CHAPTER 6

MODES OF PARTICIPATION AND RECOGNIZED DEFENSES

I. INTRODUCTION

Chapter 3 discussed the basic principles of international criminal law, including the central concept of individual personal responsibility. That principle is reflected in article 25(2) of the Rome Statute, which states: "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute."

In specific cases, however, a more precise analysis is necessary in order to determine who can be held individually responsible for which acts, or put differently, exactly what must be proven in order to hold an individual criminally liable for a given crime. Different domestic legal systems approach this question in different ways. In general, however, the analysis focuses on two aspects: (i) what conduct is required, and (ii) what motive or intent is required. The first is sometimes referred to as the "objective" aspect of the conduct or omission (or *actus reus*) and the second as the "subjective" state of mind (*mens rea*). The latter can be critical: in U.S. law for example, it is the difference between murder and manslaughter.

This chapter focuses on the approach taken by the Rome Statute, which established the International Criminal Court. Technically, its provisions apply only with respect to proceedings before that Court. As a recently negotiated multilateral treaty, however, the Rome Statute represents an internationally agreed set of common principles on principles of criminal liability, including questions of intent, motive and purpose.

II. KNOWLEDGE AND INTENT

Article 30(1) states that "[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge." These are the fundamental elements of criminal liability. As the ICTY Appeals Chamber said in *Prosecutor v. Natelić and Martinović,* IT–98– 34A, Judgment (May 3, 2006), para. 114, "[t]he principle of individual guilt requires that the accused can only be convicted for a crime if his *mens rea* comprises the *actus reus* of the crime. To convict him without proving that he knew of the facts that were necessary to make his conduct a crime is to deny his entitlement to the presumption of innocence."

For this purpose, article 30(2) states that a person has "intent" where (a) in relation to conduct, that person means to engage in the conduct and (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. Article 30(3) defines "knowledge" to mean "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."

With respect to intent, international criminal lawyers tend to use some technical terms not familiar to most U.S. lawyers or students, to make some basic distinctions: (1) the actual intent to carry out the guilty act in question is often called *dolus directus*; (2) the intent to carry out a particular act with a more general awareness that there could be certain consequences to that act is called *dolus eventualis*; and (3) the precise or "specific" intent to carry out a particularly heinous act is called *dolus specialis*. This last is relevant only to cases of genocide, persecution as a crime against humanity, aggression and some forms of terrorism.

III. MODES OF PARTICIPATION

In addition to requiring both a "guilty act" and a "guilty mind," most legal systems draw distinctions between the ways an individual may commit, or be involved in committing, a crime. For example, the person who commits murder during a bank robbery may be held to a different standard than the other members of his or her gang who served as lookouts, or drove the get-away car, or provided the necessary "inside" information about the combination of the safe, etc.

It is common to distinguish "direct" from "indirect" participation and to acknowledge that persons acting together with a common objective may share liability for the overall crime. A line is often drawn between those who actually commit the crime (the "principals" or "perpetrators") and those who are otherwise involved or complicit (the "accessories" or "accomplices"). In most instances, the liability of the accessories or accomplices is "derivative" because it depends on the commission of a crime by the principal(s). Thus, if the principal is not guilty, then by definition neither is the accomplice.

However, U.S. law students should appreciate that foreign legal systems frequently define these categories differently than U.S. law does. In consequence, the developing international criminal law system often uses the terms differently. This can create some confusion. For example, U.S. law minimizes accessorial liability; "aiding and abetting" is typically treated as a form of "principal" liability. Internationally the opposite is true; aiding and abetting normally results only in liability as an accessory. For another example, U.S. criminal law relies heavily on the concept of a criminal "conspiracy" but most foreign legal systems do not have the concept and it is therefore rarely used in international practice (genocide is the main exception).

For ICC purposes, article 25(3) defines the "modes of participation" which will entail criminal responsibility under the Rome Statute. In general, article 25(3)(a) provides for liability as a principal when an individual is a *perpetrator* (i.e., physically carries out all elements of the offense) as well as when that individual is a *co-perpetrator* (commits the crime jointly with others) or is an *indirect perpetrator* (by exercising control over those who commit the offense) or is an indirect co-perpetrator (for example, contributes to the joint scheme through some form of organization).

Article 25(3) lists six specific modes of participation. Article 25(3)(a) addresses direct participation in "committing" a crime; articles 25(3)(b)–(e) discuss various modes of accessorial liability. Some are clearer than others, and the ICC itself has not yet had an opportunity to clarify all the issues they raise.

§ 6–1 COMMITS

First, article 25(3)(a) provides that a person can be held criminally liable when he or she commits a crime, whether as an individual, jointly with another, or through another person, regardless of whether that other person is criminally responsible.

The first part of this formulation is unremarkable, since it covers the familiar situation of the individual as direct perpetrator. If the crime in question is killing someone, then the person who did the killing is the one who "committed" the crime. If the crime is "planning" or "preparing" to kill someone, then everyone involved in the planning and preparation can be charged as a direct perpetrator of that crime. Recall that at Nuremberg, one of the main charges against the individual defendants was planning and preparing a war of aggression.

