v Radoslav Brdjanin (Judgment)* (*Brdjanin*), the Trial Chamber held that a defendant must only have been aware that an additional crime committed was a 'possible' consequence of the common plan.[177] Yet according to both the Trial and Appeals Chambers in *Prosecutor v Radislav Krstic (Judgment)* (*Krstic*), a defendant must have been aware that additional crimes committed were an 'inevitable' consequence of the common plan.[178] A third standard is enunciated in *Prosecutor v Kvocka (Judgment)* (*Kvocka*), where the Appeals Chamber held that a defendant must have been aware that the crimes were a 'natural and foreseeable consequence' of a common plan.[179] Such confusion is an excellent example of the inconsistency that has plagued the ICTY.

These inconsistencies do not justify the conclusion that JCE is fundamentally flawed. Contradictions in the ICTY's jurisprudence could equally reflect the difficulty of enunciating any theory of participation rather than the flawed nature of JCE itself. For example, the ICC's control theory is not immune from inconsistent jurisprudence[180] such

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173 Bigi, above n 119, at 59.

174 *Prosecutor v Blagoje Simic, Miroslav Tadic and Simo Zaric (Judgment)* ICTY Appeals Chamber IT-95-T, 17 October 2003 at [136].

175 Cryer and others, above n 77, at 358.

176 Bigi, above n 119, at 59.

177 *Prosecutor v Radislav Krstic (Judgment)*, above n 23, at [616]; and *Prosecutor v. Radoslav Brdjanin (Judgment)*, above n 135, at [265].

178 *Prosecutor v Radislav Krstic (Judgment)*, above n 23, at [616].

179 *Prosecutor v Miroslav Kvocka, Mlado Radic, Zoran Zigic and Dragoljub Prcac (Judgment)*, above n 142, at [86].

180 Van Sliedregt, above n 58, at 100.

as vagueness of the control criterion[181] and criticism of its rigidity.[182] In addition, theories of participation in domestic criminal law have a "long history" of internal inconsistency making it unsurprising that inconsistencies exist in international theories of participation such as JCE.[183] In applying any theory of participation, it is always possible that different courts come to inconsistent results.[184] Such inconsistencies may be common to theories of participation as opposed to reflective of JCE's shortcomings. Inconsistent jurisprudence does not in itself render JCE unusable.

2 'Out of control'

Some scholars argue that JCE has lost touch with the "restraining force" of the common law.[185] On one hand, domestic principles have long influenced international law[186] and can serve a restraining function.[187] On the other hand, JCE III can inculpate defendants for crimes committed outside a common plan if these crimes were nonetheless a foreseeable consequence of such a plan, and a defendant willingly took this risk.[188] This standard of *dolus eventualis* has been heavily criticised on the basis that it can convict a defendant using a very low *mens rea* threshold.[189] Steven Powles argues that a defendant cannot be liable as a perpetrator of a crime when that defendant did not intend to commit that crime and may not have been aware that such a crime had actually been committed.[190]

Critics of JCE III emphasise the principle of individual criminal responsibility, arguing that high-level leaders cannot be criminally responsible for acts which they have only distantly personally engaged or participated in.[191] The principle of individual criminal responsibility is stronger in JCE I and weaker in JCE III. This is because a high-level leader can only be convicted under JCE I if they intend to commit a relevant crime.[192] In contrast, a high-level leader can be convicted under JCE III if they only intend to commit a common enterprise

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181 Weigend, above n 99, at 103.

182 Osiel, above n 1, at 100.

183 Stewart, above n 2, at 219.

184 Elies van Sliedregt and Sergey Vasiliev *Pluralism in International Criminal Law* (Oxford University Press, Oxford, 2014) at 111.

185 Danner and Martinez, above n 57, at 132.

186 Stewart, above n 2, at 219.

187 *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [186].

188 At [228].

189 Badar, above n 60, at 301.

190 Powles, above n 171, at 611.

191 *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [186].

192 At [228].

and additional crimes subsequently occur that were a foreseeable consequence.[193] To this extent, JCE III can convict a defendant based on a lower level of personal culpability compared to other forms of participation.

In a similar vein, however, scholars have criticised command responsibility on the basis that it does not adequately reflect a defendant's personal culpability.[194] James Stewart argues that command responsibility is insensitive to a defendant's personal culpability.[195] In a similar manner, Mirjan Damaska argues that command responsibility codified in the Rome Statute is like a type of club used to administer rough justice.[196] To this extent, command responsibility is criticised for being "dependent on prosecutorial integrity to safeguard potentially indiscriminate severity".[197] Both JCE and command responsibility have been criticised as unfairly attributing personal culpability to a defendant. The principle of *nulla poena sine culpa* may, therefore, need to be stretched to some degree if high-level leaders are to be inculpated. As mentioned above, the principle of personal culpability is to an extent incompatible with the function of individual criminal responsibility in international law.[198]

It is unclear whether additional crimes committed outside the common purpose must be objectively and subjectively foreseeable. Neha Jain argues that objective foreseeability is too low a standard on the basis that foreseeability of another's actions is difficult in the sheer scale of atrocities committed in armed conflict.[199] Antonio Cassese, however, argued that objective foreseeability is sufficient as public policy considerations – namely protecting society against criminals who form illegal common enterprises – justify the wide ambit of JCE III.[200] On balance, Cassese's argument has more practical utility. To prevent the conviction of a party to a joint criminal enterprise on the basis that the accused could not (even objectively) foresee that subsidiary crimes may be committed along the way risks, in the context of complex and spontaneous international crimes, enabling the too-frequent exculpation of architects of atrocity. In addition, JCE III still requires a defendant

193 At [204].

194 Mirjan Damaska "The Shadow Side of Command Responsibility" (2001) 1 Faculty Scholarship Series 455 at 494; and Stewart, above n 2, at 167.

195 Stewart, above n 2, at 167.

196 Damaska, above n 194, at 494.

197 At 495.

198 Van Sliedregt, above n 109, at 1173.

199 Jain, above n 4, at 62.

200 Antonio Cassese "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise" (2007) 5 Journal of International Criminal Justice 109 at 123.

to make a contribution to the common plan. A standard of objective foreseeability does not mean that JCE III becomes too powerful. On this basis, this paper will analyse the control theory from the perspective that procedural criticisms of JCE are well founded, but JCE's wide ambit and ability to attribute responsibility to a leader are not necessarily unjustified.

3 The status of JCE

Part III has analysed JCE, one of the two dominant modes of perpetrator liability used to convict high-level leaders in international law. The three types of JCE enunciated in *Tadic* have been applied beyond small-scale cases in order to convict leaders in large-scale enterprises. Critics of JCE allege that its wide ambit increases the risk that a high-level leader is found guilty by mere association. Opponents of this proposition argue that JCE's scope is restricted because a high-level leader must still have committed the *actus reus* by way of assistance in or contribution to a common purpose.[201] Significant procedural justice issues and allegations that JCE is out of control have tarnished this doctrine. JCE is still used by the ICTY as well as *ad hoc* Tribunals, but the ICC has chosen not to adopt JCE (Part IV). As one of the two dominant modes of principal liability, JCE can offer significant insight into the most appropriate steps for the ICC in its future prosecutions (Part V).

IV Sweeping Receptivity: The Control Theory

The ICC has adopted the control theory as a means to prosecute high-level leaders as principals. The control theory applies to art 25(3) of the Rome Statute. The ICC essentially dethroned JCE in favour of the control theory.[202] In refusing to apply JCE, one scholar notes that the ICC was initially associated with an analytically rigorous approach to international criminal law.[203] Contrary to international law's "sweeping receptivity" to the control theory,[204] it is not a panacea to JCE's ills. Some scholars argue that the control theory is based on "ambiguities and wrongful assumptions".[205] The source of the ICC's reliance on the control theory, as well as its scope, have been criticized.[206] Part A will identify the jurisdiction of the ICC. Part B will identify the elements of principal liability

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201 *Prosecutor v. Radoslav Brdjanin (Judgment)*, above n 135, at [424].