Article 25(3)(a) also covers co-perpetrators. Persons who act "jointly" or "through another person" can be charged with the crime(s) in question. This is true "regardless of whether that other person is criminally liable."

For specific crimes, what actually constitutes "commission" may require special

consideration. For example, in *Prosecutor v. Seromba*, ICTR 2001–66–A, Judgment (Mar. 12, 2008), para. 161, the ICTR Appeals Chamber noted that in the context of genocide, "direct and physical perpetration" does not necessarily mean physical killing but can include other acts as well. The Trial Chamber, it said, had erred by holding that "committing" requires direct and physical perpetration of the crime by the offender. The correct test was whether Seromba's actions were "as much an integral part of the genocide as were the killings which [they] enabled" and whether he "became a principal perpetrator of the crime itself by approving and embracing as his own the decision to commit the crime."

With regard to aggression under article 8 *bis* of the Rome Statute, only persons "in a position effectively to exercise control over or to direct the political or military action of a State" can commit the crime.

§ 6–2 ORDERS, SOLICITS, INDUCES

Under article 25(3)(b), a person can be held criminally liable who "orders, solicits or induces the commission of such a crime which in fact occurs or is attempted." In contrast to the direct commission of a crime, these modes of participation are accessorial and thus can lead to criminal liability only if the crime "*in fact occurs or is attempted*."

The concept of "ordering" rests on a hierarchical relationship and the notion of one person's authority to compel compliance by another. The relevant intent is that of the person issuing the order, not the one who obeys it, and that person must be aware of the substantial likelihood that the crime will in fact be committed pursuant to the order. As the ICTY has said, "[T]he actus reus of ordering requires that a person in a position of authority instruct another to commit an offence. There is no requirement that the order be given in any particular form. . . . [I]t is sufficient to demonstrate that the order substantially contributed to the physical perpetrator's criminal conduct." *See Prosecutor v. Boškoski and Tarčulovski,* IT–04–82–A, Judgment (May 19, 2010), para. 160.

"Ordering" liability under article 25(3)(b) may seem similar to command or superior responsibility in article 28, but the former contemplates liability for an *affirmative* wrongful act while the latter depends on an *omission*—the failure to prevent or punish a crime committed by subordinates. To put it another way, a superior may liable for ordering a war crime only if her subordinate attempts it or succeeds in carrying it out. If the subordinate takes no steps to carry out that order, the superior cannot be held liable for having ordered the crime. On the other hand, if the soldier commits the crime on her own, the superior might be held liable (even if no orders were given) on the basis of command responsibility for having failed to prevent the crime.

By comparison, "soliciting" or "inducing" do not rest on a hierarchical relationship but instead focus on the ability of one person to convince another to commit an offense. These modes probably cover "instigation" as well. Here, the issue is whether the actions of an individual prompt, provoke or "bring about" the conduct of another which constitute a covered crime. It appears those actions can be express or implied but must include a "causal result." *See Prosecutor v. Blašić*, IT–95–14–5T, Judgment (Mar. 3, 2000), para. 280.

§ 6–3 AIDS, ABETS, ASSISTS

Article 25(3)(c) recognizes a form of "accomplice" liability for an individual who, for the purpose of facilitating the commission of a covered crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

This mode of participation is broad enough to cover all acts specifically directed to assist,

encourage or lend moral support to the perpetration of covered crimes. It is an "inchoate" offense, meaning that the preparatory acts are punishable even if the core crimes they are intended to facilitate are not actually carried out.

It would seem to cover situations in which an individual gives practical assistance, encouragement, and moral support to the principal perpetrator(s), with knowledge that these actions will assist the perpetrator(s) in the commission of the crime. It may also cover planning. The aider and abettor need not share the precise intent of the principals but must know that his conduct would assist the principals in their commission of the crime, and the support he or she provided must have had a substantial effect on the perpetration of that crime. *See, e.g., Prosecutor v. Lukić*, IT–9–32/1– A, Judgment (Dec. 12, 2012) para. 450 (the aider and abettor must know that his acts would assist in the commission of the crime by the principal perpetrators and must be aware of the 'essential elements' of the crime committed by the principal perpetrators but need not share the *mens rea* for such crime).

In *Prosecutor v. Perišić*, IT–04–81–A, Judgment (Feb. 28, 2013) para. 36, the Appeals Chamber reversed the conviction of the former chief of staff of the Yugoslav Army on the grounds that that specific direction is a required element of aiding and abetting, at least in the context of the liability of a superior for actions of his subordinates. In that case, the prosecutor had not proved Gen. Perišić had effective control over his soldiers at the time of the Zagreb shelling. "[N]o conviction for aiding and abetting may be entered if the element of specific direction is not established beyond reasonable doubt, either explicitly or implicitly."

§ 6–4 CONTRIBUTES WITH A COMMON PURPOSE

Article 25(3)(d) permits the imposition of criminal liability on a person who "[i]n any other way contributes to the commission or attempted commission" of one of the crimes "by a group of persons acting with a common purpose." It provides that "[s]uch contribution must be intentional" and made either (i) "with the aim of furthering the criminal activity or criminal purpose of the group" or (ii) "in the knowledge of the intention of the group to commit the crime."