202 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 61, at [338].

203 Ohlin, Van Sliedregt and Weigend, above n 22, at 738.

204 Stewart, above n 2, at 218.

205 Ohlin, Van Sliedregt and Weigend, above n 22, at 745.

206 Cryer and others, above n 77, at 364; and Gerhard Werle and Boris Burghardt, above n 38, at 88.

under art 25(3)(a) of the Rome Statute. Part C will analyse how and why the ICC distanced itself from JCE. Part D will evaluate criticisms of the control theory in order for Part V to identify the most appropriate steps for the ICC in its future prosecutions.

A The International Criminal Court

The ICC is governed by the Rome Statute. The ICC came into existence on 1 July 2002.[207] The ICC's jurisdiction is limited to the prosecution of particular crimes: genocide,[208] crimes against humanity,[209] war crimes,[210] and (pending adoption in 2017) the crime of aggression.[211] The ICC may only prosecute defendants who are nationals of State Parties to the Rome Statute[212] unless a non-State Party accepts the exercise of jurisdiction for a particular crime.[213] Alternatively, the ICC can prosecute defendants for crimes committed within the boundaries of a State Party[214] or a consenting non-State Party.[215] The ICC's jurisdiction is further limited to crimes committed after 1 July 2002.[216] As mentioned earlier, the ICC focuses on prosecuting defendants who bear the greatest responsibility for crimes such as leaders of the State or organisation allegedly responsible for those crimes.[217]

The ICC has moved in a different direction to the ICTY's jurisprudence. Despite the parallels that exist between all three forms of JCE and art 25(3)(d) of the Rome Statute[218] the Pre-Trial Chamber held that art 25(3)(b), (c) and (d) of the Statute provide for accessory, not principal, liability.[219] Leaders in the highest echelons of power should be

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207 Ibrahim Aljazy "The Implementation of International Criminal Law in Arab States: The Jordanian Experience" in Lutz Oette (ed) *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate Publishing Limited, Surrey, 2011) at 184.

208 Rome Statute, art 6.

209 Article 7.

210 Article 8.

211 *The Crime of Aggression* GA Res 6, RC/6 (11 June 2010).

212 Rome Statute, art 12(2)(b).

213 Article 12(3).

214 Article 12(2)(a).

215 Article 12(3).

216 Article 11(1).

217 *Paper on some policy issues before the Office of the Prosecutor* International Criminal Court ICC-OTP-2003, September 2003 at 7.

218 Jain, above n 4, at 84.

219 *Prosecutor v Thomas Lubanga Dyilo (Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo)* ICC Pre-Trial Chamber I ICC-01/04-01/06-8-US-Corr, 24 February 2006 at [78].

labelled as perpetrators, not accessories, of crimes. The Pre-Trial Chamber in the *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)* (*Lubanga Decision on the Confirmation of Charges*) held that art 25(3)(a) is mode of principal liability that convicts defendants under the control theory.[220] Accordingly, the following analysis focuses on the Pre-Trial Chamber's interpretation of art 25(3)(a) in the *Lubanga Decision on the Confirmation of Charges*.

B Lubanga

Thomas Lubanga was the leader of a military wing of a political group, the Union of Congolese Patriots (UPC), in the Democratic Republic of Congo (DRC). The Union of Congolese Patriots agreed upon a common plan and acted together to build an army for the purpose of establishing and maintaining political and military control over Ituri.[221] In the ordinary course of events, young boys and girls under the age of 15 were conscripted and enlisted for the purpose of active participation in hostilities. Thomas Lubanga coordinated the group's actions and had the final say over the group's activities.[222] Thomas Lubanga was found guilty under art 25(3)(a) of conscripting and enlisting children under the age of 15 by way of control over the crime.

In its reasoning, the Pre-Trial Chamber held that art 25(3)(a) of the Rome Statute covers three types of perpetration: direct perpetration (commission of a crime), co-perpetration (commission of a crime "jointly with another") and indirect perpetration (commission of a crime "through another", regardless of whether that other person is criminally responsible).[223] The Pre-Trial Chamber used the control theory as the theoretical basis for the entire scheme of liability under art 25. The control theory is based on the writings of the German criminal law scholar Claus Roxin. Claus Roxin's control theory equates control over the crime with domination over the commission of a crime.[224] Such control over the crime can take different forms, including functional domination or domination over the will of a physical perpetrator. Generally, the control theory considers that a defendant who

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220 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 69, at [318].

221 *Prosecutor v Thomas Lubanga Dyilo (Judgment)*, above n 61, at [1019].

222 At [1019].

223 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 69, at [318].

224 Jain, above n 4, at 83.

has control over a crime (*Tatherrschaft*) can be liable as a perpetrator.[225] The elements of each mode of perpetration under art 25(3)(a) are outlined below.

1 Co-perpetration

Co-perpetration is based on the idea that the sum of co-ordinated contributions results in the realisation of a crime (horizontal liability). Any person making an essential contribution can be responsible.[226] Co-perpetration inculpates an individual if they exercise joint control with another over the commission of a crime.[227]

The *actus reus* requirements for co-perpetration under art 25(3)(a) are an agreement or common plan[228] and an essential contribution ("joint control") of the accused over the commission of the crime[229] (a retroactive analysis).[230] The *mens rea* requirements for co-perpetration under art 25(3)(a) are the requisite mental state of the accused for the underlying crime,[231] the accused's awareness and acceptance of the crime,[232] and the accused's awareness of joint control (the accused must be aware that without their contribution to the common plan, the plan cannot succeed).[233]

(a) Essential contribution

Co-perpetration differs from JCE I in that a perpetrator is required to make an "essential" contribution to the common plan. For JCE I, "assistance in" or "contribution to" the

225 Werle, above n 3, at 962.

226 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 69, at [326].

227 Rome Statute, art 25(3)(a).

228 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 69, at [343].

229 At [346].

230 *Prosecutor v Thomas Lubanga Dyilo (Judgment)*, above n 61, at [935].

231 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 69, at [349].

232 At [361].

233 At [366].

common plan is sufficient.[234] The "essential" contribution requirement is derived from Claus Roxin's control theory of co-perpetration.[235]

By way of example, a political leader and a military commander together develop a plan to ethnically cleanse a certain territory by ordering killings, deportations, and torture. The political leader and the military commander would be liable for direct perpetration if they physically committed the killings, deportations, or torture themselves. The political leader and the military commander would only be liable for co-perpetration, however, if they made an essential contribution to the crime. An essential contribution is defined as a contribution that could frustrate the commission of the crime.[236] In addition, the political leader and military commander must fulfil the relevant *mens rea* requirements in order to be liable under co-perpetration.[237]

The Pre-Trial Chamber further explained what an essential contribution looks like. Co-perpetration is rooted in the notion of a division of essential tasks for the purposes of committing a crime.[238] As a result, an "essential" contribution can be evaluated in light of the objectives of a group of co-perpetrators, events leading up to crimes committed, and the creation and structures of a group.[239] Credible witness testimony that the political leader and military leader provided necessary finances or logistical support to crimes may be a sufficiently essential contribution.[240] The political leader or military leader need not have "full control" over subordinates.[241] The political leader or military leader's "ultimate authority" is not nullified by virtue of delegation of a large number of significant tasks.[242] A leader need not be involved in "every detail" of decisions in order to have made an essential contribution to a common plan.[243]

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234 *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [227].

235 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 69, at [326]; and Neha Jain "The Control Theory of Perpetration in International Criminal Law" (2011) 12 Chicago Journal of International Law 159 at 166.

236 *Prosecutor v Thomas Lubanga Dyilo (Judgment)*, above n 61, [925].

237 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 69, at [349].

238 *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [922].

239 *Prosecutor v Thomas Lubanga Dyilo (Judgment)*, above n 61, at [1023] and [1140].

240 At [1151], [1155] and [1222].

241 At [1156].

242 At [1162].

243 At [1215].

2 Indirect perpetration

Indirect perpetration (perpetration by means) inculpates an individual who uses another person as a means to commit a crime. This is otherwise known as the perpetrator behind the perpetrator.[244] Broadly, indirect perpetration can convict a defendant who has control over an organised apparatus of power (vertical liability).[245] Indirect perpetration is also based on German legal doctrine. In particular, indirect perpetration is substantively similar to Claus Roxin's notion of *Organisationsherrschaft*.[246] *Organisationscherrschaft* is an organisational variant of the control theory.[247] Indirect perpetration looks like it performs a similar function to command responsibility: both involve control over an organised structure. Despite this similarity, command responsibility is a lesser form of liability for omission. Indirect perpetration instead labels a defendant as a principal, and is therefore capable of labelling high-level leaders occupying the highest positions of power appropriately.

The *actus reus* requirements for perpetration by means under art 25(3)(a) are hierarchical relations between parties, a sufficient number of subordinates, sufficient exercise of control by the accused (such as capacity to hire, train, or discipline subordinates), and exercise of authority by the accused in order to commit a crime.[248] The *mens rea* requirements for perpetration by means under art 25(3)(a) are the requisite mental state of the accused for the underlying crime as well as "the accused's awareness of the character of their organisations, their authority within the organization, and the factual circumstances enabling near-automatic compliance with orders".[249]

In practice, indirect perpetration applies to a situation where a leader (whether military, political or civilian) occupies such a position of power as to be hierarchically above subordinates and control a sufficient number of subordinates. If this is the case, that leader can be convicted as an indirect co-perpetrator under art 25(3)(a) so long as the *mens rea* requirements are fulfilled. It is worth noting that indirect perpetration requires a certain

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244 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)*, above n 36, at [496].

245 At [510].

246 At [499].

247 Van Sliedregt, above n 58, at 86.

248 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)*, above n 36, at [512].

249 At [513] and [534].

amount of evidence in order to successfully convict a defendant. The Pre-Trial Chamber held that even if a leader is at the apex of an organisation, it does not necessarily follow that they have fulfilled the *actus reus* requirements of indirect perpetration.[250] The absence of a "centralised and effective" chain of command militates against the conclusion that a group was an organised apparatus of power or that the leader wielded control over subordinates.[251]

3 Indirect co-perpetration

The concept of indirect co-perpetration was first introduced by the Pre-Trial Chamber in *Prosecutor v Germain Katanga and Matheiu Ngudjolo Chui (Decision on the Confirmation of Charges)* (*Katanga and Ngudjolo Decision on the Confirmation of Charges*).[252] In addition to perpetration, co-perpetration, and indirect perpetration, the Pre-Trial Chamber introduced indirect co-perpetration as a mode of principal liability. This so-called "new axis" of diagonal liability is a combination of co-perpetration (horizontal liability) and indirect perpetration (vertical liability).

The *actus reus* requirements for indirect co-perpetration involve elements of co-perpetration and indirect perpetration. All of the *actus reus* elements of co-perpetration must be proved: an agreement or common plan[253] and an essential contribution ("joint control".[254] All the *actus reus* elements of indirect perpetration must also be proved (hierarchical relations between parties, a sufficient number of subordinates, sufficient exercise of control by the accused, and the exercise of authority by the accused).[255]

The *mens rea* requirements for indirect co-perpetration also involve elements of co-perpetration and elements of indirect perpetration. A defendant must have the requisite mental state of the defendant for the underlying crime (a *mens rea* requirement of both co-perpetration and indirect perpetration),[256] an awareness and acceptance of the crime occurring[257] and an awareness of the factual circumstances enabling them to exercise joint

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250 *Prosecutor v Germain Katanga (Judgment)*, above n 38, at [1420].

251 At [1420].

252 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)*, above n 36, at [490].

253 At [522].

254 At [524].

255 At [512].

256 At [527].

257 At [533].

control.[258] The defendant must also be aware of their essential role in the implementation of the common plan, and of their ability to frustrate the implementation of the common plan.[259]

A simple illustration of this complex concept is offered by Thomas Weigend.[260] A and B carry out a common design to commit arson at a victim's house. A takes their youngest child (a) and B also takes their youngest child (b) to the victim's house. A and B then instruct these children to make a fire. A and B are co-perpetrators of arson. A and B are also indirect perpetrators of arson. To this extent, co-perpetration and indirect perpetration factually coincide[261] as opposed to being a "fourth alternative of liability".[262] To extend this illustration, a civilian leader and a military commander would be liable for indirect co-perpetration if they each sufficiently exercised control over a group of men, but a crime within the jurisdiction of the Rome Statute could not have occurred without the combination of both groups of men. Even if one leader's men actually committed such a crime, the other leader would be liable for the genocide if his participation (for example, contributing a group of men to the crime) was essential.

A third example shows the utility of indirect co-perpetration as a form of principal liability for high-level leaders. In *Katanga and Ngudjolo Decision on the Confirmation of Charges*, the Pre-Trial Chamber defined the elements of indirect perpetration before noting the respective roles of the two defendants in question. Ethnic distinctions made it unlikely that Ngitis would comply with the orders of Mathieu Ngudjolo Chui or Lendu's would comply with the orders of Germain Katanga.[263] As mentioned in Part II, these crimes committed could only have been perpetrated by the combined forces of Germain Katanga and Mathieu Ngudjolo Chui's troops. The Pre-Trial Chamber concluded that based on these facts, it was "critical" to establish the leaders' horizontal sharing of responsibility through co-perpetration.[264] Indirect co-perpetration was therefore a tool created by the Pre-Trial

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258 At [534].

259 At [539].

260 Thomas Weigend "Indirect Perpetration" in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press, Oxford, 2015) at 553.

261 At 554.

262 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert)*, above n 3, at [59].

263 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)*, above n 36, at [519].

264 At [519].

Chamber to potentially mutually attribute the separate liabilities of Germain Katanga and Mathieu Ngudjolo Chui.

C Distinguishing JCE

Prior to the *Lubanga Decision on the Confirmation of Charges*, commentators speculated as to whether the ICC would read in JCE – either in a wholesale manner or in part – as a legitimate interpretation of the Rome Statute.[265] One solution in the *Lubanga Decision on the Confirmation of Charges* was to equivocate art 25(3)(a) of the Statute with JCE I.[266] The Pre-Trial Chamber in the *Lubanga Decision on the Confirmation of Charges* chose not to adopt the doctrine of JCE.[267] Essentially, the Pre-Trial Chamber associated JCE with what it termed a 'subjective' approach to liability that unduly focused on the state of mind of an accused.[268] In its reasoning the Pre-Trial Chamber identified three approaches to art 25(3)(a).