The exact reach of this mode remains unclear. Based on the text, the prosecutor must show that a group of persons acting with a common purpose attempted to commit or committed a crime within the ICC's jurisdiction. The actions of the accused must have "contributed" to the commission or attempted commission of the crime in some way "other than" those set out in subparagraphs (a) to (c) (commits, orders, aids and abets). The contribution must have been intentional and made either with the aim of furthering the criminal activity or criminal purpose of the group or in the knowledge of the intention of the group to commit the crime. A number of decisions have set out a "significant contribution" qualification for this category of liability: iIn order to incur liability under Article 25 (3)(d), an individual must have lent 'significant' support to the group and the common enterprise. *See, e.g., Prosecutor v. Mbarushimana,* PT. Ch. I, ICC-01/04-01/10-465-Red (December 16, 2011) at para. 283.

By imposing liability for complicity in group crimes, this mode raises some difficult (and as yet unresolved) questions. It seems clearly distinct from what a U.S. lawyer would call conspiracy, since it does not appear to require any agreement among the participants and can only result in liability if the core crime is actually committed or attempted. It differs from "joint criminal enterprise" because it requires a contribution to the crime itself.

§ 6–5 DIRECT AND PUBLIC INCITEMENT

Article 25(3)(e) provides that, *only* in respect of the crime of genocide, criminal

responsibility can be imposed on an individual who directly and publicly incites others to commit genocide. It thus incorporates the relevant provisions of Article III of the 1948 Genocide Convention, which includes "direct and public incitement" as one form of responsibility along with conspiracy, complicity and attempt.

The term "incitement" in this context involves convincing, encouraging, or persuading another to commit a crime. The ICTR Trial Chamber has noted that the "public" element of incitement involves an inquiry into two factors: (i) the place where the incitement occurred and (ii) whether or not assistance was collective or limited. "According to the International Law Commission, public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television." *See Prosecutor v. Akayesu*, ICTR 96–4–T, Judgment (Sept. 22, 1988) para. 556. It is the public component of this provision that sets this crime apart from the crime of instigation.

This crime is an inchoate crime, meaning that actual commission upon incitement is not essential to incur liability, whereas instigation involves a compulsory factor of *commission* following such instigation.

§ 6–6 ATTEMPTS

Under article 25(3)(f), liability may be imposed on someone who attempts to commit a covered crime by "taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions." It also provides that "a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose."

An attempt is an inchoate crime because, by definition, it rests entirely on preliminary actions which do not produce the intended consequences. The crime of attempt is complete when "substantial" steps have been taken, even though those steps have been frustrated (and the intended crime remains "incomplete") because of "independent" or external factors. As an example, if an individual seeks to kill another person by actually shooting at him but fails because the shot is deflected by a passing truck (or because a policeman arrives just before the accused can pull the trigger), he or she could be prosecute for an attempt—but not if the accused has a last-minute change of heart and lays down the loaded gun without firing it.

IV. CONSPIRACY AND JOINT CRIMINAL ENTERPRISE

Several of the modes discussed above would apply to different types of joint commission (co-perpetration) in a given crime. An individual may be held criminally responsible, for example, when he or she acts jointly with another or through another person to "commit" the crime, solicits or induces or aids and abets others to do so, or "contributes" to the commission of the crime. For those trained in U.S. law, however, the description of modes seems odd, even deficient, because the Rome Statute does *not* deal separately with joint commission and in particular does *not* include the concept of conspiracy.

§ 6–7 CONSPIRACY

Conspiracy is generally punished in common law systems but it is unknown or severely limited in civil law systems. In U.S. law, the crime of conspiracy generally requires an agreement

between two or more persons with the intention of committing a particular crime. The core of the charge of conspiracy is the agreement among those charged. All participants in the agreement can be held equally liable, including for the foreseeable acts of any of them. Typically, conspiracy stands on its own as a separate crime and is said to be an "inchoate" crime because the object of the conspiracy need not be consummated. To prove a charge of conspiracy, it is enough to show that the participants had agreed carry out the crime in question and (at least in U.S. law) had committed at least one substantive act in furtherance of the conspiracy.

Because many foreign criminal systems do not recognize the concept of conspiracy, it has been controversial at the international level. Both the London Charter and Allied Control Council Law No. 10 did include the concept but only in respect of crimes against peace. By contrast, they offered an alternative but related concept providing that those who participated in a "common plan" to commit any of the crimes covered in those instruments could be held responsible for acts performed in execution of such a plan.

The Nuremberg Indictment and CCL No. 10 also included the notion of "criminal organizations" and charged a number of groups and entities (including the Leadership Corps of the Nazi Party, the Gestapo, the Reich Cabinet, etc.) on this ground. Doing so was in a sense analogous to charging a criminal conspiracy, since those groups had been formed and organized for a common criminal purpose, but declaring the group itself to be unlawful did not mean that every member of the group was therefore liable for the group's actions. A member might be found liable on another basis (such as complicity) but not simply by virtue of membership in the group.

§ 6–8 JOINT CRIMINAL ENTERPRISE

Neither conspiracy nor the idea of a "criminal organization" were included in the Statutes of the two *ad hoc* tribunals, and as a result the ICTY and the ICTR struggled with the need to attribute criminal liability in situations involving massive crimes committed by large groups of individuals sharing a common criminal plan or purpose. The solution was the doctrine of "joint criminal enterprise" (or "JCE").

The ICTY Appeals Chamber has held that article 7(1) of that tribunal's Statute did not exclude imposing responsibility where several persons have a common purpose act together. "Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable." In this formulation, "common purpose" liability can be imposed only where (i) the participants share an intention to take part in a joint criminal enterprise and to contribute—individually and jointly—to the criminal purposes of that enterprise and (ii) actually "contribute" to those purposes. *See Prosecutor v. Tadić*, IT–94–1–A, Judgment (July 15, 1999) para. 190.

The *Tadić* Chamber actually created three separate "categories" of JCE. All three require the existence of a group of individuals, a common criminal purpose which involves the commission of a covered crime, and the participation of the accused therein.

1. The Basic Form: Common Intent and Purpose

In this situation (referred to as "JCE I"), the co-participants in the common plan or design possess the same criminal intent to commit a crime and one or more of them actually perpetrates the crime according to the common design. The accused individual must have knowingly participated in at least one aspect of the common design. All the participants can be held liable for the crime if they have made a significant contribution to the achievement of the common design. They can have played various roles. It is not necessary for each perpetrator to be seeking to carry

out the plan for the same reason.

2. The Systemic Form: Common Institutional Context

The second form ("JCE II") contemplates the situation of a "concentration camp" or other "system of ill-treatment," in which the accused knowingly participates in some fashion, helping to implement or achieve the common design through some kind of institutional framework. There is no need to prove an express or implied agreement; the organizational context supplies the evidence of common plan and purpose. But the accused must know about the systematic nature of ill-treatment, must share the intent to contribute to it, and must have made a significant contribution. Typically, the accused will have held a position of some sort within the organizational hierarchy of the relevant entity (camp guard, for example).

3. The Extended Form: Foresight and Assumption

The third form ("JCE III") addresses the situation where one of the perpetrators has committed a crime outside the common plan that was nevertheless a natural and foreseeable consequence of the plan. Here, all members of the plan can be held liable when that crime was a natural and foreseeable consequence of the realization of the common plan. The accused need not have known of or intended that act, only to have intended to participate in and to contribute to its execution. He or she is nonetheless responsible for "extraneous crimes" occurring as a reasonably foreseeable or predictable consequence of the underlying the common design. It is not necessary that the accused have been either reckless or indifferent to that risk.

Note the differences in the *mens rea* requirements. In the first JCE category, the accused must intend both to commit the crime and to participate in a common plan aimed at its commission. In the second, the accused must have personal knowledge of an organized criminal system and intend to further the criminal purpose of the system. For the third, the accused must also share in the common purpose but can be held responsible for a crime outside that common purpose if it was foreseeable that such a crime might be perpetrated by one or other members of the group and the accused willingly took that risk (*dolus eventualis*).

One of the chief examples of prosecution under the third category is the case of *Prosecutor v. Milosevic*, Initial Indictment, at para. 6, Case No. IT-01-51-1 (Nov. 22, 2001) where the Trial Chamber found that this third category of Joint Common enterprise may be a basis for personal criminal liability.

In *Prosecutor v. Brdanin*, IT–99–36–A, Judgment (Apr. 3, 2007), paras. 410–419, the ICTY Appeals Chamber stressed that what matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the common plan but whether the crime in question forms part of the common purpose. Where the principal perpetrator of a particular crime is not a member of the JCE, this essential requirement may be inferred from the particular circumstances. It is not necessary to prove that an agreement or understanding existed between the actual perpetrator and the accused to commit that particular crime. For the third category, in order to hold a member of the JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member—when using a principal perpetrator— acted in accordance with the common plan. The existence of this link must be assessed case-by-case.

The ICTY applied the JCE concept rigorously. In *Prosecutor v. Gotovina*, IT–06–90–A, Judgment (Nov. 16, 2012) para. 96, the Appeals Chamber reversed the JCE conviction of two high-level Croatian leaders for crimes against humanity and violations of the laws and customs of

war. "No reasonable trial chamber," it said, "could conclude that the only reasonable interpretation of the circumstantial evidence on the record was the existence of a JCE with the common purpose of permanently removing the Serb civilian population from the Krajina by force or threat of force." In *Prosecutor v. Stanišić and Simatović*, IT–03–69–T, Judgment (May 30, 2013), the ICTY acquitted two former high-level officials in the Serbian State Security organization *inter alia* of JCE-based charges because it could not be established that they shared the necessary common criminal purpose.