An objective approach to art 25(3)(a) focuses on the realisation of objective elements of the crime, and therefore only physical perpetrators can be liable as principals.[269] In contrast, a subjective approach to art 25(3)(a) emphasises the state of mind in which a contribution to the crime is made, and therefore those who contribute with a shared intent to commit the common plan can be liable as principals.[270] JCE uses this subjective approach.[271] Lastly, a "control over the crime" approach to art 25(3)(a) does not limit principals to physical perpetrators. High-level leaders who control or mastermind a crime's commission through exertion of control, even if temporally or geographically remote from a crime, can be liable as principals.[272] This nexus is broken, however, if a defendant does not make an essential contribution to the commission of the crime.[273] In sum, the control theory involves an objective element (factual circumstances for exercising control) and a subjective element (awareness of circumstances).[274]

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265 Kevin Heller, above n 81, at 1.

266 Bigi, above n 119, at 82.

267 Kevin Heller, above n 81, at 1.

268 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 69, at [329].

269 At [328].

270 At [329].

271 At [329].

272 At [330].

273 At [346].

274 At [331].

The Pre-Trial Chamber concluded that art 25(3)(a) is irreconcilable with an objective approach. The phrase "through another" has the ability to convict perpetrators other than physical perpetrators. This is consistent with art 25(3)(a)'s normative approach to liability.[275] Subsequently, the Pre-Trial Chamber concluded that art 25(3)(a) is irreconcilable with a subjective approach.[276] Essentially, the Pre-Trial Chamber's rationale was that art 25(3) codifies a hierarchy of crimes. Part D of this section will analyse whether art 25(3) does codify a hierarchy of crimes. At this stage, it is sufficient to note that the ICC's statutory basis for rejecting a subjective approach is questionable.[277]

D A Wolf in Sheep's Clothing?

In refusing to apply JCE, some scholars argue that the ICC became associated with an analytically rigorous approach to international criminal law.[278] The present paper instead finds more sympathy with the view that the ICC has used judicial creativity in its judgments.[279] The following will evaluate the merits of the control theory. Part 1 will evaluate how heavily the control theory draws on domestic law. Part 2 will analyse whether an essential contribution to the criminal design is the most appropriate requirement of co-perpetration and indirect co-perpetration. Part 3 will analyse whether art 25(3)(a) codifies a hierarchy of crimes, and Part 4 will evaluate the status of advertent recklessness under art 25(3)(a).

1 Domestic law?

Current international law is characterised by a "sweeping receptivity" to German domestic law.[280] The ICC's recourse to German domestic law in interpreting art 25(3)(a) may prove problematic in future cases. As Judge Van den Wyngaert noted, the ICC's universalist mission does not sit well with the direct importation of German legal doctrine.[281] In

275 At [333].

276 At [334].

277 See *Prosecutor v Thomas Lubanga Dyilo (Separate Opinion of Judge Fulford)*, above n 3, at [8]; *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [26]; and Ohlin, Van Sliedregt and Weigend, above n 22, at 744.

278 At 738.

279 At 727.

280 Stewart, above n 2, at 218.

281 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [6].

addition, art 22 of the Statute states a crime shall be construed strictly and cannot be extended by analogy (*in dubio pro reo*).[282] Such explicit statements limit the ICC's ability to import concepts of domestic law that are not general principles of international law per art 21. Though the control theory has been applied in legal traditions other than Germany, Judge Van den Wyngaert argues that it is unlikely that the control theory has reached the status of a general principle of international law.[283] Part V will evaluate this issue of whether the control theory is a general principle of domestic law.

More specifically, the term "hierarchical relations" draws heavily on domestic law. In *Katanga and Ngudjolo Decision on the Confirmation of Charges*, the Pre-Trial Chamber held that a high-level leader's control over another can be exerted through an organisation.[284] Such an organisation is based on hierarchical relations between superiors and subordinates.[285] Problematically, the phrase "hierarchical relations" is a direct reflection of Claus Roxin's theory of *Organisationsherrscheft*. In a similar way, art 25(3)(a) uses the phrase "through another person", but indirect perpetration convicts a defendant for perpetration through an organisation. An argument can be made that there is a fundamental difference between the word "person" and the abstract legal entity that is an "organisation".[286]

Some commentators suggest that the term 'organisation' as used by the ICC is just "legal shorthand" for control exercised over a physical perpetrator.[287] On this basis, a defendant could commit an offence "through" (by virtue of an organisational structure) the physical perpetrator. Other arguments are advanced on policy grounds. For example, the growing importance of legal organisations in international criminal law may justify the ICC's interpretation of the term 'person' as an organisation.[288] The fact remains, however, that the terms 'organisations' and 'hierarchical relations' are a direct reflection of German legal

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282 Rome Statute, art 21.

283 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [17].

284 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)*, above n 36, at [511].

285 At [512].

286 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [53].

287 Ohlin, Van Sliedregt and Weigend, above n 22, at 737.

288 At 738.

scholarship. [289] Part V will examine in further depth whether the ICC can draw upon German legal scholarship in this manner.

It is worth noting that a defendant's control over a physical perpetrator is not watered down if control is exerted through an organisation. This is in contrast to Judge Van den Wyngaert's critique of indirect perpetration. Her Excellency argues that reading 'organisation' into the word 'person' is problematic because a defendant's control over physical perpetrators is less. Her Excellency's reasoning is that organisation control dehumanises a high-level leader's relationship with a subordinate.[290] A defendant's control over a perpetrator is not, however, diluted if exerted through an organisation. Claus Roxin's theory posited that organisational control is immediate: in other words, subordinates often carry out the orders of a leader immediately.[291] Judge Van den Wyngaert's questioning of the word 'person' being read as 'organisation' validly points out the heavy-handed influence of German legal scholarship in the ICC's jurisprudence but incorrectly concludes that organisational control is a diluted form of control.

2 Essential contribution to the crime?

Judges[292] and scholars[293] disagree as to the type of contribution a defendant must make in order to be liable as a co-perpetrator.[294] The phrase "commits… jointly with another" does not specify the substantive elements of co-perpetration. At best, the only inference that can be made from "commits… jointly with another" is that co-perpetration requires a common plan, either express or implied.[295] The Pre-Trial Chamber in the *Lubanga Decision on the Confirmation of Charges* held that "commits… jointly with another" requires a defendant

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289 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [53].

290 At [53].

291 Ohlin, Van Sliedregt and Weigend, above n 22, at 737.

292 *Prosecutor v Thomas Lubanga Dyilo (Separate Opinion of Judge Fulford),* above n 3, at [16]; and *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [44].

293 Heller, above n 81, at 1.

294 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges),* above n 69, at [346].

295 Heller, above n 81, at 1.

to make an essential contribution to the common plan.[296] The Pre-Trial Chamber's standard of "essential contribution" has been criticised as both too narrow and too broad.[297]

Three other types of contribution have been suggested by ICC judges. Firstly, the Trial Chamber in *Lubanga (Judgment)* held that the common plan need not be intrinsically criminal, but as a minimum the common plan must include a "critical element" of criminality.[298] Secondly, Judge Fulford argues that "commits… jointly with another" means that "any" contribution to the common plan is sufficient provided there is a causal link between the individual's contribution and the crime.[299] The implementation of the criminal plan must embody a sufficient risk that a crime will be committed if events follow an ordinary course.[300] Thirdly, Judge Van den Wyngaert criticises Judge Fulford's causal interpretation as too elastic and instead suggests that a "direct" contribution to the common plan is sufficient.[301]

The Pre-Trial Chamber's "essential" requirement is the most appropriate threshold for a contribution to the crime. Judge Fulford's 'causal link' requirement could lead to artificial, speculative reasoning about what might have happened in absence of a defendant's contribution.[302] In addition, Judge Fulford's test has the potential to look like an essential contribution test. Judge Van den Wyngaert's 'directness' requirement undermines the fact that co-perpetration involves the division of labour. If every co-perpetrator needed to directly bring about an offence, the concept of co-perpetration would become redundant: every co-perpetrator could be convicted as an individual perpetrator.[303] Requiring high-level leaders to make an "essential contribution" to a crime reduces the likelihood that a high-level leader will be held responsible by mere association or for acts that they had no control over.[304]

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296 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 69, at [347].

297 Ohlin, Van Sliedregt and Weigend, above n 22, at 728.

298 *Prosecutor v Thomas Lubanga Dyilo (Judgment)*, above n 61, at [984].

299 *Prosecutor v Thomas Lubanga Dyilo (Separate Opinion of Judge Fulford)*, above n 3, at [16].

300 *Prosecutor v Thomas Lubanga Dyilo (Judgment)*, above n 61, at [984].

301 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [44].

302 *Prosecutor v Thomas Lubanga Dyilo (Separate Opinion of Judge Fulford)*, above n 3, at [17].

303 Ohlin, Van Sliedregt and Weigend, above n 22, at 730.

304 *Prosecutor v. Radoslav Brdjanin (Judgment)*, above n 135, at [424].

3 Hierarchy of crimes?

Some authors propose that art 25(3) codifies a hierarchy of offences.[305] What this means is that liability under art 25(3)(a) is considered most blameworthy, and liability under art 25(3)(d) is considered least blameworthy.[306] The ICC in its subsequent jurisprudence has affirmed that art 25(3) codifies a hierarchy denoting the seriousness of crimes.[307] The language of individual criminal responsibility found in art 25 does not in itself create a hierarchy of crimes. Judge Fulford argues that there is no proper basis for concluding that art 25(3)(b) crimes of ordering, soliciting, or inducing a crime are any less serious than art 25(3)(a)'s crime of commission "through another".[308] In a similar manner to Judge Fulford, Judge Van den Wyngaert does not accept the hierarchy of crimes premise on which the control theory is based.[309]

The strongest argument against a hierarchy of offences is that there is no normative relationship between art 25(3)(a)'s modes of liability. The art 25(3)(c) crime of accessorial liability is no more serious than art 25(3)(d)'s crime inculpating those who participate in group criminality.[310] Similarly, the art 25(3)(b) crime of ordering, soliciting or inducing the commission of a crime is no more serious than the art 25(3)(c) crime of accessorial liability. As some scholars note, the ICC has been "too rigorous in drawing lines according to the vague legislative concepts embodied in article 25(3)(a)".[311] Article 25(3) merely provides judges with a variety of modes of participation to choose from.[312] The only point of clarity is that art 25(3)(a)'s status as a mode of principal liability is more blameworthy than art 25(3)(c)'s status as a mode of accessorial liability. Sub articles (3)(b), (c) and (d), however, cannot be said to be arranged in a hierarchy of seriousness. A hierarchy of crimes contradicts the Rome Statute's normative approach to liability.

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305 Gerhard Werle "Individual Criminal Responsibility in Article 25 ICC Statute" (2007) 5 Journal of International Criminal Justice 953 at 957.

306 *Prosecutor v Thomas Lubanga Dyilo (Separate Opinion of Judge Fulford),* above n 3, at [8].

307 *Prosecutor v Callixte Mbaraushimana (Decision on the Confirmation of Charges)* ICC Pre Trial Chamber I ICC-01/04-01/10, 16 December 2011 at [279].

308 *Prosecutor v Thomas Lubanga Dyilo (Separate Opinion of Judge Fulford),* above n 3, at [8].

309 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [6], [26] and [28].

310 Ohlin, Van Sliedregt and Weigend, above n 22, at 744.

311 At 745.

312 Saland, above n 83, at 198; and Ohlin, Van Sliedregt and Weigend, above n 22, at 744.

4 Advertent recklessness?

Some ICC Chambers have held that advertent recklessness (*dolus eventualis*) is not a part of the Rome Statute – instead, knowledge that a consequence will occur in the ordinary course of events requires virtual certainty.[313] The Pre-Trial Chamber, however, has ruled differently. In the *Lubanga Decision on the Confirmation of Charges*, the Pre-Trial Chamber explicitly accepted the standard of advertent recklessness.[314] This standard of advertent recklessness does not require that a common plan be criminal, and only requires an awareness and acceptance of a risk that a crime will occur. The Pre-Trial Chamber endorsed this interpretation in obiter as advertent recklessness was not relied upon.[315]

The drafting history of the Rome Statute suggests that *dolus eventualis* was banished by consensus. A draft Preparatory Committee report in 1996 explicitly referred to advertent recklessness but this section was removed from the draft Statute.[316] Some scholars concluded that reading advertent recklessness into the Statute is "in the teeth" of the Statute's language and history.[317] Article 30 of the Rome Statute may, however, provide a limited avenue for *dolus eventualis*. Article 30(1) of the Statute states that "unless otherwise provided" a defendant must have the *mens rea* requirements of intent and knowledge. Mohamed Badar, however, states that in the context of liability under art 25(3)(a) *dolus eventualis* is insufficient for a defendant to be liable. [318] This reasoning is sound: art 25(3)(a) as codified does not "otherwise provide" for *dolus eventualis*.

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313 *Prosecutor v William Samoei Ruto and Joseph Arap Sang (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute* ICC Pre-Trial Chamber II ICC-01/09-01/11, 23 January 2012 at [335]; and *Prosecutor v Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo)*, above n 66, at [360].

314 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)*, above n 36, at [351].

315 At [328].

316 Sarah Finnin "Mental Elements Under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis" (2012) 61 International and Comparative Law Quarterly 325 at 344.

317 See Roger Clark "Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations of the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings" (2008) 19 Criminal Law Forum 519.

318 Mohamed Badar *The Concept of Mens Rea in International Criminal Law* (Hart Publishing, Oxford, 2013) at 407; and Mohamed Badar "Dolus Eventualis and the Rome Statute Without It?" (2009) 12 New Criminal Law Review 433 at 467.

V Future Prosecutions At The ICC

The quest for a theory of criminal responsibility is a continuous one.[319] Whilst the influence of ad hoc tribunals should not be understated, the most important issue for future international law prosecutions is an appropriate theory of participation for the ICC. President Meron in his address to the United Nations (UN) Security Council anticipated that the ICTY would close in 2017.[320] In contrast, the ICC is in its infancy. As with the International Court of Justice and the ICTY, the ICC can only become credible over a long period of time.[321] Part A will assess the control theory by way of comparison to JCE and will evaluate the control theory's flexibility. Part B will question whether amending the Rome Statute is viable. Part C will identify the steps that the ICC should take in its future jurisprudence, including discussion of the control theory's status as a general principle of law and clarifying its interpretation of art 25(3).

A Assessing The Control Theory

The single greatest hurdle that the Rome Statute poses to inculpating high-level leaders is its lack of a mode of liability expressly inculpating high-level leaders. Judge Van den Wyngaert notes that "for better or worse… Article 25(3)(a) only contains basic and traditional forms of criminal responsibility" and that "any attempt to overextend the label of 'commission' to reach the intellectual authors or masterminds of international crimes is thus fraught with legal and conceptual difficulties".[322] In Judge Van den Wyngaert's view, the Trial Chamber's adoption of the control theory goes "well beyond" a strict interpretation of the Statute.[323]

The Rome Statute does not express the elements of principal liability for high-level leaders. Yet to preclude the ICC from prosecuting high-level leaders on the basis that the Statute provides only for 'basic and traditional' forms of criminal responsibility is to frustrate the

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319 Harmen van der Wilt "The Continuous Quest for Proper Modes of Criminal Responsibility" (2009) 7 Journal of International Criminal Justice 307 at 312.