Most recently, in *Prosecutor v. Prlić*, IT–04–74T, Judgment (May 29, 2013), the Trial Chamber found that six high-level members of the Croatian Defense Council (HVO) had participated in a Joint Criminal Enterprise between November 1991 and April 1994 designed to remove Muslims and other non-Croats living in parts of Bosnia and Herzegovina claimed by the Croatian community in order to create a Croatian territory with the borders of the Croatian Banovina. This JCE, it said, was aimed at the establishment of a Croatian territorial entity to enable a reunification of the Croatian people. The participants implemented a system to expel the Muslim population from those areas by displacement and confinement of civilians, murder and destruction of property, ill-treatment and harsh conditions in detention, wide-spread use of detainees to work on the frontline and even to serve as human shields at times. The six were convicted of various crimes against humanity, grave breaches of the Geneva Conventions, and violations of the "laws and customs of war."

The JCE concept remains contentious. The main criticism of JCE category 3 has been that the accused is convicted for crimes that he neither committed nor intended to be committed. However, that can also be true of other modes of liability. The real problem would seem to arise when the doctrine is applied to large-scale, well-planned atrocities which involve large numbers of perpetrators, where it can be truly difficult to say that any one individual could reasonably foresee all the possible actions of all the others. This might make sense with regard to the overall high-level political or military leaders, the ones who initiate and in some way direct the common plan, but it seems more problematic for the low-level participants.

The "guilt by mere association" argument was raised and rejected in *Brdanin*, where the Appeals Chamber said (at para. 424) that because JCE responsibility does require the accused's participation (which can consist of assistance in, or contribution to, the execution of the common purpose), there is no risk that attaching JCE liability to an individual who is "structurally remote" from the crimes in question.

The concept of "joint criminal enterprise" is not explicitly included in the listing of modes in the Rome Statute. Whether the *ad hoc* tribunals' JCE jurisprudence will be relied on in the ICC, for example in assessing liability under article 25(3)(a) or (d), remains unclear.

§ 6–9 DIFFERENCE BETWEEN JCE AND CONSPIRACY

In U.S. law, conspiracy requires an agreement among the participants to commit a crime. It is punished as a crime itself, whether or not the underlying intended crime (the object of the conspiracy) was actually carried out. Generally, the accused must have committed at least some act in furtherance of the conspiracy. Under so-called *Pinkerton* liability, co-conspirators can be held substantively liable for foreseeable crimes committed in furtherance of the conspiracy.

By comparison, JCE is not a crime in itself but a "mode" of assessing criminal liability for other crimes. It does not require an agreement, only a common plan or design. It does require that some member of the group have committed a covered crime and that the accused made a significant contribution to the achievement of the common plan. The extended form of JCE is not unlike *Pinkerton* liability.

§ 6–10 DIFFERENCE BETWEEN JCE AND AIDING AND ABETTING

Aiding and abetting requires the accused to have made a substantial contribution to another's crime. The accused must know (and have intended) that his assistance will help the perpetrator commit the crime in question. As an "inchoate" offense, it is punishable even if the underlying crime is not actually carried out.

By comparison, JCE is based on the existence of a common plan or design. The accused must be aware that his participation in some way supports the overall objective shared by the group. He or she may be held liable for the crimes committed in furtherance of that common purpose as a whole and not simply the crimes which he committed or assisted.

§ 6–11 CONSPIRACY TO COMMIT GENOCIDE

The 1948 Genocide Convention, in article 3(b), criminalized conspiracy as a particular inchoate crime related to genocide, but the proposal was controversial and had been debated intensely during the conference that preceded its adoption. It was included within their Statutes (ICTY article 4(3)(a) and ICTR article 2(3)(b)). It was *not* included in the Rome Statute and accordingly is not discussed in the Elements of Crimes.

The ICTR has rendered a few informative decisions on the subject. In *Prosecutor v Karemera and Ngirumpatse*, ICTR 98–44–T, Judgment (Feb. 2, 2012) para. 1578, the Trial Chamber said that conspiracy can be inferred from circumstantial evidence "as long as the existence of conspiracy to commit genocide is the only reasonable inference." The decision in *Prosecutor v. Musema,* ICTR 96–13– T, Judgment (Jan. 27, 2000) paras. 189–203, discussed the differing origins and concepts of common law "conspiracy" and civil law "complot," concluding that "the crime of conspiracy to commit genocide is punishable even if it fails to produce a result, that is to say, even if the substantive offence, in this case genocide, has not actually been perpetrated." It also concluded that an accused could not be convicted of both genocide and conspiracy to commit genocide on the basis of the same acts.

V. COMMAND OR SUPERIOR RESPONSIBILITY

The notion that military commanders should be held responsible for crimes committed by their subordinates has long been an accepted principle of the law of war. Most famously, it was applied in the case of Japanese General Tomoyuki Yamashita, the military governor of the Philippines near the end of World War II, for his failure to prevent widespread atrocities committed by troops under his authority. As stated by the U.S. Military Commission, sitting in Manila in 1945, "where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminal liable, for the lawless acts of his troops." *See* IV Law Reports of Trials of War Criminals 335 (l948). The conviction imposed by the IMTFE was upheld by the U.S. Supreme Court in *In re Yamashita*, 327 U.S. 1 (1946).

The principle can also apply to civilian (non-military) individuals in a superior-subordinate relationship. For example, the IMTFE also found Japanese Prime Minister Hideki Tojo and Foreign Minister Mamoru Sigemitsu criminally liable for their failure to prevent or punish the criminal acts of the members of the Japanese military. The doctrine was also applied by the Nuremberg Tribunal and incorporated into the Statutes of the ICTY and the ICTR. In the former, most decisions concerned military leaders; in the ICTR, the doctrine was applied to civilian leaders

in a number of circumstances.

Article 28 of the Rome Statute explicitly recognizes both types of responsibility, one for military commanders and the relationships other for others in "superior and subordinate" relationship.

As to the first, article 28(a) provides that "a military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces" in two circumstances:

> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

As to the second, concerning non-military situations (for example, those involving civilian governments), article 28(b) states that a superior shall be criminally responsible for crimes committed by "subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates," where:

> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Note the difference in the "knowledge" requirement. Military commanders must have had actual knowledge or a duty to have known; non-military superiors can only be held liable if they knew or "consciously disregarded" relevant information. This distinction is new. In the ICTY, a more general standard has been applied. In *Prosecutor v. Blašić*, IT–95–14–A, Judgment (July 29, 2004) para. 62, the Appeals Chamber stressed that "a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates." This knowledge cannot simply be presumed but must be proved by direct or circumstantial evidence. On the other hand, conscious avoidance (sometimes called "willful blindness") cannot justify failure to act.

The central fact in both circumstances is the existence of the superior-subordinate relationship. This relationship does not depend on formal status alone; the important thing is the superior's ability to prevent and punish the commission of the crimes in question. The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subject to their authority. *See Prosecutor v. Delalić*, IT–96–21–A, Judgment (Feb. 20, 2001) para. 193. What is essential, in the

view of the ICTY Appeals Chamber, is "effective control," which it has recently defined as the power to prevent or punish the offenses of the subordinates. *See Prosecutor v. Perišić*, IT–04–81–A, Judgment (Feb. 28, 2013) para. 119 ("absent a finding of effective control over subordinates, superior responsibility cannot be established").

It is also necessary in both circumstances for the superior not to have taken all "necessary and reasonable measures" to prevent the crime or to punish the perpetrator or perpetrators. What is necessary and reasonable must be determined case-by-case. Some decisions apply a "due diligence" standards. *See, e.g., Prosecutor v. Blaškić*, IT–95– 14–T, Judgment (Mar. 3, 2000) para. 332. This may be characterized as a failure to exercise proper control over subordinates.

It is important to note that article 28 does not impose either vicarious liability or automatic or "strict" criminal liability. Liability arises when the superior culpably violates the duties of control assigned to him or her. What is central is the commander's own acts or omissions in failing to prevent or punish the acts of his subordinates whom he knew or had reason to know were about to commit serious crimes or had already done so.

In this sense, command responsibility is responsibility for a "culpable omission"—the failure to carry out his legal duty to control his subordinates. In *Prosecutor v. Bemba*, ICC–01/05–01/08–424, Decision Confirming Charges, paras. 405–07 (June 15, 2009), the ICC's Pre-Trial Chamber said that a superior may be held responsible for the prohibited conduct of his subordinates for failing to fulfill his duty to prevent or repress their unlawful conduct or submit the matter to the competent authorities. *See also Prosecutor v. Ntagerura*, ICTR 96–10A, Judgment (Sept. 1, 2009) para. 659 (holding that command responsibility requires a duty to act, the ability to act, the failure to act, intending the consequences or at least awareness and consent that consequences would occur, and that the failure results in commission of the crime); *Prosecutor v Ntaganda*, PTC II, Decision on the Confirmation of Charges, ICC-01/04-02/06 (June 9, 2014), para. 173, which established that mere disciplinary measures undertaken by commanders to redress failure of the troops to comply with orders do not amount to punishment for crimes under the Rome statute.

More recently, the ICC addressed the scope of command responsibility in *Prosecutor v. Bemba*, ICC-01/05/08, Judgement of Trial Chamber III (Mar. 21, 2016), paras. 173-211, noting that under Article 28 the accused must have been either a military commander or a person effectively acting as one, with effective command and control (or authority and control over the forces who committed the crimes in question. That individual must have had knowledge of those crimes, established directly or by inference and must have failed to take "all necessary and reasonable measures" to prevent or repress those crimes. Moreover, the crimes must have "resulted from" that failure. That requirement does not reflect a "but for" standard of causation, it said, but the necessary "nexus requirement would clearly be satisfied when it is established that the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would have prevented the crimes." *Id*. at para. 211.

These issues, in particular the nature of the "causal link" requirement, have also been raised in *Prosecutor v. Ntaganda*, ICC-01/04-02/06 (Trial Chamber VI), currently under submission. *See* Defense Team Statement dated Nov. 8, 2018), paras. 378-390, available at *https://www.icc-cpi.int/CourtRecords/CR2018_05236.PDF*.

VI. DEFENSES AND MITIGATION

The defenses to liability, as well as factors which can be pleaded in mitigation, are set forth in article 31 of the Rome Statute. The list is not exhaustive: article 31(3) states clearly that "[a]t trial, the Court may consider a ground for excluding criminal responsibility *other than* those

referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21."