320 Justice Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia "Address to the United Nations Security Council" (The Hague, 10 December 2014).

321 Antonio Cassese "The Statute of the International Criminal Court: Some Preliminary Reflections" (1999) 10 European Journal of International Law 144 at 145.

322 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [14].

323 At [39].

raison d'être of the ICC. The very purpose of the Rome Statute and the ICC is to fight against impunity for the commission of the "most serious crimes to mankind".[324] The Statute states that "the most serious crimes of concern" must not go unpunished and that effective prosecution is achieved through "international co-operation".[325] The ICC should strive to close the impunity gap and should not shield high-level leaders from liability on the basis that the Rome Statute's drafters didn't explicitly design a mode of liability fit for the orchestrators of mass atrocity.

Article 25(3)(a) envisages liability for a defendant who commits a crime "with another" or "through another". Relative to the ICTY Statute and the ICTR Statute, this is neither basic nor traditional. Commission of a crime "through another" is a form of intellectual perpetration. On balance, Wyngaert J's statement that art 25(3)(a) only codifies "basic, traditional modes of responsibility" is qualified by the inclusion of intellectual perpetration. The Pre-Trial Chamber held that commission of a crime "through another" is a typical manifestation of control over the crime.[326] Some authors go so far as to argue that "through another" is a classic manifestation of Claus Roxin's's concept of *täter hinter dem täter* (the perpetrator behind the perpetrator[327]).[328] These authors go too far: the drafting history of the Rome Statute suggests no single doctrine underpinning art 25(3).

The ICC should not be precluded from prosecuting high-level leaders under art 25(3)(a) purely because the Rome Statute's drafters may not have foreseen the exact statutory phrasing required to make a high-level leader culpable. One commentator notes that the Rome Statute's drafters included diplomats who had no practical criminal law experience.[329] Other commentators note that the United Nations (UN) Office of Legal Affairs provided support in the drafting process.[330] Regardless of this level of expertise at the drafting stage, it is difficult to argue that the lack of an express liability for high-level

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324 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Dissenting Opinion of Judge Anita Usacka)* ICC Appeals Chamber ICC-01/11-01/11, 21 May 2014 at [19].

325 Rome Statute, preamble.

326 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 69, at [339].

327 Ambos, above n 65, at 155.

328 Van Sliedregt, above n 58, at 103.

329 Kevin Heller "The Rome Statute in Comparative Perspective" (2009) *University of Melbourne Legal Studies Research Paper No. 370* at 13.

330 John Washburn "The Negotiations of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century" (1999) 11 Pace International Law Review 361 at 365.

leaders should preclude the ICC from fulfilling its function of prosecuting the most responsible leaders.

1 Comparison to JCE

It is unlikely that JCE will be applied by the ICC in future. This is primarily because the ICC explicitly rejected a subjective approach to art 25(3)(a).[331] JCE, relative to the control theory, is a subjective approach to liability.[332] In addition, even if the ICC were to overrule itself, JCE is based on customary international law.[333] The sources of law which the ICC can draw upon differ from those at *ad hoc* tribunals such as the ICTY.[334] More specifically, customary international law plays a more dominant role in the ICTY than the ICC.[335] This does not diminish the value of JCE. JCE is one of the two major forms of principal liability in international law. By way of illustration, JCE continues to be applied in *ad hoc* Tribunals.[336]

More importantly, JCE's strengths and weaknesses are a useful comparative tool. Though the ICC is unlikely to apply JCE, the control theory's effects are not dissimilar to those of JCE. The ICTY Appeals Chamber in *Prosecutor v Milomir Stakic (Judgment)* (*Stakic*) acknowledged that the end result of co-perpetration is similar to that of JCE "and even overlaps in part".[337] In addition, JCE III and the concept of indirect co-perpetration have a similar effect. JCE III can convict a defendant for crimes outside a common plan if those additional crimes were a foreseeable and natural consequence of the common plan.[338] Indirect co-perpetration can convict a defendant for the conduct of a physical perpetrator, even if the defendant did not exercise direct influence over this person nor share any intent

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331 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 69, at [329].

332 Jens Ohlin "Joint Intentions to Commit International Crimes" (2011) 11 Chicago Journal of International Law 693 at 725; and *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 69, at [329].

333 Fry, above n 42, at 221.

334 See Gerhard Werle and Florian Jessberger "'Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Elements of Crimes Under International Criminal Law (2005) 3 Journal of International Criminal Justice 35 at 55.

335 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [9].

336 Briony McKenzie, above n 155, at 27.

337 *Prosecutor v Milomir Stakic (Judgment)* ICTY Trial Chamber II IT-97-24-T, 31 July 2003 at [441].

338 *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [228].

with them.[339] This is the precise fact situation in the *Katanga and Ngudjolo Decision on the Confirmation of Charges.* Both JCE III and indirect co-perpetration allow a defendant to be inculpated for risk-taking behaviour.[340]

On balance, indirect co-perpetration is a more restrained mode of principal liability than JCE III. Indirect co-perpetration requires a defendant to make an essential contribution to a crime.[341] In contrast, the *actus reus* of JCE merely requires a defendant to assist in or contribute to the common purpose.[342] As one ICTY Chamber noted, the stronger a defendant's contribution to a common plan, the less likely a defendant is held guilty by mere association.[343] The future of indirect co-perpetration is unclear. It has not, so far, been used to successfully convict a defendant. The Appeals Chamber in a recent judgment left the status of indirect co-perpetration open to further litigation.[344] In this vein, Part C will discuss the future of indirect co-perpetration at the ICC.

2 Flexibility

A theory of participation must be flexible enough to convict different types of high-level leaders. This is based on the fact that serious violations of international humanitarian war differ in their nature and in their complexity.[345] A contrasting position is taken by Judge Van den Wyngaert. Her Excellency proposes that the acts of high-level leaders will "very often" not fit the mould of principal liability.[346] Her Excellency explains that in this situations, high-level leaders are sometimes more appropriately labelled as accessories rather than as perpetrators. Whilst this may be true, it does not mean that principal liability for high-level leaders is a rigid mould. International law should instead resist the temptation to make all instances of atrocity fit a mould.[347] As shown by the Srebrenica genocide, high-level leaders may be remote from a crime scene despite contributing in a large way to its contribution. The control theory adequately addresses this situation: indirect co-

339 Fry, above n 42, at 220.

340 Ohlin, Van Sliedregt and Weigend, above n 22, at 739.

341 *Prosecutor v Thomas Lubanga Dyilo (Judgment)*, above n 61, at [935].

342 *Prosecutor v Dusko Tadic (Judgment)*, above n 75, at [227].

343 *Prosecutor v. Radoslav Brdjanin (Judgment)*, above n 135, at [424].

344 *Prosecutor v Thomas Lubanga Dyilo (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction)* ICC Appeals Chamber ICC-01/04-01/06-1321, 1 December 2014 at [464].

345 Nicola Piacente "Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy" (2004) 2 Journal of International Criminal Justice 446 at 446.

346 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [29].

347 Jain, above n 4, at 5.

perpetration can be used to convict high-level leaders in the absence of direct control or shared intent.

By way of contrast, Argentina's dirty war took place in a climate of deliberate arbitrariness. Senior leaders sometimes had control over subordinates and sometimes did not.[348] The control theory also adequately deals with this situation. Indirect perpetration distinguishes a defendant who has joint control over a crime from a defendant who does not. Alternatively, co-perpetration requires a defendant to make an essential contribution to the relevant crime under the Rome Statute. This means that in the situation of Argentina's dirty war, the control theory could not convict a senior leader who did not either exercise joint control over a crime or contribute in some essential way to that crime.

A theory of participation must be able to convict both highly organised and highly disorganised leaders if such leaders have sufficient power over subordinates. Scholars note that the control theory was designed to convict leaders in the rigid hierarchies of Nazi Germany.[349] Some scholars argue that Roxin's control theory only works if a high level leader's organisational rubric is highly structured.[350] To this extent, Stefano Manacorda and Chantal Meloni argue that the control theory can convict high-level leaders within a structured context, but indirect perpetration's hierarchical structure is less appropriate for crimes committed in an informal context.[351] Gerhard Werle and Boris Burghardt question whether the control theory applies well to the more informal FRPI and FNI militias in *Katanga and Ngudjolo Decision on the Confirmation of Charges*.[352]

Whilst indirect co-perpetration was not able to be used to successfully convict Germain Katanga, the control theory is overall the most coherent method to assign responsibility to high-level leaders. The control theory can reflect the culpability of indirect perpetrators who orchestrate crime from a distance.[353] Jens Ohlin applies a 'shared intentions' theory to various situations in order to show shortcomings of the control theory.[354] Jens Ohlin's shared intentions analysis, however, does not provide a method of distinguishing between principals and accessories. Jens Ohlin's proposed solution is a binary mode of liability – a

348 Osiel, above n 1, at 102.

349 Werle and Burghardt, above n 38, at 89.

350 Osiel, above n 1, at 100; and Weigend, above n 99, at 107.

351 Manacorda and Meloni, above n 30, at 171.

352 Werle and Burghardt, above n 38, at 89.

353 Maria Granik "Indirect Perpetration Theory: A Defence" (2015) 28 Leiden Journal of International Law 977 at 978.

354 Ohlin, above n 332, at 738.

defendant would either co-perpetrate a JCE, or aid and abet a JCE. Though this is a reasonable proposition, it does not fit well with the strict wording of the Rome Statute. Direct perpetration, co-perpetration and indirect co-perpetration are explicitly codified by art 25(3)(a) whereas aiding and abetting are explicitly codified by art 25(3)(c). It is unlikely that the ICC will interpret art 25(3)(a) as capable of both principal liability and accessorial liability.

B Amending the Rome Statute?

In order for the Rome Statute to be redrafted, State parties must consent to a new mode of liability aimed at political leaders. The difficulty in drafting the Rome Statute in the first instance suggests that this process is likely difficult to achieve and, whilst desirable, unrealistic. A mode of perpetration appropriate for the ICC, in lieu of Rome Statute redrafting, should focus itself within the confines of the Statute. This paper notes that the potential adoption of the crime of aggression into the Statute could impact upon the conviction of high-level leaders. This paper also notes that a potentially viable amendment to the Statute would be a mode of principal liability based on planning. Planning is arguably the most suitable mode of responsibility to prosecute the intellectual authors of crime.[355] The word "planning" is absent from the text of the Rome Statute. Amending the Statute by way of providing for planning liability may be a viable option for the ICC. In lieu of this unlikely scenario, the following will consider how the ICC in its jurisprudence can best clarify art 25(3)(a).

C Interpreting Article 25(3)(a)

Given the separate opinions that have questioned the viability of the ICC's control theory, Sofia Lord argues that the ICC is likely to change some of its initial rulings.[356] Judge Tarfusser in a Dissenting Opinion in the Appeals Chamber held that case law on art 25(3) was "far from being uncontentious or settled".[357] To this extent, the ICC may in its future prosecutions weigh the relative merits of alternate interpretations of art 25(3)(a) that fit within the confines of the Rome Statute. The quest continues for a satisfactory answer to the question posed by judges and scholars alike: how can the high-level perpetrators of crime best be held to account in a manner concordant with the principles of international

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355 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert*), above n 3, at [15].

356 Lord, above n 76, at 62.

357 *Prosecutor v Germain Katanga (Judgment)*, above n 38, at [15].

law? The following will analyse the best steps that the ICC can take in its future art 25(3)(a) prosecutions.

The ICC must first and foremost clarify and rebut criticisms of its interpretation of art 25(3). Article 31(1) of the Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted in "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".[358] In addition, art 22(2) of the Rome Statute states that the Statute must be strictly construed and cannot be extended by analogy to domestic law. Article 21, however, enables the ICC to draw on general principles of international law.[359] With this in mind, the following will evaluate the merits of various interpretive options open to the ICC.

1 General principle of law

The ICC is limited in the sources of law it can draw on. Article 21 of the Rome Statute enables judges to draw primarily on the Rome Statute, the Elements of Crime, the Rules of Procedure and Evidence.[360] Article 21 also allows judges to draw on treaties and principles and rules of international of law.[361] Article 21 also allows judges to draw on general principles of national law.[362] Yet when the Pre-Trial Chamber read Claus Roxin's control theory into art 25(3)(a) of the Rome Statute, it was unclear whether the ICC engaged in statutory interpretation, recognising customary international law or principles of international law, or relying on general principles of law.[363]

The first possibility, that the control theory was based on statutory analysis, is irreconcilable with the fact that the Rome Statute is based on a variety of domestic legal traditions. The second possibility, that the Pre-Trial Chamber based the control theory on customary law, is also unlikely: customary international law requires widespread or uniform state practice.[364] The third possibility is that the Pre-Trial Chamber relied on the control theory as a general principle of law. This possibility still requires the control theory to be a "general principle of law derived by the Court from the national law of legal systems

358 Vienna Convention on the Law of Treaties 18232 UNTS 1155 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(1).

359 Rome Statute, art 21(1)(c).

360 Article 21(1)(a).

361 Article 21(1)(b).

362 Article 21(1)(c).

363 Weigend, above n 260, at 524.

364 At 524.

of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime" but of the three options, this is most likely.[365] Does the control theory reach this status?

At best, the control theory could be said to reach the status. Contrary to comments in some jurisprudence,[366] the control theory is not unique to German domestic law.[367] The Pre-Trial Chamber held that the control theory has been increasingly used in national jurisdictions[368] and is "widely recognised in legal doctrine".[369] More specifically, indirect perpetration is recognised in major legal systems.[370] The most promising domestic example of indirect perpetration is its codification in the American Moral Penal Code.[371] Another national court that has referred to indirect perpetration is the Argentinean Court of Appeal.[372]

Despite these positive indications, however, the ICC has not engaged in a comprehensive analysis of whether the control theory is a general principle of law. Some scholars[373] point out that the Pre-Trial Chamber cited only German and Spanish law for the proposition that the control theory is widely used.[374] The critical scrutiny given to the objective and subjective approaches is notably absent from the Pre-Trial Chamber's treatment of the control theory. The uncritical importation of a domestic law concept into international criminal law is an unenviable result. In order to justify its adoption of the control theory, the ICC must explicitly and more thoroughly analyse the status of the control theory as a

365 Rome Statute, art 21(1)(c); and George Fletcher "New Court, Old Dogmatik" (2011) 9 Journal of International Criminal Justice 179 at 182.

366 *Prosecutor v Mathieu Ngudjolo Chui (Concurring Opinion of Judge Christine Van den Wyngaert)*, above n 3, at [17].

367 See George Fletcher *Rethinking Criminal Law* (Oxford University Press, New York, 2000) at 639; Gerhard Werle *Principles of International Criminal Law* (TMC Asser Press, The Hague, 2005) at 354; and *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 61, at fn 418.

368 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)*, above n 36, at [500].

369 At [485].

370 Werle, above n 3, at 963.

371 At fn 36.

372 Florian Jessberger and Julia Geneuss "On the Application of a Theory of Indirect Perpetration in Al Bashir" (2008) 6 Journal of International Criminal Justice 853 at 862.