§ 6–12 MENTAL DISEASE OR DIMINISHED CAPACITY

Because crimes within the scope of the Court's jurisdiction rest on the concept of purpose and intent, an individual cannot be convicted if he or she is unable to understand that the conduct in question would violate the law or to control his or her behavior. Thus, under article 31(1)(a), criminal responsibility cannot be imposed if the accused "suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct" or the capacity "to control his or her conduct to conform to the requirements of law." Incapacity must affect the perpetrator at the time the act was committed, not afterwards.

This defense does not apply to temporary states of exhaustion or excitement. Additionally, the burden of proof to prove the existence of a mental disease or diminished capacity is on the accused as was declared by the trial chamber in *Prosecutor v. Delalić* et al. (ICTY T. Ch., IT-96-21) (Nov. 16,1998).

§ 6–13 INTOXICATION

Article 31(1)(b) excludes liability if the accused was at the time of the crime "in a state of intoxication that destroy[ed] that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law." This defense does not apply, however, when the person had become "voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court."

The term "intoxication" presumably applies whether the condition results from alcohol, drugs or narcotics or other mind-altering psychotropic substances. However, it does not exclude responsibility in all situations—only when the result was a loss of capacity to appreciate the unlawfulness of one's acts or to control one's own conduct. Voluntary intoxication only works to free the perpetrator from responsibility if he or she is not aware of the risk of committing a crime while intoxicated.

§ 6–14 SELF-DEFENSE

Acts in self-defense may also be excluded. Article 31(1) (c) permits such a defense when the person accused "acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected." The article also states that "[t]he fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph."

The provision is thus available in two circumstances: (a) defense of oneself or another and (b) defense of property "essential for the survival" of the person or another person or "essential for accomplishing a military mission." However, the fact that the accused was "involved in a defensive operation conducted by forces shall not *in itself* constitute a ground for excluding criminal responsibility under this subparagraph."

The criterion of "reasonableness" applies to both situations. This must be judged in the particular circumstances of the event. Inherent in this defense are the concepts of imminence and proportionality. Acts of self-defense are only permissible in response to force directed against the life, limb or freedom of movement of the defender or a third party. The object of the defense must be an "imminent and unlawful use of force" and the response must be proportionate and reasonable. This requirement of reasonableness, proportionality and timeless was stressed by the Trial Chamber in *Prosecutor v. Kordić and Čerkez* (ICTY IT 95-14/2), T. Ch., Judgment (Feb. 26, 2001), para 459.

§ 6–15 DURESS AND NECESSITY

Under article 31(1)(d), it may be a defense that the conduct alleged to constitute a crime "has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided." Such a threat may either be made by other persons or "constituted by other circumstances beyond that person's control."

The defense of duress has long been controversial. The reasons are illustrated by the now-famous case of Drazen Erdemović, a soldier in the Bosnian Serb Army who was involved in the massacre of unarmed Bosnian Serb men near Srebrenica in July 1995. He admitted to shooting some 70 individuals but claimed that he had been compelled to do so. At first, he had refused to participate but was told by his superiors, "if you don't wish to do it, stand in the line with the rest of them and give others your rifle so that they can shoot you." Before the ICTY he pled guilty but later appealed his sentence and succeeded in obtaining a reduction.

In *Prosecutor v. Erdemović*. IT–96–22–A, Judgment (Oct. 7, 1997), para. 19, the Appeals Chamber said categorically that "duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings."

In their Joint Separate Opinion, Judges McDonald and Vohrah explained their position as follows (at para. 80): "There must be legal limits as to the conduct of combatants and their commanders in armed conflict. In accordance with the spirit of international humanitarian law, we deny the availability of duress as a complete defence to combatants who have killed innocent persons. In so doing, we give notice in no uncertain terms that those who kill innocent persons will not be able to take advantage of duress as a defence and thus get away with impunity for their criminal acts in the taking of innocent lives."

In his Separate and Dissenting Opinion, Judge Antonio Cassese provided a thoughtful review of prior decisions relating to the defense, and concluded (at para. 44) that "the customary rule of international law on duress, as evolved on the basis of case-law and the military regulations of some States, does not exclude the applicability of duress to war crimes and crimes against humanity whose underlying offence is murder or unlawful killing. However, as the right to life is the most fundamental human right, the rule demands that the general requirements for duress be applied particularly strictly in the case of killing of innocent persons."

The Rome Statute reflects much of Judge Cassese's nuanced approach. It conditions the availability of the defense on the existence of a threat of imminent death or of continuing or imminent serious bodily harm and requires both that the accused have acted "necessarily and reasonably to avoid this threat" and that he or she not have intended to cause "a greater harm than the one sought to be avoided." It combines the concepts of necessity and duress into a single ground for excluding criminal responsibility.