373 Manacorda and Meloni, above n 30, at 170; and Weigend, above n 99, at 105.

374 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)*, above n 36, at fn 647.

general principle of law.[375] The ICC should analyse whether the control theory is a general principle pursuant to art 22(1)(c).

2 Points of clarification

The ICC's control theory has relatively fewer inconsistencies than JCE. Nevertheless, in the fact of dissenting judgments and academic critique, the ICC's jurisprudence would benefit from clearly articulating a few points of contention. The ICC in its future jurisprudence should therefore clarify the following. The ICC should rebut Judge Fulford's causal link standard and Judge Van den Wyngaert's directness standard, and affirm itself in terms of requiring an essential contribution to the common plan. The ICC could, in obiter, rebuke the arguments of some scholars asserting that art 25(3) does codifies a hierarchy of crimes. Instead, art 25(3) merely offers judges a range of modes of participation to choose from.[376] It is, however, important to note that international tribunals may choose not to overrule themselves. By way of illustration, the ICTY, despite being able to overrule its own rules,[377] is still plagued by inconsistencies in its jurisprudence 10 years on from its inception.[378]

3 Cluster of factors

Jens Ohlin, Elies van Sliedregt and Thomas Weigend are concerned that the wide scope of the control theory leaves little room left for accessorial liability.[379] A co-perpetrator does not have to be present at the scene of the crime.[380] It is sufficient for a co-perpetrator to provide assistance in the formulation of a common plan.[381] It is also sufficient for a co-perpetrator to direct or control other participants.[382] Finally, a co-perpetrator can determine the roles of others involved in the offence.[383] A direct or physical link between the co-

375 Ohlin, Van Sliedregt and Weigend, above n 22, at 737.

376 At 744.

377 Vasiliev, above n 110, at 23; and Gideon Boas "A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY" in Gideon Boas and William Schabas (eds) *International Criminal Law: Developments in the Case Law of the ICTY* (Martinus Nijhoff Publishers, Leiden, 2003) at 15.

378 Bigi, above n 119, at 59.

379 Ohlin, Van Sliedregt and Weigend, above n 22, at 732.

380 *Prosecutor v Thomas Lubanga Dyilo (Judgment)*, above n 61, at [1003].

381 At [1004].

382 At [1004].

383 At [1004].

perpetrator's contribution and the commission of the crimes is unnecessary.[384] All of these contributions can be quite remote, temporally and geographically, from the realisation of the criminal plan.[385] What is the plight of a scientist who provides critical information enabling a high-level leader to produce chemical weapons?[386] Or a geographer who provides a route through rough terrain enabling a high-level leader to commit genocide?

International criminal law should be able to distinguish individuals at the centre of a criminal offence from those at the margins.[387] The inability of the essentiality requirement to distinguish between 'centre' and 'peripheral' offenders does not mean that either the essentiality requirement or the control theory should be abandoned. Rather, some scholars propose that an additional "cluster of factors" should determine whether a defendant should be liable as a perpetrator or as an accessory.[388] This proposed cluster of factors would ultimately be a normative judgment of fair attribution: judges would on a case by case basis weigh this cluster of factors. Jens Ohlin, Elies van Sliedregt and Thomas Weigend suggest that a "cluster of factors" analysis could include subjective factors such as whether there is a joint "meshing" of subplans amongst co-perpetrators[389] or a strong personal interest in the success of the criminal enterprise (well beyond a minimal *mens rea* requirement).[390] Objective factors may include an "element of immediacy" in that a temporally-close contribution to the crime pushes towards liability as a perpetrator; another suggestion is that only those who participate in the crime after the stage of attempt is reached should be co-perpetrators.

4 Indirect co-perpetration

Indirect co-perpetration may represent the future of international criminal prosecutions.[391] Many recent indictments have relied on indirect co-perpetration as a means of prosecuting a defendant.[392] The Pre-Trial Chamber in *Prosecutor v Al-Bashir (Warrant of Arrest)*

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384 At [1004].

385 Ohlin, Van Sliedregt and Weigend, above n 22, at 732.

386 At 732.

387 Jain, above n 4, at 4.

388 Ohlin, Van Sliedregt and Weigend, above n 22, at 732.

389 At 721.

390 At 733.

391 At 735.

392 See *Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* ICC Pre-Trial Chamber II ICC-01/09-02/11, 23 January 2011 at [287]; and *Prosecutor v William Samoei Ruto and*

pleaded indirect co-perpetration.[393] Indirect co-perpetration is the most recently articulated mode of liability under art 25(3)(a). It is unique in that it is capable of attributing both vertical (indirect perpetration) and horizontal (co-perpetration) liability. The Appeals Chamber in a recent decision neither affirmed nor rejected the validity of indirect co-perpetration[394] leaving the issue of its existence open to further litigation.[395] To this extent, indirect co-perpetration has the potential to become the darling of prosecutors.

Indirect co-perpetration mutually attributes liability in order to capture complex forms of collective violence:[396] as mentioned in Part IV, indirect co-perpetration was able to account for the situation that crimes committed could only have been perpetrated by the combined forces of separate leaders.[397] Indirect co-perpetration is capable of convicting participants in a similar manner to JCE III.[398] Indirect co-perpetration is "what can only be described as a truly potent prosecutorial tool".[399] Nevertheless, indirect co-perpetration is not unrestrained. By way of defence, indirect co-perpetration is not a fourth manifestation of the control theory – it is merely a "factual coincidence" of two recognised modes of participation.[400] A limiting principle is that a defendant must have known it was possible that additional crimes might be committed and must have accepted this possibility.[401] In addition, indirect co-perpetration cannot convict a defendant if there is a low and unaccepted probability that the objective elements of the crime will occur.[402] For these reasons, indirect co-perpetration has the potential to become the ICC's chief prosecutorial tool.

Joshua Arap Sang (Decision on the Confirmation of Charges) ICC Appeals Chamber ICC-01/09-01/11, 23 January 2012 at [286], [299] and [332].

393 *Prosecutor v Omar Hasan Ahmad Al Bashir (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-02/05-01/09-3, 4 March 2009 at [8].

394 *Prosecutor v Thomas Lubanga Dyilo (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction)*, above n 344, at [464].

395 At fn 863.

396 Ohlin, Van Sliedregt and Weigend, above n 22, at 726.

397 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)*, above n 36, at [519].

398 Fry, above n 42, at 221.

399 Ohlin, Van Sliedregt and Weigend, above n 22, at 735.

400 Weigend, above n 99, at 110.

401 *Prosecutor v Thomas Lubanga Dyilo (Decision on the Confirmation of Charges)*, above n 69, at [352] and [353].

402 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Confirmation of Charges)*, above n 36, at [537].

VI Conclusion

The present paper has explored principal liability in international criminal law. International criminal law seeks to combat impunity by successfully prosecuting individuals who are the most responsible for crimes. High-level leaders responsible for serious violations of international humanitarian law should be labelled as principals to a crime, and not as accessories. A high-level leader's participation in mass atrocity can take a number of forms which a theory of participation should be able to account for. The control theory has the ability to account for the characteristics of mass atrocity whilst limiting liability to defendants who make an essential contribution to a crime. In particular, indirect co-perpetration is a potent form of the control theory capable of addressing complex fact scenarios. Whether indirect co-perpetration will become the darling of prosecutors is yet to be seen. It is of utmost importance, however, that the ICC justify its reliance on the control theory. If the control theory's status is that of a general principle of law, the ICC can more justly continue on its mission of ending impunity for high-level leaders.

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