§ 6–16 MISTAKE OF FACT OR LAW

According to article 32(1), a mistake of *fact* can operate to exclude criminal responsibility "only if it negates the mental element required by the crime." By contrast, under article 32(2), a mistake of *law* as to whether a particular type of conduct is a crime within the jurisdiction of the Court does not exclude criminal responsibility, although it may do so "if it negates the mental element required by such a crime, or as provided for in article 33" (which relates to superior orders). Thus, it would not be a defense if a perpetrator's mistaken perception concerned the material elements of the crime (the individual thought that rape was not a crime, for example) but it might be if the defendant lacked the necessary *mens rea.*

§ 6–17 SUPERIOR ORDERS

Under article 33(1), "the fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) [t]he person was under a legal obligation to obey orders of the Government or the superior in question; (b) [t]he person did not know that the order was unlawful; and (c) [t]he order was not manifestly unlawful."

These three conditions are cumulative. In other words, the defense only applies when the accused had a legal obligation to obey, and even then, if the accused knew it was an unlawful order, he or she could not claim the "superior orders" defense. In any event, the defense is not available with respect to "manifestly unlawful" orders, which are defined in article 33(2) to include "orders to commit genocide or crimes against humanity." This provision reflects long-standing principles, embodied in the Nuremberg and Tokyo Charters, Control Council Law No. 10, and the Statutes of the two *ad hoc* tribunals.

Propriety Under Domestic Law. While the Rome Statute does not specifically address the issue, it seems clear that article 33 would apply to the situation in which the compulsion results not from a specific command from a superior but by the general operation of domestic law. This rule was stated at Nuremberg, where a number of defendants sought to justify their actions as having been not merely compliant with, but required by, applicable domestic law. As expressed by the International Law Commission, the response is straightforward: the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law. *See Formulation of the Nürnberg Principles*, 1950 Y.B. Int'l Law Comm'n, vol. II, p. 374.

§ 6–18 OTHER ISSUES

1. *Juveniles*

Under Article 26, the ICC has no jurisdiction "over any person who was under the age of 18 at the time of the alleged commission of a crime."

2. *Statute of Limitations*

There is none in the ICC. As stated in article 29, "[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."

3. *Official Status or Immunity*

The official position of a defendant (for example, as Head of State or Government, as a diplomat or some other governmental official) cannot protect him or her individual in the International Criminal Court.

Article 27(1) states that the Rome Statute applies "equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Article 27(2) provides that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

The "no immunity" rule is common to international tribunals. A different approach typically governs in domestic courts, which give effect to the international recognized principles of immunity for foreign officials, diplomats, Heads of State, etc. But with rare exceptions, foreign officials are not subjected to criminal prosecution in foreign courts. A State is of course able to subject its officials to prosecution in its own; it can also waive the immunity of its own officials from prosecution in foreign courts.

Consider this example. The King of Bellehaven has ordered and directed a campaign of persecution and ethnic cleansing against his own citizens in his own country. As King, he would likely be immune from prosecution in Bellehaven's own courts; under customary international law he would be entitled to "Head of State" immunity in foreign courts. However, he would have no immunity from prosecution for genocide or crimes against humanity in the International Criminal Court. Following his overthrow, the Bellehaven legislature could remove any domestic immunity he might have had to permit his prosecution in Bellehaven. If, by some chance, the King were to flee to the neighboring country of Justicia, he would still have "Head of State" immunity from prosecution in Justicia's courts unless and until Bellehaven's new government formally waived that immunity. (Justicia might have an obligation to surrender him to the ICC.)

4. *Tu Quoque*

Another general principle recognized in international tribunals is the non-applicability of the so-called *tu quoque* ("you too") defense. It was raised as a defense in post-World War II trials and universally rejected. As a general matter, an accused may not avoid liability by demonstrating that others committed the same act but were not punished. *See Prosecutor v. Zoran Kupreškić*, IT–96– 12–T, Judgment (Jan. 14, 2000) para. 516.

5. *Double Jeopardy*

International law does not generally apply the concept of double jeopardy (*non bis in idem*) to prosecutions by different sovereigns. For example, it is technically possible for an individual of State A who kills a citizen of State B while they are both in State C, to be subjected to sequential prosecutions in C, B and A. For practical reasons, it seldom happens.

The rule would not, in theory, prohibit prosecution by an international court with jurisdiction. As reflected in article 20 of the Rome Statute, the rule is somewhat more protective of the individual. The concept of double jeopardy is applied with respect to multiple proceedings in the ICC itself and to subsequent proceedings in other courts with respect to crimes for which the accused has already been tried (convicted or acquitted) in the ICC. Where the accused has

previously been tried by another court, however, the ICC can also prosecute him or her "with respect to the same conduct" only where the prior proceedings were "for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction" of the ICC or "[o]therwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

FURTHER READING:

Selma Kafedźić, "Determining Modes of Liability in International Criminal Law, 14 New Zealand Y.B. Int'l L. 134 (2018); Mikael Baaz and Juliet R. Amenge Okoth, "The Crime of Conspiracy in International Criminal Law," 14 J. Int'l Crim. Justice 203 (2016); Iryna Marchuk, THE FUNDAMENTAL CONCEPT OF CRIME IN INTERNATIONAL CRIMINAL LAW: A COMPARATIVE LAW ANALYSIS (Springer 2014). See also *https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-9-modes-of-liability.pdf.*